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PATRIOT JURIST: BEAMISH MURDOCH OF HALIFAX, 1800-1876

by

PHILIP V. GIRARD

**Submitted in partial fulfilment of the requirements
for the degree of Doctor of Philosophy**

at

Dalhousie University

Halifax, Nova Scotia, Canada

March 1998

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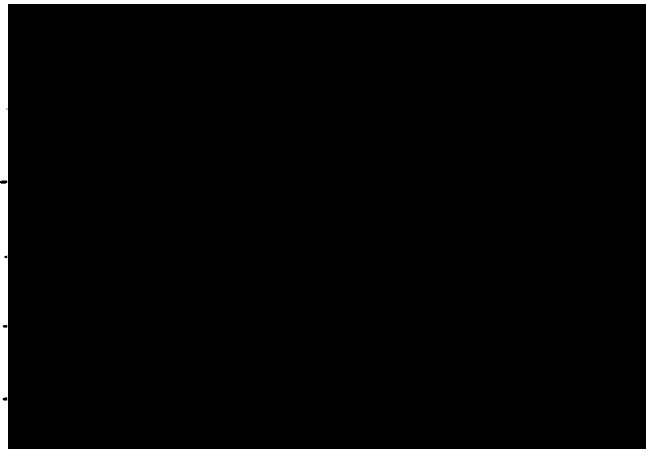
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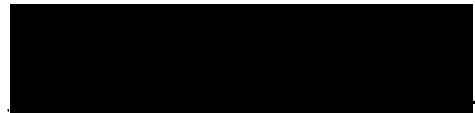
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ABSTRACT

The role of lawyers in British North American society became much more important in the 1820s and 1830s than it had been in the early period of settlement. Understanding this role has been hampered by a dearth of empirical work on the functions and day-to-day activities of the "average" lawyer, who attained neither high political office nor the bench. The professional and public life of Halifax lawyer Beamish Murdoch (1800-1876) is examined, principally in the pre-1850 period, with this goal in mind. Three themes are stressed: the lawyer as professional, the lawyer as intellectual leader and cultural figure, and the lawyer as economic actor. Murdoch's apprenticeship and professional life are examined in the period 1814-1850 against a backdrop of significant change within the profession. A detailed reconstruction of Murdoch's legal practice in terms of clientele, income, types of legal services rendered and organization of work sheds light on the making of a colonial lawyer.

Murdoch's extensive writings on legal and non-legal themes, and his contributions to political and community life, illustrate the many leadership roles he sought, with varying degrees of success. His example suggests that the leadership roles of lawyers were closely intertwined with their professional success, and required that they be visible and active members of their communities. Particular attention is devoted to two areas in which Murdoch sought to exercise cultural or political leadership: the attempt of this "patriot jurist" to articulate a provincial identity through the analysis of Nova Scotia law and legal culture which he provided in his Epitome of the Laws of Nova-Scotia (1832-33); and his principled resistance to the coming of responsible government.

Lawyers are considered as economic actors by examining the growth and dispersal of the provincial bar during the crucial decades 1820-1840, when the number of lawyers in Nova Scotia tripled as the population doubled. The fact that the vast majority of lawyers were able to remain professionally active for a significant portion of their lives suggests that their services were increasingly in demand as economic activity in the province took on more complex forms. As lawyers penetrated rural society, they became unwitting agents of modernization as they gradually undermined the authority of the local magnates who sat on the county bench.

To judge from Murdoch's example, British North American lawyers were neither the rapacious vultures depicted in some contemporary anti-lawyer literature, nor the saints portrayed in some professional biographies. The "clean," independent and intellectual nature of their work made them early exemplars of middle-class status, while the demands of securing a clientele forced them to become actively involved in the political, social and economic development of their societies.

LIST OF ABBREVIATIONS

<u>D.C.B.</u>	<u>Dictionary of Canadian Biography</u>
N.S.A.R.M.	Nova Scotia Archives and Records Management [formerly Public Archives of Nova Scotia]
S.N.S.	Statutes of Nova Scotia
MG*	Manuscript Group
RG*	Record Group

*All RG and MG references relate to documents found at N.S.A.R.M., unless otherwise specified.

ACKNOWLEDGEMENTS

Many years ago, Alan Arthur awakened my interest in the study of history. Jane Glenn encouraged me to pursue legal history, while Douglas Hay, Constance Backhouse and David Flaherty served as mentors and sources of inspiration early on, as well as later. This dissertation is the fruit of sustained interaction with legal historians and social historians over the last dozen years. Among the first group I would like to acknowledge particularly Blaine Baker, David Bell and Jim Phillips; among the second, my committee members Michael Cross, Jack Crowley and Judith Fingard. Margaret Conrad, Gwen Davies and Barry Moody have shared references and provided encouragement. Special words of thanks are due to my supervisor David Sutherland, whose timely and insightful comments were always appreciated; and to Barry Cahill, who provided helpful critiques and saved me from many, but probably not all, errors. I am also grateful to W.N. Osborough of University College Dublin for sharing with me his encyclopaedic knowledge of Irish legal history. All have stimulated my ideas and forced me to refine my thinking in a variety of ways. I hope I have been able to provide as much in return.

In spite of the constant cutbacks to archival services and university libraries which occurred during the writing of this dissertation, I received nothing but the highest levels of service from the staff at N.S.A.R.M. (which will always be the Public Archives of Nova Scotia to me), the Sir James Dunn Law Library, and the Killam Library. Special thanks to Karen Smith, Head of Special Collections, for bringing items of Murdochiana to my attention over the years.

I owe much to my parents, Bernard and Veronica Girard, who always encouraged me to pursue the kinds of educational opportunities to which they did not have access. My spouse Sheila Zurbrigg and our children Daniel and Gabriel have supported me in many ways through this period, and I wish to record my gratitude to them here. By the time I finished writing, I think my family would not have been surprised to see Beamish Murdoch show up for Sunday dinner.

Introduction

Lawyers have long loomed large in the history of British North America. Traditional historiography, oriented to the study of politics and political élites, could hardly fail to note the predominance of lawyers in colonial life, whether as office-holders and supporters of early colonial governments or as participants in the reform movement which led to responsible government. Those lawyers who went on to be judges of the superior courts, especially those of the pre-responsible government period, received special attention from early historian-biographers which resulted in numerous individual and collective studies.¹ Both of these trends continue today in various ways, whether in the form of entries for the Dictionary of Canadian Biography, in the study of particular offices such as that of attorney general, or in the renewed study of judicial biography from more critical and enlarged perspectives.²

¹Multiplying examples would serve no useful purpose. For the crowning achievement of this type of study in the Maritimes, see J.W. Lawrence, The Judges of New Brunswick and Their Times (1907), ed. by D.G. Bell (Fredericton: Acadiensis Press, 1985). For a review of early twentieth-century Nova Scotian efforts at judicial biography, see Philip Girard, "The Supreme Court of Nova Scotia, Responsible Government and the Quest for Legitimacy, 1850-1920," Dalhousie Law Journal 17 (1994), pp. 440-444.

²Paul Romney, Mr. Attorney: the Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899 (Toronto: University of Toronto Press for the Osgoode Society, 1986); Clara Greco, "The Superior Court Judiciary of Nova Scotia, 1754-1900: A Collective Biography," in Philip Girard and Jim Phillips, eds., Essays in the History of

By the 1960s the traditional approach to lawyers in colonial British North America was no longer in favour, as the social history revolution directed attention to new topics and methodologies. The very study of lawyers came to seem élitist as the history of women, workers and marginalized groups emerged as major subjects of inquiry. Insofar as lawyers continued to be studied, it was as members of social and economic élites and builders of middle-class hegemony. In contrast to the hagiographical aura of earlier studies, this approach was distinctly unsympathetic to lawyers. Their role was described as parasitic, that of "paid agents of an economic system, entrenched in law, that discriminated against agrarian smallholders and left them at the mercy of the merchant and the moneylender."³ A rich vein of colonial anti-lawyer sentiment could be invoked in support of this position.⁴ Whatever its impact on the study of lawyers, a major effect of this literature on the study of legal history was to direct attention away from the superior courts and towards the inferior courts, where the bulk of the population conducted their litigation or came into contact with the enforcement of the criminal law.

Canadian Law, vol. III, Nova Scotia (Toronto: University of Toronto Press for the Osgoode Society, 1990), pp. 42-79; Gordon Bale, Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review (Ottawa: Carleton University Press, 1991); Patrick Brode, Sir John Beverley Robinson: Bone and Sinew of the Compact (Toronto: University of Toronto Press for the Osgoode Society, 1984).

³Paul Romney, "From the Types Riot to the Rebellion: Elite Ideology, Anti-Legal Sentiment, Political Violence, and the Rule of Law in Upper Canada, Ontario History 79 (1987), pp. 113-44 at p. 177. For a rebuttal, see Colin Read, "Conflict to Consensus: the Political Culture of Upper Canada," Acadiensis 19 (1990), pp. 169-85.

⁴Michael S. Cross, "'The Laws Are Like Cobwebs': Popular Resistance to Authority in Mid-Nineteenth Century British North America," in P.B. Waite et al., eds., Law in a Colonial Society: The Nova Scotia Experience (Toronto: Carswell, 1984), pp. 114-115; Greg Marquis, "Anti-Lawyer Sentiment in Mid-Victorian New Brunswick," University of New Brunswick Law Journal 36 (1987), pp. 163-174.

Inspired largely by developments within sociology, a new framework for studying lawyers emerged in the 1970s and 80s: the historical process of professionalization. By this point Canadian legal history was beginning to emerge from the shadows, and a curious division of labour evolved. Social historians leapt eagerly to the study of the clergy, the military, the medical profession, teachers and nurses, using the new paradigm of professionalization, but the study of the legal profession remained largely within the law faculties until very recently.⁵ Two major studies of the legal profession have been conceived within neither a history department nor a law faculty. Two scholars working in a faculty of education, R.D. Gidney and W.P.J. Millar, have produced a major study of the medical, legal and clerical professions in nineteenth-century Ontario, while an independent historian, Christopher Moore, has written the bicentenary history of The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997.⁶ A major point which emerges from this historical literature is that within the general trend towards professionalization in Western society, there has been much diversity of experience at the

⁵Most of this literature, Canadian and international, is surveyed in R.D. Gidney and W.P.J. Millar, Professional Gentlemen: The Professions in Nineteenth-Century Ontario (Toronto: University of Toronto Press, 1994). For the legal profession specifically, see W. Wesley Pue, "Trajectories of Professionalism? Professionalism after Abel," Manitoba Law Journal 19 (1990), pp. 384-418. For all the themes surveyed in this introduction, useful comparative perspectives can be found in the essays by Robert Gordon (on the United States) and David Sugarman (on England) in Carol Wilton, ed., Beyond the Law: Lawyers and Business in Canada, 1830-1930 (Toronto: Osgoode Society, 1990). Both papers range far beyond the "lawyers and business" theme.

⁶(Toronto: University of Toronto Press, 1997). It must be emphasized that this work is not the kind of adulatory commemorative history often produced for such occasions, but a major scholarly study of a long-understudied institution enriched by constant reference to the legal profession as a whole and its place within Ontario society.

level of specific professions which must be taken seriously, such that abstract models must be employed with great caution. A major example within the legal profession is the resistance of the benchers of the Law Society of Upper Canada to the introduction of university legal education for over half a century after it had been accepted as the norm elsewhere in North America for law and many other professions.

Within the Canadian literature on lawyers and professionalization, changing forms of legal education have been the principal focus of inquiry.⁷ The shift from professional etiquette supplemented by judicial control as a mode of ordering, to modern statutory-based schemes of lawyerly self-regulation, has also been investigated.⁸ Much of this work has been regionally specific, and no national synthesis has yet emerged.⁹ Work on lawyers and the legal profession in the early colonial period has tended to confirm the existence of highly particularistic patterns of organic ideas and ordering in each colony, within a broad commitment to that elastic concept, "British justice." The slow homogenization of the provincial bars in the wake of Confederation, the role of the

⁷Works of relevance to the colonial period include D.G.Bell, Legal Education in New Brunswick: A History (Fredericton: University of New Brunswick, 1992), and G. Blaine Baker, "Legal Education in Upper Canada, 1785-1889: The Law Society as Educator," in David H. Flaherty, ed., Essays in the History of Canadian Law, vol. II (Toronto: University of Toronto Press for the Osgoode Society, 1983), pp. 49-142. Legal education is a major theme of both Gidney and Millar, Professional Gentlemen and Moore, Law Society, but both focus more on post-1850 developments in this regard.

⁸Bell, Legal Education in New Brunswick, *passim*; Philip Girard, "The Roots of a Professional Renaissance: Lawyers in Nova Scotia, 1850-1910," Manitoba Law Journal 20 (1991), pp. 148-180; Gidney and Millar, Professional Gentlemen, pp. 70-84; Moore, Law Society.

⁹It should be noted that Moore's Law Society, although a study of Ontario lawyers, is well grounded in the growing literature on lawyers and the legal profession in other Canadian jurisdictions.

Canadian Bar Association (established in 1914), and the increasing popularity of university legal education in the twentieth century in creating what is now in substance a Canadian legal profession, has yet to be investigated.¹⁰

At times as an approach to the theme of professionalization, and at times independently of it, recent work on the history of lawyers and the law in British North America has been influenced significantly by developments in cultural and intellectual history. To the extent that there are debates within what is still a relatively young literature, they have been largely around the nature of the mentalité of nineteenth-century lawyers in Upper Canada. Blaine Baker has suggested that the élite lawyers of old Upper Canada saw themselves as a divinely-anointed group largely unaccountable to the normal processes of the law, while Paul Romney has forcefully challenged this view.¹¹ A second question has been the extent to which the late Victorian legal profession was responsible for an alleged intellectual disruption, in which the innovative and indigenous

¹⁰ See, however, H.W. Arthurs and D.A. Stager, Lawyers in Canada (Toronto: University of Toronto Press, 1990).

¹¹G. Blaine Baker, "'So Elegant a Web': Providential Order and the Role of Secular Law in Early Nineteenth-Century Upper Canada," University of Toronto Law Journal 38 (1988), pp. 187-205. David Howes, "Property, God and Nature in the Thought of John Beverley Robinson," McGill Law Journal 30 (1985), pp. 365-414. Paul Romney, "Very Late Loyalist Fantasies: Nostalgic Tory History and the Rule of Law in Upper Canada," in W. Wesley Pue and Barry Wright, eds., Canadian Perspectives on Law and Society: Issues in Legal History (Ottawa: Carleton University Press, 1988), pp. 119-147; "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture," Law and History Review 7 (1989), pp. 121-174.

elements of the colonial past were disparaged and forgotten in a headlong scramble to embrace imperial legal ideals which were of limited relevance in the Canadian context.¹²

Most recently, the role of lawyers in the economy has attracted attention, in the form of two book-length studies sponsored by the Osgoode Society. The earlier of these, Beyond the Law, looks specifically at the role of lawyers as entrepreneurs and at links between lawyers and business.¹³ The second, Inside the Law, is a history of law firms in Canada, which concentrates primarily on the involvement of law firms with corporate law and with particular corporate clients in the twentieth century, and secondarily on changing patterns of recruitment, promotion and management within law firms.¹⁴ In both of these works, the focus is very much on the post-1850 period. The role of lawyers in the economy is also a major theme of Moore's bicentenary history of the Law Society of Upper Canada.

This study of a single lawyer considers its subject from all three perspectives just identified: lawyers as professionals, lawyers as generators of ideas and contributors to intellectual and cultural history, and lawyers as economic actors. The wider focus is pre-1850 Nova Scotia, in particular the maturity and decay of the old regime as it faced and ultimately succumbed to the challenge represented by the movement for responsible

¹²G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire," Law and History Review 3 (1985), pp. 219-292.

¹³Wilton, ed., Beyond the Law.

¹⁴Carol Wilton, ed., Inside the Law: Canadian Law Firms in Historical Perspective (Toronto: University of Toronto Press for the Osgoode Society, 1996).

government.¹⁵ In contrast to most earlier studies, the ideological resistance to responsible government is taken seriously. More generally, by situating its subject in the context of his community, his profession, and his "times," I attempt to show how the study of lawyers can enrich colonial social history.

Halifax native Beamish Murdoch (1800-1876) was chosen for both thematic and documentary reasons. His life illustrates all three themes referred to above, and his own writings and the sources which survive from his law practice permit a more detailed examination of those themes than would be possible for most other lawyers of this period. Although biographical in form, this is not a traditional biography. It does not examine to any great extent the psychological development of its subject, and is more a "career of" Beamish Murdoch than a "life." Chapter One examines Murdoch's ancestry mainly to point out his ambiguous position in the highly status-conscious society which was early nineteenth-century Nova Scotia. Chapter Two considers in detail a lengthy lawsuit which involved his extended family throughout his entire youth, both to provide some context

¹⁵The relevant chapters in Phillip A. Buckner and John G. Reid, The Atlantic Region to Confederation: A History (Toronto and Fredericton: University of Toronto Press and Acadiensis Press, 1994) provide invaluable historical context. Particularly useful for this study have been the chapters on the 1800s by Graeme Wynn, the 1810s by D.A. Sutherland, the 1820s by Judith Fingard, the 1830s by Rosemary E. Ommer, the 1840s by T.W. Acheson and the 1850s by Ian Ross Robertson. Still useful is W.S. MacNutt, The Atlantic Provinces: the Emergence of Colonial Society, 1712-1857 (Toronto: McClelland and Stewart, 1965). For the legal and constitutional context, see D.G. Bell, "Maritime Legal Institutions under the Ancien Régime, 1710-1850," Manitoba Law Journal 23 (1995), pp. 103-131. J.M. Beck, Joseph Howe, 2 vols. (Montreal and Kingston: McGill-Queen's University Press, 1982-83) is indispensable on the movement towards responsible government.

for Murdoch's deep commitment to the unreformed colonial legal order, and to make some suggestions about the nature and function of civil litigation in colonial society.

One of the features which makes lawyers difficult to study is the seemingly protean nature of their involvements, both historically and at the present day. In addition to mastering their chosen profession, lawyers often play important roles in politics and contribute to the development of political ideas, work as office-holders or civil servants, serve as leaders of voluntary societies and reform movements, appear in religious controversies, contribute to the arts as authors and journalists, act as spokespersons for various economic interests and become directly involved in business enterprises outside their law practices. Not all lawyers did all these things, but a surprising number of colonial lawyers functioned in many of these capacities over the course of a lifetime. Beamish Murdoch, for example, participated in all of the above activities, and his identity as a professional lawyer -- "one of the fraternity," in the contemporary phrase -- both subsumed and was a function of all of them.

What is often missing in studies of the profession and of individual lawyers is precisely the many-faceted nature of their activities. It has recently been suggested in the context of the early twentieth-century Montreal bar that the wide range of lawyers' non-legal activities was an important factor which allowed them to exercise power and influence.¹⁶ One of the goals of this study is to examine the life of a lawyer who came

¹⁶Dominique Marquis, "Une élite mal connue: les avocats dans la société montréalaise au tournant du XXe siècle," *Recherches sociographiques* 36 (1995), pp. 307-325. Such an argument has even more force in the colonial period, when the line between a lawyer's "legal" and "non-legal" activities is more difficult to draw.

before the public eye in many capacities, but not primarily as a politician or a judge, in order to develop some idea of the public perception of lawyers and to understand better the synergies created by their many roles. In spite of the seeming prevalence of anti-lawyer sentiment in British North America, the colonial population needed and expected lawyers to assume a variety of leadership roles, and not just those in the political sphere. In the colonial period the role of lawyer included ideals of statesmanship, scholarship and gentlemanly behaviour. At some level most colonial lawyers tried to include all three as part of their professional "image." This theme is thus integrated into the entire thesis, although it features most prominently in Chapters Three, Five and Six, which examine Murdoch's apprenticeship and the first two decades of his law practice.

If Beamish Murdoch's "professional" involvements were protean in nature, it is not surprising that his contributions to intellectual and cultural life also covered many fields. To some extent all chapters of this thesis consider this theme. The formative influence of his Anglo-Irish Uniacke patrons on the young Murdoch is explored in Chapter Three. Murdoch's political ideas as an opponent of responsible government are explored in Chapter Seven. The fact that his stance would appear to have been contrary to his material and promotional interests directs us to the role of ideas in political debate, and more generally in colonial society as a whole. It is argued that Murdoch's aversion to political reform was rooted in his convictions about the transcendent rightness of traditional British ideas about the constitution, and his belief that civic virtue could never flourish under a party system.

Chapter Eight is a study of Murdoch's contribution to literature, legal letters, and provincial history, but focuses primarily on his four-volume Epitome of the Laws of Nova-Scotia (1832-33). The Epitome, labelled by David Bell as "the apogee for the whole nineteenth century [of] lawyerly literary achievement in the Maritimes,"¹⁷ provides a uniquely comprehensive overview of the substantive law, legal institutions and legal culture of the colonial legal order on the eve of the achievement of responsible government.¹⁸ In the days before law reporting and legal periodicals, both of which effectively began in British North America only in the 1850s, uncovering evidence of how lawyers thought about their profession and about the law is a difficult task. They accepted the law as a kind of cultural given, upon which it was not necessary to elaborate. When rhetorical emphasis was required, as in legislative debates, lawyers' views tended to be hidden behind stock phrases such as "the rights of Englishmen" and "British justice."¹⁹ It is mainly in private papers that one gets the occasional glimpse of their opinions on these subjects. The Epitome, as a statement of one lawyer's reflections on the organization of the substantive law, the relationship of colonial law to English law,

¹⁷Bell, "Maritime Legal Institutions," p. 124.

¹⁸See generally Philip Girard, "Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his Epitome of the Laws of Nova-Scotia," Law and History Review 11 (1993), pp. 101-144.

¹⁹This is not to say that these phrases and the worldview which subtends them cannot usefully be explored. See Greg Marquis, "Doing Justice to 'British Justice': Law, Ideology and Canadian Historiography," in W. Wesley Pue and Barry Wright, eds., Canadian Perspectives on Law and Society: Issues in Legal History (Ottawa: Carleton University Press, 1988), pp. 43-69, and his "In Defence of Liberty: 17th-Century England and 19th-Century Maritime Political Culture," University of New Brunswick Law Journal 42 (1993), pp. 69-94.

the position of the native people and many other topics, is thus a document of some significance.

Uniting all aspects of Murdoch's cultural endeavours was his concern to delineate a Nova Scotian identity; it is in this sense that the word "patriot" is used in the title of this thesis. In all such attempts, description and prescription are almost impossible to separate, and Murdoch's oeuvre is no exception. His attempt in the Epitome to uncover a Nova Scotian identity secreted in the interstices of the colony's laws and legal institutions "ranks with Judge Haliburton's literary effusions," according to one commentator, "as impressive evidence of emergent self-confidence in the region."²⁰ It is worth adding that Murdoch's views on the Nova Scotia identity as expressed in the Epitome are much fresher and more nuanced than those which can be inferred from his History of Nova Scotia, or Acadie, published over thirty years later.

The historical value of the Epitome would be much lessened if its author had been a theoretical lawyer with limited knowledge of the law's practical side. But Murdoch was a typical lawyer of his day, neither the most nor the least successful of his peers. Recognized as a leader of the bar, and still practising law well into his sixties, albeit part-time, Murdoch was by no means the best-paid member of his profession. His account-books reveal the painstaking process of building up a clientele as a sole practitioner, the long steady climb to financial independence for those young entrants of the 1820s and 30s who had no ready-made network of business contacts through kin or social position.

²⁰Bell, "Maritime Legal Institutions," p. 125.

Even those with such advantages could find law practice a hard row to hoe during the early years.

The primary sources documenting Murdoch's professional career from the beginning of his apprenticeship in 1814 until his retirement in the 1860s are, while not unique, certainly far from common for this early period.²¹ Chapters Five and Six use these sources to develop the third theme of this study, the lawyer as economic actor, by means of a detailed analysis of the growth of Murdoch's clientele (both numerically and in terms of gender and social status), the changing variety of services he provided, and his professional income, over the first two decades of his professional career. The prevalence of "small" clients, mainly artisans and small tradesmen and their widows, in the early years of Murdoch's career, and their continuing presence thereafter, provides a more complex picture of the role of lawyers in their communities than has hitherto been available. Lawyers seem to have provided a range of services to all but the very poor and the lowest echelon of day labourers, not just to the propertied.

The study covers primarily the period between 1815 and 1850, with some excursions before and after that date for limited purposes. Although Beamish Murdoch continued to practise law after the achievement of responsible government, and indeed to adapt to it, he will always be associated with the unreformed colonial constitution.

²¹Similar documentation exists for William Young, who was much more successful, in financial, political, and professional terms, than his contemporary Beamish Murdoch. Young's legal and business career would repay study, but his attainment of the offices of attorney general, provincial premier and chief justice were counter-indications for the purposes of this thesis, which sought to examine the career of an "ordinary" lawyer closer to the professional mean.

Responsible government resulted in some discontinuities within both the legal profession and provincial law, which are better explored in a different context. Thus Murdoch's career as Recorder of the City of Halifax (1850-1860) is noticed but not examined in any detail, although the experience with city government after incorporation in 1841 would certainly repay study.²² Chapter Nine closes the thesis with a brief consideration of Murdoch's later years.

The career of a single lawyer in any historical period can only be assessed with reference to the activities of his or her peers. Thus this individual study is complemented by a detailed quantitative study of lawyers in Nova Scotia from 1800 to 1840, with particular reference to the third and fourth decades of the century, when the size and movements of the bar can be calculated with a high degree of accuracy. This twenty-year period also comprises the first two, and most crucial, decades of Murdoch's legal practice. While it is generally known that these two decades witnessed an exponential increase in the numbers of lawyers in the Maritimes, in no British North American colony have the numbers or geographic movements of the bar been documented with any precision.²³

It is with reference to these general developments within the legal profession that the role of lawyers as key social and economic actors in colonial society can best be appreciated. The argument outlined in Chapter Four is that the steady spread of lawyers to all communities of any size in mainland Nova Scotia by 1830 helped to undermine the

²²Cf. T.W. Acheson, Saint John: The Making of a Colonial Urban Community (Toronto: University of Toronto Press, 1985).

²³Gidney and Millar, Professional Gentlemen, begin serious quantitative study only in 1851, when the first census reports become available.

traditional sources of local authority, the lay magistrates of the county bench and the justices of the peace. In retrospect, the rapid spread of lawyers after 1820 illustrates just how dispensable they were prior to that date, at least outside Halifax, where local communities were largely self-governing. The arrival of the lawyers coincided with a shift away from deference, custom and virtue in rural society, and towards equality, legality and accountability as the touchstones of social order.

This suggestion will be counter-intuitive to those who see lawyers simply as members of "local élites," which they certainly were. One must account, however, for the transformation of the basis of élite influence from birth and status to professional qualifications of one kind or another, which one sees everywhere in British North America by the last quarter of the nineteenth century. Shifts within élites, generated by wider social movements, must therefore be addressed. The rise of lawyers within colonial society should be studied as part of the movement towards responsible government and, more broadly, towards modernity. The "rise of professional society" is a theme which deserves more emphasis in the history of the Atlantic region than it has hitherto obtained.²⁴ It is largely absent in the impressive synthesis represented by the volumes on the pre- and post-Confederation history of the region recently published by Acadiensis Press.²⁵ A major reason for studying the professions in the Atlantic region is their

²⁴Harold Perkins, The Rise of Professional Society: England since 1880 (London: Routledge, 1989). For some suggestive insights on this theme in the Canadian context, see Marquis, "Une élite mal connue."

²⁵Buckner and Reid, The Atlantic Region to Confederation, and E.R. Forbes and D.A. Muise, eds., The Atlantic Provinces in Confederation (Toronto and Fredericton: University of Toronto Press and Acadiensis Press, 1993). See however Brian

relatively greater attraction as vehicles for middle-class advancement in an area where careers in business have traditionally been more difficult to establish. It is perhaps no coincidence that professional reform initiatives of national significance, such as the founding of the Dalhousie Law School in 1883, have emanated from the Atlantic region.

Pursuit of this theme, however, will push us far beyond the chronological limits of this thesis. Whatever historical appeal the study of the professions in the Atlantic region may have, analysis must begin in the colonial period. While existing scholarship has suggested important discontinuities in the history of the legal profession after the achievement of responsible government,²⁶ there were also continuities, but the impact of both on later developments must remain a topic for future research.

Cuthbertson, Johnny Bluenose at the Polls: Epic Nova Scotian Election Battles 1758-1848 (Halifax: Formac, 1994), pp. 11-13 on the changing role of lawyers in Nova Scotia's social structure.

²⁶Girard, "Professional Renaissance." A similar theme is explored in D.G. Bell, "Judicial Crisis in Post-Confederation New Brunswick," Manitoba Law Journal 20 (1991), pp. 181-195.

Chapter One

Antecedents

Beamish Murdoch was born at Halifax on 1 August 1800.¹ He was unusual among non-Acadian European Nova Scotians of the day in having not only both parents born in the province, but also two locally-born grandmothers. Amelia Ott (Mason) Beamish and Abigail (Salter) Murdoch were both born at Halifax in the 1750s. Murdoch was raised by his grandmother Beamish after the early death of his mother, and it was she and her daughters who inspired his attachment to his birthplace and his interest in its history. In a society where kinship counted for so much, a study of Beamish Murdoch's ancestry is necessary to set the successes and failures of his later career in context. Murdoch's attempt to use but also to transcend the ties of kinship, and to link his public persona to representation of a recognizably middle-class interest, is a central theme in his life.

¹This is the date traditionally given, probably because it is inscribed on Murdoch's tombstone in Hillcrest Cemetery, Lunenburg, but there is no documentary proof for it. The St. Paul's baptismal records at N.S.A.R.M., mfm. reel 11553, show the baptism of Benjamin Salter Beamish Murdoch on 14 February 1802, with the marginal notation "1 yr old." A more authoritative piece of evidence for a birthdate of late July or early August is Murdoch's admission as an attorney of the Supreme Court of Nova Scotia on 22 July 1821. By statute, a man could only be admitted an attorney on reaching majority. Murdoch completed his apprenticeship in November 1819, and it was only the attaining of his majority that delayed his admission as an attorney by nearly two years. So scrupulously observed was the requirement of majority, that it is doubtful that Murdoch would have been admitted even ten days before his twenty-first birthday. However, such a slight relaxation of the rule is possible.

Despite the relative depth of Murdoch's New World roots, the Old World was equally important to his identity, especially in his early years. Both his grandfathers had emigrated from Ireland to Nova Scotia in the 1760s, and his Irish ethnicity was an important feature of his public persona until roughly 1830, when Murdoch began to assert a more embracing "Nova Scotian" identity. Some appreciation of his Irish roots will assist in understanding these later developments. For Beamish Murdoch, Nova Scotia provided an environment where the ethno-religious enmities of the Old World might be transcended: civil equality and religious tolerance were two principal ingredients of the Nova Scotian identity which he sought to fashion and publicize.

Benjamin Salter Beamish Murdoch, to give him his full name, was the only child of Elizabeth Ott Beamish and Andrew Murdoch, who married at St. Paul's on 29 October 1799.² Their union would have been an unusual one in the Ireland from which their fathers had come: Elizabeth's father belonged to an Anglo-Irish family from County Cork which adhered to the Church of Ireland, while Andrew was the son of a Scots-Irish minister of the Secession Church from County Donegal. Although differing in religion, the Beamish and Murdoch families shared a common experience as colonizers of Ireland. Both families had been established in Ireland for about a century and a half before emigrating to Nova Scotia. Both suffered during Ireland's tumultuous seventeenth century, but survived and prospered in the eighteenth.

The emigration of the Beamish and Murdoch families was not, so far as is known, propelled by any dire economic circumstances at home. In this they represented what has

²Royal Gazette and Nova Scotia Advertiser, 5 November 1799.

recently been described as an entirely new phenomenon in the history of European emigration, beginning in the 1760s. Emigration became less a collective response to intolerable conditions at home by dissenters, alienated groups and the poor, and more an act of choice by a more mobile and skilled population, moving within an Atlantic economy.³ This seems an apt characterization of the actions of both Murdoch's grandfathers. James Murdoch came to Nova Scotia as a missionary in response to appeals from leaderless presbyterian congregations, but his arrival was really part of a larger economic strategy which would see his father sell his farm in Ireland and attempt to re-establish the family as linen producers in Nova Scotia. Thomas Beamish had the status of "gentleman" in Ireland, and emigrated shortly after the sale of family lands provided him with a certain amount of capital. He chose to come to Halifax, when he might have gone to England, to the West Indies, or to some other North American colony.

Although their motivations for leaving Ireland were rather different, the experiences of Beamish Murdoch's grandfathers in Nova Scotia were quite similar. Both emigrated as young men in their early twenties, married locally-born women who were the daughters of men who had achieved a measure of local prominence, and had very large families. After a period of initial success in their new environment, both suffered severe financial setbacks which created serious strains for them and for their families. By the late 1780s both had been compelled to surrender to creditors the premises upon which they had established themselves, and to move to more marginal locations. Lack of

³L.M. Cullen, "The Irish Diaspora of the Seventeenth and Eighteenth Centuries," in Nicholas Canny, ed. Europeans on the Move: Studies on European Migration, 1500-1800 (Oxford: Clarendon Press, 1994), at pp. 144-46.

business acumen, the demands of raising large families, an extremely creditor-oriented debt law, and the strains imposed on the provincial economy after the end of the war in 1783, all conspired to bring these men and their families close to complete financial ruin. It would be left to the generations of their children and grandchildren to try and re-establish their fortunes on a more secure basis, and in this they were generally successful.

The Murdoch family

James Murdoch was born about 1745 at Gillie Gordon (present-day Killygordon) in County Donegal, the only son of a prosperous flax grower and linen producer, John Murdoch and his wife Margaret Dryden.⁴ The family was originally Scottish, and according to family tradition had been in Ireland for over a century at the time of the Glorious Revolution of 1688.⁵ Civil war ensued in Ireland in 1688-89 after James II was deposed as King of England and Scotland but remained King of Ireland. In 1689 John

⁴Much of what is known about the Murdoch family in Ireland comes from two principal sources: the writings of Eliza Frame (1820-1904), a great-niece of the Rev. James Murdoch and amateur historian, and a published compilation of family lore distilled by W.J. Stairs and his wife Susan Stairs and published posthumously by their family. Susan Stairs was Murdoch's great-granddaughter, who learned much of the family tradition from her grandmother, Susannah (Murdoch) Duffus. See [Eliza Frame], Descriptive Sketches of Nova Scotia, in Prose and Verse, by a Nova Scotian (Halifax: A. & W. McKinlay, 1864); "Rev. James Murdoch. 1767-1799," Collections of the Nova Scotia Historical Society 2 (1881) 100; W.J. and Susan Stairs, comps., Family History. Stairs, Morrow (Halifax: McAlpine Publishing, 1906). These sources must be used with some caution since they are based on oral traditions which in many cases cannot be authenticated by written documents. Where they can be so authenticated, they have proved to be generally accurate.

⁵A settlement in the early decades of the seventeenth century, during the plantation of Ulster by James I, seems more likely, given the major influx of Scottish Protestants at that time.

Murdoch's grandfather (also John) was murdered by a gang of James II's supporters, known as "Rapparees," allegedly for the support he provided to the Protestant cause during the siege of Londonderry. Despite this setback the family prospered in the eighteenth century, and acquired sufficient wealth to invest in books and education. John Murdoch possessed a large library (which eventually followed him to Nova Scotia), and sent his son James to the University of Edinburgh to study theology in 1759.⁶ After some years there he studied at an Antiburgher theological hall in Scotland before returning to Ireland. By this point he had become interested in emigrating to North America, though probably not as a missionary to the Mi'kmaq, as recounted in family tradition.

In spite of offers from a number of parishes in Ulster, Murdoch remained firm in his decision to leave Ireland. His need coincided with demands on the Irish presbytery from the Scots-Irish inhabitants of Amherst and Truro, who in 1764 and 1765 petitioned the church for a minister.⁷ In September 1766, James Murdoch was ordained a minister by the presbytery of Newton Limavady (Ulster) "for the Province of Nova Scotia or any

⁶The record of his matriculation in 1759 is held at the University of Edinburgh Archives, but records for the 1760s have not survived. It was not usual for candidates for the ministry to graduate from the University, and Murdoch did not do so (personal communication from the Assistant Librarian, 17 September 1996).

⁷George Patterson, "Pioneers of Presbyterianism" (unpublished ms., c. 1870), MG 1, vol. 742. Patterson insists that Murdoch was sent in response to the Amherst petition, even though the inhabitants of Truro also petitioned the church in 1764 and 1765 according to James Robertson, History of the Mission of the Secession Church to Nova Scotia and Prince Edward Island from its commencement in 1765 (Edinburgh: John Johnstone, 1847), p. 20.

other part of the American continent where God in his Providence might call him."⁸ Murdoch belonged to the Antiburgher wing of the Secession Church, which was the most anti-authoritarian and evangelical of all the factions which had developed out of the Church of Scotland as a result of various theological controversies.⁹ All these rifts were duly reproduced among the Scots-Irish settled in northern Ireland.

Murdoch arrived in Nova Scotia by the end of 1766 or early 1767. For a while he preached to the dissenters who gathered at Mather's Church in Halifax, but in the summer he reached an agreement with a Horton congregation that he would "perform and attend the Duties and Business of a Protestant Dissenting Gospel Minister," and began his duties on 1 December 1767.¹⁰ In 1769 he secured the grant of 500 acres of land, including some marsh land on the Grand Pré, which had been set aside for the first minister to settle in the township. This land was in addition to the glebe revenues, which he enjoyed in spite of not belonging to the established church.

Horton Township was still in the final stages of plantation when Murdoch arrived. The initial proprietors were all from southeastern Connecticut, but the grants were taken

⁸Frame, Descriptive Sketches, p. 243. Frame gives a detailed account of Murdoch's ordination, based on original documents made available to her by one of Murdoch's granddaughters, but apparently no longer extant: Family History. Stairs, Morrow, p. 231.

⁹For an overview of the development of these factions, see Robertson, History of the Mission, pp. 16-18.

¹⁰James Murdoch v. Nathan DeWolf et al. (1773), Supreme Court Records (Halifax), RG 39 C, Box 14. Murdoch detailed his relationship with the congregation in this suit for back wages. Court records for Kings County are filed with those of Halifax County until the Supreme Court began to go on circuit to King's in 1774. Sources for Murdoch's ministerial career include A.W.H. Eaton, The History of Kings County, Nova Scotia (Salem, Mass.: Salem Press, 1910); E. Arthur Betts, "The Rev. James Murdoch, 1745-1799" (Halifax?, 1973), N.S.A.R.M. V/F, vol. 47, no. 5.

up in fact by a group of fairly diverse origins, and the population numbered about 1750 by 1770. Horton may seem a curious base for a minister of the Secession Church, given the needs of the Scots-Irish at Truro and Amherst, but it had two powerful economic attractions: the availability of the minister's lot, and a proven agricultural capacity which was of interest to Murdoch's parents.¹¹ By 1769 Murdoch's father had sold the family property in Ireland and come out to Nova Scotia with his wife Margaret, his mother Ann, his daughter Elizabeth (James's sister) and her fiancé Matthew Frame. The family arrived with flax seed and linen-making tools, intending to introduce that industry to Nova Scotia as had been done so successfully by the Scots-Irish at Londonderry, New Hampshire. Unfortunately in the very year of their arrival the Board of Trade prohibited the carrying on of linen production in Nova Scotia, in order to protect the domestic industry.¹² Undaunted, Murdoch senior and Frame bought land and by 1779 the Murdoch-Frame family owned 900 acres.

John Murdoch arranged for a house to be built for his son, and renovated an old Acadian house on a nearby farm for the use of his own family. Matthew Frame bought

¹¹By the time of Murdoch's arrival in Nova Scotia, the Rev. John Eagleson had settled in Cumberland (c. 1765) and taken up the minister's lot: Gertrude Tratt, "John Eagleson," D.C.B. IV, pp. 258-59.

¹²I.F. Mackinnon, Settlements and Churches in Nova Scotia, 1749-76 (Montreal: Walker Press, 1930), p. 92. On the success of the linen industry in New England, see A.W.H. Eaton, "The Settling of Colchester County, N.S. by New England Puritans and Ulster Scotsmen," Royal Society of Canada Transactions, II (1912), 3rd ser., p. 221. Eaton states that the linen industry never attained great proportions in Nova Scotia, but fails to note the 1769 prohibition. The prospects of the industry in Nova Scotia seem never to have been investigated by historians.

half his brother-in-law's land and rented the rest from him.¹³ Soon the minister's house was put to good use. In Halifax James Murdoch had met Abigail Salter, daughter of prominent New England merchant and Assemblyman Malachi Salter. She was born at Halifax about 1753 and would thus have been 17 or 18 when they married on 24 July 1771. Between 1772 and 1796 they had eleven children, of whom Beamish Murdoch's father Andrew was the fourth, born in 1777.¹⁴

Murdoch's relations with his mainly New England Congregationalist flock began well, and his reputation as a forceful preacher spread across the province. Within a few years, however, he was embroiled in disputes over finances, politics and theology, possibly exacerbated by rumours of a ministerial problem with alcohol. Murdoch's 1773 lawsuit against his congregation alleged that they had not paid him any wages since his arrival in 1767, and now owed him over £600.¹⁵ The Alline Revolution and the American Revolution soon followed each other in quick succession, turning Murdoch's world upside-down. A product of the scholarly and classical traditions of the Scottish ministry, Murdoch was aghast at the displays of religious enthusiasm which now erupted

¹³This account is based on Eliza Frame, "Rev. James Murdoch," but is confirmed by deeds filed in the King's County Registry of Deeds, RG 47, vol. 2, p. 64 (deed from James Murdoch to Joseph Gray, 23 January 1770, reciting grant from Governor William Campbell 26 September 1769); vol. 2, p. 41 (deed from Thomas Harding et ux. to John Murdoch, 20 October 1769); vol. 3, p. 247 (deed from James Murdoch et ux. to Matthew Frame, 21 December 1773).

¹⁴Information on the marriage and progeny of the Rev. James Murdoch and Abigail (Salter) Murdoch is derived from entries in their family Bible reproduced in Family History. Stairs, Morrow, p. 229. The original Bible, published at Edinburgh in 1766, is held at N.S.A.R.M., MG 8, vol. 22.

¹⁵Supra, note 10.

throughout the Planter townships. He did not stand aside, but publicly "exhort[ed] [the] father of the New Lights to give up his idle and fanatical notions" and warned his parishioners repeatedly against Alline's "dangerous soul-destroying delusion."¹⁶

The American Revolution posed new difficulties. The Murdoch family were strong supporters of the House of Hanover and the government. Yet the minister's religious convictions compelled him to denounce a compulsory fast proclaimed by the government in April 1777, as an inappropriate act by the civil power, an act which earned him no friends in Halifax.¹⁷ Malachi Salter's loyalty was more ambiguous, and in February 1777 and January 1778 he was charged with seditious acts. His political problems soon led to financial embarrassment, and by the time Salter died in 1781 he could no longer provide his customary support to his daughter's household.¹⁸ This in turn caused a cash crisis for the Murdoch household.

All these difficulties came to a head in the early 1780s, when Murdoch and his congregation came to a parting of the ways.¹⁹ Normally, serious differences between a

¹⁶Frame, Descriptive Sketches, pp. 44-45. For the background to Alline's movement, see Gordon T. Stewart, Documents Relating to the Great Awakening in Nova Scotia 1760-1791 (Toronto: Champlain Society, 1982).

¹⁷Frame, Descriptive Sketches, pp. 46-7.

¹⁸On Salter's political troubles, see Barry Cahill, "The Treason of the Merchants: Dissent and Repression in Halifax in the Era of the American Revolution," Acadiensis 26:1 (1996), pp. 52-70.

¹⁹The only contemporary evidence is that of the Rev. John Wiswall, the S.P.G. missionary at Cornwallis, who managed to oust Murdoch from enjoyment of the glebe revenues by legal action in 1785: Wiswall to William Morice, 6 August 1786, N.S.A.R.M. Micro-Biography, Rev. John Wiswall, mfm. 11153, p. 77. He refers to Murdoch's "dismissal" by his congregation, but this word can refer to a voluntary or involuntary departure in this context. Wiswall does not elaborate on the circumstances

congregation and its minister would be submitted to the presbytery for resolution. This was impossible here, since Murdoch's "dismissal" occurred before the first presbytery of the Secession Church in Nova Scotia was founded at Truro in 1786. In any case, the Truro presbytery was part of the Burgher wing of the Secession Church, and Murdoch was Antiburgher. When the first Antiburgher presbytery was erected in 1795 at Pictou, however, Murdoch was not invited to join.²⁰ During his long ministry, he remained aloof from the emergent institutional structures of the Secession Church, and for this reason has remained a "missing link" in the history of Nova Scotian presbyterianism.²¹

Even before his dismissal, Murdoch was in financial difficulty. In June 1782 the minister was obliged to mortgage nearly all his land in order to borrow £274 from Halifax merchant John Fillis. By 1785 he could not pay a small judgment of £16 obtained against him, and a parcel of his unmortgaged land was sold to the creditor at a sheriff's sale. In 1789 James and Abigail surrendered all their lands to Fillis for £387, no doubt as a way of avoiding a foreclosure action.²² The Murdochs joined the ranks of many smaller

of the 'dismissal.'

²⁰Patterson, "Pioneers of Presbyterianism," pp. 85-89. The minutes of the Pictou Presbytery begin only in 1801, while the minutes of the Truro Presbytery shed no light on Murdoch.

²¹He is totally overlooked in the editors' introduction to Charles H.H. Scobie and G.A. Rawlyk, eds. The Contribution of Presbyterianism to the Maritime Provinces of Canada (Montreal and Kingston: McGill-Queen's University Press, 1997), where the initiation of Antiburgher clerical activity is associated with the arrival of the Rev. James McGregor, who arrived in Nova Scotia twenty years after Murdoch, in 1786. Murdoch was also excluded from the Dictionary of Canadian Biography.

²²RG 47 (King's Co. Registry of Deeds), vol. 4, p. 74 (mortgage from James Murdoch et ux. to John Fillis, 28 June 1782); vol. 4, p. 190 (deed from James Murdoch et ux. to John Fillis, 19 May 1789); vol. 4, p. 260 (sheriff's deed to J.T. Hill of property formerly

landholders who lost out as the lands of Horton Township quickly accumulated in the hands of an ever-decreasing circle of owners.²³

After twenty years of labour in his adopted homeland, Murdoch was left with virtually nothing. For a time the Murdoch household moved to Windsor, but James found the Anglican atmosphere surrounding King's College uncongenial. At the request of a small congregation of Loyalists at Musquodoboit, he moved there in 1791 to minister to them. There was no stipend, but they built him a small house. When it burned they built another, but many of Murdoch's books and papers were destroyed. He continued to minister to families and small congregations as far away as Chignecto, travelling by foot, horse and canoe in all seasons under punishing conditions.²⁴ It was likely at this time that the Rev. Dr. James McGregor, the Scottish Antiburgher firebrand, met with Murdoch in his rude log dwelling at Musquodoboit and "was touched with profound pity for his

owned by James Murdoch, 6 July 1785). Fillis was the brother of Abigail Murdoch's sister-in-law Susannah (Fillis) Salter, who had married Abigail's brother Benjamin. Eliza Frame's account of these matters in "Rev. James Murdoch" contains some inaccuracies when compared with the land records.

It is not clear from the land records what happened to the lands purchased by John Murdoch. There appear to be no estate papers for him, and few Supreme Court records from King's County survive from this period. Elizabeth and Matthew Frame also sold out to Fillis in 1792 and moved to rented premises in Hants County, which suggests that John Murdoch's lands were sold for debts at his death. After surrendering his own lands, James Murdoch and his family appear to have lived with his parents until their deaths in December 1790. Some sources suggest that the family then spent some time at Windsor before moving to Musquodoboit.

²³Debra Anne McNabb, "Land and Families in Horton Township, N.S. 1760-1830," (University of British Columbia M.A. thesis, 1986), pp. 52-55.

²⁴Eliza Frame gives an account of his travels in the 1790s based on fragments of his diary she found during a trip to Musquodoboit in the 1860s: Descriptive Sketches, pp. 33-50.

condition, but ... felt unable to unite with him in ministerial fellowship."²⁵ The pity arose from Murdoch's obvious poverty, from his widely-known epileptic affliction, and possibly too from his rumoured fondness for alcohol.

The body of the Rev. James Murdoch was found at the edge of the Musquodoboit River on 21 November 1799, not far from his home. Some accounts suggest that he drowned after an epileptic fit, others that he died of exposure after being incapacitated by a seizure.²⁶ Any suggestion of suicide would have been suppressed by contemporaries, but whether he died of natural causes or not, the Rev. James Murdoch came to an inglorious end.

The minister left no pecuniary legacy to his descendants, but his pioneering ministry must be counted a success in at least some respects. He participated in the first ordination in the province in 1770, and made no secret of his anti-slavery views. At a time when the preaching of Henry Alline was highly popular, Murdoch continued to be sought after. The loss of his papers, his estrangement from the institutional structures of

²⁵George Patterson Scrapbook, MG 9, vol. 31 (N.S.A.R.M. mfm. 170), p. 18. This scrapbook contains an augmented, and more explicit, version of the manuscript biography of Murdoch found in Patterson's "Pioneers of Presbyterianism." Patterson must have sent a draft version of the more explicit version, which treated as fact Murdoch's alcohol problem, to Murdoch's great-nephew the Rev. William Frame. An animated correspondence between the two men on this topic follows in the scrapbook. On McGregor's career in Nova Scotia, see Barry Cahill, "The Antislavery Polemic of the Reverend James McGregor: Canada's Proto-Abolitionist as 'Radical Evangelical'," in Scobie and Rawlyk, Contribution of Presbyterianism.

²⁶Royal Gazette and Nova Scotia Advertiser, 3 December 1799.

presbyterianism, and his personal problems have led to an undeserved neglect of his contribution to the ecclesiastical history of the province.²⁷

Murdoch's eldest son Andrew was twelve years of age when the family's lands at Horton were surrendered. He was then sent to Halifax to the home of Abigail's brother Benjamin Salter, who ran a ship's chandlery and marine insurance business. Given the wreck of the Murdoch family fortunes, young Andrew and his siblings would have to make their own way in the world, with some assistance from their extended family. Benjamin Salter trained Andrew in his business, and later arranged for Andrew's younger brother William to be sent to sea as a captain's clerk. By the time of his marriage to Elizabeth Ott Beamish in 1799, Andrew was much involved in his uncle's business.²⁸ Simeon Perkins recorded a number of instances in his diary where he obtained insurance "in Mr. Salter's office, by giving a Memdm to Andrew Murdoch."²⁹ On 27 April 1799, he noted that "Mr. Murdoch" and others had come from Halifax to speculate in a prize

²⁷The pattern was set early on. In his History of the Mission of the Secession Church, the Rev. James Robertson devoted three pages to the activities of Mr. Samuel Kinloch, a Scottish probationer who spent only three years in the province, while Murdoch's 33-year ministry is summarized as follows (p. 22): "All that we have been able to learn of Mr. Murdoch is that, after preaching for a short time at Windsor . . . he removed to Musquodoboit, where he was unfortunately drowned." The decision of the Rev. George Patterson to write Murdoch out of his biography of the Rev. James MacGregor, and to accord MacGregor (Patterson's grandfather) the starring role among his Presbyterian pioneers, undoubtedly contributed to this trend. See George Patterson, Memoir of the Rev. James MacGregor, D.D. . . . (Philadelphia: J.M. Wilson, 1859). Patterson's glorification of MacGregor at Murdoch's expense was the subject of some acerbic comment by Eliza Frame in her Descriptive Sketches, pp. 44-6.

²⁸Benjamin Salter's daybook for June-October 1799, MG 3, vol. 1838c, records numerous payments to Andrew Murdoch in cash and in kind.

²⁹D.C. Harvey, ed., The Diary of Simeon Perkins (Toronto: Champlain Society, 1978), vol. 4 (1797-1803), p. 164. See also entries at pp. 163, 167.

ship which had been condemned to Perkins.³⁰ An entry for 3 December 1801 is more ominous, and gives a hint of the financial disaster which was soon to engulf the young man. Perkins noted that he had a letter from lawyer Daniel Wood, "calling for payment of a Bond I gave in the Import Office with Andrew Murdoch, for Duties in May 1799, for about £112, which he has not paid. . . . [T]he Commissioners have ordered it put in Suit."³¹ The Attorney General did sue for that amount in Easter term 1802, and Murdoch managed to pay it by July of that year, but clearly he was in some financial difficulty.³² A large part of Murdoch's problems may be traced to the untimely death of his uncle on 25 March 1800. Benjamin Salter died intestate, leaving his affairs in some disorder.³³ His widow Susannah petitioned the court that Murdoch and her two brothers be appointed as co-administrators to assist her in administering the estate. They were sued by the London mercantile firm of Brook Watson & Co. for the sum of £4365, allegedly due on Salter's accounts. When Salter's assets proved insufficient to satisfy this huge judgment, the firm sued Andrew Murdoch as the "surviving partner of Benjamin Salter, late of Halifax." Unfortunately, Murdoch had just been taken into his uncle's

³⁰Ibid., p. 162.

³¹Ibid., p. 349, entry for 3 December 1801.

³²Attorney-General v. Andrew Murdoch (1802), RG 39 C (Halifax), box 83. The continuation in box 84, The King v. Andrew Murdoch, notes payment of the sum.

³³The estate papers of Benjamin Salter, RG 48 (Halifax County Court of Probate), S1, reel 19421.

business as a partner in June 1799, so that he was legally liable for this debt. Judgment was entered against him on 2 July 1802 for £3000.³⁴

A year of negotiations followed, during which Murdoch desperately tried to recover debts owing to him, arranging for the commitment of one of his own debtors to jail in the process.³⁵ It was all to no avail. A writ of execution issued on 25 October 1803, which Sheriff Lewis M. Wilkins endorsed on 10 December with the curt notation "I could find no goods and Chattels Land or Tenements of the within named Andrew Murdoch whereon to levy this Writ. I have therefore taken the Body of the said Andrew Murdoch and committed him to Jail."³⁶ Compounding Andrew's misfortune was the death of his wife about this time. Elizabeth Ott Murdoch is usually said to have died in childbirth, but she survived Beamish's birth by over three years, dying in late 1803 or early 1804, probably as result of long-term complications arising from the birth. With her death Andrew lost not only his wife but his son, as the homeless Beamish was taken in by his maternal grandmother. For his part, young Beamish would be left with only

³⁴Brook Watson, William Goodal and John Turner v. Susannah Salter, John and Thomas Fillis, and Andrew Murdoch, administrators of Benjamin Salter (1802), Brook Watson, William Goodal and John Turner v. Andrew Murdoch (1802), both at RG 39C (Halifax), box 84. Watson had also been the most pressing of Malachi Salter's creditors in the 1770s, according to Susan Bugey, "Malachi Salter," D.C.B., vol. IV, pp. 695-96.

In his petition to the House of Assembly in 1806, Murdoch admitted to owing Watson the £3000: MG 100, vol. 193, no. 44 (typescript transcription of petition dated 18 November 1806).

³⁵Andrew Murdoch v. Charles Chipman (1802), RG 39 C (Halifax), box 84.

³⁶Endorsed on the writ of execution issued in Brook Watson et al. v. Andrew Murdoch. This notation implies that Murdoch was imprisoned in late 1803, but in his 1806 petition Murdoch stated that he had entered jail in June of that year: supra, note 33.

fleeting memories of a mother who shared the fate of many others in an era of high maternal mortality. The loss of his mother, a literate woman who would no doubt have taken great interest in her son's education, was probably at least as great a misfortune to Beamish Murdoch as the financial ruin of his father.

Andrew Murdoch would remain in the squalid Halifax jail for at least the next four years. The experience of imprisonment for debt was not uncommon, but Murdoch's length of stay in prison was unusual.³⁷ Under a Nova Scotia law, insolvent debtors could be released if they were prepared to make an inventory of all their property and assign it to their creditors, even though the value of that property was not enough to satisfy the full debt. This law reflected the prevailing belief that it was better to have debtors engaged in useful work than languishing in prison, if they genuinely did not have sufficient assets to cover their debts. Provincial law did not recognize bankruptcy as such, but the insolvent debtors' law went some way in that direction. Unfortunately for Murdoch, relief was available only to debtors whose debts totalled less than £100. For Murdoch, there were only two possible avenues of release: mercy by the creditor, or a special relief act passed by the House of Assembly.³⁸

³⁷In his 1805 petition to the House of Assembly, Murdoch noted that more than 130 persons had been committed to debtors' prison at Halifax in the preceding two years: RG 5 A, vol. 12. Most would have been released after a fairly brief stay if their debts were under £100.

³⁸On the development of debtor-creditor law, see generally Philip Girard, "Married Women's Property, Chancery Abolition and Insolvency Law: Law Reform in Nova Scotia, 1820-1867," in Philip Girard and Jim Phillips, eds., Essays in the History of Canadian Law, vol. III (Toronto: Osgoode Society, 1990).

Murdoch's December 1805 petition to the House of Assembly makes for grim reading in spite of its eloquent, learned and forceful expression, testimony to the superior education which James and Abigail Murdoch had been able to provide to their children. The petition did not ask for Murdoch's release, merely for better conditions for imprisoned debtors. Only fuel and water were supplied in jail, and Murdoch alleged that creditors seldom arranged for the 8 lb. of bread per week for their debtors which they were obliged by law to provide. Debtors thrown on their own resources would have perished had other prisoners not shared their food with them. Murdoch also complained that the absence of prison yards for air and exercise was "far from [demonstrating] that Humanity, Benevolence and Attention which so eminently distinguishes the British character in Europe above all the civilized Nations of the World." This invocation of the British national character may have provoked the desired result: in January 1806 the Assembly voted £50 for the relief of distressed debtors.

Two bills in 1807, reacting to a second petition by Murdoch in November 1806, aimed at his release by providing that he could take advantage of the insolvent debtors' law in spite of the amount of his debts. The first was rejected by the Council on 8 January, while the next passed second reading in the Assembly on 19 December but ultimately did not become law.³⁹ There is no record of a provincial act in Murdoch's

³⁹RG 5 U, vol. 4 (1804-1812).

favour, but he appears to have been released in 1808, possibly as an act of grace by the estate of Sir Brook Watson, who died in October 1807.⁴⁰

Upon his release Andrew Murdoch sought to support himself as a teacher, though he continued to style himself "gentleman" in legal documents. For the rest of his life he eked out an existence in the settlements sprinkled around the eastern part of the Bay of Fundy, following literally in his father's footsteps. Thomas Chandler Haliburton's 1849 account of the life of a colonial school teacher might have been written with Andrew in mind:

When a man fails in his trade, or is too lazy to work, he [re]sorts to teaching as a livelihood, and the school-house, like the asylum for the poor, receives all those who are, from misfortune or incapacity, unable to provide for themselves. The wretched teacher has no home; he . . . resides, a stipulated number of days, in every house -- too short a time for his own comfort, and too long for that of the family.⁴¹

Murdoch was paid £50 to teach at the village school in Parrsborough in 1811-12, and received a licence to keep a school at the settlement of Noel in Hants County in 1816.⁴² This wage of £1 per week was about that of a day labourer, and was the minimum required to keep body and soul together.

⁴⁰In August 1814 Murdoch petitioned the Council for a land grant, stating that he had "resided for these last six years constantly in the said Province:" RG 20 A (1814). This is a curious statement given that Murdoch had lived his whole life in the province. It makes more sense if the six years is taken to refer to his release from prison, which would place that event in 1808. Although recommended for 250 acres, it seems Murdoch ultimately did not receive any land as his name does not appear in the Crown Land Grants index.

⁴¹Thomas Chandler Haliburton, The Old Judge; or, Life in a Colony (Ottawa: Tecumseh Press, 1978), p. 128.

⁴²MG 1, vol. 187, no. 81; RG 1, vol. 173, p. 343.

Yet Andrew Murdoch was not entirely dependent on his teaching wage. Through all his travails he had managed to keep his interest in certain property which had come to him through his wife's estate. Elizabeth Ott Murdoch had inherited an interest in various Halifax properties, including a valuable wharf, under the will of her step-grandfather. The wharf was the subject of lengthy litigation between the Cochran and Beamish families beginning in 1802. It was not until 1820 that the claims of the Beamish family were finally settled after an appeal to the Privy Council in England, and the Cochrans were compelled to return the wharf to its rightful owners. Had Elizabeth Ott Murdoch been alive, she would have been entitled to a share in this property in common with her siblings. Upon her death her share descended to her son Beamish, subject to a life interest in her husband, known to the common law as an estate by the curtesy. In order to avoid this encumbrance, the family entered an arrangement in 1825 whereby Andrew gave up his life interest in a number of properties, in return for ownership of a one-fifth interest in two tenements near the Market Wharf.⁴³

Land ownership was a mixed blessing for Andrew Murdoch, in that it gave him a source of credit which encouraged him to live beyond his means. He and his wife's siblings sold one of the properties in 1832, which netted Murdoch some £60.⁴⁴ His

⁴³Halifax County Registry of Deeds, RG 47, vol. 48, p. 232, deed from Andrew Murdoch to Beamish Murdoch dated 8 July 1825; vol. 49, p. 364, deed from Beamish Murdoch to Andrew Murdoch dated 9 July 1825. The purchase price in both transactions was stated to be £300, so in substance the parties were effecting an exchange of the properties.

⁴⁴RG 47, vol. 56, p. 473, deed from Andrew Murdoch et al. to Cornelius O'Sullivan, 6 September 1832.

interest in the other he mortgaged in 1833 to Parrsborough merchants James and Charles Ratchford for £52, and then a year later to Truro attorney Robert Dickson for £100.⁴⁵ A decade later he was in default on both mortgages. His son came to the rescue, paid off the mortgages and arranged for a sale of Andrew's interest.⁴⁶ Now nearly 70, Andrew Murdoch faced the prospect of total destitution at the end of his working life. Without savings or property of any kind, it was up to his son to support him if he was not to be left to the ministrations of the overseers of the poor. For the last decade of his father's life, Beamish Murdoch paid £26 annually to Robert Dewis of Fort Belcher (near Truro) for Andrew's board, lodging and washing.⁴⁷

In economic terms, Andrew Murdoch's story is a simple one. He was a poor manager of money in a society which provided little relief for those so afflicted. His first failure in business was probably precipitated by being thrown in over his head upon the early death of his uncle; his later failures were mostly his own. At a psychological level, the story is more complex. The relationship between Andrew and Beamish Murdoch is usually characterized as one of estrangement, yet that term does not fully capture their

⁴⁵RG 47, vol. 59, p. 344, mortgage from Andrew Murdoch to James Ratchford, Jr. and Charles Edward Ratchford, 11 June 1833; RG 47, vol. 59, p. 417, mortgage from Andrew Murdoch to Robert Benjamin Dickson, 28 April 1834.

⁴⁶RG 47, vol. 80, p. 270, release from Andrew McGrigor to Beamish Murdoch, 17 May 1845. The document recites that Beamish Murdoch requested McGrigor to pay off the holders of two mortgages made by Andrew Murdoch in May 1843 in the amount of £145, and now that Beamish Murdoch has repaid McGrigor in full, McGrigor conveys to him all Andrew Murdoch's former interest in the property in question.

⁴⁷MG 3, vol. 1836a, f. 41. MG 3, vol. 1837, f. 45 is a draft letter by Beamish Murdoch dated 24 March 1860 to Dewis regarding final payment of his "late father's account." Andrew Murdoch died at Parrsborough on 30 October 1855 at the age of 78: Presbyterian Witness, 10 November 1855, p. 179.

lives. Beamish Murdoch did not have the luxury of being totally "estranged" from his father - they remained in contact throughout Andrew Murdoch's long life, and Murdoch fulfilled his filial duties to the end.

The nature of their emotional relationship is a puzzle. Beamish Murdoch could probably have forgiven his father's poverty but Andrew's lack of respectability must have been more problematic. His great-niece Susan Stairs records in her memoir that "all his life his habits and character were a constant source of grief and mortification to his sisters," but with typical Victorian reticence fails to specify what his failings were.⁴⁸ Certainly Andrew's financial woes were enough to justify familial and societal disapproval, but more is hinted at in this phrase. Sexual irregularity or intemperance or both are the most likely causes of this "grief and mortification." The latter is suggested by Stairs's elliptical reference to Andrew's time in prison where, she states, he beguiled his time "in posting books for merchants and in the more questionable pursuits practised in this Marshalsea."⁴⁹ Alcohol was freely available to those inmates of the prison who could pay for it, although there were periodic attempts to suppress the activity of the jailer in supplying intoxicants. It would not be surprising if Andrew had turned to drink during his long stay in jail.

The failed father hovered like a doppelgänger over the son. The hereditary principle was fundamental to colonial society, and it was assumed that well-placed fathers would assist their sons to replicate their own status. Andrew Murdoch would never be

⁴⁸Family History. Stairs, Morrow, p. 236.

⁴⁹Ibid., p. 237.

able to make the connections which might ease his son's entry into the colonial élite. Ill luck or even incapacity in money matters would probably have been easier to bear than Andrew's moral unworthiness, which was a constant liability for his son. The only way Beamish Murdoch could escape this damnosa hereditas was to fashion an identity which emphasized sobriety, thrift, temperance, civility and above all, hard work. For every paternal vice, he would find the concomitant virtue. Where Andrew Murdoch was mobile, shiftless and defied the expectations of his family and peers, his son became a pillar of Victorian propriety, rectitude and respectability.

Galvanized perhaps by the spectacle of their brother's failure, all of Andrew Murdoch's siblings managed to avoid his fate. Unfortunately for Beamish Murdoch, however, none of his Murdoch uncles was able to serve as a substitute paternal figure. Three of Andrew's brothers were sacrificed to the sea at an early age. William Salter Murdoch was sent to sea in 1796 at age 16 through the efforts of his uncle Benjamin Salter, and was later educated for the Royal Navy by his eldest sister's husband, merchant William Duffus. He died in the Hasler Hospital, Portsmouth in 1806 shortly after attaining the rank of lieutenant.⁵⁰ Two years later James Murdoch, Jr. drowned near Halifax at the age of 17, when he fell from the spar of a schooner returning from Barbados.⁵¹ Joseph died young while serving on a vessel in the Mediterranean.

⁵⁰Ibid., pp. 225, 244; Nova Scotia Royal Gazette, 11 November 1806.

⁵¹Weekly Chronicle (Halifax), 18 March 1808.

Andrew's youngest brother Benjamin, only four years older than Beamish Murdoch, apparently emigrated to the United States and nothing more is known of him.⁵²

Andrew's sisters fared rather better. In particular, his eldest sister Susannah married Scottish emigré William Duffus, who became a successful Halifax merchant. Their children, Beamish Murdoch's cousins, penetrated to the highest levels of the Halifax élite. Daughters Susan and Elizabeth married Samuel and Henry Cunard respectively, while Mary Ann married merchant John Morrow and became the mother-in-law of the Hon. W.J. Stairs. Margaret married lawyer William Sutherland, with whom Beamish Murdoch would have some professional dealings later in life. Beamish Murdoch appears to have been almost completely estranged from his paternal relatives. If Andrew was a source of "grief and mortification" for his sisters, they were unlikely to have much to do with his son, for fear of bringing shame on their husband's houses.

The Salter connection did not provide much assistance to Beamish Murdoch either, confounding his parents' expectations. By christening their son Benjamin Salter Beamish Murdoch, after his recently deceased great-uncle, Andrew and Elizabeth demonstrated their gratitude and loyalty to the relative who had taken in Andrew as a child. Murdoch was known in his youth as "Salter" rather than "Beamish," even by his Beamish relatives,

⁵²Eliza Frame, "Rev. James Murdoch," pp. 108-09. Another, more curious, void in the Murdoch family history is the fate of Andrew's mother, Abigail Murdoch. Widowed in 1799, and left with several of her ten surviving children still at home and no apparent source of income, her position was far from enviable. Abigail remarried at St. Paul's in 1803, to Henry King, "bachelor," a much older man who died at Boston in 1817. She herself died in Halifax in 1833: Acadian Recorder, 31 May 1817; 21 December 1833. The absence of any reference to her life post-1799 in Eliza Frame's or Susan Stairs's accounts suggests some estrangement from the Murdoch clan, possibly as a result of the second marriage.

until about the time of his majority.⁵³ However, Murdoch appears to have had little to do with the Salters. By the time he reached early manhood his absorption into his maternal family, symbolized by his selection of the Christian name of Beamish, was complete.

The Beamish family

The surname Beamish is said to derive from the place-name Beaumais-sur-Dive in France, but the English branch of the family had been long settled in the western counties by Elizabeth's time. The emigration of the Beamishes to Ireland can be dated to the late Elizabethan period with more confidence than that of the Murdochs. Their settlement occurred in the aftermath of the Munster Rebellion of 1579, which had led to the death of thousands and the confiscation of over 500,000 English acres of land from the native Irish. Some 300,000 acres of this tract considered useable were granted to English landlords, pursuant to a plantation scheme approved by Elizabeth I in 1586. The scheme relied on "undertakers" to find and establish English settlers on the lands granted to them as seigniories, similar to the system which would be applied two centuries later in Prince Edward Island. Unlike earlier schemes which had involved English settlement

⁵³References to Beamish Murdoch as "Salter" include: RG 20 A (1814) (petition of Andrew Murdoch for land grant referring to son "Salter Beamish Murdoch"); Dale McClare, ed., Louisa's Diary: the Journal of a Farmer's Daughter, Dartmouth, 1815 [Louisa Collins, future wife of Murdoch's uncle Thomas Ott Beamish] (Halifax: Nova Scotia Museum, 1989), p. 26, entry for 1 October 1815; will of Frederick Ott Beamish dated 9 June 1817 names as executor "Salter Murdoch, my nephew:" Halifax County Court of Probate, RG 48, B32, reel 19397. Murdoch signed as "Beamish Murdoch" when witnessing this will, however. There are no references to Murdoch as "Salter" after 1821 in any documents seen by the author.

in Ireland, the distinction between ruler and ruled was now more apparent since it was based on the bright line of religion. Only Protestant undertakers and settlers were to be permitted, and these people were sometimes called the New English, to distinguish them from the Old English who had settled in Ireland in previous centuries, but who had remained very largely Catholic after the Reformation.⁵⁴

Lands at Bandonbridge (or Bandon) in what later became County Cork were granted to an undertaker named Phane Becher from the west of England, and a settler named Beamish is one of the 85 listed there in 1588.⁵⁵ The family suffered and survived the convulsions of Irish history over the next century: a second flowering of the Munster Rebellion from 1594 to 1603, the rebellion of 1641-42 occasioned by the English Revolution, and the civil war of 1688-89. John and Francis "Bemish," two sons of the original settler (whose first name is unknown), made depositions to the commission which heard evidence of losses to English Protestants during the 1641 rebellion.⁵⁶ They described themselves as yeomen, but succeeding generations would adopt the style of gentleman, including Francis's great-grandson, Thomas Beamish of Cork and Halifax.

⁵⁴Michael MacCarthy-Morrogh, The Munster Plantation: English Migration to Southern Ireland 1583-1641 (Oxford: Clarendon Press, 1986).

⁵⁵C.T.M. Beamish, Beamish. A Genealogical Study of a Family in County Cork and Elsewhere (London: privately published, 1950), at p. 9. The following account of the Beamish family in Ireland is based largely on this source, which is itself based on primary sources.

⁵⁶Trinity College Dublin Manuscripts Department, Ms. 825.66. The descent of John and Francis from the original Beamish settler of 1588 cannot be conclusively established from the existing documentary record, but is highly likely. It is assumed that their mother, Catherine Beamish, whose death is documented in 1642, was the widow of the original Beamish settler.

Bandon was a notable Protestant enclave in the midst of a sea of Irish Catholicism. Sir Richard Boyle, Earl of Cork, purchased the surrounding seigniory from the Becher family about 1619, encircled it with a fine wall, and made it "the showpiece foundation in Munster . . . with its brand-new walls, houses, and gardens laid out with chessboard precision."⁵⁷ The town burgesses early on enacted that "no Papist inhabitant shall be suffered to dwell within the town," and Boyle expelled those Catholics who had settled just outside it in Becher's day. Not until 1800 were any Catholics suffered to live in the town.⁵⁸ Religious exclusivity invaded Cork City as well. Following Cromwell's bloody campaign in Ireland in 1649 all Catholics of any substance, including the wealthy Old English merchants, were expelled from the city. Municipal government and complete control of trade and industry were accorded exclusively to Protestants.⁵⁹

Peace finally came to the region after the defeat of James II at the Boyne in 1690. With the return of trade and agricultural production, Cork soon became a recognized port of call for transatlantic shipping. Prevented by British tariffs from producing wool or grain, landowners around Cork turned their lands to the production of meat, hides and dairy products. Vast amounts of foodstuffs left the port for the continent, North America

⁵⁷MacCarthy-Morrogh, Munster Plantation, at pp. 253-54.

⁵⁸George Bennett, The History of Bandon and the principal towns in the west riding of County Cork, enl. ed. (Cork: Francis Guy, 1869), pp. 44, 326, 340-45, 520.

⁵⁹William O'Sullivan, The Economic History of Cork City from the Earliest Times to the Act of Union (Cork: Cork University Press, 1937), pp. 108-12.

and the West Indies. By 1760 the population of Cork was 60,000, twice the size of Glasgow, Liverpool or Birmingham.⁶⁰

Thomas Beamish's father John was a freeman of the corporation of Bandon, but Thomas and his brother Richard both removed to nearby Cork to enter trade. John's elder brother succeeded to the major part of the Beamish lands, and John and his sons appear to have sold their smaller holdings to the senior branch of the family in order to use their capital in mercantile ventures and to finance emigration.⁶¹ Cork's very success in the export trade made it vulnerable to embargoes imposed during wartime by the British government. A series of such restrictions in 1762-63 during the war with France caused many failures among the provision merchants, and this experience may well have led the Beamish brothers to consider emigration.⁶²

Cork's close economic ties with the eastern colonies of North America meant that Thomas Beamish would probably have been reasonably familiar with the conditions prevailing at Halifax, where he arrived about 1765.⁶³ He set himself up as a merchant

⁶⁰*Ibid.*, pp. 144-49.

⁶¹The Beamish lands at Kilmalooda remained in the family until at least 1950, though the great house suffered extensive damage by fire during the Irish civil war in 1923.

⁶²*Ibid.*, pp. 150-52. A generation after their emigration, a collateral branch of the family responded to this same problem by deciding to focus on a product which could be consumed at home. The Beamish and Crawford Brewery, established in 1792, has survived for two centuries in Cork and now exports its ales to the international market.

⁶³Information on the Beamish family in Nova Scotia is derived largely from Terrence M. Punch, "Beamish of Kilvurra and Halifax," *Nova Scotia Historical Quarterly* 9 (1979), 269-278. Thomas's brother Richard Beamish emigrated to America but not to Nova Scotia, and nothing more is known of him. Their sister Elizabeth Beamish either accompanied or followed Thomas to Halifax, where she remained, unmarried, until her death in 1826.

and soon had formed an association with Frederick Ott, whose fifteen-year-old step-daughter Amelia he married in 1770. Ott was a highly successful victualler in early Halifax: a 1776 survey showed him as one of the largest landowners in the town.⁶⁴ Beamish's relationship with Ott, cemented by the marital tie, initially allowed him to establish a secure place within colonial society. In 1781 he was considered able and loyal enough to be appointed Warden of the Port of Halifax, responsible for verifying the status of all incoming vessels during the revolutionary war. The bubble burst in 1783, when the death of Frederick Ott, the end of the war and the influx of the loyalists, gave rise to an entirely new situation. Reduced British spending, a fall in commodity prices from inflated wartime levels, and the sudden appearance of a whole troop of competitors gave a sharp shock to the Halifax mercantile community, and the Beamish fortunes suffered accordingly. Ott left his substantial estate to Thomas and Amelia in trust for their children, born and to be born, so that they were not able to use his assets as security.⁶⁵ The net result was increasing indebtedness, which saw Thomas Beamish committed to debtors' prison by 1787 - at the suit of the same English creditor, Brook Watson, who would render Andrew Murdoch the same favour sixteen years later. Beamish's release was only secured by conveying to his creditors a valuable wharf property belonging to the Ott estate, but this left the family in much reduced circumstances. The family removed to Cole Harbour, and Thomas Beamish disappeared in 1792, never to return.

⁶⁴Halifax Assessments 1775-76, RG 1, vol. 411, doc. 7.

⁶⁵Will of Frederick Ott Beamish, 1 June 1780, Halifax County Court of Probate, no. 022.

It was Amelia Ott Beamish who was crucial to the restoration of the Beamish family fortunes over the next two decades. She believed that the creditors had acted illegally in 1787, and was determined to regain the wharf; the family's legal struggle forms the basis of the next chapter. In addition, after the early deaths of two of her daughters Amelia took in two grandsons and raised them as her own, with the assistance of her three unmarried daughters Sarah, Maria and Harriette. Rounding out the household was Thomas Beamish's unmarried sister, Elizabeth.

This bevy of Beamish women shaped Beamish Murdoch's youth and adolescence. On the intellectual plane, they inspired his interest in history and literature. Amelia had practically been born with the town, and was the custodian of a long family memory. Sarah was said to have tasted the wine raised from the ships wrecked in the Duc D'Anville's ill-fated expedition of 1746.⁶⁶ Maria worked for some years at the Royal Acadian School as "female superintendant," while great-aunt Elizabeth Beamish ran her own school.⁶⁷ All these women were literate, and valued education enough to arrange for Beamish to attend the Halifax Grammar School before he began his apprenticeship as an attorney. On the financial plane, the Beamish women fought along with their male kin for the restoration of the inheritance wrongfully wrested from them in the 1780s. Their

⁶⁶This incident was recounted by Thomas Beamish Akins, who lived with Sarah Ott Beamish much of her life, to John Thomas Bulmer, who recorded it in his obituary notice of Akins in the Canadian Voice, 9 May 1891.

⁶⁷She moved to separate quarters in 1804, wherein she opened a school for young children, but remained very much part of the family: Royal Gazette, 31 May 1804.

eventual success secured for Beamish Murdoch a measure of economic security which would enable him to aspire to an important role on the provincial stage.

On the psychological plane, the influence of the Beamish women is more difficult to judge. They may have intensified the alienation which existed between father and son in their efforts to ensure that Beamish did not follow Andrew's example. They raised him as an Anglican, ignoring Andrew's Presbyterianism, and sought to remake him as a member of the Beamish family. Contemporaries would no doubt have seen these measures as entirely appropriate, but they probably exacted a psychological toll on young Beamish which cannot be precisely defined.

Though very much part of the Beamish family in his private life and in public perception, Beamish Murdoch ultimately sought to transcend the heritage of both his Beamish and his Murdoch kin. The unhappy fates of his grandfathers and his parents meant that Murdoch did not have a secure place within the colony's political or social élites. He could not expect the deference accorded members of those élites in what was still a very hierarchical society modelled on, though less rigid than, class-divided Britain. If he were to achieve any notice in colonial society, it would have to be through his own efforts. In time, then, he would turn to the most communicative professions: law and journalism. Yet recognition presumes an audience. Murdoch's constituency would be neither the élites nor the unpropertied labourers at the bottom of the social hierarchy, but everyone in between: the middle class.

Chapter Two

Contested Inheritance: The Market Wharf, 1785-1820

In addressing the topic of judicial salaries in a speech to the Nova Scotia House of Assembly in the spring of 1830, Beamish Murdoch observed that "he could speak feelingly, as he had all that he was worth in the world, at one time depending upon [the judges'] decision."¹ He did not need to elaborate. Provincial society was still small enough that most of the men in the chamber would have known instantly that he was referring to a cause célèbre in the provincial Court of Chancery involving a valuable wharf property, which had ended a decade earlier. This epic struggle had pitted Murdoch and his maternal kin against the three Cochran brothers, wealthy Halifax merchants whose powerful presence had dominated Nova Scotian society for decades. The Cochrans had pursued the dispute to the foot of the throne, but to no avail. His Majesty in Council affirmed the Nova Scotia Chancery decree, which returned title to the wharf to the Beamish family, some thirty years after the Cochrans had wrested it from them.

Studies of civil justice have been fairly rare in the British North American context. There is little in Canadian legal or social history (outside Quebec) to compare with the intensive study of dispute resolution and court records in New England, for example.²

¹Novascotian (Halifax), 18 March 1830.

²To cite only a few influential works, Bruce Mann, Neighbors and Strangers: Law and Community in Early Connecticut (Chapel Hill: University of North Carolina Press, 1987); William E. Nelson, Americanization of the Common Law (Athens, Ga.: University of Georgia Press, 1994); Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825 (Chapel Hill: University of North Carolina Press, 1981)

The administration of the criminal law has tended to attract more attention, partly because of its apparently greater accessibility to scholars who despair of ever understanding colonial property law or civil procedure; and partly because it seems a natural extension of the large body of work done on Canadian social history since the 1960s. Recently there have been signs of change. The interest in women's history has finally spurred scholars to overcome their distaste for the intricacies of private law, and to examine women's experience of it by means of both quantitative techniques and case studies.³ The largely unexplored issue of the inter-relationship between criminal law and civil remedies has begun to attract attention.⁴ An interest in the development of colonial identities and in state formation has spurred others to look at the emergence of the apparatus of civil justice in specific jurisdictions, and at perceptions of colonial justice through the lens of particular case studies. Tina Loo's recent book Making Law, Order,

Quebec has been an exception in the Canadian context, partly because of a greater willingness on the part of Quebec scholars to treat law as a significant cultural phenomenon, partly because Quebec's bijuridical legal order has been an obvious place to look at French-English relations over time. See Evelyn Kolish,, "Imprisonment for Debt in Lower Canada, 1791-1840," McGill Law Journal 32 (1987) 603; Jean-Maurice Brisson, La formation d'un droit mixte: l'évolution de la procédure civile de 1774 à 1867 (Montreal: Thémis, 1986); John A. Dickinson, Justice et justiciables: la procédure civile à la prévôté de Québec, 1667-1759 (Quebec: Presses de l'Université Laval, 1982).

³Constance Backhouse, Petticoats and Prejudice (Toronto: Osgoode Society, 1992); Kimberley Smith Maynard, "Divorce in Nova Scotia, 1750-1890," in Philip Girard and Jim Phillips, eds. Essays in the History of Canadian Law, vol. III, Nova Scotia (Toronto: Osgoode Society, 1990); Rebecca Veinott, "Custody and Divorce: A Nova Scotia Study, 1850-1910," in ibid.

⁴Ernest A. Clarke and Jim Phillips, "'The Course of Law Cannot be Stopped': the Aftermath of the Cumberland Rebellion in the Civil Courts of Nova Scotia, 1778-1808" (unpublished ms., 1995).

and Authority in British Columbia, 1821-1871 is a particularly rich study which combines both techniques.⁵

There is no doubt that a sizeable percentage of the colonial population regularly came into contact with the civil side of the justice system. Although other kinds of dispute resolution mechanisms were available and were used, the formal courts were indispensable to the functioning of the British North American economy. The vast majority of cases processed by the courts were of a routine nature, and call for the application of statistical techniques. Such efforts need to be constructed, however, with a clear knowledge of the experience of individuals with the law, both in "ordinary" cases and in those which went far beyond the ordinary. As Peter Hoffer has recently stated,

Behind the aggregate data of litigation rates are individual stories, and each represents a decision to invest time, money, and effort in a lawsuit. In human terms, the cases were . . . major personal events, invested with hope and fear The proper study of lawsuits begins with the litigants themselves, with the motivations of real men and women in the past. [What is required] is a thick description of the context of individual cases, . . . an exhaustive search of prior legal controversies, family relationships, position in community, and the like.⁶

Cases which tested the limits of colonial justice are important both for what they might reveal about contemporary perceptions and expectations of the courts, and for what they

⁵(Toronto: University of Toronto Press, 1994).

⁶Peter Hoffer, "Honor and the Roots of American Litigiousness," American Journal of Legal History 33 (1989), at p. 301.

can tell us about the quality of justice rendered in the society under review. The Market Wharf litigation is one such case.⁷

The Context of the Dispute, 1751-1785

It goes without saying that the existence of wharves is crucial to the functioning of any port city. In the Halifax of the 1750s, summoned into existence by imperial fiat for purely strategic reasons, wharves were in short supply. The government was prepared to construct some facilities for naval purposes, but others were needed for commercial purposes. The Governor and Council moved quickly to licence the construction of a number of wharves along the waterfront, and on 1 July 1751 one John Grant was empowered to construct a wharf opposite George Street. He did so, and added a house to the premises as well. His heirs sold part of the property to merchant Charles Mason for £60 in 1756, who died in 1763 leaving a widow and two young daughters, Margaret and Amelia.⁸ By will he left all his realty to his widow, but upon her remarriage to his daughters equally. It is Amelia, born in 1755, who will be of particular interest, since she

⁷Prior to the dispute, the wharf was known as "Grant's Wharf" and subsequently as "Ott's Wharf." During the course of the dispute the Cochran's invariably called the wharf "Cochran's Wharf," while the Beamishes invariably called it "Beamish's Wharf." It was also known as the "Market Wharf," which is the title used here, unless the context demands otherwise.

⁸Will of Charles Mason, N.S.A.R.M., Halifax Co. Wills 1749-86, reel 19357, no. 127.

would become the grandmother of Beamish Murdoch and a key figure in the eventual litigation over the wharf.⁹

The widow Mason and her two young daughters continued to inhabit the house on the wharf until Mrs. Mason remarried in 1764. Her second husband, victualler Frederick Ott, eventually acquired many properties in and around the town of Halifax, including the other part of the wharf formerly owned by John Grant, which now came to be called Ott's Wharf. Having no children of his own, Ott treated his step-daughters as his own kin.

In 1770 15-year-old Amelia Mason married Thomas Beamish, who had come to Halifax from Ireland a few years before. Thomas and Amelia occupied the wharf with their growing family, and in 1780 Thomas bought out the half share of Amelia's sister in the part of the wharf which the two women owned as devisees of Charles Mason. The other part, which had been purchased by Frederick Ott, was left by him in his will to all his step-grand-children, born and to be born, in equal shares, with the parents to hold the shares of their children in trust until the age of majority. Ott left all his other land-holdings subject to the same trust. Thomas and Amelia took possession of all these properties at Ott's death in 1783, none of their children having reached the age of majority. Margaret's only child having died young, Thomas and Amelia's children were the only beneficiaries of the Ott estate.

⁹All information about the Nova Scotia side of the dispute comes from the case file in the Court of Chancery fonds at the N.S.A.R.M., RG 36A, box 24, no. 138, unless otherwise stated. Sources for the Privy Council appeal will be cited at the appropriate point. The accuracy of most of the information has been confirmed by cross-checking newspaper records, genealogies and land records in the registry of deeds.

Presumably Ott by-passed his step-daughters because he believed he had advantaged them sufficiently during his own lifetime; possibly too he feared that his property might be seized for the future debts of his sons-in-law.¹⁰ He imposed two conditions on his devise, one precedent and one subsequent. His grandchildren were required to take the name of Ott at the age of majority in order for their share to vest in possession. Such a clause was an echo of the "name and arms" clause sometimes found in English wills, whereby a childless testator would provide for the continuation of his name by a form of testamentary adoption, at a time when adoption was not recognized in law. All the grandchildren were scrupulous about adding the name Ott to their own family name. Thus Beamish Murdoch's mother was known as Elizabeth Ott Beamish before her marriage and Elizabeth Ott Murdoch afterwards. The second condition was less benign, although common enough at the time. Perhaps concerned that his generosity to his grandchildren might foster a spirit of unwonted independence, Ott provided that any grand-daughter who married without her parents' consent would lose her share.¹¹

At Frederick Ott's death, then, Thomas Beamish came into possession of the entire wharf property, both the "Mason portion" and the "Ott portion," though by three different

¹⁰This interpretation is supported by comparing Ott's 1780 will with his 1774 will, which the later will revoked (see Halifax County Court of Probate, no. O23). In 1774 Ott had left all his property to his daughters, subject only to a life interest in favour of his widow. The gift to the daughters contained no clause reserving it to their separate use, free from their husband's control. Had this will remained unrevoked, the assets of the Ott estate would likely have disappeared into the hands of Thomas and Amelia's creditors.

¹¹Will of Frederick Ott, 1 June 1780, Halifax County Court of Probate, no. O22. The will may be read at one point as imposing this condition on all the grand-children, regardless of sex, but at another point it is only females who are mentioned.

titles: as trustee for his children of the Ott portion; with regard to the Mason portion, by the jus mariti with respect to Amelia's personal half share,¹² and as owner only with respect to the half share which he had bought from his sister-in-law. Thomas was thus free to use only the latter interest as security for his debts. These began to mount just as Ott died, when the Halifax economy experienced a sharp contraction at the end of the war. Thomas's countrymen, the Irish-born trio of Thomas, William and James Cochran, were his principal financiers, and they had advanced him at least £1100 by 1784, when the solvency of the Beamishes began to be a concern.

The Cochrans began to demand security for the sums which they had advanced. Thomas and Amelia could mortgage their own interests in the Mason portion of the wharf, but they had been given no power under Frederick Ott's will to sell or mortgage their children's interests in the Ott portion or in Ott's other lands. In England such deficiencies were sometimes rectified by a private Act of Parliament - indeed, much Parliamentary time in the eighteenth century was spent fine-tuning family settlements. Thomas Beamish duly explored this route, appearing with counsel before the House of Assembly on 10 November 1784 in support of "A Bill to enable Thomas Beamish to sell Real Estate of Frederick Ott." Thomas Cochran had been named speaker at the beginning of the session on 1 November, but stood down on 12 November in order to speak in the

¹²Upon marriage, the common law dictated that Amelia's share came under the control of her husband for their joint lives. He could not dispose of it without her consent, however, and if she outlived him, as happened, she would regain full power to deal with it on her own.

debate on the bill held that day. Amended and passed by the House, the bill did not secure the approval of the Council. The Beamishes edged closer to the precipice.¹³

The First Chancery Decree and its Aftermath, 1785-1802

The legislative door having closed, the Beamishes tried the last route open to them - the judicial.¹⁴ In February 1785 an application was made to Chancery to remove the named executors, John Loader and James Stephens, to confirm Thomas and Amelia as sole trustees, and to give them power to sell or mortgage any of the properties in the Ott estate.¹⁵ Normally, if a trust instrument fails to equip trustees with a power of sale or mortgage, a court has no jurisdiction to add such powers contrary to the wishes of the

¹³Journals and Proceedings of the House of Assembly of Nova Scotia, vol. 6 (1783-84), pp. 67, 69.

¹⁴An earlier impediment had arisen in that the executors named in Frederick Ott's will no longer resided in Nova Scotia and declined to act. In view of their absence, the Court of Probate appointed Thomas Beamish as administrator with the will annexed of the estate of Frederick Ott, by order dated 30 September 1783.

¹⁵The original Chancery file, Thomas and Amelia Beamish v. John Loader and James Stephens, is found at PANS, RG 36A, box 13, no. 65.

There is now a considerable modern literature on the origins and evolution of the Nova Scotia Court of Chancery, in addition to Charles J. Townshend's History of the Court of Chancery in Nova Scotia (Toronto: Carswell, 1900). See Barry Cahill, "Bleak House Revisited: The Records and Papers of the Court of Chancery of Nova Scotia, 1751-1855" Archivaria 29 (1989-90), p. 149; and his "From Imperium To Colony: Reinventing a Metropolitan Legal Institution in Late Eighteenth-Century Nova Scotia," in D.W. Nichol et al., eds. Transatlantic Crossings: Eighteenth-Century Explorations (St. John's: MUN, 1995); Jim Cruickshank, "The Chancery Court of Nova Scotia: Jurisdiction and Procedure, 1751-1855", Dalhousie Journal of Legal Studies 1 (1992), p. 27; Philip Girard, "Married Women's Property, Chancery Abolition and Insolvency Law: Law Reform in Nova Scotia, 1820-1867," in Girard and Phillips, Nova Scotia Essays.

settlor or testator. There were (and are) some exceptions to this rule, however, and the Beamishes tried to bring their case within one of them.

The bill of complaint filed by Thomas and Amelia alleged that Ott was incapacitated and had been neglecting his property for years before his death, and that much of it was now in need of substantial repair. The Beamishes thus justified their request for powers of sale and mortgage on what is now known in the law of trusts as the salvage or emergency jurisdiction.¹⁶ The court granted the Beamishes a wide power to deal with the lands: they could sell or mortgage such part of the Ott estate's lands as they saw fit, "for the purpose of raising money for the Repairs and Improvements of the Remainder." The effect of such conveyances was stated to be "sufficient in Law to create to such purchasers . . . an Estate in Fee Simple forever. And such Deeds . . . shall stand free and unimpeached by the defendants . . . or by the children of the plaintiffs . . . or by any other person or persons whatsoever." The final decree issued on 31 March 1785, the cause having been heard by Governor John Parr sitting as Chancellor, assisted by Richard Bulkeley, Master of the Rolls, and Foster Hutchinson, Master in Chancery.

Armed with this decree, the Beamishes then began a mad scramble to keep creditors from the door. They mortgaged the wharf and some other Ott properties to the Cochrans in August and November, and mortgaged the wharf again for £233 to Thomas

¹⁶Jill E. Martin, Hanbury and Martin's Modern Equity, 14th ed. (London: Sweet & Maxwell, 1993), pp. 601-02. By the later nineteenth century the jurisdiction was very sparingly exercised (see In re Jackson (1882), 21 Ch. D. 786), but in the eighteenth century it seems to have been employed more freely, especially in cases involving the property of infants; Inwood v. Twyne (1762), 1 Amb. 417, 27 E.R. 279; John David Chambers, A Practical Treatise on the Jurisdiction of the High Court of Chancery over the Persons and Property of Infants (London: Saunders & Benning, 1842), p. 538.

Craine, a Jamaican merchant, in December 1785. They sold outright a number of properties in the "North Suburbs" of the town, including one to the newly arrived loyalist and Attorney General Sampson Salter Blowers.

It was all to no avail. In Trinity Term 1786 Peter McNab and London merchant Brook Watson recovered judgments for some £900 against Thomas Beamish, and subsequently had him committed to the common jail at Halifax. In May 1787 McNab consented to Beamish's release only on his paying £200 down on his debt plus making over title to a Water Street property near the wharf. At the same time the Cochrans administered the coup de grâce: by deed dated 21 April 1787 the Beamishes unconditionally sold Ott's wharf to the Cochrans for a consideration expressed to be £1400. The Cochrans then took the precaution of having a confirmatory Crown grant issued to themselves, since there had been some confusion about the exact nature of the interest created by Crown grants for wharf purposes in the past.¹⁷ After the Cochrans took possession, the Beamishes moved to Cole Harbour, a small fishing village a few miles east of Halifax, where one of Ott's properties had survived the shipwreck of the Beamish fortunes. A few properties elsewhere had also survived unscathed, so the Beamishes were not destitute, but undoubtedly their prospects were much reduced.

By 1792 Thomas Beamish was, in the words of the ballad, "a broken man on a Halifax pier." He appears to have abandoned Halifax and his family about this time, leaving Amelia in a difficult position. She was now 37 years old and responsible for the

¹⁷Halifax Registry of Deeds, RG 47, vol.24, p. 309 (deed from Beamish to McNab, 22 May 1787, reciting Beamish "now" in jail); RG 47, vol. 26, p. 199 (deed from Thomas and Amelia Beamish to Cochrans, 21 April 1787).

nine children who survived from the fourteen born to her and Thomas. All were under the age of majority and the youngest was but a few months old. Aided by the revenues produced by the remaining properties from the Ott estate, as well as a few properties which she owned in her own right, Amelia managed to support her family. Thomas's absence at least meant that she could control these lands without any interference from him, and indeed she did not hesitate to describe herself as a widow in a deed of 1801.¹⁸

After assuring her family's survival, Amelia's ultimate goal was to recover the Ott properties which had been left to her children. She harboured an acute sense of grievance against the Cochrans, whom she alleged to have procured the 1787 deed by duress when Thomas was in debtors' prison. A decade would pass before her older children were in any position to assist her in launching legal action to contest the Cochrans' ownership of the wharf. Her eldest son Frederick came of age about 1794, but became a mariner and spent much time at sea until he settled at Blandford, Lunenburg County, about 1800. The next and only other surviving son, Thomas, came of age about 1801. In October 1799 Amelia acquired two sons-in-law who, through the common law doctrine of *jus mariti*, had a clear pecuniary incentive to assist Amelia in her mission. Elizabeth Ott Beamish married merchant Andrew Murdoch of Halifax, while her sister Margaret married

¹⁸Halifax Registry of Deeds, RG 47, vol. 35, p. 607, deed from Amelia Beamish to William Sabatier and Foster Hutchinson, 29 May 1801. In theory the common law did not allow a married woman's legal identity to revive upon the mere absence, as opposed to the death, of her husband, but colonial attitudes seem to have been fairly relaxed on this point. Amelia acted as a feme sole (unmarried woman) from the time of Thomas's disappearance, in spite of the fact that her children deposed during litigation in 1804 that they did not know whether their father was alive or dead.

merchant Thomas Akins of Liverpool. Both men assisted their new relations in preparing for litigation.

The Dispute Erupts, 1802-1816

By 1801 the Beamishes were prepared to go on the offensive. Thomas Cochran, the patriarch, had just died, so they named as defendants only his younger brothers James and William as surviving partners. It is hard to avoid the inference that the Beamishes were waiting for Thomas's death to bring their action. He was, after all, a member of the Council, on which the Chief Justice also sat. The latter would likely be involved in the Supreme Court action which the Beamishes wished to launch, and might well be asked to assist the Lieutenant Governor, sitting as Chancellor, if there were further proceedings in Chancery.

The usual way of trying title at common law was an action in ejectment in the Supreme Court, which the eight surviving Beamish children (plus the husbands of two of the daughters) duly launched; Amelia was not a party to the action. No doubt they anticipated the Cochrans' next move, which was to apply to the Chancellor for an injunction preventing the Beamishes from proceeding with their suit at law until the Cochrans' bill of complaint against them could be heard. Filed on 3 February 1802, the bill rehearsed the sequence of events outlined above. The Cochrans' position was that all the money advanced to the Beamishes was used either to repair the wharf, which was in a ruinous condition at Frederick Ott's death, or to improve Ott's property at Cole Harbour. The mortgages securing those amounts were thus valid exercises of the power

conferred by the Chancery decree of March 1785. When the Beamishes fell behind on those mortgages, the Cochranes were within their rights in taking the wharf in full settlement by the deed of April 1787, and they were protected by the 1785 decree from the claims of the Beamish children or anyone else. The injunction issued as a matter of course a month later.

It took the Beamishes over two years to file their answer, which was dated 7 April 1804 and filed 15 August 1804. No doubt the delay is explicable both by ongoing financial difficulties and by personal tragedies which intervened. Amelia's daughter Elizabeth Ott Murdoch, alive in April 1803, is described as "lately dead" in the answer a year later, while her husband Andrew was imprisoned for debt in June 1803. Thomas Akins, meanwhile, bought out the interest of the adult Beamishes in one of the Ott estate properties in dispute (not the wharf) for £100, probably in order to help finance the lawsuit.¹⁹

In their answer the Beamishes differed with the Cochranes on some crucial matters of fact and alleged other facts not mentioned by the complainants. They denied that the wharf was in a decayed state at Frederick Ott's death. Ott, they alleged, was an industrious man who took care of his property, and the annual income of his estate was £750, which was adequate to support him and keep his property in repair. The Cochranes induced Thomas and Amelia Beamish to apply for the Chancery decree of 1785, which was "procured by the Interest and Influence of the said Complainants ... for the express

¹⁹Halifax Registry of Deeds, RG 47, vol. 35, p. 607, deed from Frederick Ott Beamish et al. to Thomas Akins, 19 April 1803.

and only purpose of enabling them to apply the property of the Defendants to the payment of a Debt the said Complainants . . . considered to be otherwise desperate." Thomas, they said, was "well known to the [Cochrans] to be unfortunate by lapses in Trade," and the Cochrans took advantage of him when imprisoned in 1787 to procure the deed to the wharf. Thomas and Amelia only agreed to sign in order to secure his liberation and because they were assured that the deed would not affect their children's rights. In addition, Thomas by this point was "totally unfit to manage his own concerns," an ambiguous reference which nonetheless fits with his unexplained departure a few years later.²⁰

The answer of the Beamishes raised three distinct legal arguments, only the first of which depended on the court believing their story about the "real" purposes to which the money was put. If the mortgages were granted to the Cochrans only to secure Thomas and Amelia's personal debts and not in connection with repairing estate property, arguably the mortgages were not within the scope of the 1785 decree. If the Cochrans knew these facts to be true, then they would not be able to enforce the mortgages in equity or to rely on the deed of 1787 as a "settlement" of those mortgages. Even the confirmatory Crown grant was invalid on this reasoning: obtained on the basis of wilfully incomplete information, it should be set aside.

Alternatively, Chancery had a broad jurisdiction in the eighteenth century to relieve the vulnerable from the consequences of imprudent transactions. In addition to

²⁰It is not clear whether the respondents meant that Beamish was mentally incompetent or simply a poor businessman.

the description of Thomas's difficult state, the Beamishes' answer painted Amelia Ott Beamish as a struggling but vulnerable figure, borne down by the oppressive action of the Cochrans. She "did use every argument she was capable of and even Tears to dissuade the said Complainants . . . from their unjustifiable Attempt upon the Property of her Children." Further, she admonished

that if she lived to see her children grow up, she would inform them of the aforesaid circumstances, and do every thing in her power to defeat the unjust Intentions of the said Complainants, and that although her children were Infants borne down by poverty, distress and the unfeeling proceedings of the Complainants, she entertained the Hope the day would come, when Justice should be rendered them, and their Property, thus unjustly wrested from them, restored.

This kind of heartfelt appeal was permissible only in Chancery and would never be encountered in the more formulaic pleadings of the common law courts. It is precisely the more verbose Chancery pleadings which are so useful to the modern historian, though productive of much of the delay lamented by contemporaries.

Finally, the Beamishes invoked, albeit elliptically, the argument that the deed of 1787, although an absolute conveyance on its face, was intended by the parties to be only a mortgage. This equitable doctrine, epitomized in the maxim, "once a mortgage, always a mortgage," dated back to the mid-seventeenth century at least, and is occasionally invoked even today.²¹ Acceptance of this argument would allow the Beamishes to

²¹Joseph A. Roach, The Canadian Law of Mortgages of Land (Toronto: Butterworths, 1993), pp. 59-61. The doctrine was affirmed with some vehemence by the Supreme Court of Canada as recently as 1977: Petranik v. Dale, [1977] 2 Supreme Court Reports 959. On the origins of the doctrine, see David Sugarman and Ronnie Warrington, "Land law, citizenship, and the invention of 'Englishness.' The strange world of the equity of redemption," in John Brewer and Susan Staves, eds., Early Modern Conceptions of Property (London: Routledge, 1995). It was invoked in a number of cases in Upper

reclaim the wharf once they had acquitted their debts to the Cochrans, with interest since 1787.

What exactly was the Cochrans' "Interest and Influence" of which the Beamishes complained? The three brothers had arrived from the north of Ireland with their father Joseph circa 1765, about the same time as Thomas Beamish. They arrived in the province early enough to benefit from large grants (26,750 acres in Amherst Township alone), and between property speculation and a large mercantile business in Halifax amassed a considerable fortune in a relatively brief period of time. The three brothers, but especially Thomas, became part of an Irish clique which dominated provincial life until the coming of the loyalists and afterwards. Thomas Cochran sat in the House of Assembly for Liverpool Township from 1775 until 1785, when he was elevated to the Council.²² His younger brother William then sat for Halifax Township from 1785-1816. In the years just before the loyalist arrival, the province was effectively ruled by the Irish-born "duumvirate" composed of Chief Justice Bryan Finucane (1778-1785) and the Hon. Richard Bulkeley, Master of the Rolls and Provincial Secretary. Finucane championed the interests of the Irish merchants and was substantially indebted to Thomas Cochran, for

Canada in the early nineteenth century, one of which also went to the Privy Council; R.C.B. Risk, "The Golden Age: The Law about the Market in Nineteenth-Century Ontario," University of Toronto Law Journal 26 (1976), pp. 330-31.

²²For an example of the kind of influence which Cochran exercised as an assemblyman, see Brian Cuthbertson, Johnny Bluenose at the Polls: Epic Nova Scotian Election Battles, 1758-1848 (Halifax: Formac, 1994), pp. 176-77.

whom he lobbied hard for a Council seat. Governor Parr, also an Irishman, has been portrayed as something of a pawn in the hands of Finucane and Bulkeley.²³

At the time that Thomas and Amelia Beamish sought the Chancery decree of 1785, Thomas Cochran was Speaker of the Assembly. He would be named to the Council three months after the decree. Parr as Chancellor was advised by Bulkeley and Foster Hutchinson, a former Massachusetts judge who had come to Halifax in 1776.²⁴ Chief Justice Finucane did not formally attend the hearing, as Supreme Court judges were sometimes requested to do, but Parr admitted that he normally sought Finucane's advice on matters of law; as a military man he had little interest in Chancery affairs.²⁵

A number of other factors support the Beamishes' allegation that the decree was procured at the instance of the Cochrans for their own purposes rather than instigated by Thomas and Amelia. Counsel for Thomas and Amelia were the Crown law officers, Attorney General Sampson Salter Blowers and Solicitor General Richard John Uniacke, acting in their private capacities. Uniacke was definitely associated with the Cochran-Finucane-Bulkeley clique at this time. He was the protégé of Finucane, who had arranged for his appointment as Solicitor General in 1781. Moreover, Uniacke had acted for the Cochrans in other matters since at least 1783, and later served as counsel to the Cochrans

²³This interpretation follows that of Barry Cahill, "'Fide et fortitudine vivo': The Career of Chief Justice Bryan Finucane," *Nova Scotia Historical Society Collections* 42 (1986), p. 153.

²⁴Bulkeley had been named Master of the Rolls, a sort of deputy judge in Chancery, in 1782, at which time Hutchinson had replaced him as Master in Chancery, which was more of an administrative post; Cahill, "Imperium to Colony," pp. 15-18.

²⁵Cahill, "Finucane," p. 163.

during their Chancery suit against the Beamishes. His actions would not have been seen as embodying a conflict of interest by contemporary standards, but it is clear that his primary role in this matter was to protect the interests of the Cochrans rather than the Beamishes.

The 1785 proceeding, an action by the Beamishes against the executors named in Ott's will, Loader and Stephens, was adversarial in form only. The answer of John Loader was made by "Thomas Cochran, the said Defendant's Agent and friend," and filed with the consent of Uniacke. There was in substance no dispute at all: the "complaint" was really just an opportunity to bring the matter before the court to vary the terms of the trust, ultimately to the Cochrans' benefit. Even granting that the salvage jurisdiction was exercised more freely in the eighteenth century than later, the responsibility of the Court of Chancery was to protect the interests of Thomas and Amelia's children. The decree, however, imposed no effective constraints on the parents' ability to sell their children's property, and no mechanism to ensure that any money secured by such sales would be used for the authorized purposes. The Court might have directed a Master in Chancery to carry out periodic accounts of the proceeds of any sales, but without such a safeguard it was entirely predictable that the Beamishes' creditors, not their children, would benefit from sales of the Ott estate properties.

The argument made by the Beamish children in 1804, that the 1785 decree was part of a plot orchestrated by the Cochrans to secure the Ott properties for the payment of the parents' debts, is quite plausible. Thomas and Amelia were not totally innocent in this affair, and in their desperation may have perjured themselves if the allegations in

their children's answer to the Cochrans' bill, regarding the state of Ott's property in 1785, were accurate. Nonetheless, they were being guided through the maze of Chancery by someone whose interests were directly in conflict with their own, arguably with the knowledge and acquiescence of at least some of the judges concerned.

On the basis of their answer to the Cochrans' petition, counsel for the Beamishes, the prominent Loyalist lawyer Simon Bradstreet Robie, moved that the injunction be dissolved, thus allowing the ejectment action in the Supreme Court to proceed. Lieutenant Governor Sir John Wentworth, acting as Chancellor, ordered on 14 August 1804 that the injunction be dissolved unless cause were shown to the contrary within 21 days. Uniacke, now Attorney General but still acting in his private capacity, filed an appearance on 5 September stating that he wished to oppose the order for dissolution, but no date for a hearing was set. For unknown reasons, the proceeding remained paralyzed for the next seven years. On the face of it, the injunction should have been dissolved when the terms of the order of 14 August were not met. Yet this did not happen, since in 1811 the Beamishes were asking anew that the injunction be dissolved.

There are a number of possible explanations for this long hiatus. It may be that the parties began settlement negotiations which dragged on longer than expected. Certainly the Beamish clan, who now resided at Blandford and Liverpool as well as Halifax, were an unwieldy group for purposes of client consultation. Andrew Murdoch's protracted stay in debtors' prison, until some time in 1808, probably complicated matters. Margaret Ott Akins died in 1809, her death a tragic echo of her sister's six years earlier. Both Elizabeth and Margaret died not long after giving birth to their only sons, Beamish

Murdoch and Thomas Beamish Akins, who each in turn was taken in by his grandmother Amelia. Each boy inherited his mother's interest in the Ott estate, subject to his father's entitlement to it for life, pursuant to the common law doctrine of curtesy.

Another complicating factor was the fact that Lieutenant Governor Wentworth was succeeded by Sir George Prevost in 1808. When Prevost came out to Nova Scotia, he was accompanied by his private secretary Samuel Hood George, who was none other than Thomas Cochran's grandson. Prevost promoted his protégé to the post of Provincial Secretary as soon as it became vacant. Samuel Hood was the son of Sir Rupert George, who was on very good terms with Prevost, and Margaret Cochran, Cochran's eldest daughter.²⁶ It may be that the Beamishes despaired of a fair hearing before a Chancellor who was on such terms of intimacy with the Cochran family, and preferred to wait for Prevost's departure.

Whatever the reasons, the delay could only be of benefit to the Cochrans. As they were the parties in possession and the parties who had commenced the Chancery suit, they were essentially in control. However, in spite of their intimacy with the Prevost regime, the political situation had shifted since those halcyon days in the 1780s when the Cochrans ruled the province. The Loyalist influx had rearranged the political situation, and the Loyalists had seen their efforts for recognition crowned with success in the appointment of John Wentworth as Lieutenant Governor in 1792 and Sampson Salter

²⁶Samuel Hood George died prematurely in 1813 and was succeeded as Provincial Secretary by his brother Rupert Denis, who remained an important figure in the province until the achievement of responsible government, when he retired to England. Letters by Samuel Hood George in the George Fonds at N.S.A.R.M., MG 1, vol. 2160, reveal the closeness of the ties between the George family and Prevost.

Blowers as Chief Justice in 1797. The Cochrans remained on reasonably good terms with the emergent Loyalist political hierarchy, but their principal power base had been in the preloyalist population, and their "Interest and Influence" were slowly diminishing, if by no means gone.

It is perhaps illustrative of this trend that all of Thomas Cochran's sons made their careers outside the province. Two studied at the Inns of Court and secured judicial appointments, Thomas Jr. as Chief Justice of Prince Edward Island and James (later Sir James) as Chief Justice of Gibraltar.²⁷ The third, William, went into the military and served in imperial wars around the globe. Thomas's daughters were better connected locally, at least in the short term. Margaret, as mentioned, married a naval officer and became the mother of two provincial secretaries. Elizabeth married John Inglis, son of the "first Bishop," who would become Bishop of Nova Scotia in his turn in 1825.

If the Loyalists were successful in exerting their influence politically, they were also having a marked impact on the bar and the judiciary, an impact which would be felt in the Cochran-Beamish litigation. Finucane's death in 1785 had left the judiciary in some disarray, and the preloyalist bar, aside from a few leading lights such as Uniacke, was relatively undistinguished. An influx of the cream of the pre-revolutionary New England bars in the 1780s changed the situation dramatically. The most obvious fallout

²⁷Thomas Jr. studied at Lincoln's Inn and was called to the bar in England in 1801. After a year as Chief Justice of P.E.I. he was named an assistant judge in Upper Canada, but drowned in the wreck of the vessel Speedy in October 1804. James was first admitted to the bar in Nova Scotia in 1817, then to the bar of the Inner Temple in 1829. He became Attorney General of Gibraltar in 1837 and served as its Chief Justice 1841-1877. A.W.H. Eaton, The Cochran-Inglis Family (Halifax: C.H. Ruggles, 1899). Brendan O'Brien, Speedy Justice (Toronto: Osgoode Society, 1992), passim.

of this change was the "judges' affair" of 1787-88, which pitted the newly arrived Loyalist lawyers against the somewhat hapless judges who remained on the Supreme Court after the demise of Chief Justice Finucane.

Provincial history has tended to emphasize the political aspects of the struggles between Loyalists and preloyalists in Nova Scotia. Yet there were positive aspects to the arrival of the Loyalist lawyers. While they certainly fought for their share of patronage, they also breathed new life into the bar, and insisted upon more exacting standards of professional competence. In selecting one of these lawyers, Simon Bradstreet Robie, as their counsel, the preloyalist Beamishes were paying tribute to the reputation of the Loyalist bar, and shrewdly acknowledging their strong position in the new judicial and political order of the province.

The change was perhaps even more noticeable in the judiciary than in the bar. After the death of Finucane, Governor Parr pleaded with London to send him a worthy successor from England. Parr has been criticized for not recommending a loyalist for the post, but in view of the strained relations between Loyalist and preloyalist at this point in provincial history, it would have been impossible for a candidate from either "camp" to fulfill the role adequately.²⁸ Under the circumstances the appointment of a candidate from England with close ties to neither group was probably the wisest course if the office

²⁸Neil MacKinnon, This Unfriendly Soil: the Loyalist Experience in Nova Scotia, 1783-1791 (Montreal and Kingston: McGill-Queen's University Press, 1986), p. 127. In fact, Parr did recommend the Loyalist Blowers for the post when it fell vacant again a year later (see note 30), but Strange had been appointed before his letter reached London; see P.R.O., C.O. 217/61/173 (mfm. at N.S.A.R.M.), cited in Barry Cahill, "Henry Dundas' Plan for Reforming the Judicature of British North America, 1792," University of New Brunswick Law Journal 39 (1990), note 22.

of chief justice was to preserve any claim to impartiality. Thomas Andrew Strange, although young and untried, ultimately rose to the challenge.²⁹ By the time he left the province in 1796 he had enhanced the image of the Supreme Court and taken steps to improve standards at the bar, most notably by donating his collection of law books to serve as the nucleus of a barristers' library.

Strange provided the bridge to the appointment of Sampson Salter Blowers as the first Loyalist chief justice. Blowers, a scion of the pre-revolutionary Massachusetts bar, was a good choice. Extremely competent and authoritative, he was able to rise above the bickering between Loyalist and preloyalist, and was seen as administering justice fairly according to law. His role in the Beamish litigation was decisive.

In May 1811 the Beamishes attempted to revive the case by asking anew that the injunction, preventing them from continuing their ejectment suit, be dissolved. The complainants responded with a petition to make the injunction permanent, and it was Blowers who endorsed the petition "A day should be given for hearing the petition." Yet once again nothing happened. Prevost was promoted to Governor-in-chief and left Halifax for Quebec in the fall, to be replaced as lieutenant-governor by Sir John Coape Sherbrooke. The Beamishes waited for three more years, until December 1814, to petition him to have the bill dismissed for want of prosecution. Finally, a year later, Lieutenant Governor Sherbrooke, assisted by Blowers, heard counsel on both sides on the substance of the complaint. Sherbrooke ruled that three Halifax merchants should act as

²⁹Strange was preceded as chief justice by another Englishman, the Hon. Jeremy Pemberton, but he remained in the province for less than a year (1788-89) and departed for reasons of health.

commissioners to audit the accounts of the Beamish Wharf since 1785, and that the injunction be dissolved. The commissioners moved much more speedily than anyone ever had before in this lawsuit; appointed on 27 November 1815, they filed their report on 10 January 1816.

In effect, the Beamishes had already won, even though counsel presented further arguments in February, and the final decretal order did not issue until 26 April 1816. Given the politically sensitive nature of the allegations, it was not surprising that the order was embellished with only the briefest of reasons. The court accepted the third of the arguments advanced by the Beamishes, which imputed no actual wrongdoing to the Cochrans and evaded any questions about the validity of the 1785 Chancery decree. Although the deed of 1785 to the Cochrans was absolute on its face, stated the court, in equity it was intended to function at most as a lien or mortgage. The auditors found that the Cochrans had spent £6454 repairing the wharf and building premises thereon over the period 1787-1815, while receiving £9603 in rentals over that period, leaving a surplus of £3149 to the credit of the Beamishes. Against that the Cochrans had to be credited with the £3950 they had advanced to Thomas and Amelia by way of loan (with interest), leaving a balance owing to the Cochrans of £802. On payment of this sum by the Beamishes, the court ordered the Cochrans to reconvey the wharf. Receivers were appointed to manage the property pending the final reconveyance, or, as it turned out, in case of an appeal.

The Appeal to the King in Council, 1816-1820

The Cochran brothers were determined to resist. Within three days they gave notice that they would launch an appeal. Appeals from the Atlantic colonies to the King in Council at this period were not common, but nor were they unknown. During the years that the Cochrans' appeal was underway, several other petitions from the region to the King in Council were dealt with: another one from Nova Scotia, two from Prince Edward Island, and five from Newfoundland. Litigants from the Caribbean were by far the most likely to invoke the process. On the same day that the Cochrans' arguments were heard, two petitions from Lower Canada and four from Jamaica were dealt with, and in 1821 alone 32 petitions from the Caribbean were considered. That the Cochrans chose to appeal probably attests more to the symbolic affront to their power and status and a concern with familial reputation, than to the value of the property as such. James and William Cochran were two childless old men, aged 75 and 65 by 1816, but they had the honour of their nieces and nephews, Thomas's progeny, to uphold.³⁰

Once again, though, matters seemed to drag. The Cochrans filed the bond for £500 required as security for costs on the appeal on 17 January 1817, but on 5 May 1818 the Beamishes sought enforcement of the Chancery decree and forfeiture of the bond on

³⁰The progress of appeals to the King in Council can be traced through the annual Privy Council Registers at the Public Record Office, London, where they are classified under PC 2. The volumes relevant for this appeal begin with vol. 198 (1816); each subsequent year is numbered consecutively. Petitioners were obliged to submit to the committee a printed record including the entire proceedings in the courts below as well as the arguments of counsel, and these are still held by the office of the Judicial Committee of the Privy Council in Downing Street, where they can be consulted with the permission of the Registrar. Unfortunately, the only gap in the last two centuries covers the decade 1815-25, so that the record submitted by the Cochrans does not survive.

the basis that the appeal had not been prosecuted. William Cochran replied via Uniacke that he could not get copies of the whole file made until January 1817, but that they had immediately been sent off at that time, and that his London counsel had been instructed to bring on the matter as soon as possible. This sounds plausible, as the Order in Council referring the appeal to the Committee for hearing Appeals from the Plantations was dated 13 August 1817. In view of the steps taken by the appellants, Lord Dalhousie, now Lieutenant Governor, noted that he could not allow the Chancery decree to be enforced "until the decision [of the King in Council] be known."

The identity of the Cochrans' counsel shows just how seriously they took the appeal. Sir Samuel Romilly, the political radical and noted criminal law reformer, was at the zenith of his political and legal career in the second decade of the nineteenth century. Solicitor General in the Ministry of All the Talents in 1806-07, he was rumoured to be next in line for the post of Lord Chancellor if the Whigs managed to resume office. He was undoubtedly the best-known and most successful Chancery practitioner of the day, with an income reputed to be £16,000 a year. His clients included the Prince of Wales, the Duke of Kent, Sir Walter Scott, Lady Byron and numerous scions of the English aristocracy. Romilly was on excellent terms with Lord Eldon, Lord Chancellor from 1801 to 1827, in spite of the wide divergence of their political views.³¹

Appeals to the King in Council from colonial courts did not yet go to that body so familiar to students of Canadian constitutional law, the Judicial Committee of the Privy

³¹Patrick Medd, Romilly: A Life of Sir Samuel Romilly, Lawyer and Reformer (London: Collins, 1968).

Council. The Judicial Committee was established by statute in 1833 as part of a series of wide-ranging reforms to the English judicature.³² From 1696 to 1833, appeals from the plantations were heard by a standing committee of the whole Council, often called the Appeals Committee. It was to sit with a quorum of three, and was thus differently constituted for each cause. Any councillor might attend, and there was no requirement that any of those present be judges or legally trained, though some legal men usually sat on each appeal. The lack of any degree of specialization in colonial laws and of any formal distinction between the Council's colonial and domestic functions, meant that the system was seen as increasingly unsatisfactory.³³ Lord Brougham, a future Lord Chancellor and severe critic of the pre-1833 system, claimed that he had witnessed property "worth thirty thousand pounds sterling per annum, disposed of in a few minutes . . . by the learned members of the Privy Council who reversed a sentence pronounced by all the [colonial] judges upon no less than nineteen days of anxious discussion."³⁴

The next delay in the proceedings was the fault of no one. Distraught at the death of his beloved wife Anne, Sir Samuel Romilly slit his throat three days later, on 1 November 1818. New counsel had to be instructed, which again retarded the cause. Back

³²3 & 4 William IV, c. 41.

³³Joseph Henry Smith, Appeals to the Privy Council from the American Plantations (New York: Columbia University Press, 1950), pp. 323-28.

³⁴Hansard, Debates H.C. 2nd Ser. XVIII, 7 February 1828, 155, as quoted in David B Swinfen, Imperial appeal: The debate on the appeal to the Privy Council, 1833-1986 (Manchester University Press, 1987), at p. 6. Lord Brougham was the one of the few barristers with any regular practice on colonial appeals, according to William Burge, Observations on the Supreme Appellate Jurisdiction of Great Britain (London, 1841), p. 14.

in Halifax, William Cochran was left to carry on alone when his brother James died in 1819. The appeal was finally heard on 11 May 1820, by a panel of three highly eminent judges: Sir William Scott, Sir William Grant, and Sir John Nicholl.³⁵ It is not known who replaced Sir Samuel Romilly, or who represented the Beamishes; the order of council merely states that counsel were heard on both sides.³⁶ Did Beamish Murdoch's erstwhile principal, Crofton Uniacke, now studying at Lincoln's Inn, attend the hearing? No doubt he acted as liaison with London counsel on behalf of his father, who continued to represent the Cochrans in Halifax.

Four years to conclude the appeal may seem unduly long, but Cochran v. Beamish et al. in fact did much better than most cases heard by the Privy Council during this period. Between 1814 and 1826, 517 appeals were lodged, but only one-quarter had been heard by early 1828; another quarter were abandoned or dismissed for want of prosecution, and half remained undisposed of.³⁷ Given this dreadful record and the change in counsel, a four year delay hardly seems a source of complaint.

³⁵Sir William Scott (1745-1836) was judge of the London Consistory Court and of the High Court of Admiralty, and was created Baron Stowell in 1821. Sir William Grant's presence was highly prized on colonial appeals. He had been Attorney General of Quebec, was familiar with a variety of legal systems and took a keen interest in colonial law; Howell, The Judicial Committee of the Privy Council, pp. 10-11. Sir John Nicholl (1759-1838), a distinguished civil lawyer, was President of Doctors' Commons and Dean of the Arches, a member of Parliament and subsequently judge of the High Court of Admiralty.

³⁶RG 36A, box 41, file 138, doc. 44a, copy of Order of Council affirming original decree, 29 May 1820.

³⁷Swinfen, Imperial appeal, pp. 5-6.

On 29 May the Committee's decision was read before the Privy Council, who humbly advised His Majesty that the decree of the Nova Scotia Court of Chancery should be affirmed.³⁸ Had Romilly survived, his unparalleled standing as a Chancery lawyer might have persuaded the Committee that the Cochrans were in the right. As it was, the members of Council sitting around the table had other matters on their mind. The nation had been in a state of ferment since the massacre at Peterloo the previous summer, and in February a plot to overthrow the government ("the Cato Street conspiracy") had been uncovered. The kingdom was rife with rumours of the impending return from the continent of Queen Caroline, the long-estranged wife of the new king, George IV having succeeded his father on 29 January 1820. The rumours were true: Caroline arrived in England on 5 June, and the ensuing attempt by the King to divorce her and deprive her of her title made her - improbably - the focus of a popular movement which briefly threatened to become insurrectionary. Under these circumstances, it is unlikely that Council members were unduly concerned about the fate of a wharf in far-off Nova Scotia.

Although he could not have known of the result, William Cochran died the day after the Committee dismissed the appeal. To Beamish Murdoch, the coincidence was a fitting one. In the precedent-cum-commonplace book he kept during the years 1814-1821, he made the following solemn inscription: "June 1st 1820. Wm Cochran is dead - died

³⁸Since the role of the Privy Council is to tender advice to the sovereign, the practice of the Committee hearing colonial appeals was not to give a "judgment" as such. Rather, its conclusions were formulated as an opinion on the case rendered for the advice of His Majesty - a formula observed to this day by the Committee's successor, the Judicial Committee of the Privy Council.

3 days ago in the Country. Thus ends the Trio."³⁹ The death of the last of the Cochran brothers coincided, precisely and poetically, with the utter failure of their attempt to crush the Beamish family.

It may be that "the better-informed counsel and judges in the colonies had little respect for Conciliar decisions" as legal precedents at this time,⁴⁰ but the order in the Market Wharf case was implemented in Nova Scotia as if it constituted Holy Writ. The news of the decision took six weeks or so to reach Halifax. On 24 July 1820 the Beamishes petitioned to enforce the decree, expressing for the first time a hint of impatience. They prayed for an early day to hear the petition, "as the Cause has been pending upwards of eighteen years, to the great loss and injury of your Petitioners."⁴¹ The Court ordered the same day that the receivers appointed in 1816 account for the rents received, and that the Beamishes show that they had complied with the terms of the 1816 decree as affirmed; i.e., that they could tender the amount of £802 determined to be owing the Cochrans. With interest since 1816, this sum now amounted to a round £1000.

³⁹This manuscript volume, entitled "Forms of the Supreme Court," is held in the Rare Books Collection of the Sir James Dunn Law Library at Dalhousie University. There is a conflict in the sources about the exact date of William Cochran's death, but it was definitely within the last few days of May 1820. He died while visiting in Truro - thus "in the Country."

⁴⁰Howell, Judicial Committee of the Privy Council, p. 9.

⁴¹Thomas Ott Beamish and Beamish Murdoch signed the petition on their own behalf and on behalf of the other defendants, marking the first time that Murdoch had taken an active role in the proceeding. He had completed his articles with Uniacke in November 1819, and was waiting to reach the age of majority so that he could be admitted as an attorney, a necessary stage before finally being called as a barrister.

The final capitulation came in a declaration dated 16 October 1820. Representatives of the Cochran estate stated that, having been required by the Chancery decree to "yield up and deliver the peaceable and quiet possession of the Land and Premises described in the Bill commonly called the Market Wharf or Cochran's Wharf," and to deliver up all relevant title documents in their possession, they now did so on receipt of £1000 from the Beamishes. For their part, the Beamishes obtained the money by mortgaging the premises to merchant Samuel Muirhead. Even before the final cession, Beamish Murdoch was busy writing to various parties in possession of lands formerly part of the Ott estate, which had been sold by Thomas and Amelia under the authority of the Chancery decree of 1785. Brandishing the Privy Council's order confirming the rights of the Beamishes, Murdoch sought to convince these parties to give up without a fight, and offered compensation for any improvements made during the period of their possession.⁴² In fact, the Beamishes had taken a number of ejectment actions in the Supreme Court against parties who had bought lands on the strength of the 1785 Chancery decree, and had been successful in many of them. Only the Cochrans and one other party seem to have resisted by means of a Chancery suit.⁴³

⁴²In "Forms of the Supreme Court," there is a draft letter on this matter to the heirs of one John Charles Rudolf dated 9 September 1820, with reference to a parcel of land in Lunenburg (facing p. 145), and an undated fragment of a similar letter to one John Bolman, Esq. at p. 146.

⁴³Thomas Goudge v. Thomas Akins et al., Supreme Court (Halifax), RG 39C, box 27, no. 154. The Beamishes had obtained an order of ejectment against Goudge in 1804, and he filed his bill of complaint 29 July 1804. There is no indication that Goudge was successful, so presumably the Beamishes were left to exercise their rights at law. It is not clear why these ejectment suits should have been successful at law. The rights of the Beamishes depending on an equitable doctrine, any subsequent purchasers of the legal

Justice Delayed - But Not Denied

The significance of the Market Wharf litigation may be assessed on a number of levels. On the purely biographical plane, it is clear that the victory was a defining moment in the life of the young Beamish Murdoch. Without the material security provided by the confirmation of his inheritance, he might still have become a lawyer. It is unlikely that he could have aspired to contribute to the political, cultural and legal leadership of his society. The victory had an ideological impact too, confirming for Murdoch his faith in the perfection of the Nova Scotia constitution. For all his support of political reform in the 1825-35 decade, Murdoch had a basic faith in provincial institutions, which meant that he was unlikely to follow those who wanted more significant change. That faith was based in part on an intense personal experience of the law, which he did not hesitate to proclaim publicly. In dedicating his Epitome of the Laws of Nova-Scotia to the nonagenarian Sampson Salter Blowers, Murdoch wrote of his respect for the Chief Justice's "public services, high judicial qualities, and inflexible integrity, which are interwoven with the author's earliest recollections."⁴⁴

At the institutional level, the litigation provides important evidence of changes over time in the Court of Chancery, and by extension the legal order as a whole. The experience of Thomas and Amelia Beamish in the 1780s seems to epitomize the

estate should have taken free of an earlier equitable interest provided they had no notice of it.

⁴⁴4 vols. (Halifax: Joseph Howe, 1832-33), i, p. iii.

corruption and oppression of the old oligarchic order, when the "Interest and Influence" of magnates such as Thomas Cochran could turn the law's institutions and personnel to their own private purposes. Thirty years later such influence, while by no means extinct, seems much reduced. Lord Dalhousie was keen to professionalize the Court of Chancery, and would have appointed Blowers Master of the Rolls if London had permitted it.⁴⁵ The appointment of a legally trained Master of the Rolls to preside in Chancery in place of the Governor, and prevent the kinds of delays experienced in the Market Wharf litigation, was made soon after, in 1825. The post went, appropriately enough, to the Beamishes' lawyer, Simon Bradstreet Robie.

The decisive intervention of Chancery in this matter also cautions us about making generalizations based on experiences in the common law courts alone. The administration of the common law in the colonial period often appears as a harsh and rigorous exercise where possessive individualism enjoys free rein. Yet it was tempered in some instances, as in the Market Wharf case, by equitable doctrines. The law appears Janus-faced: committed to uphold both the rigour of the common law of contract and conveyancing, and the flexibility which allowed the clear terms of a duly executed deed of sale to be interpreted as a mere security arrangement. W.R. Cornish has suggested that between the common law's "severely individualistic view of freedom and sanctity of contract" and equity's "protective jurisdiction of conscience . . . a peculiar balance was reached which

⁴⁵Cahill, "Imperium to Colony," p. 19.

depended on the structure of institutions."⁴⁶ We see this peculiar balance in action in the Market Wharf case, where it confirms that judges were sometimes compelled to take into account values other than those of classical liberalism.

In order to assess the wider meaning of the Market Wharf litigation for the legal culture of British North America, we must return to some of the questions posed at the beginning of this paper. What did this litigation mean to the participants? Why were they so tenacious? Why did they not settle? Here we must speculate to some extent, since the parties did not leave any private papers in which they explained their motivation. It seems clear that something other than mere money was at stake here. On both sides matters of honour and reputation were involved. The Beamishes were alleging that the Cochrans, one of the most highly placed families in the entire province, had acted oppressively and unjustly. What could the Cochrans do but resist? The Beamishes' allegations were tantamount to saying that the Cochrans were not "fit and proper persons" to hold high office. They had to seek the authoritative determination of a tribunal, the highest in the land if necessary, in order to uphold their family name. The Cochrans could easily have afforded to give up the wharf or to make a financial settlement to end the litigation. But to have settled or resorted to some more informal means of resolution would have left the insult unaddressed.

For their part, the Beamishes felt their honour was also at stake. Their father had, they believed, been imposed upon; advantage had been taken while he was in a weakened

⁴⁶W.R. Cornish and G. de N. Clark, Law and Society in England 1750-1950 (London: Sweet & Maxwell, 1989), p. 202.

state. Amelia Beamish stated to the court that the Cochrans had assured them that the deed of 1787 would not affect their children's interests, and believed that they had either misled her and her husband, or gone back on their word. In her worldview, restitutio in integrum by the Cochrans was the only acceptable outcome. The Chancery decree cleverly managed to give both parties what they sought: restitution to the Beamishes, but no finding of colourable behaviour on the part of the Cochrans.

In view of the subsequent history of the Market Wharf within the Beamish family, it is likely that the ancestral nature of the wharf property inspired a particularly ferocious attachment to it. The wharf was the family's link to the very founding of Halifax, having been bought by Amelia's father soon thereafter. It was Amelia's home from infancy to middle age, and she had inherited a part-interest in it as a girl of eight. After 1820 the wharf remained for over half a century in the hands of a diminishing circle of Beamish descendants until 1874, when Beamish Murdoch and his cousins Thomas Beamish Akins and Charles Beamish sold it for \$53,200. Land was often spoken of as a mere article of commerce in the New World, barely distinguishable from chattels, in contrast with the Old World. Yet the Market Wharf litigation suggests that Nova Scotian families might feel loyalties to particular parcels of land which would inspire them to undertake lengthy litigation of the kind described by Elizabeth Bowen in the history of her family's ancestral manor in southern Ireland, Bowen's Court.⁴⁷

The point of the story for the Beamish family, and very likely for contemporaries, was that ultimately the Cochrans' power was constrained by law and was seen to be so

⁴⁷2d ed. (London: Longmans, 1964).

constrained. "Equity will not suffer a wrong to go without a remedy" was in this case no hollow boast, when a settled possession of thirty years' duration might be overturned to right what was determined to be a historic wrong. Cases such as this, which by definition must be rare, are nonetheless potent symbols of equality before the law. In a small jurisdiction such as Nova Scotia, governed by a tiny mercantile and office-holding élite with which all the judges were tightly connected by bonds of kinship and intermarriage, achieving even the appearance of equality before the law was no mean feat. Much of the credit for any improvement in the administration of civil justice between the 1785 and 1815 must go to Blowers, and to the highly professionalized Loyalist bar.

Members of a society judge its legitimacy and that of its government in large part on the perceived efficacy and fairness of its dispute resolution mechanisms. Much of the literature on dispute resolution in colonial New England has been concerned to understand whether seemingly high litigation rates were an index of health or disease. There is a persuasive argument that high litigation rates indicate a basic satisfaction with the service on offer. If litigants were not satisfied, they would evade the formal system, possibly in favour of alternatives less productive of closure and social peace. A near contemporary of Murdoch, Nathaniel Whitworth White, was struck by the seeming paradox of high litigation rates and relative social harmony during his apprenticeship at Annapolis Royal. "There is . . . scarcely an individual that is not in the course of the year either Plaintiff or Defendant," he reported to his father in 1815. "And the beauty of it is they do it with such perfect good humor that like the sparring of two Attornies, their disputes cease and entire cordiality prevails the instant the suit is decided. In truth they are . . . like man and

wife, occasional jarrings among them [being] indispensably necessary to cement social union and render it still stronger."⁴⁸

In the Cochran-Beamish litigation, both sides seem to have respected the forum implicitly, and to have soldiered on in spite of what seem to us heart-rending delays. Given the importance of the interests at stake, one might have expected one or the other of the parties to resort to extra-legal pressure tactics. As far as we know, they did not. When the final decision arrived from London in 1820, the Cochrans accepted it with dignity, with nary a whisper. As E.P. Thompson has said, the rule of law cannot be sustained as an ideology unless the ruling class submits to its strictures at least some of the time.⁴⁹

This observation does not sit well with the assumptions often held about the nature of the civil justice dispensed under the Family Compacts of British North America. With its "dismayingly irrational" structures, its seemingly impenetrable technicalities and its unattractive displays of bias and nepotism in the appointment process, it is easy to think of colonial justice as a kind of joke. Yet the parties to the Market Wharf litigation clearly did not regard it so. For them it was deadly serious, and essentially legitimate.

⁴⁸Nathaniel Whitworth White to Gideon White, 23 November 1815, White Papers, MG 1, vol. 953, no. 1023.

⁴⁹E.P. Thompson, Whigs and Hunters (London: Allen Lane, 1975).

Chapter Three

Apprenticeship

What John Adams had observed as a law student in Boston in 1756 was just as true in Regency Halifax. To get ahead in the law, one needed not only knowledge, time, and a large collection of books, but most importantly, "the Friendship and Patronage of the great Masters in the Profession."¹ Knowledge and time Murdoch possessed, and he was in the process of acquiring a large library. When he began his five-year apprenticeship as an attorney on 11 November 1814 with Crofton Uniacke, the second son of Attorney General Richard John Uniacke, it seemed that he had found the best patron Nova Scotia had to offer. The Uniacke law office was in a sense the nerve centre of the Nova Scotian legal profession in the first third of the nineteenth century. Although the principal role of a patron is to advance the material interests of the client, another role can be that of mentor. This chapter considers the Uniackes' "patronage" of Murdoch in this latter sense. It is based on the premise that apprenticeship was not just the means of reproducing the legal profession, but also a vehicle for the transmission of a legal culture.² The legal culture being transmitted in Murdoch's case was Anglo-Irish, hence a major part of this chapter will be devoted to an examination of that culture in Ireland

¹Adams to Richard Cranch, 18 October 1756, as cited in Gordon Wood, The Radicalism of the American Revolution (New York: A.A. Knopf, 1992), p. 74.

²Following the lead of social historians in employing concepts and insights derived from anthropology (particularly through the work of Clifford Geertz), the phrase "legal culture" has been used extensively in legal history in the last fifteen years. It is worth noting that lay people as well as lawyers possess a legal culture, insofar as their own ideas and behaviour regarding the law can be identified.

itself in the eighteenth century.³ This perspective on Murdoch's apprenticeship will show incidentally that what is referred to as "the reception of English law" was by no means a monolithic or uniform process.

Beamish Murdoch worked with almost every one of the Uniacke lawyers. When Crofton was appointed judge of the Vice-Admiralty Court in October 1817, the remainder of Murdoch's term was assigned to the Attorney General himself. During this time Murdoch would have worked alongside Crofton's younger brothers. Called to the bar in 1810, Richard John, Jr. spent a few years as Attorney General of Cape Breton, which remained a separate colony until 1820, before returning to Halifax to practise law about 1816. James Boyle and Robert Fitzgerald would both begin their apprenticeship in 1818 after graduating from King's College. James Boyle Uniacke would be called to the bar the year after Murdoch, in 1823, but then proceeded to study at the inns of court before returning to Halifax. Robert Fitzgerald Uniacke experienced a conversion and abandoned his legal career to prepare for receiving holy orders in the Anglican Church. Only the oldest and youngest Uniacke brothers would not have been in the office during Murdoch's apprenticeship. Andrew Mitchell Uniacke, the late child of the Attorney General's second marriage, was a whole generation younger and would not begin his apprenticeship until

³This approach, which examines in a detailed way Old World and New World linkages within a specific cultural group over time, has been used with some success by social historians: see for example, Ian Ross Robertson, "Highlanders, Irishmen, and the Land Question in Nineteenth-Century Prince Edward Island," in L.M. Cullen and T.C. Smout, eds., Comparative Aspects of Scottish and Irish Economic and Social History, 1600-1900 (Edinburgh: Donald, 1977); Rusty Bittermann, "Agrarian Protest and Cultural Transfer: Irish Immigrants and the Escheat Movement on Prince Edward Island," in Thomas P. Power, ed., The Irish in Atlantic Canada 1780-1900 (Fredericton: New Ireland Press, 1991).

1828. The eldest son, Norman Fitzgerald Uniacke, had trained in his father's office and been admitted to the Nova Scotia bar in 1798 before proceeding to England, where he was admitted to the bar of Lincoln's Inn in 1805. After some years as Attorney General of Quebec, in 1819 he returned to Halifax for a two-year period of leave. It is likely that Murdoch, with his lifelong interest in the law and culture of both Quebec and France, would have had some interchange with him.⁴

There was at least one other student in the office around this time, namely George Thesiger Solomon, who was called to the bar in 1820 and practised law in Lunenburg for over fifty years. Other lawyers who had received their training in Uniacke's office included George Pyke, who was admitted in Nova Scotia in 1796 but proceeded to study for the Quebec bar, and became an office-holder and judge of the court of King's Bench at Montreal; Henry Hezekiah Cogswell, an important figure in the formation of the Nova Scotia Barristers' Society; and the province's first Roman Catholic lawyer, Lawrence O'Connor Doyle, who was called to the bar in 1829. This record suggests that a study

⁴Biographical information on the Uniackes used in this chapter is drawn from the following sources unless otherwise stated: Brian Cuthbertson, The Old Attorney General. A Biography of Richard John Uniacke (Halifax: Nimbus, 1980); Dictionary of Canadian Biography entries on Richard John Uniacke (1753-1830), Norman Fitzgerald Uniacke (1777-1846), Richard John Uniacke, Jr. (1789-1834), Robert Fitzgerald Uniacke (1797-1870), and James Boyle Uniacke (1800-1858). See also Brian Cuthbertson, ed., "Fatherly Advice in Post-Loyalist Nova Scotia: Richard John Uniacke to his son Norman," Acadiensis 9:2 (1980), pp. 78; D.G. Bell, ed., "Richard John Uniacke's Advice to a Young Lawyer, 1797," Nova Scotia Historical Review 8:2 (1988), 136; [Barry Cahill], "Attorney-General Uniacke's Advice to a Young Lawyer, 1798," Nova Scotia Historical Review 15:1 (1995), 127.

of Murdoch's apprenticeship experience has the potential to shed light upon the formation of an important segment of the early nineteenth-century bar.⁵

Murdoch no doubt would have become known to Richard John Uniacke through his representation of the Cochrans in the long-running Beamish-Cochran litigation, which was entering the final stage of its Nova Scotian phase in 1814. At the time Murdoch entered the Uniacke office the outcome of the suit was by no means certain. The Uniackes must have been extraordinarily impressed with the probity of this young man, whose family was in an adversarial relationship with a Uniacke client, to invite him to apprentice with them. Likewise, Murdoch would have learned early in his career the ability to place personal and professional concerns in totally separate compartments.

There were a number of reasons why the Uniackes offered this opportunity to the young Murdoch. Gordon Wood has noted how the colonial New England gentry would recruit new blood by seeking out quick young lads of lower status and raising them up through a process of clientage or informal adoption.⁶ All elites must do this to some extent if they are concerned with preserving social stability. The legal profession had long been an avenue for social mobility in the mother country, so much so that in England and Ireland the attorney was allowed by long usage to employ the style of gentility regardless of his actual social origins.⁷ The attorney was styled "gentleman" in

⁵The Dictionary of Canadian Biography contains entries on Pyke (1775-1851), Cogswell (1776-1854), and Doyle (1804-1864).

⁶Wood, Radicalism of the American Revolution, pp. 74-77.

⁷Geoffrey Holmes, Augustan England: Professions, State and Society, 1680-1730 (London: George Allen & Unwin, 1982), p. 117.

both kingdoms, the barrister "esquire". In highly status conscious societies, this concession was of considerable importance. In Nova Scotia, men invariably styled themselves "esquire" upon their call to their bar. In the United States, meanwhile, "esquire" rapidly fell into disuse after the Revolution.

Another connection between Murdoch and the Uniackes was their common Irish heritage. The Anglo-Irish roots of the Beamish family in County Cork have been explored in a previous chapter. Richard John Uniacke came from an old Anglo-Norman family in the same county, one which had conformed to the Church of Ireland and become part of the Protestant Ascendancy in the eighteenth century. The two families had known generally of each other in Ireland, since the Uniackes and the senior branch of the Beamish family both formed part of the landed gentry of County Cork, and both sent M.P.'s to the Irish parliament. The ties of ethnicity, religion and region all reinforced each other in this case.⁸ The sorry plight of Murdoch's parents and the absence of any well-connected male relative on his part also lent an air of noblesse oblige to the Uniackes' gesture.

Before examining Murdoch's apprenticeship experience, one must first confront a certain stereotype prevalent in both the legal and the historical literatures. There is a frequent assumption that apprenticeship was a form of professional education inherently inferior to that provided by university education. Once university legal education had been established as the ideal form of education for the bar, there was a good deal of

⁸Uniacke had also served as principal to Voster Lombard, whose parents had sent him from County Cork to Halifax in 1783 expressly to apprentice with their countryman: Bell, "Advice to a Young Lawyer, 1797," p. 138.

retrospective denigration of the practice of apprenticeship, both from those with vested interests in the perpetuation of university legal education, and from legal historians.⁹ Benjamin Russell, second in command at Dalhousie Law School for nearly fifty years, said that if one had a busy principal he was too preoccupied to instruct the apprentice, while if he was not busy, then he had nothing to teach. Even if Russell's assessment had some truth, it would apply only to the period with which he was familiar, the 1850s-70s, and not to the much earlier period under review here.¹⁰

David Bell has shown that in the case of the first two generations of Loyalist lawyers in New Brunswick (c. 1784-1825), apprenticeship comprised much more than the standard copying of pleadings and low-grade clerical functions. It included a demanding reading program which began with English history, classical, English and French literature, and legal philosophy, gradually introduced general legal works such as Blackstone's Commentaries and Hale's History of the Common Law, and ended with the more specialized tomes on civil procedure, evidence, and land law. When carried out under the supervision of an engaged principal and with access to an adequate library, apprenticeship could be an entirely appropriate form of preparation for the legal

⁹Charles R. McKirdy, "The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts," Journal of Legal Education 28 (1976), pp. 124. Anton-Hermann Chroust, The Rise of the Legal Profession in America (2 vols., Norman, Okla: University of Oklahoma Press, 1965). This classic work on the history of the legal profession in the United States virtually ignores apprenticeship as a key element in professional formation during the antebellum period, while over-emphasizing the contribution of general and specifically legal university education during the same period.

¹⁰Russell's statement is quoted in John Willis, A History of Dalhousie Law School (Toronto: University of Toronto Press, 1979) pp. 22-23.

profession. Admittedly, neither of these desiderata was a given. At its best, however, apprenticeship involved not just the transmission of legal knowledge and conventions but also exposure to a broader set of values which can best be called legal culture. Legal culture involves an appreciation of how law relates to other dominant discourses such as religion, philosophy, politics and history, and an understanding of the values which a particular set of legal arrangements seeks to foster and protect. When the dominant ideals of the legal profession were those of the lawyer-statesman and the gentleman-scholar, a broad approach to legal culture and to legal formation was obligatory. Such an approach is clearly seen in Bell's early New Brunswick lawyers.¹¹

New Brunswick's Loyalist legal culture was much more unitary in its founding era than that of Nova Scotia. Nova Scotia had not one but several legal cultures, corresponding to the different populations who had come to inhabit the province. Acadians, Planters, and Loyalists had brought their traditions with them, as had the "Foreign Protestants" and the Irish.¹² Prior to the arrival of the Loyalists a common law

¹¹D.G. Bell, Legal Education in New Brunswick, A History (Fredericton: University of New Brunswick, 1992); "Paths to the Law in the Maritimes, 1810-1825: The Bliss Brothers and their Circle," Nova Scotia Historical Review 8:2 (1988), p. 6.

¹²The Acadian legal culture was not evident at a professional level, but had been acknowledged by the Annapolis regime and survived at a popular level, even after the deportation. See Jacques Vanderlinden, "À la rencontre de l'histoire du droit en Acadie," Revue de l'Université de Moncton 28 (1994), p. 47, and the remarkable constitution drafted for the Acadians of Cape Sable by the Abbé Sigogne in 1799, reproduced in H. Leander d'Entremont, "Father Jean Mandé Sigogne, 1799-1844," N.S.H.S. Collections 23 (1936), pp. 105-110; Thomas G. Barnes, "'The Dayly Cry for Justice': The Juridical Failure of the Annapolis Royal Regime, 1713-1749," in Philip Girard and Jim Phillips, eds., Essays in the History of Canadian Law, vol. III, Nova Scotia (Toronto: University of Toronto Press for the Osgoode Society, 1990). The survival of continental legal traditions among the German and French-speaking populations on the South Shore has

legal culture with an Anglo-Irish inflection was dominant, thanks to the presence of certain key figures in the legal hierarchy. Chief Justice Jonathan Belcher (1754-1776) was raised in Massachusetts but came to Halifax after twelve years at the bar in Dublin, where he had co-edited an enormous and scholarly Abridgment of the Statutes of Ireland (Dublin, 1754). Dubliner Richard Bulkeley, although not a lawyer, was in a position to influence the development of legal institutions through his role as Provincial Secretary (1766-1792) and Master of the Rolls in the Court of Chancery (1782-1800). Chief Justice Bryan Finucane (1776-1785) also hailed from Ireland, and was instrumental in having his countryman Richard John Uniacke appointed solicitor general of Nova Scotia only four years after he had been arrested on suspicion of treason for his role in the Cumberland rebellion of 1776.¹³ Another Irishman, John Parr, was governor (1782-86) and lieutenant-governor (1786-91). It was during his tenure that the Irish form of foreclosure

been as little studied as their juridical acculturation, although a beginning is made in Kenneth Paulsen, "Land, Family and Inheritance in Lunenburg Township, Nova Scotia, 1760-1800," in Margaret Conrad, ed., Intimate Relations: Family and Community in Planter Nova Scotia, 1759-1800 (Fredericton: Acadiensis Press, 1995).

¹³Belcher (1710 -1776) and Bulkeley (1717-1800) can both be found in the Dictionary of Canadian Biography. Bulkeley's role as master of the rolls is treated in some detail in Barry Cahill, "From Imperium to Colony: Reinventing a Metropolitan Legal Institution in Late Eighteenth-Century Nova Scotia," in Donald W. Nichol, Iona Bulgin, Sandra Hannaford and David Wilson, eds., TransAtlantic Crossings: Eighteenth-Century Explorations (St. John's: Memorial University of Newfoundland, 1995). On Finucane, see Barry Cahill, "'Fide et fortitudine vivo': The Career of Chief Justice Bryan Finucane," Collections of the Nova Scotia Historical Society 42 (1986), p. 153.

and sale was adopted in the Court of Chancery. This process was quite different from the English, and survives to this day in Nova Scotia.¹⁴

Popular myth has tended to celebrate the Scots as the real builders of the British Empire. Yet historical fact would confirm that the Anglo-Irish could with some justice lay claim to that title. Ireland was, long before Newfoundland, the "first colony," and the Anglo-Irish were its colonizers. From an early date they faced the same problems as the North American settlers, and indeed saw themselves as engaged in a similar enterprise.¹⁵ How to deal with recalcitrant local populations whose land they desired? How to extend English law and institutions and replicate English life in a new terrain? When the Anglo-Irish in turn emigrated, they took with them this experience of governance, which had depended for its success on the suppression of Gaelic law by English common law. For if there is one indisputable legacy, aside from the English language, which the Anglo-Irish have bequeathed to modern-day Ireland, it is the common law.

Richard John Uniacke was the most conspicuous representative of Anglo-Irish legal culture in Nova Scotia after the death of Chief Justice Bryan Finucane. Uniacke spent most of his adult life in Nova Scotia, but he had first trained as an attorney in Dublin in the 1770s, at a particularly agitated time in Irish legal and constitutional history. Some

¹⁴Under the English form of foreclosure, the creditor could either sue the debtor on the mortgage covenant and leave the debtor with the land, or take the land itself in satisfaction of the debt. Under Irish practice, the creditor could arrange for a sale by auction of the debtor's interest in the land, and sue the debtor for any deficiency if the sale did not produce enough to satisfy the mortgage debt.

¹⁵Nicholas Canny, "Identity Formation in Ireland: The Emergence of the Anglo-Irish," in Nicholas Canny and Anthony Pagden, eds., Colonial Identity in the Atlantic World, 1500-1800 (Princeton University Press, 1987), pp. 159-60.

attempt to understand his first legal career in Ireland must be made if his contribution to Murdoch's formation and, more generally, to provincial legal culture is to be appreciated. This can be done by setting the few known facts about Uniacke's Irish career in the context of developments within Irish law and the Irish legal profession in the last third of the eighteenth century.

Uniacke acquired his legal training at a time when serious efforts were being made to raise the professional standards of attorneys and the educational attainments of barristers. Those same years in Dublin saw the rapid growth of an unprecedented liberal nationalist movement within a segment of the Protestant Ascendancy, culminating in the recognition by Westminster of the legislative supremacy of the Irish parliament in 1782. In this agitation, which included a campaign to remove or at least reduce the effect of the pernicious penal laws aimed at Catholics, lawyers played no small part. Even if Uniacke's political views later took a more conservative turn, his legal worldview remained permeated by the Enlightenment values which he had absorbed in those days in Dublin before the French Revolution. The Uniackes would become champions of Catholic relief and liberalization of the debt laws, and unalterably opposed to slavery.

It is not known why Uniacke's father apprenticed him to Dublin attorney Thomas Garde in 1769, rather than launching him on a course for the more prestigious call to the bar.¹⁶ What is known is that father and son were already at loggerheads. It may be that Norman Uniacke could countenance his headstrong son's presence under some type of

¹⁶On the distinction between the two branches of the legal profession, see the next chapter.

supervision in Dublin, when he could not tolerate his being at large in London for the period of attendance at the inns of court then required of Irish barristers. Garde himself had been admitted an attorney in 1760, and would practice his profession in Dublin until his death in 1808. He came from a gentry background similar to that of the Uniackes, in County Cork and neighbouring County Waterford, and was involved to some extent in their legal affairs.¹⁷ By indenture dated 4 October 1769, Uniacke "put himself an apprentice to the said Thomas Garde with him to live and dwell as an Attorney's clarke or apprentice for the term of five years." Father Norman Uniacke paid £115 to Garde, but Garde undertook to "provide competent and necessary dyet and lodging during the said term." The agreement contained the usual prohibition on matrimony without the master's consent¹⁸, but also enjoined the frequenting of taverns or ale houses and playing at cards or dice. Unlike later Nova Scotia indentures, which contain explicit covenants relating to instruction in the business of an attorney, this one is virtually silent on professional education. Garde merely obliged himself "at the expiration of the five years to use his utmost endeavours to procure the said Richard John Uniacke ... to be admitted

¹⁷For example, he witnessed the will of Robert Uniack [sic] Fitzgerald of Corkbegg, County Cork, dated 27 October 1770. P. Beryl Eustace, ed., Registry of Deeds Dublin Abstracts of Wills, vol. II 1746-85 (Dublin Stationery Office, 1954), tit. "Uniacke." Biographical information on Garde is derived from Robert Bickersteth, "The Garde Family," Journal of the Cork Historical and Archaeological Society V (1899), p. 200.

¹⁸North American indentures could be more precise on this point. A 1742 indenture not only prohibited William Livingston (later governor of New Jersey) from contracting matrimony, but specified that "he shall not Comitt fornication;" cited in McKirdy, "Lawyer as Apprentice," p. 126.

and sworn one of the Attorneys".¹⁹ Uniacke's apprenticeship was served in two parts: his first four years ran from 1769 to 1773, when he fled to the New World after a quarrel with his father. Some time between his return to Ireland in the fall of 1777 and June of 1779 he served his final year, presumably with Garde.

Legal life in Dublin revolved around the Four Courts: King's Bench, Common Pleas, Exchequer and Chancery.²⁰ Attorneys were normally admitted to one of the first three, Chancery being the preserve of solicitors who were then still distinct from attorneys. Exchequer was the court of choice for some 448 of the 720 attorneys who were listed as admitted to practice in Dublin in 1769, and indeed both Garde and

¹⁹The original indenture does not survive, but was extant as late as 1890. The Hon. Lawrence G. Power reproduced it in his biographical sketch "Richard John Uniacke," *Nova Scotia Historical Society Collections* 7 (1889-91), p. 78. Murdoch's indenture does not survive, but it was probably similar to Uniacke's. Voster Lombard's 1783 indenture with Uniacke reproduced it almost verbatim: RG 39, ser. J, vol. 117. George Pyke's 1787 indenture was also very similar, except that Uniacke covenanted to "Use his best Endeavours to Instruct and Learn him ... the Business and Profession of an Attorney," as well as to secure him admission at the end of the term. Pyke also promised to arrange for himself "competent Cloathing Dyet Lodging and Washing and Necessarys of every Kind:" MG 100, vol. 211, no. 11. Neither mentions any sum of money paid to Uniacke.

²⁰No comprehensive Irish legal history has yet appeared, and to date the legal profession has garnered most attention. See generally J.F. McEldowney and Paul O'Higgins, *The Common Law Tradition: Essays in Irish Legal History* (Dublin: Irish Academic Press, 1990); Daire Hogan and W.N. Osborough, eds., *Brehons, Serjeants and Attorneys: Studies in the History of the Irish Legal Profession* (Dublin: Irish Academic Press, 1990); Colum Kenny, *King's Inns and the Kingdom of Ireland: the Irish 'Inn of Court', 1541-1800* (Dublin: Irish Academic Press, 1992); Daire Hogan, *The Legal Profession in Ireland, 1789-1922* (Dublin: 1986); Brian Henry, *Dublin Hanged: Crime, Law Enforcement and Punishment in Late Eighteenth-Century Dublin* (Dublin: Irish Academic Press, 1994); W.N. Osborough, ed., *Explorations in Law and History* (Dublin: Irish Academic Press, 1995).

eventually Uniacke were admitted attorneys of this court.²¹ When added to the approximately 280 barristers present in Dublin in that year, the legal needs of the residents of Dublin would appear to have been amply filled. However, Dublin was not only the second largest city in the Empire with some 125,000 souls in 1775, but also the capital of a kingdom of some 4,000,000. Some of the city's legal personnel held government offices, while many lived by servicing the needs of county landowners and merchants, or English owners of Irish estates. For example, an attorney named Garde (not our Thomas, but perhaps a connection) did the legal work for the Duke of Devonshire's Irish estates.²²

A glimpse of the kind of relationship which might exist between an attorney and a county landowner is provided by the Anglo-Irish writer Elizabeth Bowen in Bowen's Court, a history of her family's ancestral home in County Cork. In the 1760s the attorney, Mr. Chester,

bought wine for Henry [Bowen] in Dublin, checked over books Henry ordered and had them despatched, bought horses (he showed a good deal of knowledge and attended the sales), bought clothes for the Bowen ladies when he was in London, visited Henry's daughters at their Dublin school, chose Henry a fishing rod, saw through some business about some sheep and, last but not least, tried to find the Bowens a cook.²³

²¹Wilson's Dublin Directory for the Year 1769. Of these, 349 were admitted to Exchequer alone, and a further 99 were admitted to the Court of Exchequer, plus Kings Bench or Common Pleas or both.

²²Personal communication from Professor W.N. Osborough, 1 May 1996. The papers connected with these estates are located at the Public Records Office of Northern Ireland, but the author has not been able to consult them.

²³Bowen's Court, 2d ed. pp. 175-6.

Attorneys were clearly expected to provide advice on a wide variety of matters besides business and property, and in this case the relationship took on an almost familial cast. Such examples go some way to balance the many expressions of anti-attorney sentiment which one can find in the written record of the mid-eighteenth century.

Much of young Uniacke's day-to-day work with Garde would have consisted of the traditional copying of pleadings and precedents, leavened perhaps by the occasional quest for a fishing rod. Whether Garde subjected his apprentice to any more ambitious program of reading or instruction is not known. No inventories of the libraries of eighteenth century attorneys, from which one might have followed the contours of their intellectual interests or lack of them, appear to have survived.²⁴ Uniacke could not have failed to be aware, however, of an important reform movement within the Irish legal profession and, particularly upon his return to Ireland in 1777, of dramatic events upon the stage of Irish politics and constitutional history. These matters would have given him a broader view of the role of lawyers and the law within the social fabric than the rather crabbed perspective from the apprentice's desk.

These two strands of reform, within the legal profession and within the Irish political system, united in the person of Gorges Edmond Howard (1715-1786), attorney,

²⁴Walter Gordon Wheeler, "Libraries in Ireland before 1855: A bibliographical essay" (typescript ms., 1957), held at the Department of Early Printed Books, Trinity College, Dublin. This essay contains at pp. 160-216 a list of catalogues of library auctions which appeared in Irish newspapers in the later eighteenth and nineteenth centuries. A number of barristers' collections appear, but not a single collection is identified as having belonged to an attorney.

office-holder, treatise-writer, law reformer, playwright and pamphleteer.²⁵ Howard was the first writer to devote any sustained attention to Irish law,²⁶ and authored a series of works impressive for their scope, length and learning. Two of these, A Compendious Treatise of the Rules and Practice of the Pleas Side of the Exchequer in Ireland (2 vols., Dublin, 1759) and A Treatise of the Exchequer and Revenue of Ireland (2 vols., Dublin, 1776) Uniacke thought sufficiently important to bring with him to Nova Scotia.²⁷ They remained in his library until it was sold after his death.²⁸ A brief examination of Howard's efforts in favour of professional, political and legal reform provides a window on the Dublin environment in which Uniacke first became a lawyer.

Howard's diagnosis of Ireland's problem was simple. The attachment of the entire Irish people, Catholic as well as Protestant, to the British Crown would only be sustained

²⁵Dictionary of National Biography, vol. 28 (London: Smith & Elder, 1891), pp. 21-22.

²⁶Understood as the English-derived law as introduced and applied in Ireland, rather than the original Gaelic law.

²⁷Howard's other major legal works were: A Treatise on the Rules and Practice of the Equity Side of the Exchequer in Ireland (Dublin: Oli. Nelson, 1760); The Rules and Practice of the High Court of Chancery in Ireland, with the several statutes relative thereto (Dublin: E. Lynch, 1772); A Supplement to the Rules and Practice of the High Court of Chancery in Ireland (Dublin: E. Lynch, 1774); Several Special Cases on the Laws Against the Further Growth of Popery in Ireland (Dublin: E. Lynch, 1775); An Abstract and Commonplace of all the Irish, British, and English Statutes relative to the Revenue of Ireland (Dublin: Executors of David Hay, 1779). His Compendious Treatise . . . [on] the Pleas Side of the Exchequer was issued in a second edition in 1793. Two important pamphlets are his Queries, relative to . . . defects and grievances in some of the present laws of Ireland (Dublin: Oli. Nelson, 1761), and Some questions upon the legislative constitution of Ireland (Dublin: S. Powell, 1770) [published under pseudonym Publicola].

²⁸On Uniacke's library, see MG 1, vol. 1769, no. 42, "List of books belonging to late Hon. R.J. Uniacke to be sold Monday at 11 a.m. by W.M. Allan." His library contained approximately 1000 volumes, of which about half were law books.

through proper laws, effectively enforced. The policy of the Irish government was to enforce those laws which would encourage disloyalty (the popery laws), while neglecting to enforce those which might inspire loyalty and effective government (the revenue laws and administration of local justice in the quarter sessions). His cure was equally simple. Reform of the substantive law, more attentive execution of existing laws, promotion within government service according to merit, and enhanced regulation of attorneys, would all tend toward more effective government and a more contented and loyal population. Howard was particularly critical of the laxity of justices of the peace, who neglected to hold quarter sessions, and sheriffs who allegedly failed to pay due attention to the collection of Crown revenues. If these matters were dealt with more zealously, Howard suggested,

besides increasing the casual revenue very considerably, it would be a principal means of promoting that due, that absolutely necessary obedience to the laws, which is so much wanting in this kingdom, and of course contribute greatly to the prevention of the many riots and violences of every kind, for which it is at present noted above all other nations in Europe; not one in twenty of which would happen, were it not for the ignorance of some, the neglect or misconduct of others, and, I much fear, the corruption of several among those who are employed in the conduct of this business²⁹

This was no simple jeremiad against the unruly lower orders. Howard laid the blame for rural disturbances squarely on the shoulders of the Protestant ruling class, not on any propensity to violence among the "undisciplined" Catholic Irish. Although an adherent of the Church of Ireland and a firm supporter of the English presence in Ireland, Howard

²⁹A Treatise of the Exchequer and Revenue of Ireland (2 vols., Dublin: E. Lynch, 1776), i, p. x.

was also a prominent exemplar of the movement for religious toleration within the liberal wing of the Ascendancy in the late eighteenth century.

Howard's views on the Catholic issue were clearly stated in his collection of court decisions on the interpretation of the popery laws, published in 1775.³⁰ These laws, dating principally from the reign of Queen Anne, were an attempt to break once and for all the political power of Catholics in Ireland by imposing a whole spectrum of disabilities on land purchase, inheritance, and employment. Catholics could not acquire land except for leases under 31 years and could not invest in land by way of mortgage. The law tried to ensure the fragmentation of the remaining great estates held by Catholic landowners by providing for their descent by equal sharing among brothers, rather than the common law's primogeniture. Finally, Catholics were excluded from the franchise and from all government posts, municipal office and the legal profession.

It was true, said Howard, that the popery laws had greatly strengthened the Protestant interest in Ireland, but they now presented two main problems, by tending "to preserve eternal jealousies and enmity between the subjects to the same prince [and to] prevent the improvement and increase of its husbandry, commerce and trade." Over the course of the century the Irish Catholics had, in contrast to the rebellious Scots, "demeaned themselves peaceably." Howard drew a clear line between agrarian unrest and outright rebellion. If Catholics were allowed to take long leases and receive the value of

³⁰G.E. Howard, Several Special Cases on the Laws against the Further Growth of Popery in Ireland (Dublin: E. Lynch, 1775). See W.N. Osborough, "Catholics, Land, and the Popery Acts of Anne," in Thomas P. Power and Kevin Whelan, eds., Endurance and Emergence: Catholics in Ireland in the Eighteenth Century (Dublin: Irish Academic Press, 1990).

their improvements, as well as invest in mortgages, Howard believed that few "would at this day change an English constitution for a French one, or liberty for slavery."³¹

Howard also devoted himself to enhancing the status and qualifications of attorneys, and his efforts were just beginning to bear fruit as Uniacke served his apprenticeship with Thomas Garde. His earliest published views on this subject appeared in an anonymous 1753 pamphlet entitled "Some further advice to the gentlemen, members of the late instituted Society of Attornies."³² A few years later Howard was named president of this society, which followed by only a little more than a decade the first such society in England, the Society of Gentlemen Practisers in the Courts of Law and Equity (1739). In all his writings Howard lamented the low social and educational attainments of attorneys, and the hard work required for relatively little reward. He thought an income of £40 per annum should be a pre-requisite to serving an apprenticeship, and advocated "a very solemn, public, strict, and regular Examination, and one of the Judges of the Court to be always present," before final admission as an attorney. In 1764 he drafted the heads of a bill aimed at the admission and regulation of attorneys, which was finally passed by the Irish parliament in 1773, principally as a result of his efforts.³³

³¹Howard, Several Special Cases, pp. v - x.

³²The attribution to Howard can be made with confidence since much of the 1753 pamphlet is reproduced verbatim in his later Compendious Treatise of the Rules and Practice of the Pleas Side of the Exchequer in Ireland (1759).

³³An Act for the better regulation of the admission and practice of attornies, 13 & 14 Geo. III, c. 23 (1773). It is not known whether Howard was familiar with the extensive pamphlet literature in England which preceded the passage of the act of 1729 regulating attorneys (on this act, see below, chapter four). A 1707 pamphlet offering suggestions for the reform of the profession ran to seven editions, while a 1726 pamphlet recommended, like Howard, that an income of £40 per annum should be required to enter

Unsurprisingly, the act of 1773 did not establish a minimum income for attorneys, but it did impose two new requirements. A pre-admission examination was added, to be administered by five examiners appointed by each court. They were to inquire into the morals and qualifications of the attorney and report to the court. The second requirement was to be "of singular importance" in years to come: henceforth every attorney would spend at least two terms of each year at the Four Courts in Dublin, during the last three years of the five-year apprenticeship.³⁴ Upon his return to Ireland, Richard John Uniacke found the entrance requirements for his chosen profession considerably altered.

Uniacke cleared these new hurdles in 1779, when he was admitted an attorney in the Court of Exchequer and made a member of the Society of Kings' Inns.³⁵ Unlike the English inns of court, King's Inns had always welcomed attorneys as well as barristers, and membership was compulsory for attorneys from 1629. There is no direct evidence that Uniacke actually practised his profession in Dublin after his admission; his name does not appear in the annual list of Dublin attorneys from 1779 to 1782. Once admitted as an attorney, his focus shifted to laying a foundation for his New World career. He travelled to England in 1780 to lobby for the attorney generalship of Nova Scotia,

the profession; Robert Robson, The Attorney in Eighteenth-Century England (Cambridge: Cambridge University Press, 1959). pp. 8-9.

³⁴The phrase is that of W.N. Osborough, "The regulation of the admission of attorneys and solicitors in Ireland, 1600-1866," in Hogan and Osborough, eds., Brehons, Serjeants and Attorneys, at p. 120. See below, chapter four, for a discussion of the adoption of a similar provision in a Nova Scotia statute of 1811, which is arguably derived from the Irish statute of 1773.

³⁵The record of the admission of Richard John Uniacke as an attorney of the court of exchequer in Trinity term 1779 is found in the manuscript volume of admissions of attorneys 1752-1792, held at Kings' Inns Library, Dublin.

returned to Nova Scotia in early 1781, and found himself named solicitor general by the end of the year.

The concern with law reform and the enhanced interest in the legal profession which appeared in later eighteenth century Ireland reflected the role of law and lawyers in supporting a form of colonial rule. The seventeenth century had seen the destruction of the indigenous Gaelic law along with much of the old Gaelic culture, but the health of the transplanted English common law remained a subject of concern for some time. As we have seen, observers such as G.E. Howard believed that the administration and execution of the law outside the cities left much to be desired. In England the gentry, acting as justices of the peace, played a key role in administering and upholding the law in the countryside. The actions of individual members of that class might be questioned, but the legitimacy of the class as a whole was generally accepted.³⁶ In Ireland the situation was reversed: the legitimacy of the role of the Protestant gentry in general was subject to question, though the authority of particular landowners might be accepted. It was in this social context that Howard and others advocated raising up the county attorneys as a loyal class which would support and extend English rule, via English law, throughout Ireland. Earlier in the century it had been thought that the exclusion of Catholics from the legal profession would suffice to keep it loyal. By the later part of the century the concern had shifted from the symbolism of loyalty to its implementation. The

³⁶See generally Douglas Hay, "Property, Authority and the Criminal Law," in Douglas Hay, Peter Linebaugh and E.P. Thompson, eds., Albion's Fatal Tree (London: A. Lane, 1975); Ian Gilmour, Riots, Risings and Revolution: Governance and Violence in Eighteenth-Century England (London: Pimlic, 1993).

situation in Ireland thus presented a number of parallels with the New World, where the administration and the legitimacy of the law rested more directly on lawyers, courts and legal institutions, without being mediated through a social formation such as the English country gentry.

If the attorney was to uphold English law in the Irish countryside, the barrister would represent it more conspicuously in the city. In 1761 the Crown established a Regius Professorship in Feudal and English Law at Trinity College, Dublin, only three years after Blackstone was named Vinerian Professor of Law at Oxford. Charles II had established a professorship in Civil and Canon Law at Trinity in 1668, but it became a sinecure until the appointment of Arthur Browne (of whom more later), who filled it with great distinction between 1785 and 1805. The new chair in English Law was designed to emphasize the links between law, history and philosophy, so that future barristers might receive some broader education appropriate to the leadership role that they were expected to play.³⁷ No such concern was evident in England itself, where the Vinerian chair was the result of a private bequest, and where English law would not be taught at Cambridge until 1800.

It would be a mistake, however, to equate "English law" with the common law in the early modern period. G. E. Howard had recommended study of the civil, canon and

³⁷J.V. Luce, Trinity College, Dublin: The First 400 Years (Dublin: Trinity College Dublin Press, 1992), p. 24, 65. R.B. McDowell and D.A. Webb, Trinity College, Dublin, 1592-1952: An Academic History (Cambridge University Press, 1982). Appropriately, the first holder of the chair, Francis Stoughton Sullivan, produced a manuscript entitled An Historical Treatise on the Feudal Law, and the Constitution and Laws of England, published posthumously in 1772, which contained virtually nothing on Irish law.

feudal laws, "the Springs and Fountains of all the Laws," to attorneys as well as to members of the bar.³⁸ In both England and Ireland, the Roman-derived civil law was still an important source of law in the admiralty court, and both civil and canon law were applied in the ecclesiastical courts, which dealt with probate and matrimonial matters. Practice in these courts was restricted in England to the civilian lawyers, who were required to possess a doctorate in civil law and to become members of Doctors' Commons, the civilian counterpart to the inns of court.³⁹ Although there were no ecclesiastical courts in Nova Scotia, in other respects it followed the English model. The Court of Marriage and Divorce and the Court of Vice-Admiralty relied heavily on civil law doctrines, as to a lesser extent did the Court of Chancery, but there was no separate civilian bar in the New World. This lack of specialization meant that some knowledge of the civil law was more rather than less important, since any lawyer might appear before the courts in which the civil law was applied.

Richard John Uniacke presumably had some exposure to the civil law in Ireland, but he would have had to educate himself further for his extensive practice in the Court

³⁸G.E. Howard, A Treatise on the Rules and Practice of the Equity Side of the Exchequer in Ireland (2 vols., Dublin: Oli. Nelson, 1760), I, p. xxxix.

³⁹G.D. Squibb, Doctors' Commons: A History of the College of Advocates and Doctors of Law (Oxford: Clarendon Press, 1977); Stephen Waddams, Law, Politics and the Church of England. The Career of Stephen Lushington 1782-1873 (Cambridge University Press, 1992), chap. 1. There was no equivalent to Doctors' Commons in Ireland. The small number of civilian lawyers joined with their common law colleagues in using the facilities at King's Inns; Kenny, King's Inns, p. 3.

of Vice-Admiralty during the French revolutionary wars.⁴⁰ It is not surprising to find in his library Arthur Browne's A Compendious View of the Civil Law and of the Law of Admiralty, published in two volumes at Dublin in 1797-99. As the first treatise to deal comprehensively with admiralty law in the English language, Browne was the most authoritative source in this field in North America in the first half of the nineteenth century.⁴¹ Browne's accessible and sympathetic overview of the civil law provided an important source for Beamish Murdoch in his turn, as is revealed in his Epitome of the Laws of Nova-Scotia.⁴²

The most enthusiastic proponent of civilian learning during Murdoch's apprenticeship would have been Crofton Uniacke. As an advocate and later judge in Vice-Admiralty, he too would have had to acquire a knowledge of the civil law.⁴³ It is

⁴⁰Dr. Alexander Croke, appointed judge of the Vice-Admiralty Court in 1801, was a qualified civilian advocate as well as a member of the English bar. Many of his decisions are collected in James Stewart, ed., Reports of cases argued and determined in the Court of Vice-Admiralty at Halifax, in Nova-Scotia . . . (London, 1814), and a number of them cite the civilian writers on international and admiralty law writers such as Voet, Vattel and Grotius.

⁴¹Joseph C. Sweeney, "The Admiralty Law of Arthur Browne," Journal of Maritime Law and Commerce 26:1 (1995), pp. 59-132. The demand for the work is indicated by its republication in London in 1802-03 and a posthumous republication in New York in 1840. Browne was a third-generation New Englander who went to Ireland at the age of 16 to study at Trinity College (his father and grandfather were both graduates), and never returned to America.

⁴²Philip Girard, "Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his Epitome of the Laws of Nova-Scotia," Law and History Review 11:1 (1993), p. 101. Murdoch recommended Browne as part of his reading list to legal apprentices; Murdoch, Epitome, i, p. 14.

⁴³He appeared along with his father in Vice-Admiralty cases as early as 1812: Stewart, Reports of cases . . . in Vice-Admiralty, p. 355.

his subsequent career as a barrister and would-be law reformer in London in the 1820s, however, that reveals most clearly his commitment to the civil law. Uniacke's project was nothing less than the codification of English law along the lines of Jean Domat's famous text on the civil law Les loix civiles dans leur ordre naturel (1688).⁴⁴ In 1825 he published in London A Letter to the Lord Chancellor, on the Necessity and Practicability of forming a Code of the Laws of England . . ., a forceful and elegant plea in favour of a more scientific arrangement of English law. To it he annexed a sample redrafting of the whole of the bankruptcy law in one clear, simple and well-organized statute, from which one might have followed the contours of their intellectual interests or lack of the very much along civilian lines, as proof of what might be done. This was followed by a similar exercise on the jury law, and yet another on the law of evidence.⁴⁵ The latter was undertaken with the assistance of Samuel Bealey Harrison, an English barrister and treatise-writer who emigrated to Upper Canada in 1837, where he would play

⁴⁴His father's library contained a copy, as did that of his brother Norman Fitzgerald. The Rare Books collection of the Sir James Dunn Law Library at Dalhousie holds a copy of the five-volume second Paris edition of this work, published in 1695-97, containing the bookplate of "Norman F[it]z]Gerald Uniacke, Lincoln's Inn 1805." An English translation was published in 1722 and ran to a second edition in 1737, and its translator, William Strahan of Doctors' Commons, explained the appeal of the work in this way: Domat had left out "such Parts of the Civil Law as are not at present of general Use, and select[ed] all the Fundamental Maxims of Law and Equity, which must be the same in all Countries, and appl[ied] them to the most common Affairs of Human Life, in a plain and easy Method, and in their Natural Order." The Civil Law in its Natural Order: together with the Public Law (London, 1722), pp. ix-x.

⁴⁵The New Jury Law: Forming a Title of the Code of Legal Proceedings according to the plan proposed for the Statute Law of the Realm (London: J. & W.T. Clarke, 1825); Samuel Bealey Harrison, Evidence: forming a title of the Code of Legal Proceedings, according to the plan proposed by Crofton Uniacke, Esq. (London: Butterworth, 1825).

an important political role in the period leading up to the granting of responsible government. Considerably younger than Uniacke, he seems to have been something of an acolyte of his during the 1820s.⁴⁶

Uniacke's efforts were sufficiently noticed to draw both imitators and critics. In A Letter to Horace Twiss, Esq., M.P., being an answer to his "Inquiry into the means of consolidating and digesting the laws of England" he expressed some annoyance that Twiss, in his 1825 work, had presented various solutions very similar to Uniacke's, but without acknowledging him.⁴⁷ Uniacke noted that in the United States his work had been commended by both the Monthly Review and the New York Gazette, and in fact his Letter to the Lord Chancellor . . . was re-published at Boston in 1827.⁴⁸ The resistance of English lawyers to codification has always been strong, however, and barrister John James Park reiterated some of the traditional objections in his A Contre-projet to the Humphreysian Code; and to the Projects of Redaction of Messrs. Hammond, Uniacke, and Twiss.⁴⁹ English law would undergo significant reform after 1830, but that reform would never embrace the codification advocated by Uniacke.

The kind of model that Crofton Uniacke provided for his pupil, both during Murdoch's apprenticeship and after, can best be appreciated by an admission Uniacke

⁴⁶"Samuel Bealey Harrison," Dictionary of Canadian Biography X.

⁴⁷(London: J. & W.T. Clarke, 1826).

⁴⁸Ibid., at pp. 58-60. The American edition was published by Hilliard, Gray, Little, and Wilkins. On the campaign for codification of the law in the United States, see C. M. Cook, The American Codification Movement (Westport, Conn.: Greenwood Press, 1981).

⁴⁹(London: J. & W.T. Clarke, 1828).

made in the preface to Harrison's treatise on evidence. His only wish, wrote Uniacke, was "to see method given to the laws of my country which are now in deplorable condition; and legislative sanction afforded to some system, worthy of a great and enlightened nation." In advocating this goal, he was "willing to endure the ignominy which attaches to the . . . names of Blackstone and Jones and to the memory of every intellectual lawyer this empire has ever produced"⁵⁰ (emphasis in original). In his appreciation of the civil law, and his concern to portray the law as a rigorous intellectual system rather than "merely an unconnected series of decrees and ordinances," Crofton Uniacke did indeed run counter to a strong anti-intellectual tradition within the legal profession in the common law world.⁵¹ Beamish Murdoch would emulate him in this respect and he too would run the risk, not so much of ignominy, as of the incomprehension which accompanied his own efforts to be an "intellectual lawyer" in the New World.⁵²

A commonplace book which Murdoch kept during the years 1816-1821 provides a unique window on an early nineteenth-century apprenticeship.⁵³ It appears to have

⁵⁰Harrison, Evidence, pp. ix-x.

⁵¹The phrase is that of Sir William Jones, in the preface to his learned Essay on the Law of Bailments (2d. ed., London, 1798). It is a sad commentary on the continuance of this state of affairs that four Uniacke brothers (three lawyer/office-holder/politicians and a clergyman) have a place in the Dictionary of Canadian Biography, while Crofton, the only brother to leave an engaging and substantial corpus of published work, has been overlooked.

⁵²Girard, "Themes and Variations," pp. 130-44.

⁵³This manuscript volume is held in the Rare Books collection of the Sir James Dunn Law Library at Dalhousie University, where it is catalogued under the title "Forms of the Supreme Court," the title which appears on its cover. This title no longer describes

begun as a precedent book of the traditional kind kept by apprentice attorneys, but later became a sounding board for Murdoch's reflections and observations on various topics, both professional and non-professional. The manuscript volume contains draft letters, original songs, poems and hymns, drawings, and jottings on various topics. Except for occasional excerpts from Blackstone, it does not contain indications of any reading program in which Murdoch might have been engaged. Nonetheless, in various ways it permits us to see how Murdoch's views were being shaped. His notations on some precedents suggest that the copying exercise could have a critical component. On a precedent for a covenant for the production of deeds, he noted that "The Registry Act of this Prov. 32 G. 2 c. 2 seems to make this covenant altogether useless. The best conveyancers here make no use of it."⁵⁴ On a precedent for "General Words for a Manor," obviously copied out of some English text, Murdoch protested "There are no manors in N.S."⁵⁵ Various parts of a precedent for covenants for title of freeholds are underlined with the observation "not used here."⁵⁶ From his earliest exposure to the law, then, Murdoch was obliged to think in terms of a distinction between "here" and "there," between English precedents and their applicability or otherwise in Nova Scotia. In his Epitome of the Laws of Nova-Scotia he would lament that, "[h]aving access only to works

accurately the contents of the volume, but it will be used here for consistency. The volume has entries on every page, but there is continuous pagination only from pp. 1-33. Thereafter, only the right hand side is paginated to p. 151, but entries were inserted later on the left hand side. These will be referred to as "facing page X."

⁵⁴"Forms of the Supreme Court," p. 43.

⁵⁵Ibid., p. 38.

⁵⁶Ibid., pp. 39, 41, 42.

written expressly for English students, much of our time has hitherto been wasted in obtaining, by long and tedious research, an intimacy with the general character of the Provincial usages and statutes."⁵⁷ In that same work, he would make the case for a Nova Scotian legal culture, which shared much with English legal culture but was ultimately distinct from it.

The learning process sometimes took the form of questions and answers. Murdoch would write down a question followed by his principal's opinion. A master wanted an opinion as to what he might do with an unruly, disobedient, dishonest apprentice. How far was he bound to keep him and what legal steps should he take to procure his dismissal? Crofton Uniacke's answer shows how even a relatively simple legal question can lead to larger issues. Uniacke advised that under provincial law the master's only recourse was to make a complaint before two justices of the peace, who could commit the apprentice to the Bridewell for a punishment proportioned to his offence. He was adamant that the master could not discharge the apprentice: "[i]f the [indenture is in the usual form you must have entered into Covenants for the performance of which you have bound yourself. It therefore lies on you as a duty to fulfil them and you cannot discharge him until you have."⁵⁸ The sanctity of contract was invoked even where it involved the protection of a possibly dishonest apprentice. In 1819 a question of more constitutional importance was asked: "If King G. 3 dies, and GPR abdicates, is the Princess of Wales

⁵⁷Beamish Murdoch, Epitome of the Laws of Nova-Scotia (4 vols., Halifax: Joseph Howe, 1832-33), i, pp. 3-4.

⁵⁸"Forms of the Supreme Court," facing p. 74.

to be considered as Queen?"⁵⁹ No answer is recorded. There are not many of these interchanges, but it is unlikely that Murdoch would have troubled to write down all of them when they occurred.

Murdoch was not critical of apprenticeship itself, or even of starting it at an early age, but rather wished it to be seen as only one step in preparation for the legal profession. He strongly urged aspirant lawyers to acquire a liberal education, something he had not been able to do, at least at the university level.⁶⁰ In fact, his failure to attend King's College, the self-proclaimed training ground for the provincial élite, probably left him with some sense of inadequacy. Writing to the newspaper under a pseudonym in 1820, Murdoch exhorted Nova Scotians to hold learning in the same high esteem as it was held in Europe, and lamented that so many parents restricted their children's education "to writing reading and arithmetic, because every other science is trifling compared with the Science of multiplying Dollars."⁶¹

When trying to identify the substantive aspects of the Uniacke legacy, specifically the Anglo-Irish aspects of that legacy, it is necessary to look beyond Murdoch's apprenticeship, to his political career and his Epitome of the Laws of Nova-Scotia. On three major issues Murdoch's views coincided perfectly with those of the Uniackes: the civil equality of blacks and whites, Catholic relief, and liberalization of the debt laws. In all three areas the views of the Uniackes and Murdoch were guided by an enlightened

⁵⁹Ibid., facing p. 35.

⁶⁰Murdoch would return to this theme some years later in his Epitome, i, pp. 7-17.

⁶¹Acadian Recorder, 20 September 1820, letter by "Brutus."

Christian humanism. This fact is worth stressing since in recent years Richard John Uniacke has been portrayed, largely on the evidence of his preface to the edition of Nova Scotia statutes published under his name in 1805, as an implacable conservative and foe of any kind of innovation.⁶² It is true that the 1805 preface can be interpreted in that way, but Uniacke was certainly not the only public figure to rediscover the virtues of the status quo in the wake of the French Revolution. Some Uniackes had been murdered in Ireland in the 1798 rising which had led to the Union of 1800, and these dramatic events in his homeland may well have caused Uniacke to reflect with some anguish on his earlier commitment to a more liberal worldview.

The 1805 preface is only one piece of evidence from a very long life. Taken as a whole, the record of the Uniacke family is characterized more by independence than by uncritical acceptance of the old regime.⁶³ The Uniackes were confident enough to be

⁶²The Statutes at Large, passed in the Several General Assemblies held in His Majesty's Province of Nova-Scotia (Halifax: John Howe and Son, 1805), pp. v-x. Cf. Donald Desserud, "Nova Scotia and the American Revolution: A Study of Neutrality and Moderation in the Eighteenth Century," in Margaret Conrad, ed., Making Adjustments: Change and Continuity in Planter Nova Scotia, 1759-1800 (Fredericton: Acadiensis Press, 1991), pp. 110-12, who provides a more nuanced interpretation of the preface.

⁶³It is worth recalling that Uniacke was present in Ireland during the run-up to the constitutional change of 1782 which saw Westminster recognize the supremacy of the Irish parliament in all domestic matters, and it seems that he sympathized with the liberal nationalist wing of the Ascendancy on this matter: see Cuthbertson, Old Attorney General, pp. 3-4. There is another piece of evidence supporting this view. One of the books which still remains on the shelves of the library at Mount Uniacke is Charles Henry Wilson's A compleat collection of the resolutions of the Volunteers, grand juries, etc., of Ireland . . . (Dublin: Joseph Hill, 1782). The Volunteers were a nationalist militia, originating in Ulster in 1779 but quickly spreading across the whole island, who came together to agitate for Irish sovereignty under the British crown, free trade, and religious tolerance.

critical of the established order even as they benefited from it. Crofton's radical law reform views have been noted. With the Whigs, he supported the Queen in the divorce crisis of 1820-21, and even wrote a series of letters to the London newspapers highly critical of the King's conduct.⁶⁴ Norman Fitzgerald was a noted supporter of the French cause in Quebec, which won him few friends there. Most of the Uniackes left St. Paul's during the row over the Crown's right to appoint the new rector after the promotion of the incumbent in 1824. James Boyle became the first premier under responsible government, but Crofton and Norman too were enthusiastic converts, in marked contrast to many representatives of old regime families who left the province after 1850. Only Andrew Mitchell remained a Tory. The Uniackes in the House of Assembly supported law reform in a number of important areas, of which three can be considered here.

The Uniacke-Murdoch positions on civil equality of the races, Catholic relief and the debt laws have been chosen because these were also the three issues where a contrast with the Planter/Loyalist legal culture was most evident. The example of New Brunswick shows that a Loyalist legal culture was receptive to the claims of slave-owners.⁶⁵ In

⁶⁴These were published as Letters to the King, first published in The True Briton, by the Stranger (London: printed for J.J. Stockdale, 1820). It is probably this intervention which has given rise to the legend that Crofton acted as counsel to the Queen in the King's divorce suit. Professor Waddams, who has researched the case extensively in connection with his biography of Dr. Lushington, has found no evidence that Crofton played any role in the suit (personal communication, 29 June 1995). Crofton had established himself in London in 1819, but was not called to the English bar until 1825. He had petitioned to have the normal quota of terms reduced in view of his Nova Scotia experience, but his petition was refused; Lincoln's Inn Black Books, XX, 12 and 27 February 1822.

⁶⁵D.G. Bell, "Slavery and the Judges of Loyalist New Brunswick," University of New Brunswick Law Journal 31 (1981), p.9.

Nova Scotia their claims were consistently resisted by the courts, in part, arguably, because a more liberal Anglo-Irish ethic was dominant at the bar.⁶⁶ In his private capacity, Richard John Uniacke acted as counsel for blacks in a number of cases where their legal status (slave or free) was in question.⁶⁷ In his Epitome of the Laws of Nova-Scotia, Murdoch interpreted early court decisions to mean that from about 1800 "slaves brought into this country became free ipso facto upon landing."⁶⁸

With regard to Catholic relief, the aggressively Protestant New England legal culture from which the Planters emerged was not noted for its acceptance of Catholic claims for equal civil rights.⁶⁹ It is true that once in Nova Scotia, the Planters and the Loyalists after them became more accommodating in their views when forced to confront

⁶⁶See in particular Barry Cahill, "Slavery and the Judges of Loyalist Nova Scotia," University of New Brunswick Law Journal 43 (1994), p. 73.

⁶⁷Barry Cahill, "Habeas Corpus and Slavery in Nova Scotia: R. v. Hecht, ex parte Rachel, 1798," University of New Brunswick Law Journal 44 (1995), p. 179.

⁶⁸Epitome, i, p. 43. Girard, "Themes and Variations," pp. 122-24.

⁶⁹Rhode Island native Arthur Browne, who later attained high academic rank at Trinity College, Dublin, provides an example of New England's religious insularity. In later life he said that he "had never seen a Roman Catholic until he was seventeen years old, and he then soon considered him a prodigy; but he had since by interviews with many respectable men of that sect got rid of his prejudices;" cited in Sweeney, "The Admiralty Law of Arthur Browne," p. 65, note 16. A work quite similar to Murdoch's Epitome in form, scope and purpose, Zephaniah Swift's A System of the Laws of Connecticut (1795), is nonetheless distinguished from it by its evident anti-Catholicism. One might also mention in this context the dramatic works of New Brunswick Loyalist lawyer Henry Bliss. Between 1838 and 1866 the London-based Bliss wrote a half-dozen plays on historical themes, all based on a dramatic opposition between English liberty and Mediterranean Catholic tyranny.

a larger Catholic population in the province than they had known south of the border.⁷⁰ Nonetheless, leadership on this issue was important and the Uniackes largely provided it. When the attorney general agreed to accept Lawrence O'Connor Doyle as an apprentice in 1823, Catholics were indirectly prevented from becoming attorneys because of the statutory obligation to swear the oath of supremacy and allegiance before admission. Uniacke must already have been contemplating the change in the law which would come about in 1827.

On the issue of debt, the Uniackes and Murdoch consistently supported the abolition of imprisonment for debt and reform of the laws relating to bankruptcy and insolvency. Nova Scotia's law of debtor and creditor was even more creditor-oriented than most, and subject to the kinds of abuse which Murdoch had witnessed personally in the case of his own father. The Uniackes' involvement with this issue seems to have grown out of their general concern about the advancement of civil rights and personal liberty, rather than considerations of economic efficiency, which would become a stimulus to reform later in the century. On this issue, the Planter/Loyalist group won hands down. Halifax merchants were prepared to accept a bankruptcy law and abolish imprisonment

⁷⁰Barry Moody, "Growing Up in Granville Township, 1760-1800," in Margaret Conrad, ed., Intimate Relations: Family and Community Life in Planter Nova Scotia, 1759-1800 (Fredericton: Acadiensis Press, 1995). Moody argues that the ideal of Anglo-Protestant homogeneity which characterized New England settlements was unattainable amid the cultural diversity of later eighteenth-century Nova Scotia.

for at least small debts, but in the rest of the province the state of debtor-creditor law was seen as an important tool of social control, not to be surrendered lightly.⁷¹

Murdoch's apprenticeship with the Uniackes represented the old regime at its best. Willing student met inspiring principal, and Murdoch was set on his lifelong course. While clearly of a scholarly bent even before he entered the Uniackes' employ, his association with them only confirmed his respect for learning. Access to Richard John Uniacke's magnificent and wide-ranging library, exposure to Crofton Uniacke's civilian learning and to the family's experiences of legal traditions in Ireland, England, Quebec and Cape Breton, and contact with the wide variety of public law matters which came to the attorney general's attention, all provided the young Beamish Murdoch with an intellectual stimulus which could not have been replicated elsewhere in the province. His Epitome of the Laws of Nova-Scotia, with its tolerant Enlightenment humanism, would reveal the extent to which Murdoch's apprenticeship had marked him as the intellectual heir of the Uniackes.

⁷¹Philip Girard, "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia, 1820-1867," in Girard and Phillips, Nova Scotia Essays, pp. 92-105.

Chapter Four

The Legal Profession, 1800-1840

The American historian Stephen Botein once speculated that if not for the Stamp Act and the train of events it generated, "the colonial legal profession at mid-century may have been destined to achieve standing as a kind of provincial mandarin, defined by and responsive to cues from Whitehall."¹ The development of the legal profession in Nova Scotia provides an opportunity to test Botein's thesis. The eighteenth- and early nineteenth-century bar in Nova Scotia aspired to play, and did play to some extent, the kind of role envisaged by Botein, but this role was contingent on the availability of sufficient governmental patronage to ensure loyalty. Substantially increased recruitment to the profession in the 1820s and 1830s meant that there were not enough offices to go around, and created a new group of lawyers who were more dependent on their clientele than on government. The fact that by 1820 the bar was almost entirely native-born also diminished its links with the mother country. An élite group of lawyers fulfilled Botein's prophecy to some extent, but they were ultimately unable to retain their superintendence of provincial society once the movement towards responsible government was underway.

A study of the growth and dispersal of the legal profession from 1800 to 1840 will show that for the 1820-1840 cohort, the cues of the market were much more important than the cues of Whitehall. Lawyers penetrated the countryside thoroughly for the first

¹"The Legal Profession in Colonial North America," in Wilfrid Prest, ed., Lawyers in Early Modern Europe and America (New York: Holmes & Meier, 1981), p. 130.

time during this period, responding to and creating opportunities which were less easily available in the capital. As they did so, they subtly altered the social structure in the countryside, creating a new source of authority to compete with the lay magistracy and helping to undermine the deference which was the glue of the old order. Contrary to Botein's thesis, lawyers played an important, if largely unintentional, role in Nova Scotia's own political revolution. Before examining the numerical growth of lawyers, however, it is necessary to consider their constitution as a profession in Nova Scotia. The regulation of entry, and indeed the very terminology used, were important factors in shaping a profession which had a somewhat complex history in both England and the New World.

When Beamish Murdoch began his apprenticeship as an attorney in 1814, entry to the legal profession had recently been regulated by provincial statute for the first time since the founding of Halifax. An act of 1811 set the period of service at five years, after which the candidate was entitled to be admitted as an attorney of the Supreme Court provided he had attained his majority, passed an oral examination administered by the judges, and taken the attorney's oath. He had to spend a further quasi-probationary period of one year before final admission as a barrister, except that graduates of King's College, Windsor were exempted from this requirement and could be called to the bar of the Supreme Court immediately. During this year, the candidate had no contractual obligations to a master and could perform unaided the functions of an attorney (if he had

any clients), but was obliged to "attend the terms of the Supreme Court at its regular sittings at Halifax, for at least three terms after his admission as an Attorney."²

This combination of practical experience in an office and a period of observation in the courts attempted to combine the two modes of training which characterized the divided legal profession in England and Ireland, in a manner suitable to the North American situation. The British North American colonies of the First Empire had early on rejected the English model of a dual profession divided into attorneys and barristers; all lawyers would be both.³ In England and Ireland barristers enjoyed a monopoly on pleading in the superior courts, while attorneys were engaged principally in conveyancing work, drafting agreements and preparing cases for litigation by a barrister. The histories and professional formation of the two groups were quite distinct, and some understanding of their origins is necessary to set colonial developments in context.

²An Act for the better regulation of Attornies, Solicitors and Proctors, practising in the Courts of Law and Equity in this Province, Statutes of Nova Scotia 1811, c. 3.

³There were occasional deviations from this norm. Late in colonial Massachusetts the degree of barrister was introduced and distinguished from that of attorney, but the distinction was largely honorific rather than functional: see below, note 12 and accompanying text. In the Second Empire, Upper Canada revived the distinction for some time as part of an attempt to preserve the Georgian gentility of the bar. Attorneys were forbidden from joining the Law Society of Upper Canada from 1822 to 1857, and did not come fully under the Law Society's power until 1876; R.D. Gidney and W.P.J. Millar, Professional Gentlemen: The Professions in Nineteenth-Century Ontario (Toronto: University of Toronto Press, 1994), pp. 76-81; Christopher Moore, The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997 (Toronto: University of Toronto Press, 1997), pp. 86-88, 109-110.

Preparation for the legal profession: England and Ireland

In England, preparation for the bar came to be centred on the inns of court, which were independent of the judges and run by an oligarchy of senior barristers known as benchers. By 1591 a call to the bar (hence, barrister) of one of the inns was recognized as the sole qualification for pleading before the royal courts. In the early modern period the inns provided a fairly extensive educational program of lectures and moots, such that the inns of court were known as England's third university, after Oxford and Cambridge, and the appellation barrister was (and still is) referred to as a "degree." By the 1680s, however, the inns had ceased to provide any real educational offerings. It was partly in an attempt to fill this void that William Blackstone was invited to give the first set of university lectures on the common law at Oxford in 1753, which were subsequently published as his Commentaries on the Laws of England (1765-69). He had no immediate successor, and it would be well into the nineteenth century before a university education in the common law slowly began to fill the role abandoned by the inns of court.⁴

⁴On the development of bar in England, see the essays by J.H. Baker, C.W. Brooks, Daniel Duman and Wilfrid Prest in Prest, ed., Lawyers in Early Modern Europe and America. On attorneys, see Robert Robson, The Attorney in Eighteenth-Century England (Cambridge University Press, 1959). In the interest of simplicity, this account ignores the role of other groupings within the English legal profession such as the serjeants at law, solicitors (who played the role of attorneys in the Court of Chancery), and the civil lawyers. Of these three, only solicitors played any role in Nova Scotia in the period under review, and their functions were eventually subsumed within the role of attorney. On the relationship between the two, see Barry Cahill, "The Origin and Evolution of the Attorney and Solicitor in the Legal Profession of Nova Scotia," Dalhousie Law Journal 14 (1991), pp. 277-295.

When the disappearance of the Court of Chancery in England in 1875 obviated the need for solicitors as a separate occupational grouping, the term was confusingly retained to describe those English lawyers who were not barristers: i.e., the former attorneys. Canadian jurisdictions followed suit in abandoning the term "attorney," and all lawyers

The attorney languished for some centuries in the shadow of the bar. Subordinate to both bench and bar, attorneys were obliged to gather in what were called the inns of chancery, and were formally excluded from the inns of court by the end of the sixteenth century. Preparation for the office of attorney had traditionally been by way of apprenticeship, a form of education shared with many other occupations from grocers to silversmiths, and thus seen as insufficiently gentlemanly by those ensconced in the lofty heights of the bar.⁵ Nonetheless, by the eighteenth century the office of attorney was clearly gaining in prestige, marked by increased recruitment among younger sons of the lesser gentry and enhanced statutory regulation which aimed to control admissions, raise standards of professional competence and prohibit unlicensed practitioners.⁶ This period also saw the emergence of voluntary professional associations of attorneys in both England (by 1739)⁷ and Ireland (by 1753).⁸ An English statute of 1729 provided for a

are today described as "barristers and solicitors." In the United States usage of the term "barrister," always sporadic, disappeared entirely in the early nineteenth century, and all U.S. lawyers have been styled "attorneys" since that time.

⁵C.W.Brooks, Pettyfoggers and Vipers of the Commonwealth: The 'Lower Branch' of the Legal Profession in Early Modern England (Cambridge: Cambridge University Press, 1986).

⁶Michael Miles, "'A haven for the privileged': recruitment into the profession of attorney in England, 1709-1792," Social History 11 (1986), pp. 197-208. Miles argues that the increase in professional apparatus was influenced by the influx of men from relatively privileged backgrounds into attorneys' offices.

⁷Robson, The Attorney, p. 20. The association was called the Society of Gentlemen Practisers in the Courts of Law and Equity.

⁸This society has not been commented on in the literature, but its existence is known from the writings of G.E. Howard, who was one of its prime movers: see chapter 4, note 29.

period of apprenticeship of five years with an attorney "duly sworn and admitted," and no attorney was to take more than two apprentices at any one time. A penalty of £50 was imposed on any person purporting to act as an attorney for reward without having been admitted. An Irish statute of 1773 was in similar terms except that an attorney might take three apprentices, and unlicensed practice was punished as a contempt of court. Every candidate in England would have to take an oath and be examined by the judges on his "fitness and capacity to act as an attorney" before being admitted and enrolled in any court, while in Ireland the judges of each court were to appoint as examiners "four of the most reputable practising attorneys" of that court. As seen in the previous chapter, the Irish statute also imposed a requirement on all attorneys to attend one of the Four Courts in Dublin for two terms at least in each of the last three years of their apprenticeship.

Preparation for the legal profession: North America

In the thirteen colonies before the Revolution, the establishment of local inns of court did not seem either feasible or desirable. During the seventeenth century, the colonies seemed bent on suppressing the legal profession altogether, rather than providing for its education. Admission to plead before a court was normally within the discretion of the judges of that court, and little standardization in the requirements of professional entry occurred before the Revolution. "Attorneys in fact," lay persons appointed by litigants to act for them, long competed with regularly sworn attorneys. The courts were loath to bar them, and no professional organizations which might dispute their claims

arose until late in the colonial period.⁹ Lawyers were generally styled "attorneys," with the appellation "barrister" reserved as a courtesy for those who had been called to the bar in England or Ireland. Some colonies instituted licensing by the governor or other authority as a prerequisite to legal practice, but this was unusual. The requirements for entry to the legal profession remained largely within the purview of the courts and the profession's own norms during the colonial period.¹⁰

By the middle of the eighteenth century, the anglicization of colonial legal culture resulted in increased concern over the educational attainments of lawyers, and in attempts to institute a formally bifurcated profession.¹¹ In Massachusetts, Chief Justice Thomas Hutchinson introduced the rank of barrister in 1762. The Suffolk County bar then resolved that it would not recommend anyone to the court for admission as a barrister unless he had pursued two years of legal study, two of practice as an attorney in the lower courts, and two in the superior courts. The future Loyalist and Chief Justice of Nova Scotia, Sampson Salter Blowers, was admitted as a barrister before the Superior Court of

⁹Even when county bar associations began to emerge in the 1750s, their efforts to persuade local courts to restrict practice to regularly sworn attorneys were unsuccessful: Gerald W. Gawalt, The Promise of Power: The Emergence of the Legal Profession in Massachusetts 1760-1840 (Westport, Conn.: Greenwood Press, 1979), p. 15.

¹⁰Virginia, for example, required that prospective attorneys be examined by a board of General Court attorneys appointed by the governor and council before being licensed to practice; A.G. Roeber, Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810 (Chapel Hill, North Carolina: 1981), pp. 108-09. For a brief but useful overview of the legal profession in the colonial period, see Lawrence M. Friedman, A History of American Law, 2d ed. (New York: Simon & Schuster, 1985), pp. 94-102.

¹¹J.M.Murrin, "The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts," in S.N. Katz, ed., Colonial America: Essays in Politics and Social Development (Boston: Little Brown, 1971).

Massachusetts under this dispensation on 3 October 1770, he "having studied and practiced the usual time."¹² The next year, the Suffolk County bar resolved that no candidate would be recommended without a university education or its equivalent. These practices did not have legislative force, however, and the courts could reject candidates approved by the bar. Entry to the profession thus remained fairly loosely controlled down to the Revolution.

Preparation for the legal profession: Nova Scotia

In between the English and American models existed a third which, in theory, might have been used in Nova Scotia. In Ireland since 1542 and in the West Indies from the seventeenth century, all aspirant barristers had been obliged to spend a certain number of terms at one of the inns of court in London before being called to the bar at home.¹³ In both cases it was more or less assumed that barristers would come from a gentlemanly class for whom neither time nor expense presented undue obstacles. In both cases, too, the requirement was imposed by Westminster to ensure that legal men might be socialized as far as possible as proper Englishmen, in order to serve as loyal role models on their return home. Had the authorities in Britain reason to suspect the loyalty of Nova Scotians they might have imposed some such requirement. However, the colony remained on the "right" side of the American Revolution, obviating such measures. It was only in a new

¹²Anton-Hermann Chroust, The Rise of the Legal Profession in America (2 vols., Norman, Okla.: University of Oklahoma Press, 1965), i, p. 107.

¹³Colum Kenny, King's Inns and the Kingdom of Ireland: the Irish 'Inn of Court', 1541-1800 (Dublin: Irish Academic Press, 1992), pp. 40-48.

province such as Upper Canada that the attempt was made to establish a local inn of court, in the form of the Law Society of Upper Canada (1797), as a conspicuous bastion of loyal leadership.¹⁴

The legal profession did not emerge in Nova Scotia as the product of any grand attempt to create a class of colonial leaders, as in Upper Canada. Nor was it the product of a particular founding moment or group, as was the case with the Loyalist bar of New Brunswick. Its origins were much more utilitarian. Lawyers were needed to carry out a variety of tasks for both official and private purposes, and hence some means of admitting them to practice was needed. The Court of Chancery had admitted solicitors since its inception in 1751, and the Supreme Court began to admit attorneys to practice after its establishment in 1754.¹⁵ In practice, however, there was no distinction between the two groups. Normally one was admitted first as an attorney, and subsequently as a solicitor if a client's business required an appearance in the Court of Chancery. As in the other North American colonies, there were no "barristers" except by courtesy. Entry to the profession required an apprenticeship, but that was about all that could be said.

¹⁴G. Blaine Baker, "Legal Education in Upper Canada 1785-1889: The Law Society as Educator," in David H. Flaherty, ed., Essays in the History of Canadian Law, vol. II (Toronto: University of Toronto Press, 1983), pp. 58-67. Moore, Law Society of Upper Canada, pp. 17-34, suggests less lofty purposes behind the creation of the Law Society of Upper Canada: protection of existing practitioners and support for their mutual improvement. He agrees that the Society's role began to be more important after the close of the War of 1812.

¹⁵The Governor had admitted them previously, qua president of the Supreme Court's predecessor, the short-lived General Court. The early history of the legal profession in Nova Scotia is analyzed in some detail in Cahill, "Attorney and Solicitor," and hence is presented in very compressed form here.

Murdoch thought that a minimum period of three years' service had been required before a rule of the Supreme Court set it at four years in 1799. This may be correct since eighteenth-century indentures set terms of apprenticeship varying from three to seven years.¹⁶ Most lawyers in the eighteenth century came to Nova Scotia "ready-made," at first from England and Ireland, and then as part of the Loyalist immigration of 1783-84. Their disparate experiences made for a rather heterogeneous legal profession, which was probably reinforced by the development of local legal cultures in an equally heterogeneous province.

The Nova Scotia act of 1811 was a bold attempt to standardize the formation of young lawyers and to raise the profile of the profession, even if its immediate genesis was the brouhaha which arose when an English barrister arrived in the province and tried to claim precedence ahead of all local lawyers, including the attorney general.¹⁷ The act provided for a uniform five-year period of apprenticeship and imposed a statutory obligation on the judges to "examine and enquire, by such ways and means as they shall think proper, touching [a candidate's] fitness and capacity to act as an Attorney." They were to admit him only if "satisfied that such person is duly qualified to be admitted to

¹⁶Murdoch also did not believe that any of the English legislation on attorneys, including the Act of 1729, was in force in Nova Scotia: *Epitome*, iii, p. 116. Cahill, "Attorney and Solicitor," states at pp. 279-80 that the English Act of 1729 was considered to be in force in Nova Scotia as of 1760, but this seems doubtful. The English Act specified an apprenticeship period of five years, but the actual length of service in Nova Scotia varied widely around that mean. Further, it seems unlikely that the Supreme Court would have specified a period of service of four years in 1799 if an English Act mandating a five-year period were already considered to be in force.

¹⁷Cahill, "Attorney and Solicitor," p. 285, note 35.

act as an Attorney, . . . and not otherwise." Any person acting "for, or in expectation of, any gain, fee or reward" in any of the courts of the province without being admitted as an attorney was liable to forfeit £10 to the prosecutor for every such offence. No attorney was permitted to take more than two apprentices at any one time. Admission as an attorney was made the prerequisite to all other types of legal practice, whether as solicitor, proctor or advocate in the Courts of Chancery, Vice-Admiralty or Probate, or as barrister in the Supreme Court. Admission as a barrister or advocate required a further year of attendance at the Supreme Court, as noted earlier.

The act had its defects. It provided for no quality control of the apprenticeship experience, nor for any direction to the judges regarding the test they were to administer at its close. Nor should we expect to find such provisions: the eighteenth century tradition was strong on legislative prohibitions and weak on spelling out positive obligations. It was clearly expected that the bar itself would be responsible for providing an adequate educational experience, a challenge which it arguably did not meet.¹⁸ However, the act was crucial in articulating the identity of the legal profession as a separate and distinct professional grouping. The blurred line between attorney in fact and attorney in law which had so marked the experience of the thirteen colonies before the Revolution was now precisely delineated: only properly admitted attorneys could practise

¹⁸D.G. Bell levels this charge at the New Brunswick bar: Legal Education in New Brunswick: A History (Fredericton: University of New Brunswick, 1992), pp. 22-23, 33.

before the courts for reward.¹⁹ The unique process of qualification as a barrister also set apart the legal profession from others which relied only on apprenticeship.

What were the sources for this measure? The act of 1811 can best be seen as an amalgam of English, Irish and North American precedents. In this it may be seen as an indigenous distillation of the variant cultures which had previously characterized the legal profession. The most significant influence was undoubtedly the English Act for the better Regulation of Attornies and Solicitors of 1729, which the Nova Scotia act follows very closely, in many instances repeating clauses verbatim. The five year apprenticeship period, the prohibition on attorneys having more than two clerks, and the penalty for practising without being properly admitted were all taken directly from the English statute. The oath to be taken upon admission was identical:

I, A.B. do swear, that I will truly and honestly demean myself in the practice of an Attorney, according to the best of my knowledge and ability.

So help me God.

A concern with loyalty obtruded at this point, as Nova Scotian attorneys, but not English, were obliged to subscribe as well the oath of allegiance and supremacy. The Act itself did not require it, but the practice was for attorneys also to take the oath of abjuration and to make the declaration against popery, even though impediments to the admission of Catholics as attorneys and barristers had been removed in England in 1791 and in Ireland

¹⁹The act did not prevent lay persons such as justices of the peace and notaries public from engaging in the solictorial aspects of legal work, such as conveyancing, drafting wills and agreements, and the like. The Novascotian, 4 December 1828, carried an advertisement from notary public William Romans of Pictou, who advised that he was "ready to draw Leases, Deeds, Mortgages, Protests, and agreements of every description, in a neat and correct style."

the following year.²⁰ This practice probably replicated a New England custom, and New England was also the source of the indulgence granted to university graduates by the Nova Scotia act. The Loyalists who now occupied places of prominence in the Nova Scotia legal and political world came from a tradition where university preparation for a legal career had become de rigueur for sons of the élite.

The North American tradition of a unified profession was confirmed by the act of 1811, but the two branches were married by the unique expedient of defining the attorney as a stage in the progression toward the degree of barrister, rather than as a distinct branch of the legal profession. Although a handful of men did practise as attorneys in Nova Scotia after the act of 1811 without ever proceeding to the final stage of being called to the bar, they were clearly anomalous; it was assumed that all attorneys would become barristers in due course.²¹ The situation was entirely different in Upper Canada, where 40% of all legal practitioners in 1840 were attorneys only.²² In Nova Scotia neither

²⁰See the certificate attesting to the admission of William Lee as an attorney, signed by Chief Justice Sampson Salter Blowers 24 July 1827, MG 100, vol. 174, no. 29. On the position in England, see Robson, The Attorney in Eighteenth-Century England, p. 76.

²¹Alexander Winniett was admitted an attorney in 1827 and never signed the barristers' roll, but was listed in Belcher's Farmers' Almanack as practising in the Annapolis area until at least 1858. William Chandler was admitted as an attorney in 1836, practised at Amherst until 1843, then disappeared from Belcher's until 1852. Curiously, he was admitted to the bar in 1851 and began to practise at Arichat, where he remained for some years. One William Buckerfield practised for many years at Amherst after his admission as an attorney in 1845, and was never called to the bar. These were the only locally-born men known to have practised as attorneys without being called to the bar between 1811 and 1850. For the few immigrant lawyers who practised without being called to the bar locally, see below, notes 34 and 35 and accompanying text.

²²Gidney and Millar, Professional Gentlemen, p. 77.

economics nor ideology supported the idea of a distinct caste of barristers superior to the "low attorney." However, Nova Scotian lawyers were not slow to take up the prestigious title of barrister when it was made available to them, a phenomenon satirized by Thomas Chandler Haliburton in The Old Judge. "They have got so infernal genteel, they have altered their name and very nature," lamented Haliburton's fictional layman, Stephen Richardson. "[F]ormerly they were styled lawyers, but now nothing but bannisters will do, and nice bannisters they are for a feller to lean on that's going down-stairs to the devil."²³

To find a precedent for the provision regarding attendance at the courts in the capital one must go to Ireland, where the act of 1773 specified that for the last two years of his apprenticeship, an attorney had to spend two terms per year at the Four Courts in Dublin.²⁴ This clause reflected concerns that overcrowding had obliged attorneys to locate in ever more remote rural areas and to take ill-educated country people as apprentice attorneys, who in turn became fomenters of litigation "especially amongst labouring and industrious poor people, to the impoverishing and ruin of them and their

²³Thomas Chandler Haliburton, The Old Judge; or, Life in a Colony (Ottawa: Tecumseh Press, 1978), p. 188.

²⁴This was felt to be so onerous for attorneys beyond the pale of Dublin that Cork attorneys petitioned the Irish House of Commons for an exemption in 1781, but Dublin attorneys counter-petitioned and the measure failed. W.N. Osborough, "The regulation of the admission of attorneys and solicitors in Ireland, 1600-1866," in Daire Hogan and W.N. Osborough, eds., Brehons, Serjeants and Attorneys: Studies in the History of the Irish Legal Profession (Dublin: Irish Academic Press, 1990), pp. 123-25.

The Law Society of Upper Canada also relied on Irish precedents from time to time, and it was suggested in 1840 that the Society was "more analogous to the King's Inns of Ireland than to the Inns of Court of England." Baker, "Legal Education in Upper Canada," p. 67.

families."²⁵ Such concerns could not have been of overriding importance in Nova Scotia at a time when there were no more than a half-dozen lawyers outside Halifax. The requirement to spend three terms at the Supreme Court in Halifax more likely reveals a concern for professional socialization by bench and bar as a form of education (a concern which must have motivated to some extent proponents of the Irish measure as well). Without any local equivalent to the inns of court, or any organized professional society, the framers of the act had to fall back on the time-honoured educational technique of observation. Halifax would always host the main concentration of legal talent in the province, and a year's attendance in the capital would most likely suffice to meet not only one's fellow attorneys, but also virtually the entire provincial legal profession. A decade after the act's passage, when Beamish Murdoch began his year of observation, there were still only 40 lawyers in Nova Scotia, 23 of them in Halifax. For out-of-town attorneys, a sojourn in the capital would also allow them to consult the Barristers' Library, which was better endowed than the libraries of the few county practitioners.

In addition to these opportunities, it may well be that certain mootings or other exercises occurred of which no written trace has remained. Murdoch belonged to a "class" of nine attorneys who were obliged to attend the terms of the Supreme Court in 1820-21, and with such a critical mass they might well have organized some advocacy activities either on their own or under the supervision of a member of the bar. Draft letters in Murdoch's commonplace book suggest that he failed in an attempt to create a debating society in Halifax around 1820. If he was prepared to devote energy to such a

²⁵13 & 14 Geo., III, s. VI (Ireland).

task, he may well have tried to persuade his fellow attorneys to engage in mooted exercises of some kind.²⁶

The Legal Profession: Growth and Geography, 1800–40

Unfortunately, the sources relating to the early history of the legal profession in Nova Scotia are not as complete as those in New Brunswick. The pre-1825 barristers' and attorneys' oath rolls have not survived legibly intact, so that the size and composition of the profession cannot be conclusively established before the third decade of the nineteenth century.²⁷ The documentary record for the Society of Nova Scotia Barristers, founded in 1825, is almost non-existent before the twentieth century. From 1820, local almanacs are a rich source of evidence. They provide on an annual basis the name and location of every lawyer considered to be a member of the practising bar, allowing for a detailed reconstruction of mobility patterns. For a brief period in the 1830s, the almanacs even note the number of apprentices being instructed by each lawyer in the province.

The third and fourth decades of the nineteenth century were crucial chapters in the success story of the bar. Between 1820 and 1840 the size of the profession trebled, while

²⁶D.G. Bell notes that a "Forensick Society" was set up by four law students at Saint John in 1786, but soon expired since there were not four students again at Saint John until the 1820s: Legal Education in New Brunswick, pp. 2-3. There tended to be six to eight law students at Halifax in the later 1810s, which would have provided a large enough group for collective activities. On the debating society, see chapter 8, below.

²⁷From other manuscript sources, however, the relatively small pre-1825 bar can be identified with some accuracy. Thereafter, see the barristers' rolls in RG 39, ser. M.

the provincial population doubled. The ratio of lawyers to population thus grew from approximately 1:3000 to 1:1900 over this period.²⁸ This enhanced availability of lawyers was most noticeable outside Halifax. While no more than a dozen lawyers were located outside the capital in 1820, more than six dozen were open for business two decades later. In these two decades the bar became effectively a provincial institution, serving the needs of a wide array of citizens, not simply an offshoot of the official establishment at Halifax.²⁹

In 1800 there were at most 20 lawyers practising in the province, with only a handful of these serving the communities outside Halifax. Recruitment to the bar had been sluggish in the eighteenth century, and complaints were heard about the unavailability of lawyers. In 1766, residents of Horton and Cornwallis townships petitioned the Council regarding the difficulty of suing for debts when attorneys could be had only at Halifax.³⁰ The extent of informal representation is unclear, but the Planters

²⁸The only reasonably reliable census figures for Nova Scotia's population during this period come from 1827 (123,000) and 1838 (202,500). I have used a figure of 100,000 for the population in 1820. Comparison with Massachusetts reveals a not dissimilar profile, with significant growth in the profession coming about two decades earlier. The ratio of lawyers to population doubled from 1:2900 in 1800 to 1:1400 in 1810, and then remained at about 1:1100 throughout the period 1820-40; Gawalt, Promise of Power, p. 14. By comparison, Ontario was underserved by lawyers, following Nova Scotia's 1:3000 to 1:1900 trajectory only decades later, in the period 1851-1871; Gidney and Millar, Professional Gentlemen, p. 398, Table 4.

²⁹This phenomenon has not been much commented on, but see Brian Cuthbertson, Johnny Bluenose at the Polls: Epic Nova Scotia Election Battles 1758-1848 (Halifax: Formac, 1994), pp. 11-13. Cuthbertson also notes the importance of marriage ties in cementing alliances between lawyers and the families of local notables.

³⁰A. W. H. Eaton, History of King's County (Salem, Mass.: Salem Press, 1910), p. 443.

would have been familiar with "attorneys in fact" in their home environment, and may have employed such persons.

The arrival en bloc of a dozen or so Loyalist lawyers in 1783-4 may have led to an oversupply of lawyers, but only on a temporary and local basis. They tended to prefer the capital to the countryside, and a number of them did not actively pursue their profession. In most areas of the province, the dearth of lawyers did not abate. Decades later, even murder trials might go on outside Halifax with no lawyer appointed to represent the Crown. In 1816 a woman was indicted for murder at Liverpool. She had counsel, but attorney Robert Bolman appeared for the Crown only because he "was induced by the repeated solicitation of Gentlemen residing at Liverpool to conduct the prosecution." He later petitioned the Assembly for compensation, and was granted £11. A murder trial at Guysborough had gone on in 1812 without a lawyer on either side. The clerk of the peace represented the accused, while the prosecution was conducted by none other than the deputy clerk of the peace, neither being a trained lawyer.³¹

In the absence of lawyers, legal services of a civil nature were provided by a variety of lay personnel, among whom justices of the peace and notaries public played major roles. The justices usually had no formal legal training, but they had a familiarity with the law sufficient to satisfy most of the population's legal needs, and an air of

³¹RG 5, ser. P, vol. 41, no. 5; RG 1, vol. 226, no. 16. Such examples are admittedly rare in this period, but they serve nonetheless to demonstrate that lawyers' services were not considered indispensable even in cases involving the death penalty. William Lee was convicted of murder and sentenced to death in the Guysborough case. His "counsel," the clerk of the peace, was the brother of John George Marshall, whom Lee had wished to defend him. Marshall was unable to attend, and sent his brother some notes and precedents he had made when he was involved with the case at an earlier stage.

authority which allowed them to function as community arbiters. Some were respected, others held in awe. The Acadians of Pubnico, reported a visitor, feared their local justice of the peace, Benoni d'Entremont, "as much as they feared the King of England."³² Eighteenth-century almanacs listed the justices by county immediately after the judges of the Supreme Court, but lawyers were notably absent.³³

By 1820 this picture had not changed dramatically, with some 38 lawyers in the province (including one in newly annexed Cape Breton). Twenty-five of these were located in Halifax, while the remaining thirteen were located in ten other communities across the province. Only Annapolis and Pictou could boast more than one lawyer. Virtually all the Halifax lawyers were connected to the official establishment or mercantile élite through birth or marriage, and either held office or would soon become office-holders of one kind or another. The situation was a little more fluid outside Halifax, where the occasional attorney existed on the margins of the local notability, but such examples were rare.

This situation began to change fairly quickly in the 1820s. Recruitment to the bar had been depressed during the long war with France, as it usually is during wartime. The entire decade 1811-1820 had seen only 19 men called to the bar, and four of these were no longer in the province by 1821. With the return of peace in 1815 the young men of the province began to turn their minds to suitable civilian careers, and the law ranked

³²J. Alphonse Deveau, ed., Diary of a Frenchman (Halifax: Nimbus, 1990), p. 73.

³³Metonicus's almanac of 1794 and previous almanacs contain no listing of lawyers. The first available almanac to contain such a listing is Ward's (1820).

fairly high among them. A sense of the opportunities available outside Halifax may be glimpsed in the bargain that William Young struck with his principals, the Fairbanks brothers, in 1820. They were to pay him £30 salary in the first year of his apprenticeship (highly unusual at the time) and to charge him no fee for acting as principals. Young recorded in his diary that if during the second year he proved himself "competent and willing to practice in one of the country towns, they have engaged to allow me one half of the net profits arising out of the business there."³⁴

The long apprenticeship period meant that the post-1815 cohort would not appear at the bar until the 1820s. The years 1821-25 alone saw 29 further calls to the bar, and the second half of the decade (1826-30) 31 more. The year 1822 saw nine admissions to the bar, unprecedented in provincial history except for the unique Loyalist influx of 1783-84. By 1830 the number of practising lawyers had doubled, rising to 75, and by 1840 there were 117, for a rate of increase of 56% over that decade. Between 1820 and 1839 a total of 153 men can be identified as practising law in Nova Scotia for at least a year, of whom 122 were new entrants during that period.

Who were these new entrants, and where did they all go? By and large they remained the sons of prominent figures in the Halifax official or mercantile élite or its local counterparts, but perhaps a half-dozen (at most) of the 57 1820s entrants were not so favoured. These were not from labouring or even artisanal families, but nonetheless came from a background considered less than sterling by the élite. The origins of

³⁴Document, "The Autobiography of Chief Justice Sir William Young, *aet.* 21," Nova Scotia Historical Review 12:2 (1992), p. 130.

Alexander Stewart ('22) and William Delaney ('23) are obscure, while Laurence O'Connor Doyle ('29) was the first Catholic at the bar in Nova Scotia. Beamish Murdoch himself possessed a somewhat chequered history, as we have seen.

Taking the whole population of 153 practising lawyers, one feature definitely stands out. This was overwhelmingly a native-born group, who became even more indigenous over the period as the original Loyalist lawyers and a few British immigrants died off. Even in 1820, only three practising lawyers were not native-born (8%). The last Loyalist lawyer, Nicholas Purdue Olding of Pictou, would retire before the end of the decade. The two immigrants were Robert Hatton, an Irish attorney who arrived at Pictou in 1813 and practised there until his death about 1826, and James Buchanan, a Scottish-trained solicitor who died in that year. During the next 20 years, only six new entrants (5%) were not native-born. Five hailed from Scotland, and of these only one came (probably) with prior legal qualifications: James Turnbull, who practised at Arichat between 1831 and 1847. The others came as boys or young men and served a regular apprenticeship in Nova Scotia. The non-Scot was James R. Smith, who was born in England and spent some time in the Caribbean before arriving in the province in 1833.³⁵

³⁵J.L. MacDougall, History of Inverness County Nova Scotia (Belleville: Mika Publishing, 1972 [Truro, 1922]), p. 82 refers to "James Turnbull, a Lowlander who had been educated and had studied law in the Old Country." Turnbull was never called to the bar in Nova Scotia and is likely to have been a Scottish solicitor. He is erroneously referred to as a barrister in Shirley Elliott, The Legislative Assembly of Nova Scotia: a biographical directory (Halifax: Province of Nova Scotia, 1984). The other four Scots were Alexander Primrose, b. circa 1790 in Banffshire, arrived Halifax by 1816, called to the bar 1823; William Young, b. 1799 in Falkirk, arrived Halifax 1814, called to the bar in 1826; his brother George Young, b. 1802 in Falkirk, arrived Halifax 1814, called to the bar 1834; and James Fogo, b. at Glasgow, arrived in Pictou as a boy and called to the bar 1838. James R. Smith was the father of a future justice of the Supreme Court of

Nova Scotia was considerably less attractive to English emigrants than Upper Canada, which even in the second half of the nineteenth century counted 39% of its lawyers as British-born.³⁶

The cohort of the 1820s had little choice but to fan out across the province, as the capital would absorb only nine of them by 1830. Halifax was like mayonnaise, able to absorb olive oil only one drop at a time. Among Beamish Murdoch's "class" of nine in 1822, only he remained in Halifax. The number of communities in which a lawyer could be found rose from 11 in 1820 to 18 eight years later, as lawyers settled in Antigonish, Arichat, Horton (now Kentville) and Liverpool in 1823, Guysborough in 1824, Newport in 1826, and Bridgetown and Chester in 1828. Some of these communities had had a resident lawyer intermittently before these dates, but after the 1820s there would always be at least one lawyer present. By 1830 only Cape Breton and the Eastern Shore could be regarded as still underserved by lawyers in any absolute sense. William F. Desbarres held sway at Guysborough as the only lawyer between Halifax and the Strait of Canso on the mainland, admittedly a thinly populated area even by Nova Scotia standards, while Cape Breton could count only two lawyers in Sydney and one at Arichat.

Certainly the doubling of the provincial population created a demand for more lawyers. Some communities which could not have supported a lawyer in earlier times

Nova Scotia, Henry W. Smith (1875-90), born at St. Kitts, W.I. in 1826.

³⁶Gidney and Millar, Professional Gentlemen, p. 196. On the basis of this percentage, and the fact that 47% of lawyers were born in Ontario, the authors claim somewhat curiously that the legal profession was exceptionally "Canadianized" in that province. It was so by comparison with medical men and the clergy, but the claim cannot be sustained in any intercolonial context.

now passed a critical threshold. Bridgetown had only eight houses in 1823, but Beamish Murdoch noted that by 1824 "quite a town had sprung up" since his last visit in 1822; by 1827 it could boast two lawyers, Stephen Bromley and James A. Dennison. Taking the period 1820-1840 as a whole, however, the population barely doubled while the number of lawyers in practice trebled. Analysing this trend purely in supply and demand terms, either the market for legal services was increasing significantly, or lawyers' incomes were static or declining as more competitors entered the market.

It is probable that both trends were occurring, for different sub-groups within the lawyer population. On the positive side, the return of prosperity after the slump of the early 1820s meant that the services of a lawyer were within the grasp of a larger proportion of the population. A large majority of Beamish Murdoch's clients in the 1820s were artisans, keepers of small shops or smallholders. This is not to say that these groups previously lacked all legal services, as they may well have used the services of lay legal workers such as justices of the peace, arbitrators or conveyancers. The more affluent sectors of the population may well have needed more frequent or more complex legal services as the provincial economy diversified, and all sectors of the population may have been more willing to seek legal services from qualified lawyers rather than laymen. The greater physical accessibility of lawyers would have stimulated demand for their services, creating markets where none existed before. On the negative side, more lawyers meant more competition, and inevitably not all would survive in the new environment.

It is true that many lawyers came from relatively leisured family backgrounds or married into money, and were not dependent solely on their professional earnings for their

livelihood. The evidence does not suggest that more than a few lawyers lived on family wealth as genteel dilettantes. The mobility patterns of the 1820s cohort suggest that many new entrants were trying to maximize income by moving to areas with better market opportunities. Newly minted lawyers moved with greater frequency to communities outside Halifax, and they might move a number of times. This is especially noticeable with entrants in the later 1820s. Of 36 entrants in the years 1825-29, 15 had practised in two or more centres within ten years of their call to the bar, and three more moved out of the province after practising for some period in Nova Scotia. This gives a "mobility rate" of exactly 50%, which can be compared with a rate of 28.5% for the years 1820-24.³⁷ Table I gives an impression of the movements of the most mobile of the group from the later 1820s.

Some of this movement may have resulted from personal or family preferences, but seen on such a scale the pursuit of more attractive economic opportunities must have been the more important motive. Another indication of such motives is the frequency with which the death of a lawyer, his departure from a particular community, or his

³⁷The emigrants were Charles Dickson Archibald ('25), who went first to Newfoundland as registrar of the Supreme Court and then to England, where he remained involved in business activities rather than the law for the rest of his life; George H. Emerson ('28), who emigrated to Newfoundland; and Beamish Murdoch's friend Thomas Forman ('27), who emigrated to New South Wales in 1828 and died there in 1831.

TABLE I

George R. GRASSIE	1825-28, Annapolis; 1828-29, Halifax; absent until 1832; 1832-33, Halifax; 1833-43, Truro
Stephen BROMLEY	1825-26, Windsor; 1826-28, Annapolis; 1828-34, Bridgetown
William GREAVES	1825-26, Kentville; 1826-27, Truro; 1827-28, Halifax; 1828-34, Chester
Robert B. DICKSON	1826-27, Truro; 1827-30, Pictou; absent 1831-42; 1833-35, Parrsborough; 1835-43, Truro
C.W.H. HARRIS	1828-30, Lunenburg; 1830-39, Halifax; 1839-43, Wolfville
James A. DENNISON	1827-28, Annapolis; 1828-29, Bridgetown; 1829-30, Kentville; 1830-42, Annapolis; 1842-43, Digby

his promotion to the bench, was followed by the appearance of a new lawyer there in the next year. When Yarmouth's sole lawyer, John Forman, died in 1832, newly called lawyer William Keating ('29) immediately replaced him. Parrsborough had a succession of lawyers in the 1830s and 1840s, each of whom practised there for a few years, but never more than one at a time. A whole chain of moves might be set off by a promotion. When W.H.O. Haliburton of Windsor was appointed as first justice of the Inferior Court of Common Pleas in 1824, Lewis M. Wilkins soon moved from Kentville to replace him, while the vacant situation in Kentville was attractive to new recruit William Greaves ('25).

The correspondence of Harry King ('29) of Windsor with his fiancée Margaret Halliburton Fraser ("Halli") provides a unique window on the building up of the county

bars during the years 1829-31.³⁸ King was the son of William Colsel King, Rector of Windsor 1813-43 and probably the most affluent inhabitant of the village after the Haliburtons. Harry graduated from King's College in 1822, articled in Halifax, was called to the bar in 1829, and returned to Windsor to practice law. In addition to family ties, Windsor was attractive because senior lawyer William P.G. Fraser had just died in 1828. King nonetheless began his career in the summer of 1829 with some trepidation. Lewis Wilkins Jr. was already established in Windsor, as was a young lawyer named George Emerson ('28). King was affected by the "pitiable description of himself and his little family" which Emerson poured out to him. His confidant raised troubling feelings in King:

altho' opposed to him professionally still can I, could any man hear a man of Equal standing & older than himself declare his own misery without feeling deeply? True he has by imprudent and wasteful Expenditure reduced himself to his present state & Equally true it is that my competition has partly contributed to this Consequence -- but my competition has been fair & open. I have no reproach from it. Yet it does not diminish my feeling of regret³⁹

³⁸The courtship correspondence of Harry King and "Halli" Fraser makes up the major part (322 out of 543 items) of the King-Stewart Papers, N.A.C., MG 24 I 182 (at N.S.A.R.M. see MG 1, King-Stewart Papers, mfm. reel 10367). Of the 322 courtship letters, 174 were penned by King, and these have been transcribed with a critical introduction by Alice Terry Marion as "Harry King's Courtship Letters, 1829-1831" (M.A. thesis, Acadia University, 1986). References will include the date of the letter and page number of the thesis.

³⁹Ibid., 12 November 1829, pp. 72-73.

Within a few months of King's arrival "poor Emerson" followed his brother Hugh ('24) to Newfoundland, discouraged by his poor pecuniary prospects in Windsor after nearly two years there.⁴⁰

In addition to Emerson's tale of ill omen, King was troubled by another event on the horizon. Windsor's venerable W.H.O. Haliburton was seriously ill, raising the prospect that Thomas Chandler Haliburton might return from Annapolis to his ancestral seat upon the death of his father. As King reflected later, "[s]upposing . . . that he [T.C.H.] had come here to practice, of course both Lewis & myself must have been more or less injured, and he would have transacted all his own Law business."⁴¹ Fortunately for King, matters worked out much better than he had feared. Thomas Chandler Haliburton did return to Windsor after the death of his father in July 1829, but soon succeeded to his position as first justice of the Inferior Court of Common Pleas (Middle Division). As this position statutorily precluded him from practising law, Haliburton then directed all his legal business to King, his second cousin, in preference to Wilkins.⁴² The absolute necessity of patronage was obvious to King, and perhaps accounts for some of his guilt in witnessing Emerson's plight. Haliburton's action, wrote King, was "likely

⁴⁰Both George H. and Hugh A. Emerson seem to have landed on their feet in Newfoundland. Each held the office of solicitor general and was appointed to the legislative council, Hugh before the achievement of responsible government, which he opposed, and George, a supporter of reform, thereafter: see entries in the Encyclopedia of Newfoundland and Labrador, vol. 1 (St. John's: Newfoundland Book Publishers (1967) Ltd., 1981).

⁴¹"Courtship Letters," 14 September 1829, p. 59.

⁴²The act of 1824 which had created the position of first justice for the four districts of the Inferior Court of Common Pleas prohibited them from practising law or holding any other government office: S.N.S. 1824, c. 38.

to be a very great advantage to me bringing me into the Knowledge of an Extensive circle of people who unless thus necessarily brought into collision with me might not have known [of me] for Years to come."⁴³ Also for reasons of exposure, it was "worth the Experiment" to accompany Haliburton to Horton where he was to try a criminal matter on a special commission, on the chance that he [King] might be appointed as defence counsel. "[T]is not the fees," he explained to Halli, "but the more we are before the public the More We become Known, and the more we are Known, the more likely we are to succeed in our profession."⁴⁴

Mere publicity was not sufficient - one also had to be available, which could impose a considerable burden on a sole practitioner with his "office Crowded from Morning till night & no one here to whom I could Entrust my business."⁴⁵ Like most young lawyers, King had no clerk or office assistance of any kind. In March he lamented that he did not know when he could steal a few days to visit Halli in the capital. "I am obliged to Keep my office all & Every day. People are Constantly Calling & if I am not at home they will push down to Lewis Wilkins & that is a dead loss."⁴⁶ The demands of local clients and the circuits meant that King managed only two flying visits to Halifax between Christmas 1830 and the fall of 1831. In April he was with the Inferior Court of Common Pleas in Lunenburg, returned with it to Windsor in May, and spent June in

⁴³"Courtship Letters," 14 September 1829, p. 56.

⁴⁴Ibid., 6 November 1830, p. 283.

⁴⁵Ibid., 9 January 1831, p. 334.

⁴⁶Ibid., 13 March 1831, p. 365.

Horton for the sitting of the Supreme Court. Even so well-connected a lawyer as Harry King was constantly seeking exposure and new business, and working to maintain his competitive position.

King, Emerson and Wilkins were part of the shift to the countryside which was characteristic of the new entrants of the 1820s. The cohort of the 1830s saw a continuation of that trend. The Halifax legal community continued to grow modestly, at the rate of about one lawyer per year (net) to a total of 42 lawyers in 1840, but the principal growth occurred in the rest of the province. There were by then 75 lawyers outside Halifax, for a total of 117, compared to 34 non-Halifax lawyers a decade earlier. By 1830 there were few communities of any size without a lawyer, so that the number of communities being served for the first time in the 1830s was necessarily small. Parrsborough and Port Hood (Cape Breton) each became home to a lawyer for the first time in 1833, and Wolfville joined them in 1839. No community lost its sole lawyer during the period,⁴⁷ while some achieved substantial numbers of the fraternity by 1840: Amherst with eleven, Pictou eight, Annapolis six, and Truro, Kentville, Windsor, Antigonish, Lunenburg and Sydney with five each.

The mobility characteristic of the entrants of the later 1820s declined with the 1830s cohort. Of 65 entrants in the decade 1830-39, only 27.6% had practised in more

⁴⁷Digby may have been briefly without a lawyer 1835-42, but there were a number of lawyers in nearby towns. The status of Chester is unclear. The town's sole lawyer, William Greaves, was no longer listed in Belcher's after 1834, but he remained in the town, was made a local Master in Chancery in 1840, and died in Chester in 1853. His position with the Customs Department may have been seen as incompatible with the ongoing practice of law.

than one community in the ten years after their call to the bar, compared to 50% in the 1825-29 group. In other words, the 1830s cohort returned to the pattern of the early 1820s. This was perhaps to be expected, now that the bar was growing no faster than the rate of increase in the general population.⁴⁸ The relative professional longevity and stability of a large majority of the entrants over the two decades 1820-39 suggest two things: first, that the legal profession was not overstuffed, in spite of a lawyer:population ratio considerably higher than that in Upper Canada; and second, that the services of lawyers were becoming indispensable in a way they had not been before 1820.

The Legal Profession: Governance and Impact, 1820-1840

There is little evidence as to why the Society of Nova Scotia Barristers came into existence in 1825, but the substantial growth in the profession in the preceding few years must have played some role in its foundation. Contemporaries reported that "the chief objects of the institution . . . are to advance the respectability of the profession, and to

⁴⁸The lists in Belcher's upon which this interpretation is based are quite rigorous in excluding anyone who was not thought to be a member of the "practising bar." The compiler seems to have known when lawyers retired, for example, after which their names no longer appeared on the list (perhaps they requested removal of their names?). In a number of cases, practising lawyers disappear from Belcher's even though they can be identified as still living in the community with which their practice was associated. These cases seem to involve the acceptance of particular offices or the decision of a lawyer to devote himself principally to non-legal (usually business) interests. There are a few cases where a practising lawyer quit his profession to train for the ministry, and in these cases his name always disappeared from the list (see, e.g., E.A. Crawley, Thomas Maynard and James J. Ritchie). In brief, lawyers appearing in Belcher's can with some confidence be defined as those men identified by contemporaries as devoted principally to the practice of law.

gather funds for an increase to the Law Library."⁴⁹ It has been argued that in New Brunswick, the coming into being of the Law Society in the same year represented a shift "from family connexion to peer control" in the face of increased recruitment to the bar from non-élite classes.⁵⁰ A similar interpretation seems less plausible in Nova Scotia, where the bar was never as cohesive as the pre-1825 Loyalist bar in New Brunswick, nor as much the preserve of a few dominant families. With the possible exception of an unpleasant dispute between a lawyer and his apprentice which erupted in 1823, there seems to have been no major crisis to explain the Society's origin. The reference to "respectability" may suggest some closing of the ranks against lower-class recruitment, but this interpretation is hard to reconcile with the fact that virtually every barrister in the province had signed the Society's roll by March of 1825. Probably the increase in numbers alone suggested the time was opportune for lawyers to coalesce in an organized group. The emergence of the Society can also be seen as an example of the relentless associationalism which characterized early to mid-nineteenth century Halifax.⁵¹

In the absence of any organized professional society, the act of 1811 had assumed that the ultimate authority over the profession would remain with the judges of the Supreme Court. In this respect Nova Scotian lawyers, even after being admitted as

⁴⁹Novascotian, 2 February 1825, p. 46.

⁵⁰D.G. Bell, Legal Education in New Brunswick, pp. 12-18.

⁵¹David A. Sutherland, "Voluntary Societies and the Process of Middle-class Formation in Early-Victorian Halifax, Nova Scotia," 1994 Journal of the Canadian Historical Association, 238. For a brief history of the Society, see Philip Girard, "The Roots of a Professional Renaissance: Lawyers in Nova Scotia, 1850-1910," Manitoba Law Journal 20 (1991), pp. 153-55.

barristers, were more like English attorneys, who were seen as officers of the court over whom the judges exercised an inherent disciplinary power. There was little choice. There was simply no body equivalent to the benchers in the English inns of court or those summoned statutorily into existence to govern the Law Society of Upper Canada in 1797.

The appearance of the Society of Nova Scotia Barristers in 1825 did not change matters since it was a voluntary organization without legislative recognition, and being called to the bar did not automatically lead to membership.⁵² Even over its own members the disciplinary powers of the Society were limited, leaving most such matters to be dealt with officially by the judges. Although formal "peer control" lay far in the future, the Nova Scotia bar nonetheless exercised a certain moral authority, or informal peer control, which can be glimpsed periodically. A dispute which erupted in 1823 between an apprentice and his master reveals the delicate interplay between bench and bar over matters of internal discipline.⁵³

William Young had served three years of his apprenticeship with Charles Rufus Fairbanks when the incumbent member of the House of Assembly for the town of Halifax

⁵²The original "Roll of the Society of Nova Scotia Barristers, 14 March 1825" is held at N.S.A.R.M. After this list of charter members in 1825, the next membership list dates from 1860, when a mere 29 lawyers out of 155 resident in the province were recorded as members. Accounts of the annual dinners of the Society in the 1820s suggest that virtually all the Halifax bar attended: Novascotian, 22 March 1827. The initial Rules of the Society of Nova Scotia Barristers (Halifax, 1825), N.S.A.R.M., V/F vol. 16, no. 14, however, made it clear that candidates had to be formally admitted to the Society by a vote of the members.

⁵³The following account is taken from the Sir William Young Papers, MG 2, vol. 731. The episode is discussed by J. Murray Beck in his contribution on Young to the D.C.B., vol. XI.

died. Both Young's father, agricultural reformer John Young ("Agricola"), and Fairbanks contested the seat. When William Young began to canvass for his father, Fairbanks hinted to various people that during the election campaign Young had misused confidential information acquired while working in Fairbanks' law office. He then told Young that his connection with the office had ceased, but informed him that he would cancel Young's articles of indenture rather than vacate them and assign Young to another lawyer. Young, alarmed by the aspersions cast on his integrity and fearful that three years of his life might be wasted, sought a resolution via intermediaries, first Beamish Murdoch and then Alexander Primrose.

Primrose relayed Fairbanks' position: he and his partner (his brother Samuel Prescott Fairbanks) "would be regulated in their future conduct by the sense of the Judges & Profession." The brothers Fairbanks seemed to regard both the court and the bar as having joint authority over the dispute. They nonetheless refused to go with Young to put the matter before the judges, so Young had his father submit the entire correspondence to Judge James Stewart. Stewart and fellow puisne judge Brenton Halliburton pronounced in favour of Young. An attempt to involve the chief justice failed when he declined to enter the lists. After various delaying tactics, Charles Fairbanks finally succumbed. The disputed indenture was delivered up and the residue of Young's term assigned to David Shaw Clarke on 17 February 1824, six months after the dispute began.

A concluding homily recorded by Young in his diary shows that he too thought of both bench and bar as jointly seized of the matter, in spite of the court's leading role:

Thus by the firmness & integrity of the Hon. Chief Justice & Judges & the good offices of my friends, Mr. Chas. Fairbanks, after practising every expedient of delay, has been foiled in his attempt & obliged to do me justice -- It affords me satisfaction to learn that the Judges & the Bar, as far as I have ascertained their sentiments, unanimously approve of my conduct throughout this affair. With their sanction, confirming the decision of my own mind, I rest satisfied.⁵⁴

Where bench and bar were in accord, a clear jurisdictional line did not have to be drawn. Gradually, however, the bar began to chafe at what it regarded as abuses of judicial disciplinary power. By 1837, it went so far as to censure a judge who had prohibited a lawyer from practising in his court, then fined and jailed him for an alleged act of contempt. O delicious irony: the players were the same as in 1823, but the roles had altered. The judge was Charles Fairbanks, then Master of the Rolls and judge of Vice-Admiralty, in which court this drama unfolded; the lawyer who wrote the report of the bar's investigating committee was William Young; and the co-counsel of jailed lawyer William Sutherland, who successfully sought his release on a writ of habeas corpus, was Beamish Murdoch. Nowhere in the report is the Barristers' Society mentioned as such, which suggests that the bar's authority was still exercised in informal rather than institutional ways.⁵⁵ Yet that authority was growing regardless of its form: Fairbanks was obliged to revoke his suspension of Sutherland when the Lieutenant-Governor remitted the fine as a way of allowing the judge to save face.

⁵⁴Sir William Young Papers, MG 2, vol. 731, no. 70.

⁵⁵This incident can be followed through the records of the Court of Vice-Admiralty, RG 40, vol. 11, nos. 1-4; MG 2, vol. 732, no. 210; it is discussed by Arthur J. Stone, "The Admiralty Court in Colonial Nova Scotia," Dalhousie Law Journal 17 (1994), at pp. 407-09.

The success of the professional project begun with the act of 1811 was apparent by the mid-1830s and possibly earlier. One example of this success was the willingness of Belcher's Farmers' Almanack to organize its listing of lawyers according to professional desires rather than consumer convenience. Prior to 1835, Belcher's listed lawyers by community: the name of each town was followed by a list of the lawyers resident there, without any further notation. In 1835, Belcher's adopted a new means of organization. Lawyers' names were now presented in tabular form, in order of seniority, followed by the respective dates of their admissions as attorney and barrister, and finally their place of residence. Those lawyers who were admitted only as attorneys, or who were not admitted in Nova Scotia at all (such as the Scot James Turnbull), were exposed as such; their seniority, however, was determined by Belcher according to the date of their entry into practice. A further change came in the 1850s, when such "irregular" practitioners were actually demoted to the bottom of the list, precedence now being determined formally only by call to the bar.

The success of the act of 1811 may also be deduced from the statute which replaced it in 1836. The existing system was retained almost intact, with changes restricted mainly to improved record-keeping. The new geographic reach of the bar was reflected in the failure to maintain the requirement of keeping terms at the Supreme Court in the year prior to call to the bar. Attorneys who were not university graduates still had to wait the year before final call, but they no longer had to spend it in Halifax. Finally,

the ability of a duly admitted barrister to plead before all the courts of the province, "without any other or particular admission," was guaranteed.⁵⁶

The new assertiveness on the part of the bar, and its willingness to challenge authority, was especially noticeable in the countryside, where lawyers began to undermine the authority of the lay magistracy. Once again Harry King's impressions are illuminating. For him the arrival of the county magistrates in Windsor meant "[f]ellows come from the wilds of the forest looking as rough & fierce as the very Bears. . . . They take their Seats on the Bench, and really think themselves qualified for their Situations. How sadly Some are mistaken, & how many a good laugh I have had with Lewis [Wilkins] at their Expense."⁵⁷

King's disparagement of the magistrates was not limited to private jokes. On this particular occasion the magistrates had arrived in Windsor to undertake the examination of some of Thomas Chandler Haliburton's tenants at Kempt Town, arrested under suspicion of having murdered the sheriff who came to collect their rent. King explained to his beloved that "[O]ur magistrates are not very learned and when Lewis Wilkins & myself perceived their irregularity the first Morning in taking down the Examinations We proposed to act as Secretaries."⁵⁸ This reproof -- gentle but undoubtedly noticed -- took place as a good proportion of the town's population sat in attendance. It is thus not surprising to find King reporting on the following day that the "Master of the Town

⁵⁶Statutes of Nova Scotia 1836, c. 89, s. 18.

⁵⁷"Courtship Letters," 22 December 1829, p. 106.

⁵⁸*Ibid.*, p. 105.

School came to me to beg my assistance in having him Continued in office."⁵⁹ Harry King was barely six months at the bar, but already seen as a power broker in the community. As lawyers spread throughout the province in the 1820s and 1830s, they provided a new source of power and influence, an alternative to the old regime model of deference to the authority of wise men selected by His Majesty's government.

⁵⁹Ibid., p. 106.

Chapter Five

The Making of a Colonial Lawyer, 1822-1827

Whether in pre-Confederation British North America or the antebellum United States, lawyers have seldom been studied as lawyers. Their prominence as political leaders, judges, office-holders or businessmen has interested historians more than the day-to-day business of their legal careers. As Richard Scott Eckert recently observed in the context of colonial America, there has been no "detailed treatment of the legal career of a representative member of the legal profession in either colonial Massachusetts or one of the other colonies."¹ There are a number of reasons for this gap in the literature, both material and ideological. First and most obvious is the problem of documentation. Lawyers' papers have tended not to survive, which renders the reconstruction of an individual law practice difficult. Where the ravages of fire and moth have spared such documents, lawyers have often destroyed them out of a concern over possible violations of client confidentiality.

¹Richard John Eckert, "The Gentlemen of the Profession": The Emergence of Lawyers in Massachusetts, 1630-1810 (New York: Garland Publishing, 1991), p.2 of unpaginated preface. Works such as A.G. Roeber, Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810 (Chapel Hill: University of North Carolina Press, 1981) tell us little on the actual work of lawyers, and even Eckert's book contains only a few pages on the subject (pp. 203-208). See though Carol Berkin, Jonathan Sewall: Odyssey of an American Loyalist (New York: Columbia University Press, 1974), chap. 2; Milton M. Klein, "The Rise of the New York Bar: The Legal Career of William Livingston," in David H. Flaherty, ed., Essays in the History of Early American Law (Chapel Hill: University of North Carolina Press, 1969).

A lawyer's own records are not indispensable to the reconstruction of a law practice, however. Court archives and newspapers contain a wealth of information, although naturally oriented to the forensic rather than the solicitorial side of law practice. The failure to exploit such records as do exist makes it clear that the lack of interest in colonial lawyers' work is not based only on the absence of adequate primary sources. Historians have simply not believed that the task was a particularly important one.

This belief is based on a somewhat outdated conception of power as comprising only official forms of political power. Since one of the major historical questions of the colonial period, whether in the pre-revolutionary United States or colonial British North America, is the changing nature of power and authority, historians have been most interested in those lawyers who have been closest to the centres of power. Thus historians of colonial America have been most interested in lawyer office-holders and in lawyers who were active in the revolutionary movement,² while historians of the nineteenth-century United States have been obsessed with the question of how lawyers became the "American aristocracy."³ Historians of British North America have been concerned to examine the role of lawyers as architects of the new society which was being established in Upper Canada and New Brunswick.⁴

²Stephen Botein, "The Legal Profession in Colonial North America," in Wilfrid Prest, Lawyers in Early Modern Europe and America (New York: Holmes & Meier, 1981).

³Gerald W. Gawalt, The Promise of Power: The Emergence of the Legal Profession in Massachusetts 1760-1840 (Westport, Conn.: Greenwood Press, 1979).

⁴ See three works by G. Blaine Baker, "The Juvenile Advocate Society, 1821-1826: Self-Proclaimed Schoolroom for Upper Canada's Governing Class," Canadian Historical Association Historical Papers (1985); "Legal Education in Upper Canada, 1785-1889: The Law Society as Educator," in David H. Flaherty, ed., Essays in the History of Canadian

Certainly their political role was important, but lawyers were often leaders of colonial society even when they did not wield direct political power. Better-than-average education fitted them for a leadership role, but their prominence was also a function of the ubiquity of the law in colonial society. Citizens high and low regularly came into contact with the law, mainly in the form of civil rather than criminal justice. They depended on it in a much more direct way - principally, but certainly not exclusively, to enforce debt obligations - than citizens do in the twentieth century. The administration of criminal law was important as spectacle and morality tale, but it unfolded almost entirely with lay rather than professional participation, except for the most serious offences. It was for ordinary matters of civil law - debt, conveyancing, succession, marriage, business transactions - that people sought out lawyers, and their constant reliance on lawyers allowed the latter to assume their unique role in colonial society.

This chapter and the next will look at Beamish Murdoch's law practice during its first two decades.⁵ By analyzing the nature of his clientele in terms of social position, gender, ethnicity and volume, and examining the variety of services performed for these

Law, vol. II (Toronto: Osgoode Society, 1983); "'So Elegant a Web': Providential Order and Rule of Secular Law in Early Nineteenth Century Upper Canada," University of Toronto Law Journal 38 (1988) 184; Paul Romney, "From the Types Riot to the Rebellion: Elite Ideology, Anti-legal Sentiment, Political Violence, and the Rule of Law in Upper Canada," Ontario History 79 (1987) 113; D.G. Bell, "Paths to Law in the Maritimes, 1810-1825: The Bliss Brothers and their Circle," Nova Scotia Historical Review 8 (1988), p. 6; Carol Wilton, "'Lawless Law': Conservative Political Violence in Upper Canada, 1818-1841," Law and History Review 13:1 (1995), pp. 111-36.

⁵ An earlier version of these chapters appeared as "The Making of a Colonial Lawyer: Beamish Murdoch of Halifax, 1822-1842," in Carol Wilton, ed., Inside the Law: Canadian Law Firms in Historical Perspective (Toronto: University of Toronto Press for the Osgoode Society, 1996), pp. 57-99.

clients and Murdoch's professional income, it will be possible to understand better the role that lawyers played in the lives of their clients and in the broader community. Such a study is possible because a good collection of Murdoch's letter-books, account books and day-books has survived. His "non-Halifax" letter-book for the years 1823-1829 contains copies of (most of?) the letters which he wrote on behalf of clients, whether from Halifax or not, to parties who lived outside Halifax County. It also contains a number of letters written to parties in the United States and the United Kingdom who had sought advice from Murdoch.⁶ Several account books have also survived, covering the periods 1827-1830, 1825-1851, 1831-1837 and 1846-1856, along with a day-book for January 1834 to August 1836 (which appears to contain a complete listing of his clients over this period), a ledger book covering the period 1845-1857, and a small booklet entitled "Halifax Conveyancing" which covers the years 1850-1855.⁷ When supplemented by newspaper accounts and cross-checked against surviving court records, Murdoch's business papers permit the reconstruction of an early nineteenth century law practice in often surprising detail.

As noted earlier, Murdoch's five years of apprenticeship to the Uniackes ended on 23 November 1819. He had to wait 18 months until he was old enough to be admitted an attorney of the Supreme Court of Nova Scotia, which occurred on 14 July 1821. The following year Murdoch spent the requisite three terms in attendance at the Supreme

⁶His letter-book devoted to clients with business in Halifax County has not survived.

⁷These can be found N.S.A.R.M. as, respectively, MG 3, vols. 1838B, 1836B, 1836A, 1836C, 1835B, 1838A, 1837, and 1835A.

Court before his call to the bar, and probably spent much of his time reading at the Barristers' Library. He also acquired new domestic responsibilities in addition to supervising the education of his 12-year-old cousin, Thomas Beamish Akins. In early 1821 Murdoch invited their cousin Charles Ott Beamish, also aged 12, to live with him in Halifax after the death of the latter's father, Murdoch's uncle Frederick Ott Beamish of Blandford.

The happy day finally arrived on 14 July 1822, when Murdoch was called to the bar of the Supreme Court and signed the barristers' roll.⁸ Mere admission did not guarantee a clientele, and it was nearly a year before Murdoch was able to exercise his professional skills. In itself this was not surprising: William Johnstone Ritchie related in later life that it took six months after he opened his office in Saint John, New Brunswick in 1837 before he welcomed his first client, and that his second year of practice netted him only £5.⁹ Murdoch was well aware of the effort which would be required to create a niche for himself, as he later warned prospective law students in his Epitome of the Laws of Nova-Scotia, in terms which would warm the heart of any Victorian: "In the race of competition the lover of his own ease must be left far behind - among the number who press eagerly forward, he who loiters on the way and wastes the

⁸RG 39, ser. M.

⁹Gordon Bale, Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review (Ottawa: Carleton University Press, 1991), p. 15.

precious moments he should devote to self improvement, cannot expect to bear away a prize."¹⁰

Increasing numbers were indeed pressing "eagerly forward" just as Murdoch began his career. Halifax was supplied with 25 lawyers for a population of some 12,000 in 1821. A further three were called to the bar in that year; Murdoch was part of a "class" of an unprecedented nine young men in 1822, and a further six were called to the bar in 1823. The capital thus offered a competitive market which had no parallel elsewhere in the province. Seven county towns counted no more than one lawyer each, though Pictou boasted three and Annapolis two.¹¹ Given that 1822 represented the nadir of the post-war slump in Halifax's fortunes, the town simply could not absorb 18 newly minted barristers. Only five of this group remained in Halifax, while the rest spread out across the province.¹²

Most Halifax lawyers were already well-connected to the political, legal, ecclesiastical, military or mercantile élites. Murdoch began his career without such advantages. His apprenticeship with Uniacke provided him with some cachet, but it could

¹⁰Beamish Murdoch, Epitome of the Laws of Nova-Scotia, 4 vols. (Halifax: Joseph Howe, 1832-33), i, p. 12.

¹¹The one-lawyer towns were Shelburne, Digby, Cornwallis, Windsor, Yarmouth, Amherst, and Truro. "Pythagoras," The Nova Scotia Almanack for Town and Country for the Year of our Lord 1821 (Halifax: Edmund Ward, 1821). Newly annexed Cape Breton was not included in the almanac. The island appears to have had only one resident lawyer in 1820-21, Richard Gibbons, Jr. of Sydney. E.M. Dodd would be the second after his call to the bar in 1822.

¹²For an overview of the provincial and urban economy during this period, see David Sutherland, "Halifax Merchants and the Pursuit of Development, 1783-1850," Canadian Historical Review 59:1 (1978) p. 1.

not guarantee access to the kind of connections which Uniacke deployed so assiduously for the benefit of his own sons. Some assistance from family or patron was crucial in the early years after admission to the bar precisely because of the time it took to build up a clientele.¹³ A government post with some income, even if modest, could greatly assist a man in those lean years. Murdoch's friend James Scott Tremain, called to the bar in 1823, was the son of powerful merchant Richard Tremain. In 1825 this fledgling lawyer had already been appointed deputy registrar to the Court of Vice-Admiralty, an office which carried handsome fees. His brother John Lewis Tremain married the daughter of the former Chief Justice of Cape Breton in 1822, and was promptly named judge of probate, registrar of deeds and prothonotary of the Supreme Court for the County of Inverness - and he was not even a lawyer. Such rewards eluded unconnected men such as Beamish Murdoch.

Fortunately Murdoch began his practice when the demand for legal services from the non-élite section of the population was reasonably strong. Artisans, proprietors of small businesses, shopkeepers, small landowners, mariners, that large group of urban society between the wage labourers and the small professional, mercantile and office-holding élite, depended on the law for a whole host of services, but particularly on the law of creditor and debtor.¹⁴ Since debt collection was such an important part of all

¹³Daniel Duman, The English and Colonial Bars in the Nineteenth Century (London: Croom Helm, 1983), p. 202.

¹⁴One study of access to justice in early modern England found that 70% to 80% of litigants appearing in the courts of King's Bench and Common Pleas between 1560 and 1640 came from the ranks of yeoman farmers, merchants, artisans, labourers, professional men and their widows: Christopher W. Brooks, "Litigants and attorneys in the King's

lawyers' work in this period, some brief account of legal representation in debt matters in the various courts is necessary.

Lawyers were not required for the recovery of small sums, since debts of less than £5 could be brought before a justice of the peace, and lawyers were not usually involved at this level.¹⁵ Debts between £5 and £10 could be sued for in either the Inferior Court of Common Pleas or the Supreme Court, the latter court being authorized to try such cases in summary fashion (i.e, without a jury), in an effort to reduce costs. Legal representation for plaintiffs was almost invariable in the Supreme Court, but for defendants much less so; the only study, which covers the years 1830 and 1831, shows only 4% of plaintiffs unrepresented, while 40% of defendants had no lawyer.¹⁶ In the Inferior Court of Common Pleas plaintiffs were invariably represented by lawyers from at least the 1770s, while defendants seldom appeared by counsel until about 1820, when lawyers began to represent them more frequently.¹⁷ Once the Commissioners' Court was created at Halifax in 1817, it rapidly became the forum of choice for the recovery of medium-sized debts (those between £5 and £10), favoured because of its summary

Bench and Common Pleas, 1560-1640," in J.H. Baker, ed., Legal Records and the Historian (1978).

¹⁵Neither Murdoch's account books nor his letter-book give any hint that he ever appeared before a justice of the peace in a debt (or any other) matter.

¹⁶Dale Darling, "Nova Scotia Supreme Court Records, Halifax County, 1830-1832" (unpublished ms., 1993), on file with the author. These figures include all claims, not just debt claims, but debt cases constituted between 80% and 90% of all Supreme Court litigation during these years. The Supreme Court case files are virtually complete for these years, but become much less so in the later 1830s.

¹⁷Inferior Court of Common Pleas, Halifax County, RG 37 HX, vol. 25.

procedure and low costs.¹⁸ Its records have not survived, but the pattern of legal representation there is likely to have been broadly similar to that in the Inferior Court of Common Pleas, although the proportion of plaintiffs with lawyers was probably lower.

Murdoch's account books show a sprinkling of entries for appearances in both these inferior courts in the 1820s and 1830s, no more than half dozen for the Commissioners' Court. The bulk of Murdoch's debt collection took place in the Supreme Court. Already in 1823, Murdoch filed 11 claims in the Supreme Court, for sums ranging from just over £10 to £174.¹⁹ In several of these his clients were merchants or suppliers, but he also represented Daniel Grant, Jr., tailor, in his claim against George Creelman, yeoman, for £12. By 1824 Murdoch filed 33 claims in the Supreme Court, almost all for debt, then 23 in 1825 and 32 in 1826, falling to 14 in 1827. A Supreme Court practice, comprising mainly debt collection, was an essential part of Murdoch's practice in the early years. Some of his contemporaries featured even more prominently in debt litigation: William Young and James Stewart Clarke, both called to the bar in 1826, filed 54 and 57 claims in the Supreme Court in 1827. Young's extensive mercantile connections would

¹⁸At least, this can be deduced from the rapid decline in the number of judgments rendered in the Inferior Court of Common Pleas for Halifax County after 1818. From an average of 50 cases per year in the years 1815-1818, the number of judgments declined to 3 or 4 annually for the next five years, to zero in 1824-26, and then remained at one or two annually until 1831. A study of the case load of the Commissioners' Court for the period 1827-1837 requested by the House of Assembly revealed that the court rendered 435 judgments in 1828 alone. Journals and Proceedings of the House of Assembly of the Province of Nova Scotia (1837), app. 81.

¹⁹Supreme Court Book of Original Entries 1815-1830, RG 39, ser. J, vol. 105.

have aided him, while Clarke's father David Shaw Clarke was clerk of the peace, Halifax's senior judicial administrator.

A unique overview of the development of a young lawyer's practice in the 1820s can be found in Murdoch's first letter book, covering the period 1823-1829,²⁰ supplemented by his account books and court records for the same period. The letter book contains 84 documents, of which 80 are letters, 3 are petitions, and 1 is a draft partnership indenture. Of the letters, fully 76 relate to debt collection or the drafting of mortgages, although a few also contain advice on property management. The most common addressee of these letters (34) is the sheriff of a particular county, who had the responsibility for serving summonses, seizing property under writs of execution and attachment, and imprisoning debtors under writs of *capias*. Since this letter book contains only correspondence relating either to clients resident outside Halifax, or to Halifax clients with claims outside Halifax County, it overstates the proportion of Murdoch's practice devoted to debt matters, but not dramatically. There is very little in it regarding conveyancing or the settlement of deceased's estates, for example, services which Murdoch performed for his Halifax clientele, albeit infrequently, in the 1820s.

Long-distance debt collection was often tedious and required considerable persistence. On 12 May 1824 Murdoch wrote to the sheriff of Cumberland, enclosing a writ against a carpenter "named Turpel," with the unhelpful observation that he was

²⁰MG 3, vol. 1838B. There are 85 documents in the letterbook, but I have excluded the last one from consideration since it relates to Murdoch's personal business. The top right hand corner of the volume is shorn off, removing the pagination, but the documents follow in chronological sequence and will be referred to by date only.

"settled somewhere in Cumberland." Unsurprisingly, the sheriff could not find Mr. Turpel, and three months later Murdoch wrote to the sheriff of Kings, with the slightly more helpful advice that Turpel was now believed to be living somewhere near Parrsborough.²¹ He eluded detection for another year, until finally run to earth in Halifax: on 15 September 1825 Murdoch obtained a writ of *capias* against William Turpel on behalf of his client William Wells, for a debt of £10.²² Murdoch also sought to obtain redress for William Hesson, a Halifax tailor, who had a claim of £8 against one John MacDonald of Antigonish. Hesson had hired lawyer J.T. Hill to sue for the debt in the Commissioners' Court, but somehow the wrong MacDonald was sued. This MacDonald in turn sued Hesson, who became liable for the costs of the suit (nearly £3). On 8 March 1824 Murdoch wrote to his friend and "classmate" W.F. DesBarres of Guysborough, asking him to investigate. DesBarres ignored this request, and Murdoch wrote again over three years later, asking DesBarres to "endeavor to put it in a train for settlement." Hesson had "been very hardly used," said Murdoch, and he implored DesBarres to write him on the subject. The slowness of travel and communication, and

²¹Parrsborough was part of Kings County at this time; it would not become part of Cumberland County until 1840.

²²RG 39, ser. J., vol. 105, 15 September 1825. A similar train of events occurred when Murdoch tried to collect a debt from merchant Israel Harding on behalf of Halifax merchants William and Francis Letson. A summons sent to the sheriff of Cumberland in January 1826 could not be served on Harding, but by the end of the year Murdoch had found that Harding was living in Yarmouth. He wrote Harding there on 16 November, informing him that he was now responsible for the expenses of the Cumberland writ (£1 3s 8d) as well as the original debt of £4 12s 7d, and urged him to settle as soon as possible, "as I have directions to sue for the same and do not wish to put you to greater expense."

difficulties involved in securing accurate information about personal names and residences meant that the expenses involved in debt collection could easily mount.

Once the right debtor had been impleaded in the right court, the law afforded a whole arsenal of weapons to the creditor. In particular, imprisonment for debt, or the threat of it, was a highly visible feature of the debt collection process. Murdoch's familial history of imprisonment for debt made him an uneasy participant in this process, as he revealed in his Essay on the Mischievous Tendency of Imprisoning for Debt and in other civil cases (2d ed., 1831). His letters show that he sought imprisonment only as a last resort, and usually with an expression of regret. Murdoch felt sorry that a debtor at Annapolis should be detained for a small sum, "but as he has not made any offer of arrangement it is the only course I have to pursue."²³ The sheriff played a key role in negotiating with debtors in this regard, especially out-of-town debtors whom neither Murdoch nor his client could meet face-to-face. When Murdoch obtained a writ of *capias* for his clients, Halifax merchants John Starr & Son, against one James Johnson, he asked the sheriff of Sydney County to enforce it immediately, but then gave further instructions. The object of the plaintiffs, he said, "is to obtain security for their debt, not to distress the defendant, but as they think themselves unfairly dealt with by him they wish his arrest, to bring him to terms." Starr was prepared to give Johnson up to a year to pay provided

²³MG 3, vol. 1838B, Murdoch to E.H. Chandler [sic: error for Cutler], Sheriff of Annapolis, 17 November 1826.

he would sign a promissory note for the debt. Murdoch simply asked Sheriff McDonald to use his discretion in this regard.²⁴

Imprisonment for debt was not used just by wealthy merchants. In fact, they could afford to forego it if they thought there was any prospect of repayment. Poorer creditors could not always be so generous. In 1828 Murdoch wrote to lawyer Henry Blackadar at Pictou for some assistance in enforcing three writs of execution, for three different creditors, against one Lowden. Two of them, Murdoch's uncle Thomas Ott Beamish and tailor William Hesson, did not insist on Lowden's imprisonment and were resigned to him taking the benefit of the Insolvent Debtors' Act.²⁵ Under this act a debtor whose total debts amounted to less than £100 could escape imprisonment by assigning all his assets (saving some personal items) to his creditors and swearing that he had not concealed any other assets. However, the third creditor, Thomas Marvin, whose claim was for a small sum of wages, would "not agree to his being discharged and in the event of his taking the oath wishes him to be supplied with bread according to the act of the Province."²⁶ Until an 1832 amendment to the act abolished the privilege, a creditor possessed a veto over the release of any otherwise eligible debtor, provided he supplied "the full quantity of eight pounds of good and wholesome biscuit bread per week unto the said prisoner." If

²⁴Ibid., Murdoch to Kenneth McDonald, Sheriff of Sydney, 10 August 1825.

²⁵Statutes of Nova Scotia 1819, c. 22 (first passed in 1763). See generally Philip Girard, "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia 1820-1867," in Philip Girard and Jim Phillips, Essays in the History of Canadian Law: vol. III, Nova Scotia (Toronto: Osgoode Society, 1990), pp. 92-100.

²⁶MG 3, vol. 1838B, Murdoch to Henry Blackadar, 8 June 1828 [sic - 8 July].

the debt were small, however, presumably the creditor would not wish it to be literally eaten up by feeding the prisoner over an extended period.

As has been noted, the sheriff was a key figure in the debt collection apparatus. What recourse existed if one suspected that the sheriff himself was acting improperly? Murdoch was faced with this problem early in his career. In trying to realize a claim by the powerful Ratchford brothers of Parrsborough against a debtor in Annapolis County, Murdoch came to believe that sheriff William Winniett was keeping the debtor's seized goods for his own use. He tried to sue Winniett on his sheriff's bond in 1824, but various technical defences were raised. In 1826 Murdoch finally wrote to the newly appointed Master of the Rolls, Simon Bradstreet Robie, to obtain authorization to carry on the suit in the name of the Crown. Previous complaints about Winniett had resulted in petitions to the governor and the chief justice, but local lawyers had thrown up their hands when his commission was always renewed. Whether the Ratchfords obtained monetary satisfaction is unclear, but Winniett died about this time, and Murdoch tried to continue the action against his estate.²⁷

Debtors employed legal counsel much less frequently than creditors, either out of poverty or because in many cases they knew no valid legal defence existed. Murdoch did occasionally represent a debtor, in which case he would deploy his best persuasive efforts to secure a delay in the collection of the creditor's due. He put the claims of the Rev.

²⁷The tale can be followed through the following letters in MG 3, vol. 1838B: 17 November, 3 December 1823; 8 March 1824; 7 March 1826. Complaints about Winniett from others dated back to at least 1821: RG 1, vol. 230, docs. 52-54, 86; RG 1, vol. 231, doc. 44.

Archibald McQueen, who had just confessed a judgment for £12, to the creditor's lawyer Alexander Stewart in the following terms:

If you could delay adding expence or trouble to it for some time he is striving very hard to maintain a wife and large family. The Rev. Mr. Uniacke has just appointed him teacher of the school in Dutch town to which £50 was given last session but of course he cannot receive his salary till he has earned it by the quarter of year's services. I know him to be a worthy man though unfortunate and if without deviating from what you should do for your client you could extend some indulgence to him in the collection of the demand I should take it as a personal favor. He is willing to give up 300 acres of land in Cumberland if he could liquidate the demand in that way.²⁸

Stewart was known to be a hard bargainer; whether he acceded to Murdoch's request may be doubted.

Murdoch's account books and the Supreme Court records supplement the picture derived from the letter book. While debt collection retained its predominant role in his law practice throughout the 1820s, it is impossible to quantify that role any more precisely. The most common entry in the account books is for a "letter" written for a named client to a named party. The contents of the letters are not specified, and although most of them no doubt contained demands for the payment of debts, letters would sometimes have been written for other purposes. The account books provide some 120 entries for the years 1823 through 1826 inclusive, but there are over 120 entries for the year 1827 alone, covering a range of services for some 75 clients. Aside from debt collection and drafting letters, these services fall into five broad categories: drafting documents for private parties; drafting petitions to the Governor or the Assembly on

²⁸Ibid., Murdoch to Alexander Stewart, 27 May 1828.

behalf of individuals; providing advice; arranging property matters, including inter vivos conveyancing and the transmission of assets on death; and attending at court on matters other than routine debt enforcement. Each of these will be examined in turn.

The documents which parties were most likely to ask the young Murdoch to draft between 1823 and 1827 related to partnerships, powers of attorney, and arbitration bonds, with the latter appearing most frequently. Very few other documents such as contracts or leases are apparent. In 1823 Murdoch drafted a partnership indenture between two Halifax tailors, Daniel Grant, Jr. and John Fraser, containing detailed provisions about the respective contributions of each party, the location of the business, and so on.²⁹ In 1827 he drafted a deed of dissolution of partnership between Alexander Gordon and Hector McLennan, but was compelled to threaten a suit in Chancery when the latter refused either to settle the accounts with his erstwhile partner or to refer the matter to arbitration.³⁰ Numerous entries for "arbitration bonds" provide no further details. Such bonds commonly specified that the parties should each name an "indifferent person" resident in Halifax, with these two naming a third who would act as umpire in case they could not agree.³¹ The parties obliged themselves to observe the terms of the award and not to commence suits at law or equity on pain of forfeiting a stated sum of money. In this way the parties tried to preserve some control over the dispute-resolution process, which they

²⁹Ibid., 10 April 1823.

³⁰Ibid., Murdoch to Ross and William Murray, 23 June 1828. The Murrays had agreed to act as sureties to McLennan.

³¹The partnership agreement drafted in 1823 contained such a clause. For a fuller precedent, see p. 39 of "Charles E.W. Schmidt's Precedent Book 1827," a manuscript held in the Rare Books collection of the Sir James Dunn Law Library at Dalhousie University.

had ample incentive to do since the Chancery Court, with its higher fee structure, was the normal forum for litigating partnership disputes.³²

The nineteenth century has been called the "heroic age of the petition," and Nova Scotians participated avidly in this mode of addressing authority.³³ Partly as a result of relatively low literacy rates, and partly because the petition was conceived of as a legal document, lawyers were often retained to draft them. Murdoch's records show that he drafted at least five petitions on a variety of subjects during his first five years of practice. One of his very first acts as a lawyer was to draft a petition on behalf of two Halifax mariners who alleged that they had been unjustly excluded by the Newfoundland authorities from the Labrador fishery, and had suffered losses for which they claimed compensation from the Assembly.³⁴ In 1824 he petitioned the Secretary of War of the United States of America for a pension on behalf of one Anthony Beecham, who alleged that he had been seized with blindness while on duty after serving two and one-half years in the United States Artillery.³⁵ More usual were two petitions for roads which he

³²On arbitration generally, see Murdoch's Epitome, iv, pp. 36-41. In cases where no more than two partners disputed over less than £500, the legislature provided in 1829 that they had to choose arbitration on the model described rather than go to Chancery. If the parties refused to choose arbitrators, the Supreme Court would do so for them: Statutes of Nova Scotia 1829, c. 28. Murdoch supported the bill in the Assembly: Novascotian, 12 March 1829.

³³J.M. Bourne, Patronage and Society in Nineteenth-Century England (London: E. Arnold, 1986), p. 9. The consideration of petitions took up a good deal of time at each sitting of the House of Assembly.

³⁴MG 3, vol. 1838B, undated petition of William Long and Thomas Phelan [January-March 1823].

³⁵Ibid., Murdoch to Hon. J.C. Calhoun, 30 November 1824.

addressed to the Lieutenant-Governor, and one to the magistrates of Halifax regarding ferry service to Dartmouth.³⁶

Murdoch's entries regarding "advice" do not always indicate the subject of the client's problem. He seems to have reserved the label for those cases where some reflection was required beyond a simple letter, such as one demanding the payment of a debt. For example, he charged Mrs. Mary McPherson 11s 8d for a "letter to Mr. Clarke & advice re overholding tenant" on 11 November 1826.³⁷ Murdoch's normal fee for a letter was 6s 8d, suggesting that he had done more than just send a notice to quit to the tenant. He also provided advice regarding a promissory note and another troublesome tenant in 1827, but one can only speculate what the "advice re Brig Feronia" involved, which he supplied to merchant James Forman, Jr. in the same year. Fees of 5s for advice on relatively simple matters and 10s for more complex opinions may appear high in comparison to the wages of skilled craftsmen (4s/day until at least mid-century), but they seem to have been remarkably stable over time. Such sums were identical to those charged by Boston lawyer Richard Dana during the early years of his practice nearly a century earlier, in the 1730s and 1740s.³⁸ They were also identical to those charged by Murdoch's contemporary William Young.³⁹

³⁶MG 3, vol. 1836B.

³⁷Ibid.

³⁸Eckert, "Gentlemen of the Profession", p. 205.

³⁹Sir William Young Papers, MG 2, vol. 760.

These early years saw Murdoch involved in some conveyancing and estate work, but in modest quantities. Occasional entries for "searches at Registry" indicate title searches for either prospective purchasers or mortgagees, but between 1822 and 1827 he appears to have drafted only one mortgage, one assignment of mortgage and one memorandum of lease. He petitioned the Governor in Council for letters of administration in four cases of intestacy, but did not draft his first will until 1829.

The courts in which Murdoch did not appear are as significant as those in which he did. With the exception of his first Chancery case in 1827, the more lucrative pay scales of the Chancery Court, the Court of Marriage and Divorce, and particularly the Vice-Admiralty Court, would elude him until the 1830s. Murdoch nonetheless appeared in several significant Supreme Court cases during this period. The earliest was Robertson v. Phillips, which he argued in the fall of 1824. Mrs. Robertson was a widow who had cohabited with Halifax grocer Samuel Phillips for some years, and borne him three children. When they parted, he agreed to pay a weekly sum for maintenance of the children. Upon his default, Murdoch succeeded in obtaining a substantial jury award on her behalf.⁴⁰ The press coverage which this case received no doubt assisted Murdoch greatly in the early days of his career, and it will be examined more closely in that light below. A case of less general interest but more legal significance was Knodel et al. v. Little, which Murdoch argued and won in 1826. This was an action in partition where all but one of several tenants in common agreed that the land in question should be

⁴⁰Novascotian, 13 April 1825, pp. 124-125. The original case file is extant in RG 39, ser. C (Halifax), box 169, but it is framed as a formulaic demand for debt and gives no hint of the context.

divided. There were no provincial precedents relevant to a contested partition action, and the application of English precedents was unclear. Murdoch argued that the defendant's technical objection was invalid, and successfully moved for confirmation of the writ of partition.⁴¹

In the mid-1820s Murdoch was admitted as a solicitor and counsel (the equivalents of attorney and barrister) to the Court of Chancery, which was put on a more professional footing with the appointment of prominent lawyer Simon Bradstreet Robie as Master of the Rolls in 1826.⁴² Murdoch's first case was a simple uncontested foreclosure action. He represented carpenter James Dechman, Jr., who had loaned £130 at 6% interest to Robert Knox, a ministerial assistant at St. Matthew's Church. The amount was secured by a mortgage dated 17 May 1823, on which the full principal was due in two years. In June 1825 Knox died intestate, leaving as his only heir his mother, the impugnant (defendant) Jane Knox. She maintained the interest payments, but could not pay the principal and agreed to a foreclosure in November 1827; the final order for sale of the property issued in January 1829.⁴³

The ethnic, gender and class identity of Murdoch's clientele during these early years is of some interest, as a way of judging the extent of access to legal services, and ultimately to justice. Names are the only indication of ethnic identity, making it the

⁴¹The case file is no longer extant, but Murdoch gives a brief account of the case in his Epitome, iii, pp. 82-3.

⁴²Admission to the Chancery bar was pro forma for those already admitted to the bar of the Supreme Court, but the exact date of Murdoch's admission is unknown.

⁴³RG 36, ser. A, box 163, no. 773.

hardest variable to quantify. All that can usefully be said is that only 11 of approximately 153 clients (1823-27 both inclusive), or about 13%, have names which can be identified with some confidence as Irish, when the Irish made up close to one-quarter of the city's population. Murdoch certainly publicized his Irish ties, joining the Charitable Irish Society in 1823 and already serving as its vice-president in 1824. On St. Patrick's Day 1825 he and five other men patronized the Irish community to the tune of some £50 which they spent on a lavish meal for a large number of guests.⁴⁴ If the proportion of his Irish clients is significantly lower than that of the town's population, the simple explanation is that the immigrant Catholic Irish occupied the second lowest rung in Halifax society, just above the blacks. Their marginal economic power was reflected in reduced access to lawyers' services. They retained some access to courts, however, as the "humorous" newspaper coverage of their antics in the Commissioners' Court demonstrates; the quality of the justice they received is less certain.⁴⁵

No other ethnic or racial groups appear prominently in Murdoch's records for this period. It is unlikely that he had any black clients, but this possibility cannot be eliminated on the basis of names alone. One Acadian appears: Christian Tybo appears

⁴⁴William Sutherland v. Thomas J. Keegan, Beamish Murdoch, Michael Burnet, Bartholomew Hackett, David Fletcher, and John Albro, RG 39, ser. J, vol. 105, 20 September 1826. Sutherland catered the meal and sued for the agreed price in this action, which he said had not been paid.

⁴⁵George Renny Young's Novascotian contains satirical coverage, reported in dialect, of disputes between Irishmen in the Commissioners' Court in almost every issue in early 1825.

from newspaper evidence to have been a landlord in Halifax, but consulted Murdoch about a claim against Cape Breton justice of the peace William Watts.⁴⁶

At least 12% of Murdoch's clientele were women,⁴⁷ virtually all of whom were widows. Widows needed the same assistance collecting debts and dealing with tenants and other property matters as men did, and were not afraid to pursue their remedies at law, though they seldom resorted to imprisonment for debt. It is not possible to tell if Murdoch's female clients carried on businesses, as some women did in Halifax at this time. A number of them consulted him with regard to property matters, suggesting the traditional roles of landlady or provider of lodging. Their claims were not necessarily small. Margaret Hogg claimed £248 from "gentlemen" James, Peter and William Donaldson in October 1824,⁴⁸ while Mrs. Ann Hinshelwood, widow of a Council member and a resident of New York City, owned a substantial property on Argyle Street about which she sought advice from Murdoch on numerous occasions.⁴⁹

⁴⁶Tybo is mentioned as a landlord in the account of a court case reported in the Acadian Recorder, 21 January 1826. For the letter to Watts, see MG 3, 1838B, 13 August 1827. Tybo alleged that Watts had purchased a horse belonging to Tybo from Tybo's vendor, with whom Tybo had left the horse, knowing that the vendor had already sold the horse.

⁴⁷This calculation is not as straightforward as it might seem given the presence of "collective" clients such as the families of deceased persons. If it was clear that a deceased man had left a widow, the estate was counted as two clients, one male and one female. While somewhat arbitrary, this method allows some generalizations to be made without having to trace the families of each deceased client, and without overstating the presence of women.

⁴⁸RG 39, ser. J, vol 105, 13 October 1825.

⁴⁹MG 3, vol. 1838B, Murdoch to Hinshelwood, 14 August, 23 December, 30 December 1823, 10 September 1824.

The vast majority of Murdoch's clientele during this early period came from a modest class background. He was usually careful to note those of his clients who warranted the appellation "Esquire" (4), three more can be identified as "gentlemen" from court records, and another client was his own physician. Another three clients, all non-residents, might be thought to possess high social status - Mrs. Hinshelwood, as an officer's widow, an army captain from Wales, and a London clergyman. No more than 7% (11/153) of his clientele came from the élite. A further group comprised a few reasonably prominent merchants, although none of the city's most prominent. About 90% of his business thus came from the smaller merchants and "mechanics," leavened by a few farmers and mariners, and their widows. Occupations have been identified for 80 of his non-élite clients, and of these 27 were traders of some sort, ranging from small grocers to large wholesale merchants.⁵⁰ Artisans and skilled craftsmen were the next most numerous group at 19, including a tinsmith, a portrait painter, two confectioners, brewer Alexander Keith, several tailors and carpenters, two cabinetmakers, a brass founder, a saddler, a baker, a butcher and a shoemaker. A few fell into a miscellaneous category: schoolteacher William Barry, auctioneer Richard Bulger, veteran Anthony Beecham, truckman Edward Warren and pedlar Patrick Brown. It is probable that more of those with unidentified occupations were artisans than merchants, since merchants can usually be traced through newspaper advertisements, while artisans often cannot. Merchants and "mechanics" and their widows probably made up similar proportions of Murdoch's client base, about 40% each. Their legal needs were relatively simple, relating to debtor-creditor

⁵⁰This includes the 18 women identified as widows.

matters rather than the more lucrative conveyancing and estates work which would occupy Murdoch in later years.

What income did Murdoch's law practice generate? It is clear from his account books that he handled a lot of money, but less clear how much of it he retained. When a client lost a suit and paid Murdoch a sum for "costs," it is often not possible to distinguish how much of this sum was profit over and above the court fees which he had already paid on the client's behalf. Fortunately, Murdoch tried to calculate his earnings for 1827 and the first five months of 1828. He showed his gross income for the calendar year 1827 as £101 12 9, from which he deducted "charges of business" in the amount of £4 12 1, for a total of £97 0 8 net income.⁵¹ The rent on his combined residence/office at 32 Barrington Street was £90 per annum, so Murdoch had to depend on his private means to cover anything more than his basic expenses.⁵² Yet an annual income of £100 was respectable for a young man of his profession. It was much less than the £600 salary accorded the assistant judges of the Supreme Court in 1822, but twice the wages of a labourer, who typically earned £1 per week or less.

⁵¹MG 3, vol. 1836B, 61-62.

⁵²Ibid. The account with James Scott at the end of the volume shows that Murdoch was paying £90 p.a. rent for the house at 32 Barrington St. before he purchased it for £1102 on 27 November 1832, after which he paid annual interest of £66.

Murdoch's total income from other sources is not known. He received £40 p.a. from Philip J. Holland for editorial assistance on the Acadian Recorder over the period May 1824 - September 1826. Murdoch had begun to invest in mortgages by at least 1827: MG 10, vol. 23, no. 47b is the release of the equity of redemption in a Cape Breton property from Thomas Nowlan to Murdoch and J. Scott Tremain, which recites that they had taken a mortgage for £37 on the property in 1827.

If Murdoch's professional income was satisfactory in 1827, it became even more so in 1828. His tally for the first five months of 1828 showed a gross income of nearly £150, almost three times the £56 he had grossed in the same period in 1827. The "charges of business" are not listed for 1828, but if they represented the same proportion of total income as in 1827, Murdoch would still have substantially augmented his income over the previous year. The "unusual brisk trade" which Murdoch referred to in a letter to a client in 1828, as well as his own growing reputation, had an encouraging effect on his professional income.⁵³

In these early years at least, Murdoch was prepared to do almost all his business on credit. He seldom asked for retainers or for court costs to be paid "up front," and indeed advanced money to his clients on the anticipated success of their lawsuits. In a society chronically short of specie and without savings banks, most suppliers of goods and services were obliged to provide them on credit. Predictably, Murdoch suffered his share of bad debts. An estimate of their quantity can be gleaned from the "Accounts Current, made up Nov. 1830" at the end of one of his account books. These show an outstanding balance of £291 owed him, of which he noted £34 were "very doubtful balances." If we assume these to be uncollectable, they would represent a default rate of 11%, which was probably optimistic. Clients often took years to pay, and were not usually charged interest. A few entries which show Murdoch himself as the debtor, reveal that he too sometimes took years to settle his accounts with others.

⁵³MG 3, vol. 1838B, Murdoch to Capt. Thomas Hurlow, 7 June 1828.

One example of this delay also demonstrates Murdoch's willingness to accept payment in kind. His medical bills with Dr. Joseph Prescott for services provided to himself and his aunt Harriette amounted to some £9 over the period 1826-1830. He had provided legal services to Prescott over the same period, and finally deducted the amount from the bill he prepared in 1830. In later years he would deduct from his account with West India merchants Saltus & Wainwright the cost of "1 barrel of Canada flour" and "one Bermuda plait for H. Beamish." William Donaldson of Sherwood was given credit for "lodging etc. last summer" [a summer cottage?] in 1830, while Robert Geddes acquitted part of his bill by supplying 25 lb. of butter. Such entries were unusual: the vast bulk of Murdoch's accounts were ultimately settled in cash.

The organization of Murdoch's law practice remained very simple. His cousin Thomas Beamish Akins began assisting him in 1823, at the age of 14, and would complete his articles with Murdoch in 1830.⁵⁴ There is only one indication that Murdoch contemplated taking on another lawyer in some form of association. Two letters dated August and October 1827 are recorded in Murdoch's letter-book as signed by himself and Thomas Forman, who had been called to the bar on 10 October 1827. Perhaps the extra time needed for his political duties after his election to the House of

⁵⁴An indenture of apprenticeship between Murdoch and George Renny Young, dated 1 November 1821, shows that Murdoch was prepared to take on an apprentice just after his admission as an attorney: Sir William Young Papers, MG 2, vol. 731, no. 42. The indenture is signed and sealed by both parties, but George's father may have objected, as an accompanying document embodying his consent to the arrangement (necessary in view of George's minority) is unsigned. George Young, brother of the future premier and chief justice William Young, postponed his decision to study law and occupied himself with the editorship of the Novascotian in the interim. He was called to the bar in 1834.

Assembly in September 1826, suggested to Murdoch the need for extra help in his law practice. If so, the experiment seems not to have continued. Forman left the province in 1828 and is reported to have died at Sydney, Australia in October 1831.⁵⁵

Murdoch remained a sole practitioner for the rest of his long career. This was virtually the only form of law practice known in the Maritimes - or anywhere else in North America - before Confederation. Aside from familial configurations, even the two-man partnership was rarely encountered before 1850 in Nova Scotia. One or two can be identified in the eighteenth century, and a few at most in the first half of the nineteenth. Familial groupings were only an apparent exception, since they did not possess a principal feature of modern partnerships: indefinite duration. Father-son partnerships were fairly common, but were transitional in nature, destined to advance the career of the son who would in due course become a sole practitioner. The Uniacke brothers, for example, did not function as a modern "firm." They shared their father's magnificent library and perhaps the labour of current apprentices, but they operated essentially as sole practitioners. This form of business organization reflected a deeply-felt conviction that the lawyer's independence was best guaranteed by providing legal services on an individual basis.⁵⁶

⁵⁵Novascotian, 31 May 1832.

⁵⁶The only pre-1850 grouping of lawyers which might arguably constitute a "firm" in the modern sense is the trio of James W. Johnston, William Blowers Bliss and Alexander Stewart, who seem to have been established as a partnership at Halifax c. 1825, according to references in the Desbarres family fonds at N.S.A.R.M. Bliss was elevated to the bench in 1834 and was not replaced.

By 1827 Beamish Murdoch had already established himself in the eyes of both the public and his peers as a well-known member of the profession. He drew his clientele mostly from the middling and humbler classes of Halifax society, who had shown their trust by electing him to the House of Assembly in the fall of 1826, but he was also beginning to serve a few of the more substantial merchants and rentiers.⁵⁷ He had managed to carve out a better niche for himself than some of his peers.⁵⁸ How, precisely, had he done this? Talent, persistence and a fondness for hard work he had in ample measure, but presumably others did too. What, then, went into the "making" of this colonial lawyer?

Three factors were key: the rise of journalism, the changing nature of the market that Murdoch served, and the efflorescence of voluntary associations which Murdoch avidly joined. Murdoch's entry into practice coincided with the rapid expansion of journalism in his native Halifax. Newspaper accounts assisted him in becoming better known among the city's growing numbers of artisans, shopkeepers and minor merchants,

⁵⁷Brian Cuthbertson, Johnny Bluenose at the Polls: Epic Nova Scotian Election Battles 1758-1848 (Halifax: Formac, 1994), p. 58 has analyzed voting patterns in the 1830 election (which Murdoch lost) and concluded that "almost all Murdoch's votes were 'independent ones,' . . . and came from the middle and humble classes."

⁵⁸It is difficult to assess what "success" means for an individual lawyer, much less to determine the relative success of a number of lawyers. One might take as a rough index of size of client base, the number of Supreme Court cases in which Murdoch and 13 other near contemporaries appeared in the year 1827. The top group comprises James Stewart Clarke, William Young, Charles Twining and J. Scott Tremain with 57, 54, 25 and 22 cases respectively. Murdoch came next with 14, Wentworth Fliieger with 6, and all the rest had between one and four appearances. This was a low year for Murdoch, as he had 33, 23 and 32 appearances in the previous three years, putting him far ahead of most of his contemporaries.

who were becoming more affluent as trade recovered after the initial peacetime slump of 1815-1822. His activities in court, in municipal affairs, provincial politics, church controversies, literary, philanthropic and cultural endeavours were fully chronicled by the numerous weekly newspapers circulating in Halifax in the second quarter of the nineteenth century. Murdoch himself participated in this journalistic frenzy through his editorial work for the Acadian Recorder in 1824-26, to which he would return a decade later. It is almost impossible to find a period of more than a few months in the second half of the 1820s which does not carry some reference to Murdoch in the newspapers.

In the press Murdoch was portrayed as independent, in the eighteenth century sense of that word. In the political, legal and ecclesiastical spheres he appeared to act on his own beliefs, without fear of reprisal or hope of reward from the powerful. A few examples of his appearances demonstrate the kind of image which grew up around Murdoch, and why it might have been attractive to his nascent clientele. His role as counsel for the plaintiff in the case of Robertson v. Phillips in the fall of 1824 has already been mentioned. The case did not look particularly bright for Murdoch. His client was a "fallen woman," a widow who had had three children out of wedlock with Mr. Phillips. He had orally agreed to support them at a rate of 7s 6d per week, plus clothes and schooling, while she retained custody. Mrs. Robertson had brought one of the children back to Phillips at one point, then thought the better of it and clandestinely removed the child from his home. The law allowed an agreement for the support of illegitimate children to be rescinded at any time, which made Mrs. Robertson's position rather tenuous.

Phillips was represented by J.W. Johnston, nearly a decade senior to Murdoch and already possessed of a large practice. Johnston tried to argue that Robertson was jealous of "a new, and a laudable connexion" that Phillips had formed with another, "virtuous female," and was thus motivated by simple malice in pursuing her claim. Murdoch neatly turned the tables by painting a tragic picture of Robertson as a wronged woman "struggling in widowhood and poverty with that energy of mind which could only inspire a mother," who had managed to support her children alone for 68 weeks. He urged the jury not to judge her too harshly for taking back her child, as "it would be sinning against the best feelings of human nature to condemn her for this -- it might be a misfortune, but certainly it was not a crime." Judge Lewis M. Wilkins recommended £19 compensation, but the jury awarded £22.

The Novascotian gave full rein to Murdoch's panegyric to wounded maternity. It gave equal coverage to Johnston, but his arguments sounded stiff and technical in contrast to Murdoch's heartfelt appeal. At a time when the parties to an action were disabled from giving evidence on the ground of their interest in the outcome, there was no chance for the jury to judge their credibility.⁵⁹ Everything depended on the lawyer's skill in painting a credible portrait of his client. Murdoch's ability to portray Mrs. Robertson in a favourable light not only swayed the jury, but was conveyed to a wide public through detailed newspaper coverage. Of course, Murdoch was in the process of creating an image for himself as well: as the man who speaks truth to power, who is not

⁵⁹It is possible that in a small community such as Halifax in the 1820s, some at least of the jurors would have known the litigants personally or by repute and been able to form opinions about their credibility based on out-of-court experiences.

afraid to champion the claims of a poor woman against a more respectable male antagonist with an élite lawyer. The image of power being constrained by law was as old as the common law itself, but in the Halifax of the 1820s, there was a new, political edge to it. As the shopkeepers and mechanics of the capital began to question their political order, Murdoch's upset victory over the more genteel Johnston could be read as an omen of things to come.

Murdoch again appeared in the press as the champion of the common man and woman during the dispute surrounding the choice of a new rector at Halifax's Anglican cathedral in 1824-25. The dispute arose when John Inglis, the rector of St. Paul's, was promoted to the bishopric in the fall of 1824, and the Crown named as his successor the Archdeacon of New Brunswick, the Rev. Robert Willis. A large body of the congregation preferred the more evangelical curate, the Rev. John Thomas Twining.⁶⁰ The dispute was rapidly framed in legal and constitutional terms. Letters to the editor discussed whether Crown prerogative could prevail over the 1759 provincial statute which expressly gave the right of presentation to the congregation, and whether the Crown's claim rested on provisions of ecclesiastical law which arguably had not been received into the colony.⁶¹ The matter was also framed in terms of freedom of conscience, with the choice put starkly: the dissenters "must either submit and sit down contented under the ministry of a gentleman who is forced upon them contrary to their sentiments; or they

⁶⁰Judith Fingard, "John Thomas Twining," D.C.B. VIII, pp. 901-02.

⁶¹Letter by "Martin Luther," Acadian Recorder, 4 December 1824. Under English ecclesiastical law, the Crown could appoint a new rector to an English parish only in the unusual case where the incumbent rector was promoted to a bishopric, as Inglis was.

must nobly assert their independence . . . [out of] a just regard for their political and spiritual welfare."⁶²

The Secretary of State would not turn back, but neither would the dissenters. A day-long public meeting, which Murdoch and others addressed, resulted in a vote of 57 in favour of the right of the parish, and 17 against.⁶³ One group of seceders ultimately founded the Granville Street Baptist Church while another took refuge at St. George's Anglican, the "round church" which had been erected in the year of Murdoch's birth. Along with Thomas Chandler Haliburton and Richard John Uniacke, Jr., Murdoch joined the St. George's group, abandoning the prestige that accompanied attendance at St. Paul's in the name of freedom of conscience. Haliburton's and Uniacke's connections were such that their stand did not harm them -- within a few years each had been promoted to the bench, as had William Blowers Bliss, who conspicuously supported Bishop Inglis during the controversy. Just as Twining was consigned to the margins of Halifax Anglicanism, Murdoch too was vulnerable, perhaps more vulnerable than he realized. His outspoken opposition to the bishop gave another reason to the Halifax élite to distrust him.⁶⁴ Murdoch's public opposition to what was widely regarded as an arbitrary act of royal prerogative was, however, more favourably regarded in those groups from whom he drew his clientele, who continued to vote for him in the 1830 election (which he lost). It rested

⁶²See the letter by "Juridicus," Novascotian, 27 April 1825, pp. 140-41. The tone and style of the letter are very much that of Murdoch, but there is no clear proof verifying his authorship.

⁶³Novascotian, 4 May 1825.

⁶⁴Norah Story, "The Church and State 'Party' in Nova Scotia, 1749-1851," Collections of the Nova Scotia Historical Society 27 (1947), pp. 33-57, at p. 46.

squarely within the traditions of the Glorious Revolution of 1688 which were a staple of Maritime political discourse in the nineteenth century.⁶⁵

Murdoch's client base was also a key factor in his success. The role played by craftsmen and small merchants in sustaining his practice in the early years could probably only have occurred in the 1820s. By this point Halifax had a population sufficiently large, prosperous and economically diversified to support the services of a lawyer like Murdoch, who could not depend on government appointments or the legal business of the mercantile élite. In the 1826 election, which resulted in his upset victory over the well-known merchant John Albro, Murdoch received his principal support from smallholders, shopkeepers and artisans precisely because of his independence from both the official party and the influence of the major merchants. This election has been interpreted as the first in Nova Scotia in which a recognizable middle class interest sought to achieve political expression, with Beamish Murdoch as its exemplar.⁶⁶

In addition to the press and personal contacts, voluntary societies were also a means of meeting clients, developing a profile in the community and gaining leadership experience. Numerous new societies were founded in the second quarter of the nineteenth century, and their membership surged as middle-class residents of Halifax sought stability and meaning against a backdrop of mass immigration, ethno-religious diversity, and a

⁶⁵Greg Marquis, "In Defence of Liberty: 17th-Century England and 19th-Century Maritime Political Culture," University of New Brunswick Law Journal 42 (1993), p. 69.

⁶⁶Cuthbertson, Johnny Bluenose, p. 58.

fickle economy.⁶⁷ In addition to his membership in the Charitable Irish Society (one of the older societies in the capital), Murdoch also joined a number of others in the 1820s, including the newly formed Society of Nova Scotia Barristers and the Halifax Poor Man's Friend Society. His role in the latter once again provided him with a platform to address his fellow citizens.

The society had commenced activity in 1820 with the aim of relieving distress among the Halifax poor in the winter season. With the reduction in wages and general decline in trade which followed the end of the war in 1815, the plight of the poor in Halifax had become more acute and more evident, especially in winter. The society claimed to help 1380 persons each year (over 10% of the town's population), mainly by providing wood and operating a soup kitchen. Its budget of some £400 was raised mostly by subscription. A series of letters in the Novascotian by "Malthus," beginning in January 1825, attacked the society for dispensing charity indiscriminately and encouraging profligacy and immorality. The society was thrown on the defensive and compelled to articulate its mission, which it had assumed to be universally accepted.⁶⁸

⁶⁷David A. Sutherland, "Voluntary Societies and the Process of Middle-class Formation in Early-Victorian Halifax, Nova Scotia," Journal of the Canadian Historical Association 5 (1994), p. 237.

⁶⁸G.E. Hart, "The Halifax Poor Man's Friend Society, 1820-27: An Early Social Experiment," Canadian Historical Review 34:2 (1953), pp. 109-23; N.S.A.R.M., Halifax Poor Man's Friend Society, Annual Reports; Judith Fingard, "The Relief of the Unemployed Poor in Saint John, Halifax, and St. John's, 1815-1860," Acadiensis 5:1 (1975), pp. 32-53. For a recent overview of the Society's activities in light of the movement to establish savings banks for the working classes, see Dan L. Bunbury, "From Region to Nation: Government Savings Banks in the Maritimes and Canada, 1824-1900," (Ph.D. dissertation, Dalhousie University, 1995), pp. 58-87.

Rising to the challenge, Murdoch accused "Malthus" of being "led astray by the cries of a cold calculating spirit." He had once acted as a visitor to the society, and had "found greater poverty than he could imagine, even in a respectable ward."⁶⁹ The society ultimately failed in its attempt to remedy the seasonal employment problem which afflicted the labouring classes, but it must have been some comfort for them to know that Murdoch could articulate their basic needs in a convincing manner, and fend off attacks based on fashionable new theories of political economy. Charity on the part of the better-off was seen as an important part of the moral economy by most people in all classes, and Murdoch's affirmation of its role could only have been seen as reassuring.

By the end of 1827 Beamish Murdoch had good reason to believe that his career had been well and truly launched. He had not just survived the early years, but prospered in every sense. His income was adequate and respectable, if not spectacular. He had achieved considerable local prominence through participation in voluntary societies, philanthropic work, religious affairs and the beginnings of his own literary⁷⁰ and journalistic endeavours, all of which had culminated in his election to the House of Assembly in 1826. With his election as vice-president of the Society of Nova Scotia Barristers in 1827, Murdoch secured recognition within his chosen profession at an unusually early age. Having accomplished so much in such a short period, he no doubt looked forward to even more successes in the future. His professional career would

⁶⁹Novascotian, 2 February 1825. As secretary to the society (jointly with fellow lawyer E.A. Crawley), Murdoch probably authored the report on the Society's history and current activities which appeared in the 18 February 1825 issue of the Novascotian.

⁷⁰ These are examined in chapter 8, below.

continue to flourish but in other fields, particularly the political, he would find serious challenges in the years to come. It was perhaps no coincidence that in retirement he ended his History of Nova-Scotia, or Acadie with the year 1827. For him 1827 would always remain the golden year, the high point of Fortuna's wheel, before the descent into the turbulent waters which lay ahead.

Chapter Six

The Maturing of a Colonial Lawyer, 1828-1850

The busy pace which Murdoch had set for himself in his law practice and his community, political and cultural involvements, did not slacken in the years after 1827. His law practice continued to grow, not only in terms of volume, which probably doubled by the mid-1830s, but in the variety and complexity of work performed and the amount of remuneration per client. The proportion of his practice devoted to debt collection remained important but declined overall as Murdoch spent more time on other types of work, such as admiralty law, conveyancing and the settlement of estates. Some tasks developed naturally from transactions he had engaged in during the 1820s: from drafting arbitration bonds, he went on to appear before arbitrators fairly frequently, and to sit as an arbitrator himself by the 1840s. He also began to engage in new areas of professional endeavour: insurance, patents, and work related to business corporations. Other horizons opened for him when he was admitted to practice before the Court of Marriage and Divorce and the Court of Vice-Admiralty in the 1830s, and his Chancery practice grew considerably. Before returning to the analysis of Murdoch's law practice, some idea of the contours of his other involvements during this period is necessary.

Professional growth in the 1830s and 40s was matched by political defeat. After offering himself as a candidate in the elections of 1836 and 1840, Murdoch finally abandoned his ambition to regain the seat in the Assembly which he had lost in 1830. The changing political landscape of the 1830s was very stressful for Murdoch. One of Reform leader Joseph Howe's most prominent supporters at his famous libel trial in 1835,

the next year Murdoch opposed him on the hustings.¹ Labelled a Tory and turncoat, he threw himself into the municipal politics which emerged after the incorporation of the city of Halifax in 1841. Here he achieved some success, serving as city Recorder for the entire decade of the 1850s.

By 1840 Murdoch also began to achieve modest official recognition in the form of appointments as Deputy Judge in Vice-Admiralty (1838), Master in Chancery (1840), and secretary and commissioner to the newly created Central Board of Education (1841-45). Compared to many lawyers of the period, Murdoch's office-holding began late and confined itself to positions of lesser status. What one may presume to be his ambitions for the provincial bench would never be realized.

In addition to his political activity, Murdoch remained in the public eye in the 1830s through his literary and community involvements. His four-volume Epitome of the Laws of Nova-Scotia, modelled on Blackstone and on James Kent's Commentaries on American Law (1826), appeared in 1832-33. Although it did not provide its author with the recognition he sought in the legal world, it was a substantial cultural achievement.² Murdoch retained membership in a number of fraternal societies, but devoted his efforts principally to the Halifax Temperance Society, founded in 1831. He became its president in 1837, and when he retired from that office nine years later, his colleagues noted that he had

¹ Murdoch's political ideas are considered more fully below, chapter 7.

² For further analysis, see below, chapter 8.

been oftener before the public than any other man resident among us (clergymen excepted). His unaffected kindness and gentleness of manners . . . and the language and temper with which he generally addressed himself to the very numerous audiences that he has frequently spoke [sic] to, have made him well and acceptably known to almost every inhabitant of the City.³

In short, Murdoch's lack of sympathy with Joseph Howe's goals did not represent a rejection of the whole spectrum of reform sentiments which animated early Victorian British North America. Moral, educational, social and urban reform would occupy him for the middle decades of the century, as a bureaucrat and as a leader of the Halifax temperance movement. Marginalized in the political realm, he remained in the vanguard of the middle-class evangelical reformism which shaped mid-Victorian British North America. Evangelical, philanthropically inclined and eminently respectable, Murdoch was a veritable icon of the early Victorian middle class.

The organization of Murdoch's law practice remained unchanged during this period, and indeed until his retirement. One might have expected him to go into partnership with his cousin Thomas Beamish Akins. The two men followed very similar life courses, as bachelors who combined law practice with historical research and scholarship. Yet when Akins was called to the bar in 1831 he soon established his own practice in an office on Granville Street. One might read into this action a rebellious assertion of independence by Akins, resistant to playing perpetual helpmeet to his dominant cousin. The continuing good relations between the two men, however, cast

³Quoted in Sandra Lynn Barry, "Shades of Vice and Moral Glory: the Temperance Movement in Nova Scotia 1828-48" (M.A. thesis, University of New Brunswick, 1986), p. 64.

doubt on any such interpretation. More likely Akins's separate establishment reflects the widespread assumption that a sole practice was the "natural" way for a lawyer to offer his services. In the absence of large corporate clients there was no particular incentive for lawyers to organize their practices any differently, and the non-specialist nature of both lawyers' services and their clientele was seen as the best guarantee of the lawyer's independence.

Akins's departure would have posed a labour problem for Murdoch. Virtually all legal documents, whether pleadings for litigation or private instruments such as mortgages, wills and deeds, were drawn up individually for each occasion, standard printed forms not being in use until some time after mid-century. Unlike in England, where scriveners or law-writers were employed by the piece, the labour required for all this copying was supplied principally by articled clerks. As was common during this heyday of "family capitalism" in North America, family members often pitched in, and the clerks themselves were often family members. Murdoch's cousin Charles Beamish appears to have helped in the office after Akins's departure, although he did not ultimately become a lawyer. Another younger cousin, Francis Stephen Beamish (b. 1821), the son of Murdoch's uncle Thomas Ott Beamish, articled with Murdoch from about 1842 until his call to the bar in 1847, but may have assisted him in earlier years. Murdoch never married, but it was apparently not unknown for the wives, daughters and mothers of lawyers to put pen to parchment on their behalf. Shortly after beginning his practice at Windsor in 1829, Harry King thought his fiancée "Halli" Fraser would "have some pleasure in Knowing that it will not be at all mal-Etiquette to have a lady's [hand] Exhibited in Court -- Mrs.

[W.P.G.] Fraser's delicate & beautiful hand has numberless places assigned to it & I believe the whole family of [Judge Lewis M.] Wilkins assisted [him] when Younger." King put Halli on notice that "[y]ou will be able to assist vastly by Your rapid hand."⁴

Before beginning the analysis of Murdoch's law practice after 1827, it is necessary to note one important omission from that practice. Murdoch appears never to have "ridden the circuit" with either the Supreme Court or the Inferior Court of Common Pleas. This may well have been for reasons of health. Murdoch was often described as "frail," and insulted for it by his political enemies. He was troubled all his life with what he called an "ulcerated bladder," which must have made travel over rough roads difficult. Whatever the cause, Murdoch missed out on a major source of professional sociability and "contacts," which may explain in part the respectful but cool tone one often detects in references to Murdoch by other members of the bar. Harry King's courtship letters provide useful details on the etiquette surrounding dining and social life on the circuit, and show how crucial it was for maintaining a sense of professional camaraderie.⁵ This lesser visibility in the rural areas must also have harmed Murdoch's political chances when he ran for one of the county seats.

The principal records for this part of the study are Murdoch's daybook for the period January 1834 - August 1836 and an account book covering the period 1825-1851.

⁴ King to Fraser, 10 December 1829, as transcribed in Alice Terry Marion, "Harry King's Courtship Letters, 1829-1831" (M.A. thesis, Acadia University, 1986), p. 100.

⁵ R.D. Gidney and W.P.J. Millar, Professional Gentlemen: The Professions in Nineteenth-Century Ontario (Toronto: University of Toronto Press, 1994) note this phenomenon at pp. 140-144.

The daybook provides an apparently complete list of his clients, which permits an analysis of their class, gender and ethnicity similar to that undertaken for the earlier period. The daybook can also be used in conjunction with his account books and the original court files to provide a window on the variety of legal work in which Murdoch engaged, and on his professional income.

After the early 1830s it became increasingly rare for Murdoch to write a letter or two for a client whom he would not see again. His practice slowly shifted from one where he provided a few relatively simple services to a large number of "small" clients, to one in which he provided a wider range of services to a more affluent and more regular clientele, although the "small" clients never entirely disappeared. Murdoch's practice was based almost entirely on private law: he continued to provide almost no legal services to government, the military, or the churches, and he very seldom represented clients in criminal proceedings.⁶ The range and sophistication of legal services performed by Murdoch provides evidence of both his widening reputation and his enhanced experience, skills and knowledge. More prominent clients came to him partly because they perceived that he was capable of doing more for them.

Over the years 1828-1842 Murdoch represented Halifax merchant Benjamin Wier, a scion of the New England Planter élite and future Canadian senator. Murdoch appeared for Wier in 14 lawsuits, including two actions by Wier for defamation; advised him on

⁶In 1834 Murdoch was retained by the District of Halifax to assist the clerk of the peace David Shaw Clarke in drafting eight bills for the consideration of the legislature, but this is the only such entry in his account books. There are very occasional references to representing clients at trials at Quarter Sessions, and in 1841 Murdoch was paid £36 to prosecute Lieut. A.B. Parker of the 64th Regiment before a court martial at Halifax.

his interest under a will; searched the title for properties on which Wier wished to take a mortgage; prepared mortgages, including one on Nova Scotian land owned by Wier's Upper Canadian brother to a lender in New Brunswick; prepared a variety of bonds; and provided advice on customs fees regarding the import of sealskins. For West India merchants Saltus & Wainwright he drafted agreements, protested bills of exchange regarding shipments from Trinidad, Puerto Rico, and St. Vincent, provided advice on bottomry with regard to a schooner out of Antigua, and drafted a deed and will for Wainwright.⁷ For Benjamin Wier's son-in-law Dunbar Douglass Stewart he provided constant conveyancing services and advice connected to moneylending through the 1830s. In 1839 Murdoch represented capitalist Enos Collins in an ejectment action at Windsor and in 1842 he appeared before the new Halifax City Council to object to the assessments levied on Collins's properties for municipal tax purposes.

This shift in the nature of Murdoch's practice is reflected in the class composition of Murdoch's clientele as of 1834-36, although not noticeably in the gender or ethnicity of his clients, which remained steady at about 10% female and 10% Irish. It should be noted that some of the Irish population were quite upwardly mobile during this period, with the result that Irish ethnicity is not as reliable a proxy for disadvantage as it was a decade earlier. The legal acculturation of Irish Catholics in Halifax would also have been

⁷A merchant would "protest" a bill of exchange or bill of lading if the goods mentioned in it arrived in damaged condition.

facilitated by the appearance of Roman Catholic lawyers such as Lawrence O'Connor Doyle, who was called to the bar in 1829.⁸

Murdoch's clientele underwent an almost complete turnover between the 1823-27 period and 1834-36. Only 11 clients from the earlier period, or about 7% of the total, appear again in Murdoch's daybook of 1834-36. This change coincided with a clear decline in the number of artisans in Murdoch's clientele. Only five artisans or their wives can be positively identified in the daybook: carpenter James Dechman, Jr., who had been Murdoch's client from an early date; cabinetmaker James Scott, also an old client; Mrs. Catherine Laffin, for whom Murdoch successfully obtained a judicial separation from her "brushmaker" husband, Edward; John Robinson, hatter; and Samuel Cowan, furrier, who sought help regarding a troublesome apprentice, among other matters. Undoubtedly there were more who cannot now be identified, but the nature of the services performed by Murdoch for a large majority of the clients in the daybook makes it clear that they can only be merchants or persons of substantial property. Small merchants and widows still made up a significant proportion of Murdoch's clientele in 1834-36, but the artisans showed a substantial decline.

It is unclear whether these artisans sought out other counsel, whether Murdoch discouraged them from continuing as clients, or whether legal services were becoming too expensive for them. Perhaps his defeat at the polls in 1830 was held against him. Two facts taken together suggest a subtle but visible reorientation of Murdoch's public profile.

⁸See generally Terrence M. Punch, Irish Halifax: the Immigrant Generation (Halifax: International Education Centre, St. Mary's University, 1981).

Aside from giving a very occasional lecture, he was not active in the Mechanics' Institute (founded in 1832), a notable absence given his numerous community commitments. As well, the temperance cause, with which Murdoch was so actively engaged, was regarded with some suspicion by many artisans. Whatever the reasons, Murdoch's client base was decidedly less oriented to manual labour in the mid-1830s than in the mid-1820s.

This change in clientele provided Murdoch with a higher professional income. He recorded his net income for the 15-month period May 1835 - July 1836 as £349, or £280 for the year May 1835 - April 1836.⁹ The near trebling of his income since 1827 was a direct result of a more affluent clientele requiring more complex services for which Murdoch could charge higher fees. Murdoch did not charge more for the same services because of his greater experience; his standard fee for a letter, for example, remained at 6s 8d from 1823 until the end of his practice in the 1860s. The basis for calculation of fees remained transaction-based throughout his professional life, although the idea of fees as remuneration for professional time appeared here and there in his records. Occasionally Murdoch charged a higher than usual fee for a particular service for "extra trouble," which must reflect some sense that he had to spend more time than usual on the matter.

⁹While this was a very respectable income, it does not mean Murdoch was necessarily in easy circumstances. Two judgments were obtained against him in the Supreme Court in 1835, the first on a promissory note for £90 given to Joey H. Metzler by Murdoch in February 1834, the second on an 1833 note for £50 given jointly by Murdoch and his uncle Thomas Ott Beamish to Simon Crabbs: RG 39 C (Halifax), box 179. These judgments suggest a liquidity problem, perhaps brought on by the debts incurred by Murdoch in the publication of his Epitome.

There is no convenient source from which to calculate Murdoch's professional income after the mid-1830s. All that can be said is that it probably continued to rise throughout the 1840s, especially after Murdoch began an active practice in Vice-Admiralty in 1836. His fees for eight cases in which he appeared in that court in the years 1836-39 amounted to an estimated £90, almost his entire annual income of a decade earlier. As well, Murdoch probably had more time to devote to his practice after the mid-1830s. His career in the House of Assembly had taken up a fair amount of his time in the years 1826-30, after which he plunged into the writing of his four-volume Epitome of the Laws of Nova-Scotia during the years 1830-33. Although he remained very active in voluntary societies and public affairs, Murdoch would still have had more time to devote to clients' affairs after the publication of the Epitome. The 1850s were probably Murdoch's most prosperous decade, since he was able to cumulate his £200 salary as Recorder with a still active practice.

The variety of legal services undertaken by Murdoch as his career matured poses a striking contrast with his earlier letter-book, so preoccupied with routine matters of debt. Some of these services were the result of new economic activities being carried on in the province. In early 1836 Murdoch was involved in a flurry of activity regarding a proposed "Marine Slip or Railway, . . . as will enable Owners of Ships or Vessels to obtain the repair thereof with dispatch and convenience."¹⁰ His mandate included

¹⁰An Act for securing to John Story, and his Assigns, the exclusive Right in a certain Slip or Railway, for the use of Vessels, Statutes of Nova Scotia 1834-35, c. 23. The act allowed Story the exclusive use of this device for ten years, provided it was erected within a year. It was not, and Murdoch successfully lobbied the legislature for an extension to 1 August 1836: Statutes of Nova Scotia 1836, c. 77.

drafting a petition to the legislature, agreements between the promoters on the one hand and the patent holder and the builders on the other, a partnership indenture between the promoters, and the preparation of a long lease for the opinion of the Attorney General. Twelve years later he advised John Ross in his negotiations with the Londonderry Mining Co. and on several points relating to its act of incorporation. He also began to do insurance work, both for and against the American insurance companies which started to offer their services in the province in the 1830s; the Aetna Insurance Co. was his only real corporate client during his entire career. Murdoch had no entrée into the world of the new business corporations by investing in them or managing them, as did other lawyers, so little corporate work came his way.

The vast bulk of Murdoch's billings continued to be made for the kinds of transactions and litigation which had been familiar in the province for almost a century. The advertisement which Halifax lawyer Charles E.W. Schmidt inserted in the Novascotian in 1836 could just as well have been Murdoch's; Schmidt promised to "bestow prompt attention to the Collection of Debts, Agencies, and Searches of Titles to Real Estate; and [to] draw . . . Deeds, Mortgages, Bonds, Wills, Powers of Attorney, Indentures Agreements and Instruments of all descriptions."¹¹ Most of these were based on the precedents which clerks copied out so laboriously during the early years of their apprenticeship.¹² Drafting such documents and advising parties about their consequences

¹¹Novascotian, 17 August 1836.

¹²A specimen of this kind from Murdoch's own apprenticeship survives in the Rare Books collection of the Sir James Dunn Law Library at Dalhousie University, under the title "Forms of the Supreme Court" (c. 1816-1821).

formed the backbone of Murdoch's law practice. Such arrangements depend on "facilitative law," principally the laws of contract, agency, partnership, trust, wills and property, which allow parties to order their affairs as seems best to them. As Halifax's middle class grew in numbers, self-consciousness and prosperity, it created more of a demand for such mechanisms to assist both in business planning and in the transmission of familial assets to the next generation.

Dispute resolution, principally but not exclusively in the courts, formed the second major part of Murdoch's practice. Much of his litigation practice involved debt collection, but a growing part of it did not. This involvement can be traced through the dizzying variety of courts and other bodies before which Murdoch appeared in the years between 1827 and 1842. In addition to the Supreme Court and the Court of Chancery, he appeared in the Court of Marriage and Divorce, Vice-Admiralty, Probate Court, the Commissioners' Court, the Inferior Court Court of Common Pleas, the Quarter Sessions, the new Mayor's Court created after Halifax's incorporation in 1841, and, on one occasion, a court martial. He also represented clients before City Council, the House of Assembly, the Lieutenant-Governor in Council, and before private arbitrators. Once he carried on a long negotiation with the Commissioners of Sable Island with regard to the fate of a ship stranded on that unlucky shore. An examination of Murdoch's activity in the courts of Chancery, Vice-Admiralty and Marriage and Divorce provides a good overview of both the shifts in his practice over this period, and the social and economic context in which this practice was carried on.

Murdoch's practice in Chancery and the two civil law courts (Vice-Admiralty and the Court of Marriage and Divorce) only got underway in the 1830s. Admission to the bar of the Supreme Court did not in itself entitle a barrister to plead in these courts until 1836; until then lawyers had to apply for admission to each separately, but it is unlikely that the judges had any discretion to refuse an application from a duly qualified barrister. While the British North American colonies did not in general possess a "split" profession with regard to the common law courts, the distinction between "proctors" (solicitors) and "advocates" (barristers) was retained to some extent in these three courts. Most cases tended to have two counsel on each side, one playing each role, something like the English system of senior and junior barristers.¹³ In Vice-Admiralty especially, particular pairs of lawyers worked together on a number of cases over a period of years, forming a kind of specialized litigation partnership, while leaving their individual practices intact.

These three courts were united by a procedural system derived from canon law and continental civil law which was at sharp variance with the common law procedure followed in the Supreme Court and (as a rule) the inferior courts. Common law procedure essentially relied on oral testimony before a jury. The written pleadings which launched a case were largely formulaic and derived from precedents. Once a case got to court, neither the evidence nor the lawyers' arguments were written down, and often the judge's decision was oral as well, or written down very briefly.

¹³This was true in Vice-Admiralty and the Court of Marriage and Divorce, but was less common in Chancery.

Chancery, Vice-Admiralty and the Court of Marriage and Divorce, by contrast, relied on written testimony heard by a judge¹⁴ with no jury. Pleadings were not formulaic, but recounted the promovent's (plaintiff's) tale of woe in lengthy narrative. The impugnant (defendant) replied in kind, and commissioners were then appointed to take the evidence. The witnesses were called to respond to questions drafted by counsel and submitted to the commissioners, who conducted the interrogation. The answers were written down and "published," i.e., collated in the form of a (frequently sizeable) pamphlet for the perusal of the court. Oral argument was then allowed on points of law. Given this manner of proceeding, it was not surprising that court costs were much higher than in the common law courts, leaving aside entirely the more liberal fee scale which the lawyers were entitled to charge.

Of the three courts, Chancery was the one with which an ordinary citizen would most likely have contact, though more likely as pursued than pursuer. The principal subject of its jurisdiction was the foreclosure of mortgages, which featured in four of the six cases in which Murdoch appeared between 1830 and 1834. Certain remedies such as

¹⁴The Court of Marriage and Divorce sat with several judges. Before 1841, the governor in council possessed this jurisdiction, which was held to require the presence of a majority of the members of the council, in addition to the governor's personal presence. In 1841 the court was reconstituted, and the governor was authorized to appoint a judge of the Supreme Court to preside as vice-president, assisted by two members of the council. The Chief Justice was given this commission in 1841, and was usually but not invariably assisted by the Master of the Rolls and the Attorney General. See generally Kimberley Smith Maynard, "Divorce in Nova Scotia, 1750-1890", in Philip Girard and Jim Phillips, eds., Essays III, 241, and "Divorce Book May 1840-February 1902", held at the Prothonotary's Office, Law Courts, Halifax, N.S.

injunctions and orders for an accounting could only be sought in Chancery, and were sought in the remaining two cases.¹⁵

The four foreclosure cases were all undefended, with final sale of the property occurring four to six months after the filing of the initial bill of complaint. The time did not vary significantly as between lands inside and outside of Halifax: in one case the lands were in Truro and in another in Hants County, with the remaining two in the capital. In two cases one of the mortgagors was absent from the province, but the standard procedure was simply to order one month's notice in the Royal Gazette to the absentee. Failing an answer, the proceedings resumed.¹⁶ Other complicating factors could arise. In Hugh McDade et ux. v. Mary Hay et al., there were interventions by two other parties. First, claimants under an earlier mortgage appeared, seeking to ensure that their claims were not ignored (they were not). Second, the widow of the deceased mortgagee, Michael Leonard, had taken Mr. McDade as her second husband, causing the guardians of Leonard's minor children to intervene. Laurence O'Connor Doyle and John Schrage wished to ensure that a portion of the proceeds of sale would be paid into court

¹⁵The cases files are all found in RG 36: James Black v. James and Andrew Muir (1830), box 190, no. 917; John H. Flohr and Sarah Rhalves v. Simon B. Robie et al. (1830), box 192, no. 924; John Crowe v. Isaiah Smith (1830), box 197, no. 951; Dunbar Douglass Stewart v. Robert Kent et ux. (1833), box 213, no. 1038; Hugh McDade et ux. v. Mary Hay et al. (1833), box 213, no. 1039; Dunbar Douglass Stewart v. Halliburton Grant et ux. (1834), box 215, no. 1056. Prior to 1836, a list prepared by the registrar in Chancery provided the name of counsel beside each case. The post-1836 list has disappeared, making it difficult to trace a particular lawyer's profile in the court after that date.

¹⁶They could be reopened within three years upon the return of the debtor, and the foreclosing mortgagee had to provide security to cover the eventuality that the foreclosure might be successfully defended within that time.

for the children's benefit (which they were). Despite these complications, Murdoch succeeded in having the property sold and all claims settled in just over 4 months after the filing of the bill of complaint in November 1833.

The speed of the Chancery in these cases belies the constant criticism about its delay and inefficiency. Chancery could be quick in uncontested cases because there was no need to take written evidence; contested cases would unfold much more slowly. Whether speed was a good thing in foreclosure actions depended on one's point of view. What seemed expeditious to the mortgagee might have seemed unduly hasty to mortgagors in the process of losing their land. The actions of the mortgagees in these cases do not seem particularly oppressive when viewed in context. The mortgage in McDade, for example, dated from 1817 with the principal stated to be payable in one year. Yet the original mortgagor, Peter Hay, a Halifax mason, had still not paid back the principal by the time of his death in February 1832. The mortgagee must have been content to operate on oral renewals as long as Hay could keep up the interest payments. Hay's death seems to have precipitated the action for foreclosure, as his heirs proved less creditworthy than their father. In John Crowe v. Isaiah Smith the mortgagors had paid not a cent of interest during the four-year term, leaving the mortgagee little choice but to seek foreclosure. And in Dunbar Douglass Stewart v. Halliburton Grant et ux. the mortgagor absconded when the mortgage term expired, again leaving the mortgagee little choice.¹⁷

¹⁷ Short mortgage terms of a year or two were the norm during this period. It is likely that the parties contemplated annual renewals provided the interest payments were maintained. Nonetheless, the creditor could insist on total repayment at the end of the term.

Complaints about the oppressive costs of Chancery were closer to the mark. The total bill of costs (lawyers' fees plus court costs) did not necessarily vary according to the size of the mortgage debt in question, so that the costs of foreclosure for small mortgage debts could be disproportionately high. For example, Murdoch acted for Newport gentleman Dunbar Douglass Stewart (himself a lawyer) in two foreclosure actions in 1834. In one the mortgage debt was for about £150, in the other over £300, yet the costs in the first were £13 (8.6% of the debt), in the second £14 (4.6%). Both were much higher than Murdoch's charges for ordinary debt collection, which were 5% on sums less than £100 and 2.5% on larger sums.¹⁸ Murdoch's fees in the first foreclosure were £6 10s, £9 10s in the second, but higher court costs in the first (largely owing to the Chancellor's personal presence, which cost £2 6s) meant that the total bills were nearly equal. Aside from the actual costs, Chancery seemed oppressive in another way, in that only cash sales of foreclosed property were allowed.¹⁹ In a cash-poor society, this practice not only depressed the sale price but ensured that the mortgagee was likely to acquire it, as happened in McDade.

The real reason that many thought of Chancery as oppressive, was simply that its proceedings exposed the deep economic inequalities of Nova Scotian society. All the mortgagees for whom Murdoch acted were described as "Esquire" (Stewart) or "gentleman" (Crowe, Leonard). Stewart was the son of an assistant judge of the Supreme Court, James Stewart, and the nephew of another, Brenton Halliburton, who became chief

¹⁸MG 3, vol. 1838B, Murdoch to Rev. Alexander Waugh, 20 June 1826.

¹⁹Ibid., Murdoch to Mrs. Ann Hinshelwood, 10 September 1824.

justice in 1833. He had been called to the bar in 1816, but appears to have preferred the life of a county squire at Newport. In the Rhalves proceeding, it was recounted that Frederick Rhalves had taken out mortgages on various properties with not only Simon Robie, but also prominent Halifax merchants James and Michael Tobin, Samuel Cunard and Henry Yeomans. Those being foreclosed against were yeoman Isaiah Smith and his wife Lydia, grocer Halliburton Grant and his wife Mary Ann, the family of mason Peter Hay, and farmers Robert and Anna Kent of Truro. Murdoch's developing Chancery practice assisted his professional bottom line, but it also represented a significant shift in his clientele, towards the holders of wealth and status in provincial society.

Proceedings in the Vice-Admiralty Court, to which Murdoch was admitted as a proctor and advocate by 1836, did not reveal the inequalities of Nova Scotian society in the same stark way that Chancery did.²⁰ In some ways, it allowed the tables to be turned, as sailors and disgruntled passengers used the court's pre-trial procedures to arrest captains and shipowners in order to answer claims for unpaid wages and breach of contract. In Enoch Sears v. Nicholas Moran, for example, Murdoch defended Captain Moran against an action by the ship's cook for £6 15s in wages alleged to be due. Moran

²⁰ The first reference in Murdoch's own records (MG 3, vol. 1838A) to an "appearance in V-A Court" is in August 1835, in proceedings taken by the Attorney General to declare forfeit the cargo of the American Schooner Caleb for violation of the Navigation Acts; the case file is RG 40, vol. 9, no. 7. Murdoch recorded that he appeared for Joseph Bryant, a merchant from Castine, Maine who owned the cargo. The earliest trace of Murdoch in the minute book of the court is in the October 1836 case of Enoch Sears v. Nicholas Moran, RG 40, vol. 9, no. 15. For an excellent overview of the development of the Court of Vice-Admiralty in Nova Scotia, see Arthur J. Stone, "The Admiralty Court in Colonial Nova Scotia," Dalhousie Law Journal 17:2 (1994), pp. 363-429.

was arrested on 8 October to prevent him from leaving port until the action could be heard, which was the usual procedure in Vice-Admiralty. When judgment went against him five weeks later, he became liable for the cook's costs in the amount of £36 15s 10d, not to mention the sums he would have had to pay his own lawyers. Two years later Murdoch unsuccessfully defended the captain of the brig Ann against a claim for unjust dismissal. This time the sailor was entitled to £55 damages plus costs, being 7 months' wages and return travel expenses to Halifax from Pernambuco (Brazil), where he had been put off the ship.²¹ These vignettes accord with Judith Fingard's interpretation of pre-1845 sailors' wage litigation in Vice-Admiralty, "where residual mercantilist notions made the judge the special protector of the transient, vulnerable seafarer."²²

Murdoch had more success in defending the four actions brought against George Barker, captain of the ship Panther, in 1837.²³ In these, as in the two wage cases, he

²¹RG 40, vol. 12, no. 2.

²²Judith Fingard, Jack in Port. Sailortowns of eastern Canada (Toronto: University of Toronto Press, 1982), 187. Fingard asserts that Vice-Admiralty's jurisdiction over seamen's wages was limited to claims over £20 at this time. In fact the House of Assembly passed such a measure in 1837, ostensibly to assist seamen (but probably in response to the Sears case of the previous year) but London disallowed it because Vice-Admiralty was an imperial court over which the provincial legislature had no authority: Stone, "Admiralty Court," p. 406. A similar proposal in 1841 was met with the same response, but the Colonial Office suggested that the province take advantage of the imperial act 5 & 6 William IV, c. 19, s. 15 of which gave the magistrates a summary jurisdiction for seamen's wage claims under £20. This act did not actually deprive the Vice-Admiralty Court of jurisdiction over such claims, but provided that a plaintiff who succeeded in that court when he could have brought the claim before the magistrates, would not be entitled to costs: RG 40, vol. 13, no. 12, J. Dodson and T. Wilde to Russell, 13 August 1841. It is not clear to what extent this suggestion was taken up in Halifax.

²³RG 40, vol. 11, nos. 1-4. See also Stone, "Admiralty Court," pp. 407-409, for a treatment of what follows.

acted as advocate, with lawyer William Sutherland appearing as proctor. The Panther litigation involved an American ship which had accepted £5 each from a group of passengers for a passage from County Sligo to New York in the summer of 1837. The ship was damaged in a storm during the crossing and put into Halifax for repairs and provisions, at which time the passengers instituted their claims for breach of contract. Barker was arrested at the end of August and remained in jail until Murdoch and Sutherland secured his release by a writ of habeas corpus obtained from the Supreme Court in October. The court decided that Vice-Admiralty possessed no jurisdiction over the contracts of passage since they were made on land in Ireland. The judges not only released Barker but also issued a writ of prohibition to Vice-Admiralty Judge Charles Rufus Fairbanks, forbidding him from proceeding any further with the case.

The case escalated into a cause célèbre when Fairbanks refused to recognize the writ and proceeded with the case, upon which Sutherland wrote him a private letter indicating his client's intention to pursue legal action against the judge. Fairbanks chose to treat this act as a contempt of court, fined Sutherland £20 and prohibited him from practice.²⁴ When Sutherland refused to pay, Fairbanks had him committed to jail on 19

²⁴Such techniques remained in use thirty years later, when Chief Justice William Young chose to treat an allegation of bias against him in a private letter from Halifax lawyer T.J. Wallace as a contempt of court, and struck Wallace from the barristers' roll. This time it took the Judicial Committee of the Privy Council to undo the precipitous act of an outraged judge: In re T.J. Wallace, Nova Scotia Reports 5 (1865), p. 654. Such abuses ultimately resulted in the removal of much of the judges' disciplinary power over the bar during the professional reform campaign of the 1880s. Ironically, Young had been prominent in the bar's investigation of the Sutherland suspension, which in effect censured Fairbanks for the same action for which Young himself was later taken to task by the Privy Council: the bar committee's report is found in the Sir William Young Papers, MG 2, vol. 732, no. 210.

December. The same day, Murdoch sought his release by a writ of habeas corpus from the Supreme Court, which was granted two days later on the basis that the Vice-Admiralty Court had, at most, power to fine or imprison for contempt in open court, which was not the case here.²⁵ The contretemps illustrates once again Murdoch's refusal to tolerate abuse of authority, even at a time in his life when he was coming to be identified more closely with the very "establishment" he had so often challenged in the past.

The late 1830s saw Murdoch involved in two other admiralty cases, both involving salvage. His work for the salvors of the ship Ajax netted him an estimated £20.²⁶ In the case of the ship Scio, he worked as proctor for Captain John K. Lane, master of the fishing schooner Franklin out of Gloucester, Massachusetts. His application for salvage compensation illustrated the drama, danger and courage which accompanied the sea-going life in the age of sail. The crew of the Scio had abandoned ship on 16 May 1838 when the vessel was totally surrounded by ice and fog off the east coast of Nova Scotia. Adrift in a small boat, they were rescued 13 hours later and brought to Halifax. Lane found the unoccupied ship drifting off Liscomb Harbour three days later, and had it brought to port. His crew unloaded its cargo of lumber and repaired the vessel, intending to sail it back to the United States. On the return voyage a storm off Halifax forced the abandonment

²⁵In re William Sutherland's application for habeas corpus (1837), RG 39, ser. C, box 180. Novascotian, 6 December 1837, p. 386, 20 December 1837, p. 403, 27 December 1837, p. 410.

²⁶RG 40, vol. 13, no. 1. The file does not show the costs which were awarded to Murdoch. The estimate is based on his fees in The Scio, which amounted to £25 in all. The court file in The Ajax is even more voluminous, so the £20 estimate is a conservative one.

of the Scio when it began to leak badly. It drifted to shore and was eventually sold under authority of the court. Its sale price of £194 was awarded half to the owners of the Franklin and the salvage crew, and half to the owners of the Scio and her cargo, but the latter share of £97 had to bear the full legal costs of £64, which included Murdoch's fee for £22.²⁷

Murdoch's admiralty work accurately reflected his place in Halifax society. His clients were not, with one exception, members of the Halifax mercantile élite, but rather sea captains and most often American sea captains at that. That "outsiders" would seek him out as counsel comes as no surprise, and demonstrates his perceived independence. His appointment as surrogate judge in 1838 is more of a mystery. Given the well-known irascibility and egotism of Charles Rufus Fairbanks, it is not clear why he would confer this privilege on a lawyer who had just embarrassed him publicly a few months earlier by achieving Sutherland's release from prison. The office afforded only trifling fees but nonetheless carried some prestige, and Murdoch would have been honoured by the appointment. S.G.W. Archibald renewed the appointment when he became Master of the Rolls in 1841, but Alexander Stewart did not when he succeeded Archibald in 1846.

Murdoch's practice in the Court of Marriage and Divorce was not large in absolute numbers, but in view of the court's very small caseload, he was its most experienced lawyer in the 1830s and 1840s. A lifelong bachelor, Murdoch may seem an unlikely champion of women's rights. Yet he represented women in four of the five cases which

²⁷RG 40, vol. 12, no. 12. The file is voluminous, and obviously involved a good deal of work on Murdoch's part. He charged Lane £3 for "extra work" above the costs he received from the court.

he pleaded before the court between 1831 and 1850, and in three of these he put the application on the ground of cruelty. He was successful only on the first of these, probably because he advised Catherine Laffin to seek only a judicial separation rather than a full divorce.²⁸ There was much reluctance to terminate a marriage for anything less than adultery, not just on the part of the judges and executive councillors, but among Nova Scotians in general. Cruelty had been a cause of divorce in the province since at least the statute of 1761 which formally constituted the court, and had been pleaded on occasion. Unfortunately, the sketchiness of the records before the 1830s makes it impossible to know whether the plea succeeded.²⁹

The first recorded instances of divorces being granted on the ground of cruelty occurred in 1834 and 1835, while Murdoch had obtained Catherine Laffin's separation from bed and board in 1832 or 1833.³⁰ The 1830s would remain the high water mark of indulgence to the plea of cruelty for decades: not until 1879 was it again successfully

²⁸This case is known only through oblique references, as no case file has survived. On 17 October 1831 Murdoch wrote to the court secretary, Sir Rupert George, to set a date for the hearing of the case: RG 1, vol. 238, no. 72 1/2. His account books show Catherine Laffin as a client, and in 1838 he was obliged to sue the surviving executor of her husband to recover his fees in the action, which Mr. Laffin had failed to pay during his lifetime: Murdoch v. Cassidy, RG 39 C (Halifax), box 181. Murdoch alleged that he successfully obtained a decree of judicial separation and an order for alimony on Mrs. Laffin's behalf. This case is also the first known in which Murdoch appeared before the Court of Marriage and Divorce; he was presumably admitted as a proctor and advocate by mid-1831 at the latest.

²⁹Maynard, "Divorce in Nova Scotia," p. 54.

³⁰The 1835 divorce of Charlotte Hynes was obtained in the usual way through the Court of Marriage and Divorce. The 1834 divorce of Anne Kidston was obtained via a private act of the House of Assembly, the only such divorce in Nova Scotia history. She remarried shortly after, her new husband being Mr. Justice William Hill of the Supreme Court of Nova Scotia; see Maynard, "Divorce in Nova Scotia," pp. 237-238.

invoked. Murdoch's efforts on behalf of Eliza Parker in 1841-42 were probably unsuccessful, in spite of the fact that her husband Joseph did not appear.³¹ His efforts on behalf of Patricia Carey, who also sought a divorce on the basis of cruelty, came to nought when her 1842 petition was not pursued.

The libel which Murdoch composed on behalf of Patricia Carey in 1842 was particularly eloquent and moving. It recounted in agonizing detail her life with Captain Lamarchand Carey of the 76th Regiment of Foot after their marriage at Gretna Green in the early 1830s. Captain Carey was stationed at Quebec for some years, where their three children were born, and where Mrs. Carey alleged he had two children by their servant Mary Dodd. She also alleged that he began to beat her after their first child was born. In 1839 they entered into a separation agreement, when he returned to England with their son and she went to live at Peterborough, Upper Canada with the other children. Contrary to her wishes, he allowed their son to become part of his household with Dodd. When he proposed a reconciliation in 1841, she went to New York to meet him, whence they sailed to his new posting in Bermuda. There, she said, he abused her, refused to send for a doctor when she suffered a miscarriage, and habitually went to brothels. When he returned to Halifax with his regiment in November 1841, she saw her chance and consulted Murdoch.

Only the libel exists in the court file, but it provides a useful guide to Murdoch's views on cruelty, and on marital relations more generally. He put the emphasis not on

³¹All the evidence was taken, but the last document in the file is the petition for its publication. There may have been a final decree which is no longer in the file.

the physical brutality, but on Carey's disrespect and the psychological indignities he inflicted on Mrs. Carey. The document reflects an underlying philosophy of a companionate marriage between equals, rather than the Old Testament view of marriage which continued to hold sway in the Divorce Court well into the twentieth century.³² The other two cases in which Murdoch appeared involved a school teacher from Blandford, who succeeded in obtaining a divorce from his adulterous wife, and a farm wife from the Antigonish area, for whom he was appointed defence counsel by the court. Even as his client base shifted towards the propertied, Murdoch remained sympathetic to the claims of women in distress, a legacy no doubt of his upbringing by his Beamish aunts and grandmother.

By the early 1840s Murdoch's reputation as a lawyer was well-established, as demonstrated by the fact that clients such as Enos Collins now sought out his services. The economic insecurity of the early years had been overcome, and Murdoch was now able to live comfortably if not opulently. In 1839 he sold his combined office and living quarters on busy Barrington Street and moved to a quieter residential area on Brunswick Street, although his office remained on Barrington Street in other premises. The accumulation of wealth had always been secondary to other goals for Beamish Murdoch, but his larger aspirations in the political and cultural fields had been largely frustrated. His Epitome did not win the accolades he thought it deserved, nor secure him any professional advancement beyond nomination to some fairly minor offices. Having

³²J.G. Snell, "Marital Cruelty: Women and the Nova Scotia Divorce Court, 1900-1939," Acadiensis 18:1 (1988) 1.

invested so much in the old order, Murdoch was reluctant to throw in his lot with those who wished to embark on a quite different relationship with the Mother Country.

Chapter Seven

"I will not pin my faith to his sleeve":

Murdoch, Howe, and Responsible Government Revisited

Given Beamish Murdoch's intense interest in the welfare of his community, it is not surprising that early in life he set his sights on a seat in the House of Assembly. What is more surprising is that the freeholders of Halifax acceded to the twenty-five-year-old Murdoch's desires the first time he offered himself as a candidate, in the election of May 1826. That struggle had an air of David and Goliath about it, as Murdoch competed against the well-established incumbents for the township of Halifax, lawyer Charles Fairbanks and respected merchant John Albro. Faced with such opponents, Murdoch managed to transform his apparent disadvantages into positive attributes. To those humbler freeholders demanding more of a voice in provincial affairs, Murdoch's lack of influential connections bespoke an independence from elite control, which his role in the recent imbroglio at St. Paul's seemed to confirm. His youth and idealism suggested that his mind would not be closed to reform, though it must be noted that Murdoch did not explicitly present himself as a "reform candidate;" such a label had little meaning until a decade later. When the polls closed, Fairbanks had 486 votes, Murdoch 391 and Albro 359. After this upset victory for Murdoch, the successful candidates were "chaired" by their supporters. Hoisted aloft in chairs "gaily and tastefully decorated by parti-coloured ribbons" and attended by large numbers of people carrying banners, they were carried first to Fairbanks' residence, where he was set down. "Mr. Murdoch was then carried through

nearly the whole town, amid the huzzas and congratulations of a large proportion of the inhabitants."¹ A heady beginning indeed to Murdoch's political career.

This early success was not to be repeated. Ousted from his seat in the notorious Brandy Election of 1830 through the efforts of the mercantile élite whom he had offended, Murdoch was to be unsuccessful in the 1836 election and again in 1840, when he ran for a Halifax County seat.² After 1835 he was no longer identified with the nascent reform movement, of which his erstwhile friend Joseph Howe became the leader. He and Howe fought on opposite sides of the electoral fence in the 1836 election, and their relationship degenerated into lengthy and rancorous epistolary battles carried on through the newspapers in the early 1840s. As Howe's star ascended, Murdoch's declined. The year 1843 marked the nadir of his political career. Although not a candidate in the election held that year, Murdoch took an active and vocal role in the public meetings at which the candidates presented their views.³ After losing one of the Halifax seats to Conservative Andrew Mitchell Uniacke in that election, Reform supporters vented their wrath on Murdoch.⁴ An effigy of him was paraded about the city

¹Novascotian, 10 May 1826.

²M. Gene Morrison, "The Brandy Election of 1830," Collections of the Nova Scotia Historical Society, 30 (1954), pp. 151-83; Brian Cuthbertson, "Place, Politics and the Brandy Election of 1830," Collections of the Royal Nova Scotia Historical Society, 41 (1982), pp. 5-19.

³Times (Halifax), 31 October, Morning Post, 9 November 1843.

⁴Reform candidates had won all four Halifax seats - two each in the county and the town - in the watershed 1836 election, and had retained them in 1840. Thus Uniacke's victory in regaining one of these seats for the Conservative cause in 1843 was bitterly resented by the Reformers.

in an offensive manner before being publicly burnt - a painful counterpoint to Murdoch's triumphal progress through the streets of Halifax seventeen years before.⁵ A study of Murdoch's descent from polestar to pariah provides an opportunity to reassess the debate over the shift to responsible government in British North America.

The origins and development of the movement for responsible government have figured among the most intensively studied topics of Nova Scotia, and indeed Canadian history.⁶ The events and forces within the British North American colonies which led up to a redefinition of their relationship with Britain, as well as the considerations within

⁵Times (Halifax), 28 November, Novascotian, 4 December 1843.

⁶A useful place to start is the bibliographical essay contained in Phillip A. Buckner, The Transition to Responsible Government: British Policy in British North America, 1815-1850 (Westport, Conn.: Greenwood Press, 1985), at pp. 341-44. More recent work includes Buckner's "Whatever happened to the British Empire?" Journal of the Canadian Historical Association 4 (1993), pp. 3-32; J. Murray Beck, Joseph Howe, 2 vols. (Kingston and Montreal: McGill-Queen's University Press, 1982-83); Paul Romney, "From the Rule of Law to Responsible Government: Ontario Political Culture and the Origins of Canadian Statism," Canadian Historical Association Historical Papers 1988, pp. 86-119, and his "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture," Law and History Review 7 (1989), pp. 121-74; Allan Greer and Ian Radforth, eds., Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada (Toronto: University of Toronto Press, 1992).

On the relationship of responsible government to legal and judicial developments in the Maritimes, see Philip Girard, "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia, 1820-1867," in Philip Girard and Jim Phillips, eds. Essays in the History of Canadian Law, vol. III, Nova Scotia (Toronto: University of Toronto Press for the Osgoode Society, 1990); "The Supreme Court of Nova Scotia, Responsible Government, and the Quest for Legitimacy, 1850-1920," Dalhousie Law Journal 17:2 (1994), pp. 430-457; "The Maritime Provinces, 1850-1939: Lawyers and Legal Institutions," Manitoba Law Journal 23 (1995), pp. 380-405; D.G. Bell, "Judicial Crisis in Post-Confederation New Brunswick," Manitoba Law Journal 20 (1991), pp. 181-95; "Maritime Legal Institutions under the Ancien Régime, 1710-1850," Manitoba Law Journal 23 (1995), pp. 103-131.

Britain itself which led to its acceptance of responsible government, have been studied in great detail. A common theme in almost all this literature is the inevitability of the transition to responsible government, which has been seen as propelled by both colonial and imperial conditions. A number of factors combined to make the achievement of responsible government irresistible: the blockage of more rapid economic development by the inefficiencies of the old representative system; the maturation of colonial populations no longer willing to accept oligarchic patterns of rule; and the desires of British officials to discontinue colonial trade preferences and yet to maintain the adherence of colonial élites to the Empire.

These factors certainly were powerful engines of change, but as Phillip Buckner has recently pointed out, "the decision to abandon the traditional model of colonial government in the colonies of settlement was neither an inevitable nor an obvious solution to the problem of maintaining Imperial control in British North America." Buckner also stresses the suppleness of the old representative system, pointing out that under it "the colonists could acquire sufficient self-government to meet their immediate needs," although he notes that this was beginning to change by the 1830s.⁷ This latter observation suggests that a rational and principled argument for maintenance of the constitutional status quo (perhaps with some reforms, but stopping short of responsible government) could still be made in the 1830s and 1840s. It will be argued that Beamish Murdoch was motivated by such views, and that they are worthy of study in their own

⁷Buckner, Transition to Responsible Government, pp. 10, 11.

right even though they did not ultimately prevail in the theatre of public opinion or political practice.

The existing literature gives short shrift to the opposition to responsible government, resorting to brevity, caricature, or simple oversight when compelled to notice it. There are a number of reasons for this. The most obvious is that the story of responsible government has been written as winners' history. In Nova Scotia the achievement of responsible government has been equated, not without reason, with the biography of Joseph Howe, and the views of all contemporary political actors tend to be refracted through his lens. Howe remains an appealing figure in many ways, whose flaws seem only to render him more human. His opponents, by contrast, appear limp, passé, and selfish - especially through the vivid, and often vicious, pen-portraits sketched of them by Howe himself. With few exceptions, modern literature has tended to accept Howe's characterization of his opponents at face value, and not to analyze seriously their ideas.⁸

The nature of the sources is another factor which has rendered difficult any analysis of the ideas of Howe's opponents. The documentary basis for Howe scholars presents an embarrassment of riches: a large collection of personal papers, a very personal travelogue (his Western and Eastern Rambles), official correspondence relating to Howe's various government posts, accounts of his contributions to Assembly debates -

⁸For a sympathetic exploration of the political ideas of the Conservative leader James W. Johnston, see David A. Sutherland, "James W. Johnston and the Metamorphosis of Nova Scotian Conservatism," (M.A. thesis, Dalhousie University, 1967). This pioneering effort has had few imitators.

not to mention his own newspaper. Beamish Murdoch left very few personal papers, and this study must rely mainly on newspapers and on his Epitome of the Laws of Nova-Scotia. With few sources to illuminate the inner Murdoch, his political ideas must appear in an abstract fashion which contrasts unfavourably with the more vivid context in which Howe's views can be presented.

The lack of interest in the opposition to responsible government is part of a larger problem within Maritime historical scholarship, namely the failure to take ideas, including political ideas and ideologies, seriously.⁹ Self-interest is often assumed to be the only mainspring of human motivation in Maritime society, and historians of the Maritimes have usually dismissed any reference by historical actors to their own ideological motivations as a mere screen for self-interest. A healthy skepticism is necessary to all historical inquiry, but a pervasive cynicism risks creating a kind of historical reductionism which diminishes our understanding of the past in its full complexity.

This chapter will argue that Beamish Murdoch's break with Howe and the Reform movement can only be understood in connection with his ideas about British and Nova Scotian constitutional law, which drew heavily on the Country tradition in British political thought. His own self-interest had little effect on his political views. Murdoch could

⁹Gregory Marquis, "In Defence of Liberty: 17th Century England and 19th Century Maritime Political Culture," University of New Brunswick Law Journal 42 (1993) pp. 69-94, especially at pp. 72-3. This observation is not unique to Maritime historiography: see A.B. McKillop, "So little on the mind," Transactions of the Royal Society of Canada, ser. IV, vol. 19 (1981), pp. 183-200. It remains the case that there is no detailed account of the ideological orientation of the Upper Canadian rebels of 1837, although a beginning has been made in Colin Read, The Rising in Western Upper Canada, 1837-38: The Duncombe Revolt and After (Toronto: University of Toronto Press, 1982).

expect little in the way of patronage from the Conservatives if they succeeded in stopping the movement for responsible government, while he stood possibly to gain some kind of office if the Reformers came to power. Reformers were puzzled by Murdoch's behaviour precisely because his public statements and political behaviour seemed to be at odds with his self-interest. If he had only remained loyal to Howe, he might well have secured a place on the Supreme Court in the 1850s. Instead, Murdoch remained a steadfast exponent of traditional British ideas about the mixed and balanced constitution, and the necessity of independent thought and action rather than submission to party as the best way of serving the public good.

The mixed and balanced constitution

Standard eighteenth century ideas about the British constitution, familiar also in the pre-revolutionary American colonies, were based on the classic tension between power and liberty, and the necessity for political and constitutional theory to address this fundamental premise.¹⁰ "Power," said aspiring Assemblyman Jotham Blanchard to the

¹⁰Gordon S. Wood, The Creation of the American Republic, 1776-1787 (New York: Norton, 1972), pp. 18-28. These ideas have also been thoroughly explored by Bernard Bailyn, The Ideological Origins of the American Revolution, enl. ed. (Cambridge, Mass.: Belknap Press, 1992), and J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (Princeton: Princeton University Press, 1975). In the Canadian context, see Gordon T. Stewart, The Origins of Canadian Politics: A Comparative Approach (Vancouver: University of British Columbia Press, 1986). One of the few attempts to look at these ideas in the Maritime context can be found in Donald Desserud, "Nova Scotia and the American Revolution: A Study of Neutrality and Moderation in the Eighteenth Century," in Margaret Conrad, ed. Making Adjustments: Change and Continuity in Planter Nova Scotia, 1759-1800 (Fredericton: Acadiensis Press, 1991), especially at pp. 105-112.

electors in 1830, has "a natural propensity . . . to fortify and enlarge itself - and hence arises all kinds of encroachments."¹¹ To prevent these possible encroachments, the British constitution had evolved a series of checks. The glory of the British constitution was that it was both **mixed** and **balanced**. It represented the three principal orders of society, monarch, aristocracy and commonalty ("mixed") in such a way as to create checks on the powers of each ("balanced"). The balance among the One, the Few and the Many was crucial to ensure the optimal amount of liberty consistent with peace, order and security of property. If any of the three orders engrossed more than its just share of power, disaster in the form of tyranny (royal excess), oligarchy (aristocratic excess) or anarchy (democratic excess) was sure to result.

Within this set of ideas, different emphases were possible. In eighteenth century England, two schools of thought existed, which have generally been referred to as Court and Country. Country ideology stressed the independence of members of Parliament, and frowned on the acceptance by them of any office or emolument in the gift of the crown. Possessed of sufficient income from landed property to afford them the leisure needed to deliberate over national affairs, Country members were to keep an anxious watch on the measures proposed by the ministers of the crown, lest they trench on the liberties of the people. The Court party was more centralist, more supportive of the crown's efforts to manage Parliament in the interests of effective government, and less concerned about the effects of crown patronage. As the British state became ever more powerful during the eighteenth century Country ideology declined in actual influence, but it retained a certain

¹¹Novascotian, 15 September 1830.

rhetorical vigour well into the nineteenth century. In the thirteen colonies it took on a new lease on life, and is recognized as a principal strand in the ideological origins of the American Revolution.¹²

Constantly exposed to these ideas during his apprenticeship and through his reading, Murdoch expressed them in public fora using nautical and architectural metaphors. The rights of the people, he explained, "were never safer than when the rights of the Crown, and of the aristocracy were also respected, -- and produced a balance to the influence of the Commons. If all were reduced to the same body, the vessel of the State might get a . . . lurch, as might a ship at sea" In the same campaign speech, he noted that the "strongest form of building was that of the pyramid, having a broad base, and narrowing as it increased in height." Thus the British constitution, "consisting of a King or Queen, a House of Lords, and a Commons, gave an apt illustration in politics." Lawyers, he thought, had a particular role to play in maintaining the constitution: "they were not disposed to sacrifice the balance of power that their wise Saxon ancestors had established."¹³

These constitutional nostrums were of course highly idealized representations of political practice in Britain itself. The checks and balances so important to constitutional theory hardly operated there, and if they had operated with their full rigour, it is difficult to see how government could have been carried on. The eighteenth century political system functioned reasonably well in Britain because the ministers of the Crown were able

¹²Bailyn, Ideological Origins.

¹³Novascotian, 29 October 1840.

to secure a parliamentary majority for their measures through the techniques of "Old Corruption." Rotten boroughs, the vast patronage at the disposal of the crown, and outright bribery were all means of ensuring the support of theoretically independent MPs. Awareness of these practices in the old colonies caused a tide of indignation which assisted in the delegitimation of British rule, as American colonists feared that their governors were replicating corrupt British practices in their own bailiwicks.¹⁴

In fact colonial governors seldom posed a serious threat to the polity on this side of the Atlantic. With few exceptions, neither in the thirteen colonies before the revolution nor in the loyal colonies thereafter did the governors possess sufficient power or patronage to manage the assemblies through favouring loyal members. Ironically, the balance so beloved of constitutional commentators was more present in America than in Britain itself, with the result that governmental impasse was often reached on this side of the Atlantic. The governors' power was essentially negative - that of refusing assent to legislation passed by the popular branch. They had no power to create and implement a governmental program, whether for economic development, education, or any other end. In both the old colonies and the new, the weakness rather than the strength of the executive power would give rise to problems of effective governance.¹⁵

¹⁴Wood, American Republic, pp. 145-6; Bailyn, Ideological Origins, pp. 122-30.

¹⁵Buckner, Transition to Responsible Government, pp. 50-57. Stewart's argument in The Origins of Canadian Politics that the 1790-1850 period saw the entrenchment of a state-oriented "Court" approach to government and politics which the Reformers simply continued in a new guise, cannot be sustained. He confuses the reach with the grasp of the old regime, the use of patronage to create a loyal class of officials with its usage to control the Assembly and manage a legislative program. The former was attempted in all the British North American colonies on a wide scale, the latter was not. Stewart's

The American Revolution posed a major challenge to the concept of the balanced constitution. After much soul-searching the revolutionaries had come to the conclusion that there was no social element in the new states which corresponded to the House of Lords. A new focus on popular sovereignty emerged to replace the concept of monarchical sovereignty, and suggested that all power flowed from a unitary people. This approach created new difficulties with regard to the cardinal necessity of checking excesses of power, but eventually the notion of separation of powers came to play in the United States roughly the role that a separation of orders had played in British constitutional theory.

Neither those pressing for responsible government in the British North American colonies, nor their opponents, were enamoured of the politico-constitutional model presented by the republic to the south. Both groups were committed to a monarchical society, and both felt that the American constitution had become unbalanced and excessively democratic. By 1825 all but three states recognized adult white male suffrage, but British North Americans still insisted on a property qualification, however small, as a prerequisite to political representation. Reformers and Conservatives both believed that property and wealth deserved some form of political recognition, though they disagreed about the exact means of achieving that end. Neither group believed that the elective

emphasis on the essential continuity in Canadian politics pre- and post-1850 is contradicted by much of his own evidence, which vividly illustrates the impotence of the executive branch before the achievement of responsible government. Cf. Allan Greer and Ian Radforth, eds., Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada (Toronto: University of Toronto Press, 1992), and Bell, "Maritime Legal Institutions," pp. 117-121, 129-130.

principle, and thus the popular element, should govern appointment to all important offices. After a brief flirtation with the concept of an elective legislative council in 1836, the Reformers dropped the idea, which did not resurface until the 1850s (this time in the hands of the Conservatives). Nor were calls for an elected judiciary made, though occasional petitions for elected justices of the peace can be found.

If the Reformers and their opponents were largely agreed on the role of the Many in the constitution, they disagreed over the roles of the One and the Few. Beamish Murdoch and others bitterly resisted the Reformers' views on two major issues: that heads of government departments should sit in the Assembly, and that patronage should be dispensed according to the wishes of the party with a majority in the Assembly. Taken together, these practices would reduce the crown's role in the province to that of a spectre, and would concentrate power in the hands of a small executive accountable for its actions only once every four years. This was a truly alarming prospect for those steeped in traditional constitutional lore. "If such a system were in vogue," opined the editor of the Times, we ought to have annual parliaments -- but even that would be an inefficient remedy for the corruptible practices that would be resorted to, in order to retain office and emolument."¹⁶

For Murdoch, the retention by the governor of some scope for independent action was necessary to check the possibility of overreaching on the part of the Assembly, and the existence of some tension between crown and people was inevitable but healthy. It was understood that the governor was always to strive for harmonious relations with the

¹⁶15 March 1842.

Assembly, and would normally take into account its wishes in the distribution of patronage and the enactment of important measures. In general, thought Murdoch, the crown had exercised its power wisely in the province. The people of Nova Scotia had acquired "by the concessions of the crown, a fair and legitimate share of power -- commensurate at least with the progress of wealth and population," and fortunately this had occurred "without the convulsions which took place among our ancestors in Europe."¹⁷ They shared in the benefits of 1688 without having to depose a king. In the end, though, it was imperative for the governor to retain some independence, even if it were seldom exercised. What was required was "a fair responsibility -- that which shall not prejudice the Royal prerogative, nor give it dangerous privileges."¹⁸

To the Reformers' argument that they only wished to implement in Nova Scotia constitutional innovations which had already occurred in Britain, their opponents replied that whatever the effect of Cabinet government in Britain, it was not suited to Nova Scotia. The colony had relatively limited resources and a small population, and the leadership class was correspondingly small. Responsibility on the Howe model would allow a small group to dominate provincial politics and through its control of patronage to entrench itself in power indefinitely. It was still necessary for the crown to exert some independent influence in provincial affairs in order to exercise a countervailing influence to the democratic branch and to assist in the preservation of the British connection, even

¹⁷Epitome, i, p. 58.

¹⁸Times (Halifax), 15 March 1842.

if the crown was becoming less of an active agent of the constitution in Britain itself since the passage of the first Reform Bill and the accession of Queen Victoria.¹⁹

The role of the Legislative Council was also conceived by the opponents of Reform in terms of the mixed and balanced constitution. In terms that the anti-Howites would have approved, Lord Stanley stated as late as 1845 that the Legislative Council was supposed "to arbitrate between the opposite tendencies of the Monarchical and the Democratic Branches of the Constitution, and when necessary, to control and harmonize both."²⁰ The Legislative Council had been created in 1838, along with a separate Executive Council, out of the old Council of Twelve, which had come under increasing criticism for its combination of legislative, executive and judicial roles. Its members comprised the principal office holders of the colony, plus some of the most important merchants. Service on the council was unpaid, but since its members held "the best situations in the colony, and as the rank of counsellors gives them influence and precedence, and the title of honorable, it has not been found necessary to give pay for their legislative attendance."²¹ This description of the council quickly became out of

¹⁹These arguments were detailed by J.W. Johnston in two documents drafted in January 1847; Murdoch would undoubtedly have agreed with the substance of both. See Memorandum of Executive Council to Lieutenant-Governor Harvey, 28 January 1847, Journals and Proceedings of the House of Assembly of the Province of Nova Scotia, 1847, app. 16, pp. 73-81; memorandum of Executive Council to Harvey for submission to Earl Grey, 30 January 1847, RG 1, vol. 119, pp. 74-80.

²⁰Stanley to Falkland, 20 August 1845, Journals and Proceedings of the Legislative Council of the Province of Nova Scotia, 1846, app. 1.

²¹Epitome, i, p. 63. On the Legislative Council generally during this period, see J. Murray Beck, The Government of Nova Scotia (Toronto: University of Toronto Press, 1957), pp. 100-105.

date after 1830, when a despatch from London ordained that neither salaried officials nor puisne judges were to be appointed in future; by 1840 the Legislative Council would be composed mainly of merchants.²²

After Howe and his brethren abandoned their flirtation with an elective council, they did not propose any major change to the mandate of the Legislative Council. It would still serve as an upper house which could initiate legislation or, more usually, scrutinize, reject or suggest amendments to bills passed by the Assembly. The change envisaged by the Reformers related to the appointment process. Although the Council's members would continue to be appointed, it would be brought within the principle of responsibility because future appointments would be made by the governor only on the advice of the party with a majority in the Assembly. Over time a majority of the Council would come from the same political party as that found in the Assembly, and they would work in harness. In essence, this change would render the Legislative Council an extension of the Assembly rather than an independent branch of the legislature.

Howe's opponents were disturbed by what they saw as the emasculation of the upper chamber. Under the responsible model, the Legislative Council could not operate as the constitutional equivalent of its ostensible icon, the House of Lords, which acted as the bulwark of wealth against potential radicalism in the Commons. The roles of the One and the Few would virtually disappear under the responsible dispensation, and all would

²²Viscount Goderich to Lieutenant-Governor Peregrine Maitland, 7 December 1830, reproduced in Frederick Madden, ed. Imperial Reconstruction, 1763-1840. The Evolution of Alternative Systems of Colonial Government (New York: Greenwood Press, 1987), p. 588.

be at the mercy of the Many. Yet it was not clear that the existing system was very satisfactory either. By the 1840s even opponents of the responsible model seemed to agree that there did "not appear to be materials in the country to make [the Legislative Council] an independent branch of Legislature [,] . . . for many of its members are as unable to attend their duties without being paid as Members of Assembly."²³ Without sufficient men of means and leisure, the Legislative Council could never truly replicate the House of Lords.

Faced with this difficulty, the opponents of responsibility first tried to articulate a defence of the propertied class and to place members in the Assembly who would uphold its legitimate interests. Later, in the 1850s, they advocated (albeit briefly) an elected Legislative Council. This second strategy need not concern us beyond noting that it was a logical response to the fear of turning Legislative Councillors into partisan placemen. If voters returned majorities of the same party to each body, the result might not be that different from the responsible system, but voters would not necessarily do so. The interaction of two elected bodies might well restore some of that balance of interests which was allegedly missing from the Howe constitutional model.

Beamish Murdoch was very much part of the first strategy. When he stood for a seat in the Assembly in 1836 and 1840, he emphasized that if the provincial economy were to flourish, the mercantile interest of Halifax would have to be well represented. Halifax produced nine-tenths of the provincial revenue, yet nine-tenths was expended in

²³Times (Halifax), 1 February 1842. The Colonial Office constantly rebuffed pleas to pay the councillors for their attendance, and it was not until 1854 that they were paid.

the rest of Nova Scotia. "A large growing town like Halifax [needed] a larger share of the representation . . . [and] the want of it caused the collision that now existed."²⁴ For Murdoch, Halifax merchants were the engine of provincial prosperity, and Nova Scotia risked ignoring their interests at its peril. How, it might be asked, did Murdoch come to speak for the mercantile section of the community when that very group had engineered his defeat in the election of 1830? A number of explanations have been suggested by historians, all of them relating to self-interest.²⁵ Another explanation is possible, given Murdoch's constitutional ideas. In order to explore this avenue, the circumstances surrounding his break with Howe in 1835 must be examined, and this in turn requires an understanding of the importance of "independence" in Murdoch's political lexicon.

"Independence" and the break with Howe

In March 1835 Joseph Howe was tried for seditious libel for publishing an article in his newspaper imputing corrupt behaviour to some of the magistrates of Halifax. When

²⁴Novascotian, 29 October 1840.

²⁵Beck, Joseph Howe, i, pp. 240-42 suggests that Murdoch was one of a group of élite lawyers who felt their positions threatened by the emergence of the reform movement. B.C. Cuthbertson, Johnny Bluenose at the Polls: Epic Nova Scotia Election Battles 1758-1848 (Halifax: Formac, 1994), although generally sympathetic to Murdoch, suggests at p. 92 that his politics were "no doubt influenced by the needs of his legal practice and having such clients as Enos Collins." While it is true that by the 1840s Murdoch's clientele came less from the artisanal classes and more from those solidly ensconced in the middle class, he never represented the higher echelons of the Halifax merchants to any significant degree. Enos Collins appears as a client in Murdoch's account books for the first time in 1839, and a few times over the 1840s, but always for relatively small matters. Murdoch held no retainer from Collins, and charged him no fees higher than £10 in any year until 1847, when Collins paid ten guineas to have his will drafted; MG 3, vol. 1836a, file 2.

all the lawyers he consulted told him he had no case, he resolved to act on his own behalf and was acquitted.²⁶ Although Beamish Murdoch did not represent Howe formally, he acted informally on Howe's behalf at the trial. After Howe's rambling six-hour address to the jury, Chief Justice Halliburton wished to adjourn for the day. Murdoch remonstrated with him that this would seriously prejudice Howe, as he had abridged his defence in order that the matter could be dealt with in one day.²⁷ Later, when a group of expatriate Haligonians in New York wished to congratulate Howe on his victory by presenting him with a silver pitcher, Beamish Murdoch was chosen by them as one of the members of the presentation committee, a trust which he "cheerfully accepted."²⁸

Yet when one of the Halifax seats was vacated in 1835 after the promotion of Charles Rufus Fairbanks to the bench, leading to an autumn by-election, Murdoch declined to offer. He refused even after Howe sought him out and declared that he (Murdoch) had a prior claim on the Reformers to any other candidate, having suffered so

²⁶The classic account of the trial is J. Murray Beck, "'A Fool for a Client': The Trial of Joseph Howe," *Acadiensis* 3:2 (spring 1974), pp. 28-44, later revised as chapter 9 of *Joseph Howe*, I. It should now be read along with Barry Cahill, "R. v. Howe for Seditious Libel: A Tale of Twelve Magistrates," in F. Murray Greenwood and Barry Wright, eds. *Canadian State Trials, vol. I. Law, Politics, and Security Measures, 1608-1837* (Toronto: University of Toronto Press, 1996), which complements and in some cases corrects Beck's account.

²⁷The jurors were polled and wished to continue, but in view of the difficulty of keeping order in the court the trial was finally adjourned until the next day; *Novascotian*, 12 March 1835.

²⁸*Times*, 2 June 1835.

much in 1830 in defence of popular rights.²⁹ Had Murdoch presented himself as a candidate with Howe's blessing, he would very likely have found himself a representative for Halifax once again. Why did he not avail himself of this opportunity to return to the Assembly in connection with a cause with which he was apparently in such sympathy? Why did he oppose Reform on the hustings in the general elections of both 1836 and 1840? Answering these questions requires understanding how Murdoch conceived of the role of independent statesmen within the British constitution.

It has been remarked that "the most popular word in the vocabulary of colonial legislators was the term 'independent',"³⁰ and the role of independence in English Country ideology has already been noted. Not only were members of Parliament ideally independent of the crown, but they were required to be independent of each other. Within this worldview, any campaign aimed at creating a group who would collectively propose or defeat particular measures was considered illicit. Most of the nouns describing collective action had a pejorative connotation: faction, cabal, combination, conspiracy. Such independent members "did not see themselves as the nucleus of an alternative government."³¹ Rather, they celebrated and defended their right and duty to scrutinize each legislative measure unencumbered by previous political commitments.

²⁹Times (Halifax), 8 December 1840. Murdoch recounted this visit and Howe's statement in a letter to the editor, and Howe did not seek to refute it in a reply in the Novascotian, 10 December 1840, so it seems that Murdoch's statement is accurate. There appears to be no contemporary newspaper account of this occurrence.

³⁰Buckner, Responsible Government, p. 70.

³¹Ibid.

In the British North American colonies this version of Country ideology remained the dominant conception of the Assemblyman's role until the mid-1830s. A perusal of the notices of candidates and their nomination speeches in any Nova Scotia election before that of 1836 will show that candidates appealed primarily to their reputation for independence.³² Even after Reform candidates began to make public their proposals for specific changes, Beamish Murdoch continued to rely on his "past conduct in public and private [as] the best criterion of [his] principles."³³ He insisted that his decision to come forward in 1836 was his own "spontaneous act," done "without the knowledge or concurrence of any party in the town of Halifax."³⁴ In 1840 he again relied primarily on his personal qualities, pointing out that he had "no influence except any that his talents and character might have earned," although he did put himself forward in a very general way as an advocate of proper representation for the mercantile class of Halifax. Even this step he justified in Country terms. The exclusion of the mercantile element from the Assembly was wrong because the "principle of the British Constitution was not that any party should so triumph as to be the sole governors of the land. There ought to be a healthy opposition." He did not mean by this an opposition party, but opposition

³²E.g., the candidates' speeches made during the election campaign of 1830: Novascotian, 15 September 1830. Stewart's statement in The Origins of Canadian Politics, p. 92 that Country ideology "was only a fringe phenomenon in the Canadian colonies" is not accurate for the pre-1850 period, whatever its truth over the long term may be.

³³Novascotian, 17 November 1836.

³⁴Novascotian, 7 December 1836.

"directed against extravagance; because parties in power, whatever were the principles by which they obtained it, required controul."³⁵

Murdoch did not give any credit to the institutionalized opposition which emerged with party government. Where there were disagreements about government policies, Murdoch believed that the best way to resolve them was through an ongoing and sustained dialogue. Once the merits and demerits of particular measures had been fully aired, the appropriate solution would reveal itself. Throughout the period of agitation for responsible government, Murdoch continued to believe in a unitary public good ascertainable through the exercise of reason. He disliked the American system because politics functioned as a marketplace where narrow sectional interests made deals and trade-offs which might be against the public interest. Responsible government he opposed because, in his view, it provided for no effective opposition or dialogue. Murdoch's ideal government would have been a ministry of all the talents where men of different views and backgrounds (not different parties) could debate measures of public utility.³⁶ Such an ideal was not unattainable: Lord Falkland's coalition ministry had worked through a remarkable agenda of legislative reform between 1841 and 1843. Although Murdoch was publicly critical of the partisan basis of this "mongrel government," it nevertheless showed what could be done. It soon became obvious, however, that the Reformers would not

³⁵Novascotian, 29 October 1840.

³⁶David Sutherland has noted a similar predilection on the part of J.W. Johnston: "James W. Johnston," p. 185.

countenance the lieutenant-governor's power to control the makeup of the executive council, and further coalitions became a political impossibility.

It was Murdoch's intense opposition to party government, which was the corollary of his commitment to the ideal of independent political representation, that prevented him from subscribing to the Reform cause. He agreed with some of the changes which Howe sought, but could never sacrifice his independence of judgment to join a party of whatever stripe. If Murdoch eventually came to be labelled as a Conservative, it was because provincial politics by the 1840s did not permit loose fish any more: if one was not with Reform, one was against it, and therefore a Conservative. In Murdoch's own mind, he was still independent, and those who had asked him to come forward in 1840 stated "that no political pledges were required" of him.³⁷ Murdoch's withdrawal from the formal arena of provincial politics after 1840 may be attributed to simple discouragement after a decade of rejection, but he may also have felt that he no longer had any useful role to play in the new era of party politics.³⁸ He was able to serve the public once again in a different forum in the 1850s, when he acceded to the recordership of the city of Halifax. Although city politics had their partisan aspect, there was more scope for independence in the municipal arena, which Murdoch found congenial.

Murdoch's break with Howe and his failure to support the Reform cause after 1835 have not been well received by posterity. These actions, it is said, betrayed his

³⁷Novascotian, 29 October 1840.

³⁸Murdoch was publicly encouraged to run in the city by-election which was made necessary by the death of Thomas Forrester in the fall of 1841, but did not take up the offer; Times (Halifax), 30 November 1841.

earlier commitment to the fearless defence of popular rights. This judgment is misconceived. As stated earlier, Murdoch's break with Howe was not a result of his being diametrically opposed to every line of the Reform manifesto. The two agreed on a number of issues, including the central tenet that a government which had lost the confidence of the House should resign. In the best Country traditions, Murdoch was opposed to the fact of a manifesto, and to the necessity of deferring to a party leader in case of a difference of opinion. Murdoch summed up his views on Howe as follows: "I will not pin my faith to his sleeve, I will exercise my own opinion."³⁹ Where the two disagreed, it was because Murdoch remained true to his Country principles, not because he abandoned them.

There were several principal areas of friction between Howe and Murdoch. Murdoch genuinely feared the personality cult which grew up quickly around Howe after the libel trial. He knew that someone with Howe's gifts for oratory and journalism could quickly attract considerable political support. On principle Murdoch feared the creation of large political blocs, which he still viewed with eighteenth-century lenses. It also became apparent early on that Howe would attempt to mobilize these blocs and have them put forward candidates subscribing to their views. Through the summer and fall of 1835 Howe outlined his ideas for electoral reform in the pages of the Novascotian, which J.M. Beck has summarized as follows: "instead of letting half-a-dozen [élite] candidates . . . throw themselves upon the constituency at the last moment, the freeholders should assemble well in advance of the elections, choose suitable candidates, and indicate to them

³⁹Novascotian, 12 November 1840.

that they had been chosen because of their principles and would be replaced if these were deserted."⁴⁰

Howe's views are so much in accord with modern views of how party candidates should be selected, that it is difficult to appreciate how heretical they seemed to people, like Murdoch, steeped in Country ideas about independence. When Howe approached Murdoch in the fall of 1835 about running in the by-election under the Reform banner, Murdoch could not have acceded to such a request even if he had agreed completely with the Reform platform. Such a commitment would have been totally inconsistent with his views on the very nature of politics. Murdoch's refusal to pledge himself to particular causes can be seen again in the general election of 1836. The town meeting called to nominate candidates was the first to require pledges of candidates to support particular reforms if elected -- in this case, abolition of judges' fees -- and it resolved that "those candidates who will not make these pledges . . . shall not have the voice, interest and support, of this meeting."⁴¹ Aware no doubt of the way matters would unfold, Murdoch did not attend the meeting and simply issued his election card a week later.⁴²

Murdoch did not turn against popular rights in 1836, as was charged by some at the time and has been assumed since. He acted consistently with his views on the

⁴⁰Joseph Howe, i, p. 149.

⁴¹Novascotian, 17 November 1836.

⁴²At least, there is no record of Murdoch speaking at the meeting in the extensive report of its proceedings contained in the Novascotian, 17 November 1836. If Murdoch had wished merely to oppose the substance of the resolutions, he would have attended the meeting and spoken against them. He objected to being put in the position of having to make a pledge, regardless of its content.

balanced constitution and the need for independent judgment. These views obliged him to exert himself against what he saw as threats to the constitution, whether they proceeded from the crown, the aristocratic interest, or the popular interest. When a member of the Assembly in the 1820s, Murdoch perceived the main threats to be to the popular interest, especially the attempt by the crown to recommence collection of the long-dormant quitrents. During the 1830 election it was the pretensions of the upper branch which he opposed, and he drafted the resolutions critical of the Council which were adopted by the Assembly, bringing to a head the "Brandy Dispute." With the appearance of new notions of party government and popular responsibility in the mid-1830s, a different threat arose. Murdoch was alarmed by what he saw as an attempt to alter permanently the shape of the constitution by essentially dispensing with the crown and the upper branch as independent interests. Implementation of the full system of responsibility would not ultimately be in the popular interest, in Murdoch's view, because a small executive would be able to manipulate the Assembly and the people through its complete control over patronage. These anxieties may seem paranoid today, but they were an important strand of Country ideology and shared by many throughout British North America. Murdoch saw confirmation of his fears in the acceptance by Howe in 1840 of a position on the Executive Council while remaining a member of the Assembly; even worse was his acceptance of the office of speaker while remaining a member of the Executive Council. For Murdoch, the simultaneous holding of these two positions created a potential conflict

of interest whereby Howe might be obliged to support measures detrimental to the people in order to please the lieutenant-governor or the secretary for the colonies.⁴³

It was perhaps their differing conceptions of government office that most separated Howe and Murdoch. Murdoch accepted the traditional view of government office as a species of property, held normally for life unless gross corruption or startling incompetency could be proved. Such offices should be bestowed only on those who could demonstrate superior talents and education or long service and loyalty to their country. Country ideology demanded that office and government be kept separate, lest the former become the plaything of the latter. Officials typically hired deputies to perform the more routine aspects of their work, and provided very little supervision or active direction. The main form of accountability for such officers was financial rather than political; they normally had to supply a bond or sureties for their good behaviour.

In fact, while the old regime was not entirely devoid of meritocratic tendencies, nepotism was pervasive and government offices were widely seen as being the preserve of a small and tightly inter-related official coterie. Trumpeting the call of "careers open to talents," Howe argued that the tenure of government officers had to be precarious. New administrations had to have the power to replace officials, and thereby open up the civil service to a wider range of applicants and provide rewards for political supporters. In addition, uniting office and government would provide better opportunities for checking and directing their activities. A sterling example of the need for better accountability was presented to the Reformers in 1845, when it was revealed that the provincial Treasurer,

⁴³Novascotian, 12 November 1840.

Charles Hill Wallace, had been suspended from office as a result of suspected embezzlement. He was found to owe the province some £5000.⁴⁴ It is not known how Murdoch responded to this incident, but it is likely that he would have argued for tightening existing modes of supervision rather than adopting Howe's conception of office. He might also have pointed out that Wallace or his sureties did make good the losses. Murdoch's defence of the traditional conception of government office may have been naive, but it was honest, and his critique of the new order was solidly based on his firmly held constitutional views.

Another charge levelled at Murdoch by posterity is that he was just another of the lawyers who flirted with the cause of reform only to scuttle back to the safety of conformity when opportunities for advancement appeared. With some justice, Simon Bradstreet Robie, S.G.W. Archibald, Alexander Stewart and Thomas Chandler Haliburton have all been consigned to this category. If historians have been cynical about the gap between the professed independence of these men and their subsequent actions, it is a cynicism which reflects that of contemporaries. These examples present clear evidence that personal advancement was more important than ideas in explaining conduct in some cases - though it should be noted that even Country ideology did not prevent an "independent" member from ultimately accepting a government post such as a judgeship as a reward for long public service. Robie and Archibald may be seen as belonging to

⁴⁴Dan Bunbury, "Scandal and Reform: The Treasurer's Office in Nova Scotia, 1845-60," Nova Scotia Historical Review 15:2 (1995), pp. 43-71.

this category, while Stewart and Haliburton may be more legitimately charged with paying mere lip service to the popular cause while remaining dyed-in-the-wool Tories.

The obvious contrast between Murdoch and these four men is that they all received lucrative judicial posts and he did not: three became Masters of the Rolls, while Haliburton inherited his father's place on the Inferior Court of Common Pleas and acceded to a Supreme Court judgeship when the lower court was abolished. It should also be noted that Murdoch (unlike most lawyers) was opposed from the outset to the expansion of the Inferior Court of Common Pleas in 1824, and proposed its abolition in 1829. The closest Murdoch ever came to a judgeship was being named Recorder of the city of Halifax, but that office was in the gift of city council, not the provincial government. Murdoch refused to pledge his faith to Reform just at the time when it might have been able to reward him. This should speak to his commitment to principle rather than personal advancement.

It is true that in the late 1830s the ultimate success of a Reform party government was not totally assured, and that as late as the end of 1843 Murdoch was predicting that "the Party Government cannot stand."⁴⁵ It is possible that Murdoch calculated that his only chance for preferment lay with the Conservatives, and that he fully expected them to triumph in the end. But this seems highly unlikely. As of 1835-1836 Murdoch was associated with the defence of popular interests, and not with the official party. Even after the elections of 1836 and 1840, he was still seen as possible Reform material. After his 1840 defeat the Acadian Recorder was of the view that he would have been solicited

⁴⁵Halifax Morning Post, 9 November 1843.

again by Reform if he had not come forward in association with the Conservatives.⁴⁶ In 1843, after their extremely acrimonious public battles, Howe could still say that Murdoch had "tried to make himself a tory . . . [but] in this attempt he had not been successful yet."⁴⁷ Murdoch had none of the connections of wealth or family which might have endeared him to the Conservatives, and he could not have expected much in the way of reward had he succeeded at the polls. When the Conservatives were in power under J.W. Johnston in 1843-48 and 1857-60, Murdoch received no offices or honours. It was the coalition ministry under Lord Falkland that saw him appointed to the newly-created Central Board of Education in 1841, and it was the Howe government which finally conferred the honour of Queen's Counsel on Murdoch on May Day 1863, just weeks before its crushing defeat at the polls. Not much is known about Murdoch's relations with the Conservatives in the 1850s, but it is possible that he became estranged even from them as they became a disciplined political party on the Reform (now Liberal) model. If Murdoch ran more or less under the Conservative banner in 1840, it was only because they had not demanded any ironclad commitment from him, which allowed him to be true to his principles.

Beamish Murdoch, Country Ideology and Responsible Government

W.S. MacNutt noted many years ago that party government "required a sacrifice of independence, a devotion to the leadership of a single individual, a concentration of

⁴⁶14 November 1840.

⁴⁷Halifax Morning Post, 9 November 1843.

authority, which were alien to political experience in the Atlantic Provinces."⁴⁸ Historians have seldom taken these concerns seriously, and have regarded the opposition to responsible government as based on an unthinking and self-interested defence of the status quo. There were a number of strands within the opposition to responsible government, some of which were certainly based principally on self-interest, but this review of Murdoch's political career has attempted to show that there was a principled opposition as well. Even if this much is conceded, it is legitimate to ask what relevance these principles had in the Nova Scotian environment of the 1830s and 40s? Did Murdoch stubbornly adhere to views which no longer had anything to offer contemporaries in their search for more effective government?

In retrospect, Murdoch's concern over a lack of accountability, though valid in some respects, was too much focused on the formal mechanics of government and not enough on informal mechanisms. He thought that government by majority would mean government without an opposition, which he saw as the ultimate threat to liberty and property. In this his fears were those of the lawyer rather than the social scientist. The fact that a government has the power to pass a particular measure does not mean that it will necessarily do so in the face of strong public opposition. In spite of his own extensive involvement with journalism, Murdoch does not seem to have given much credit to the power of public opinion as manifested through the press.

⁴⁸The Atlantic Provinces: The Emergence of Colonial Society, 1712-1857 (Toronto: McLelland & Stewart, 1965), p. 222.

Nor did Murdoch have a satisfactory solution for the problems posed by the ancien régime's proprietorial concept of office, which entailed problems of both accountability and access. The Charles Hill Wallace affair had shown that bonds and sureties were not effective tools for the ongoing supervision of government business. The old concept of office provided little opportunity for the active direction of incumbents. It was adequate for a slow-moving society where policy-makers faced few challenges, but not for one where change was continuous. Here Murdoch's fears blinded him to the potential for positive change. With regard to access to office, it is unclear how Murdoch thought men of talent outside the official cliques could ever be appointed, given the relative paucity of offices and their tendency to heritability. In his Epitome he expressed the view that "offices are held at the pleasure of the crown, or are otherwise regulated by acts of assembly, so that an office seems not to be a hereditament [i.e., not inheritable] in Nova Scotia," but this formal statement of law ignored the frequent bestowal by government of a father's office on his son at the former's demise.⁴⁹

Some of Murdoch's concerns were justified, especially his fears about unaccountability where a small executive commanding a majority in the legislature wielded power in a party system. Recent scholarship has noted that while responsible government did provide a mechanism for the orderly transfer of power between groups with different visions of the public good, it provided few formal restraints on the party which achieved power. One scholar has concluded that responsible government has given Canadians the worst of both worlds, a political order lacking "both British self-restraint

⁴⁹Epitome, ii, p. 63.

and American institutional checks."⁵⁰ Indeed, over-concentration of power in the hands of the executive is still identified as a central problem with Canadian political structures today, even after the adoption of an entrenched Charter of Rights which imposes some restraints on government action.⁵¹ As an example of the legitimacy of Murdoch's concern, it is interesting to contrast the extraordinary public debt which the government of Nova Scotia was prepared to assume in the 1850s, with the situation south of the border, where constitutional amendments in a number of states in the 1840s ordained strict limits on public borrowing. Under the old order in Nova Scotia, it is highly unlikely that the Assembly would have authorized borrowing on such a scale. Under party government, however, there was no real check once the proponents of a public railway gained the upper hand. The best example of this problem was the refusal of the government to call an election on the issue of Confederation in 1866-67, an election it well knew it would lose.

The example of the railway points out another problem with Murdoch's approach to politics in the rapidly changing environment at mid-century. Technological advances and political change within Britain meant that decisions about economic policy were more complex than in the past. Under the old model of politics, where every member might

⁵⁰Paul Romney, "From the Rule of Law to Responsible Government: Ontario Political Culture and the Origins of Canadian Statism," Canadian Historical Association Historical Papers 1988, pp. 86-119, at p. 117.

⁵¹For a recent example of this point of view voiced by an academic-cum-MP, and former senior policy adviser to prime minister Joe Clark, see James Gillies, "Thinking the unthinkable: the Republic of Canada," Globe and Mail (national edition), 28 June 1997, p. D9.

scrutinize government measures by his own criteria, the bias was towards inertia and stasis. The existence of vested interests meant that any new measures of economic development (favouring railways over canals, for example) were likely to be voted down. Such actions might protect "liberty" in some abstract way, but might also provide poor government. There was no easy resolution of the tension between providing effective and responsive government, and ensuring that state power did not exceed its proper bounds. If the Reformers erred too much in the first direction, those of the Country persuasion erred too much in the latter, and the possibility of some golden mean has remained elusive to this day.

Murdoch was certainly aware of the tension between achieving effective government and respecting citizens' rights. In spite of his fears of an excessive concentration of state power, he was no apologist for minimalist government. He believed that government should actively seek to promote the advancement and welfare of its people through positive measures such as the extension of education, the provision of subsidies to the fishing and agricultural sectors in certain cases, and the support of a police force. Murdoch's Epitome is infused with the spirit of eighteenth century paternal government, and devotes several chapters to the contemporary equivalent of social welfare law.⁵² It is important to appreciate how Murdoch's thought could reconcile his obsessive

⁵²Vol. I contains chapters dealing with the law connected with agriculture, with trade, with religion, morals, charity and education, and with health and amusement. See Philip Girard, "Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his Epitome of the Laws of Nova-Scotia," Law and History Review 11:1 (1993), pp. 101-44, at pp. 129-30.

concern over the protection of civil and religious liberties, with his views about the legitimacy and necessity of state intervention.

If one were to look for evidence about how he put these ideas into practice, Murdoch's tenure on the Central Board of Education (1841-45) would bear investigation. This body, like the newly incorporated city of Halifax itself, was a product of Lord Falkland's coalition administration. It was created by statute in 1841 to supervise the commissioners appointed in each county to spend the money allotted to them under the 1832 Act for the Encouragement of Schools. The members, two Reformers, two Tories and the reluctant Tory Murdoch, selected him as secretary, testimony to his continuing ability to mediate between the two factions. Murdoch quickly drafted a set of rules and regulations for the supervision of the county commissioners of education, and prepared the annual reports of the Board, which were crammed with statistics and useful information. When the Act was allowed to expire in 1845, an early effort to develop educational policy came to nought, and no attempt would be made again for twenty years, until the reforms of the Tupper administration.⁵³

Murdoch's tenure as Recorder of the city of Halifax would also bear investigation in this context. During the 1850s the city moved ahead quickly with a broad program of civic amelioration, with which Murdoch was much involved, which made it a quite

⁵³ The Reformers on the Board were Joseph Howe and Michael Tobin, the Tories J.W. Johnston and Dr. Charles Cogswell. Murdoch's rules and annual reports can be found in RG 14, vol. 30. The relevant statutes are Statutes of Nova Scotia 1832, c. 2; 1841, c. 43; and 1845, c. 25, which discontinued the Central Board of Education and returned to the 1832 system of supervision, which required the county commissioners to submit their annual reports to the lieutenant-governor.

different place at Confederation than it had been in the 1830s. City politics by the 1850s were carried on pursuant to a bipartisan model which was at odds with the adversarial model which dominated provincial politics. This demonstrates that a kind of cooperative model of politics, distinct from both the status quo and the party majority style offered by the Reformers, was possible at least at the local level. While it is undeniable that Reform was attracting much electoral support in the 1840s, there was still considerable confusion about and opposition to party government among the populace. A number of candidates labelled themselves as independents in the elections of 1836 and 1840, wishing to affiliate with neither group. The fact that all Reform's victories between 1848 and 1857 were fairly narrow, also suggests that Nova Scotians were not overwhelming supporters of responsible government, at least in the short term.

The kind of partisan acrimony which accompanied the shift to responsible government directly contradicted earlier ideals of political harmony which encouraged the sublimation of differences in a spirit of gentlemanly accord.⁵⁴ This desire for cooperation, which did not disappear, found other outlets for its expression, notably in the social sphere. Two moments stand out in the 1840s, one at the beginning and one at the end. In May 1840 the province enthusiastically feted the marriage of Queen Victoria and Prince Albert, and in Halifax all the friendly societies organized balls, suppers, and processions to honour the event. The Nova Scotia Philanthropic Society selected members Joseph Howe and Beamish Murdoch to carry the banner of Acadia at the head of their procession, a moment which Murdoch later referred to in a humorous way to try to defuse

⁵⁴On these earlier ideals and customs, see Cuthbertson, *Johnny Bluenose*, pp. 33-4.

tensions which had arisen within the Society.⁵⁵ Nine years later Halifax celebrated the centenary of its founding, and once again Joseph Howe and Beamish Murdoch were the two principal public figures called upon to give meaning to this event. The scholar Murdoch delivered a centenary oration on a historical theme to the assembled crowd on 8 June 1849, while the populist Howe composed a "Song for the Centenary" which was widely distributed.⁵⁶ The symbolism of these two political opponents uniting in support of a broader patriotic cause went against the philosophy of responsible government, which stressed the right of winners at the polls to rule, rather than working with the losers. We may see in these events some longing within civil society for cooperation by political opponents, which could not be satisfied under existing arrangements. Indeed, one may wonder whether the enormous popularity of voluntary societies in Halifax in the 1840s represented in part a reaction against the rapid creation of party blocs.⁵⁷

Murdoch expressed the reality of political division, with a tinge of regret, using a mathematical analogy: "Like the asymptotes of a parabola, in mathematics, however nearly at times they might seem to approach, they [i.e., he and Howe] never could unite."⁵⁸ A better image of the relationship between Howe and Murdoch might be the Chinese symbol of yin and yang: two opposing but complementary forces which combine

⁵⁵Times (Halifax), 21 December 1841.

⁵⁶Novascotian, 11 June 1849.

⁵⁷David A. Sutherland, "Voluntary Societies and the Process of Middle-class Formation in Early-Victorian Halifax, Nova Scotia," Journal of the Canadian Historical Association 5 (1994), pp. 237-63, refers briefly at p. 250 to the role of fraternalism in bridging ethnic, sectarian and political differences.

⁵⁸Times (Halifax), 21 December 1841.

to form a perfect circle. In personality and politics the two had diverged more and more until they seemed to represent polar opposites. Yet if Joseph Howe dominated the stage of provincial politics, Beamish Murdoch retained a certain place within Nova Scotian society, almost as a necessary foil to Howe. The pairing of Howe and Murdoch at key public events showed that while Nova Scotians had chosen Reform, they were not totally pleased with the way the choice had been put to them. Beamish Murdoch represented an older vision of patriotism, a combination of Country ideology and paternalist government uncomplicated by partisan politics, which many did not wish to leave behind.

Chapter Eight

Patriot Jurist

What was Nova Scotia? Who were Nova Scotians? In the 1820s, the inhabitants of this remnant of the First Empire could afford a little introspection. Finally, after nearly seven decades of almost constant war, Nova Scotia found itself at peace. It is perhaps not surprising that lawyers (among others) should have turned their minds to these questions. Their preparatory reading exposed them to issues of social and political organization, comparative law, and legal history. As part of the British diaspora, they were also inheritors of a tradition which explicitly linked "the rights of Englishmen" and the common law to British exceptionalism and imperial success.¹ The post-Waterloo generation of lawyers was quite prepared to make connections between law, culture, and national identity.

Of this generation, Beamish Murdoch and Thomas Chandler Haliburton would become writers of some historical significance. Along with Joseph Howe, they devoted sustained attention to the question of Nova Scotian identity, albeit for three different reasons: Murdoch to celebrate and conserve Nova Scotia's past, Haliburton to deplore the colony's present, and Howe to predict its future. This chapter will explore Murdoch's substantial cultural output with principal reference to his early literary efforts, which culminated in his editorship of British North America's first literary periodical, The Acadian Magazine (1826-28), and to his Epitome of the Laws of Nova-Scotia (1832-33).

¹J.G.A. Pocock, The Ancient Constitution and the Feudal Law, rev.ed. (New York: Cambridge University Press, 1987).

Murdoch's History of Nova-Scotia, or Acadie (1865-67) has been studied by many scholars, and will be analyzed briefly and selectively for its contribution to the "identity" question. In addition to these better-known works, Murdoch's writing ranges over virtually every literary form except the novel and short story, including poetry, ballads, literary editing, law reform pamphlets, essays, newspaper journalism, legislation, and unpublished Mi'kmaq-English and Gaelic-English dictionaries. His library included works in French, Italian, Spanish, Latin, Greek and German, and in subject matter ranged far beyond law, literature and the classics. Awareness of the full breadth of Murdoch's work and interests is necessary to appreciate his roles both as cultural producer and as lawyer-scholar.²

Existing scholarship treats the literary efforts of Haliburton, Murdoch and Howe under the rubric of the "intellectual awakening of Nova Scotia," which is said to have characterized the years between Waterloo and responsible government.³ Setting their oeuvre in the context of recent work on the evolution of nationalism, in which the idea of nations as "imagined communities" has been explored, allows a somewhat different approach to this literature. It has been widely accepted that national identity is a concept which has been actively and selectively constituted by authors and promoters who

²A complete bibliography of Murdoch's published works is provided in Appendix A to this thesis. On Murdoch's library, see the next chapter. On the lawyer as man of letters in the U.S. context, see Robert Ferguson, Law and Letters in American Culture (Cambridge, Mass.: Harvard University Press, 1984); Arthur Konefsky, "Law and Culture in Antebellum Boston," Stanford Law Review 40 (1988), p. 1132.

³D.C. Harvey, "The Intellectual Awakening of Nova Scotia," Dalhousie Review 13 (1933), p. 18.

purported only to discover and expose pre-existing traits of their particular national group.⁴ In New World societies, the definition of "national" identity was a particularly pressing and delicate issue because of the high degree of religious and ethnic heterogeneity.⁵ J.M. Bumsted has stated that the Maritimes in the early nineteenth century were societies of "almost unimaginable cultural diversity."⁶ Acadian, Mi'kmaq, African and Gael shared the terrain of Nova Scotia with New England planters and with people of Germanic, English and Anglo-Irish origin. Churchmen, Dissenters and Catholics jostled each other. How was the colony to rise above its situation as a congeries of isolated and particularistic settlements? An identity would have to be invented; shared values and common ties would have to be stressed. The English language, the domesticated common law, and a common history and territory would be the three principal means by which Murdoch sought to create a Nova Scotian identity. This chapter is thus divided into three parts, the first dealing with Murdoch's early literary efforts, the second with his principal legal work, the Epitome of the Laws of Nova-Scotia, and the third with his History of Nova-Scotia, or Acadie.

⁴A seminal text is Benedict Anderson, Imagined Communities, 2d ed. (London: Verso, 1991).

⁵Anderson, Imagined Communities, considers this question with particular reference to Latin America, but New England was to some extent an exception in being much less culturally diverse than most other parts of the New World.

⁶"The Cultural Landscape of Early Canada," in Bernard Bailyn and Philip D. Morgan, eds., Strangers within the Realm: Cultural Margins of the First British Empire (Chapel Hill, N.C.: University of North Carolina Press, 1991), p. 363.

A Provincial Creole Printman

Although today the word "creole" is used to denote a person or language of mixed racial origins, in its original meaning it signified a "person of (at least theoretically) pure European descent but born in the Americas."⁷ Thus Anderson can identify Benjamin Franklin as a "creole nationalist." In explaining the evolution of nationalism in the New World, Anderson points to the role of the newspaper as central in defining the perimeters of a particular imagined community. Thus, while acknowledging the key roles played by economic factors, liberalism and the enlightenment in stimulating New World nationalism, he concludes that the "provincial creole printmen played the decisive historic role" in shaping each nation's idea of itself.⁸ Beamish Murdoch and Joseph Howe are both good examples of this phenomenon.

Even as a young man, Murdoch was fully aware of the power of print. Writing to the Acadian Recorder as "Brutus" in 1820, he marvelled that "I can (from the extensive circulation of this paper) enter into the closet of every man in the province, tell him his failings with the confidence of a friend, reward his good conduct with unbought praise, and excite him to deeds of virtue by pointing out their advantages."⁹ The hortatory tone is striking. The young would-be lawyer spoke as a kind of secular priest, using the newspaper as a pulpit, from which platform he sought to act as an arbiter of taste and

⁷Anderson, Imagined Communities, p. 47, note 1.

⁸Ibid., p. 65. In fact, Anderson argues that modern nationalism originated in the Americas rather than Europe.

⁹30 September 1820. The identity of "Brutus" has been confirmed by the appearance of a draft version of this letter in Beamish Murdoch's 1814-20 commonplace book entitled "Forms of the Supreme Court," facing pages 49-51.

behaviour. A past indifference to literary achievement in the province was, in Murdoch's opinion, "rapidly disappearing . . . in a great measure through the medium of newspapers, the talents for composition in which would not disgrace any country."

From the beginning, Murdoch's message was that the New World in general, and Nova Scotia in particular, were different from the Old. Some of these differences were salutary. The pursuit of freedom and wealth in North America allowed its people to "surmount those obstacles to . . . civil union that exist in differences of language, country and religion." Emigrants from Europe left "all national jealousies to sink in the Atlantic" during their voyage. Other features of the New World were more problematic, and prevented the kind of cultural flowering Murdoch advocated. One was simply the less developed state of society in the province, compared to the "endless diversity of occupations" in Britain. In Nova Scotia there were fewer role models, and "[f]rom a want of competition the thirst for knowledge is slaked." Another obstacle was the insidious "maxim that money is the summit of felicity." Even when the immigrant generation had achieved economic security, its members often restricted the education of their sons to "writing, reading and arithmetic, because every other science is trifling when compared with the Science of multiplying Dollars." In colonial societies this tendency was reinforced by "numberless instances of men of genius rising to the highest offices and obtaining a universal applause without much aid from education."

If education was conceded to be a poor investment in a young society, then what exactly was Murdoch's point in prodding his compatriots to respect learning and contribute to the production of a provincial literature? His goals were two-fold. First,

learning and literature were essential to humanity's moral progress. If one possessed literary talent one had a duty to society to express it, but people needed to be constantly encouraged to do so:

Man is so far from enquiring what his duty is that he requires to be incessantly reminded of the most important obligations. The duty of self improvement can never be well understood without indefatigable research and unwearied attention and we pursue it not in proportion to the benefits we might derive from it but in proportion to the stimuli (spurs as they are emphatically named) that excite our energy and activity.

With the aid of modern techniques of publishing and distribution, Nova Scotians could participate in the world-wide march of civilization as easily as anyone else.

Murdoch's second goal was more precise. A provincial literature was necessary to create a Nova Scotian identity. It was Murdoch's fondest hope that one day Nova Scotia might be "classed among those countries that have reared and produced the benefactors of the human race." To do so, it would first have to generate a sense of itself, which was best done through the process of literary production. At the age of twenty Murdoch had thus already formulated his role in provincial society: a spur to cultural excellence, a goad to his fellow citizens to be aware of their talents and of their duty to exploit them. For the next dozen years he pursued this role with "unwearied attention."¹⁰

These goals animated "The Literary Forum" (also known to contemporaries as a debating society) which appeared in 1820 in Halifax. Its members were fourteen young men, including Murdoch, all but one of them with links to the law. Their constitution

¹⁰The quotations are taken from a draft letter in Murdoch's commonplace book "Forms of the Supreme Court" (facing pp. 49-51), much of which was published in the Acadian Recorder, 20 September 1820.

stated that the club aimed at the "improvement of its Members in general Knowledge and in the art of speaking" through weekly discussions of "History, Morals, the comparative merit of eminent men, and occasionally points of mere speculation and Law." It was hoped by its founders that these activities would "sharpen the intellects and create the habit of classifying the ideas and of accurate thinking."¹¹ These goals seem entirely innocuous to modern eyes. Yet the literary/debating club was the subject of much criticism by the older generation, including the parents of some prospective members. Judge Brenton Halliburton refused to serve as patron to the Literary Forum, and S.G.W. Archibald and other prominent citizens were averse to it. Their objections reveal the extent to which conformity of opinion was felt to be necessary for social cohesion by Halifax's conservative elders. They also betray a fear that such groups might provide an undeserved platform for men of the "wrong" social origins. "Tullus Hostilius" thundered in the pages of the Acadian Recorder that a debating society would "throw open the door to every flippant cox-combical blockhead to self-constitute himself a second Cicero or Demosthenes," and that the proponents might better spend their time in more serious pursuits.¹² Even though politics and religion were to be prohibited as topics of discussion, the worthy patriarchs of Halifax were apprehensive of "anything that may have but the appearance of an opening to the propagation of sentiments opposed to morality

¹¹Eleven were articled clerks and two others would become lawyers in the early 1830s. "Rules, constitution and correspondence regarding the Literary Forum, 1820," MG 20, vol. 222, no. 95.

¹² Acadian Recorder, 20 May 1820.

or religion and consequently to the peace and happiness of society."¹³ The older generation of notables considered that any discussion of the nature of provincial society might undermine their own role at its apex. The Literary Forum was stillborn.

It was the misfortune of the club's promoters to commence their endeavours at the very time when their contemporary William Wilkie caused "a tempest in the Halifax teacup" with the publication of A Letter to the People of Halifax. This "incendiary pamphlet" contained stinging critiques of virtually every court and legal official in the province except the lieutenant-governor, and merited its author a trial for seditious libel at Easter term 1820. Convicted and sentenced to "Two Years' Imprisonment in the House of Correction . . . at hard labor," Wilkie's sentence appears to have been commuted, provided he agreed to leave the province. It is no surprise that the same official clique who sought to purge the body politic of the malcontent Wilkie would view a debating society as the thin edge of a dissentient wedge which could not be tolerated.¹⁴

The fiasco of the Literary Forum illustrated that dependence on the patronage of community notables might frustrate the goals of its members. Freedom of speech could only be secured through direct involvement in journalism. George Renny Young founded the Novascotian in 1824, and three years later sold "the best all-round paper in the

¹³Supra, note 11.

¹⁴The Wilkie case is exhaustively considered in Barry Cahill, "Sedition in Nova Scotia: R. v. Wilkie and the Incontestable Illegality of Seditious Libel before R. v. Howe (1835)," Dalhousie Law Journal 17 (1994), p. 458. Cahill suggests that Wilkie may have been apprenticed to a lawyer at this time.

province" to Joseph Howe in order to prepare for the legal profession.¹⁵ Murdoch too became actively involved in journalism, assisting Philip J. Holland with editorial work at the Acadian Recorder.¹⁶

In 1825 a local disaster provided Murdoch with another occasion to explore the question of local identity. He combined his interests in journalism, history and poetry in a 48-page pamphlet entitled A Narrative of the Late Fires at Miramichi, New-Brunswick, published by P.J. Holland in December of that year. The extensive forest fire which ravaged 8000 square miles of the Miramichi valley in early October had left 250 people dead and caused enormous damage. Murdoch's immediate goal in composing this pamphlet was to provide a poignant account of the tragedy which would inspire readers to contribute to relief efforts. Much of the pamphlet is taken up with an account of the philanthropic response to the event in British North America and New England, and a description of "Remarkable Instances of Suffering." Murdoch the historian was already at work, however, as he contextualized his story with some description of the history and topography of Northumberland County. Much of the writing, like his History of Nova-Scotia, or Acadie forty years later, consists of extracts from original sources (primarily newspapers) spliced with bits of narrative.

¹⁵The assessment is that of J. Murray Beck, Joseph Howe, vol. 1 (Kingston and Montreal: McGill-Queen's University Press, 1984), p. 43.

¹⁶Murdoch recorded a payment in his account book of £66 13s from Philip J. Holland for editorial services from 18 September 1824 to 26 May 1826, representing a rate of pay of £40 per annum. A later payment shows that he again provided editorial services from September 1835 to June 1836: MG 3, vol. 1836a.

Appended to this account of the fire is a two-page poem entitled "The Conflagration," in which Murdoch permitted himself to meditate on the larger meaning of the disaster. He did not interpret it as evidence of God's displeasure, as a Puritan divine of the previous century might have done, nor as a random act of nature. Rather, the fire is part of God's plan for the universe, foreshadowing the final apocalypse of the End of Days. It is God's way of reminding His people of His awesome power and of the purpose of human existence. In his narrative of the event, Murdoch noted at one point that some survivors thought the Last Day had indeed come, a theme which recurs in the poem:

The trembling earth appears
To shake from pole to pole
As when the trump shall call
To its last dawn, each soul.

At a more prosaic level, the poem is also about the meaning of community and the need for mutual aid:

Thro all Columbia speeds the tale
And showing tears all eyes overflow
"Quick man the bark and spread the sail,
And bear relief to soothe their woe."

There follow several stanzas describing the response to the disaster in Quebec, Upper Canada, Boston, New York and the other Maritime provinces, which affirm the importance of the human bonds that defy geography in this vast portion of the continent.

The significance of this poem lies not in its purely literary value, which is unremarkable, but in Murdoch's attempt to invest a local event with transcendent meaning. It was this dual aspect which defined cultural production for Murdoch:

regional writers should attempt to interpret local events for both internal and external audiences. While preserving local idiom and colouration, they should be alert to those elements of universal significance which would allow their work to add to the cumulative cultural achievement of Western civilization. Murdoch's description of the fire early on in his narrative illustrates this process:

[T]he proximity of immense forests parched up to tinder by the summer's heat, and now in one universal conflagration, caused an ocean of fire that we may conclude to be unparalleled in the history of forest countries, and perhaps not surpassed in horrific sublimity by any natural calamity from this element, that has ever been recorded.

The distinctively local elements -- vast forests, extreme summer heat, the "ocean of fire" - - combine to create an event of "horrific sublimity," a key term in eighteenth-century aesthetics. An experience was "sublime" if it exceeded the usual frontiers of human appreciation, leaving one awestruck by an encounter with great beauty, terror, or complexity.¹⁷ In presenting the Miramichi fire in this way, Murdoch tried to demonstrate that regional writers might have something of value to say to a broader audience, even when treating local events.

Although he continued to write poetry for his own pleasure, "The Conflagration" remained Murdoch's only published poem, and it appeared anonymously. A long ballad on a historical theme also remained unpublished.¹⁸ In spite of his aims to cultural

¹⁷Daniel Boorstin, The Mysterious Science of the Law (Cambridge, Mass.: Harvard University Press, 1941), chap. 4.

¹⁸The untitled ballad is found written in Murdoch's hand in the back of his signed copy of Jacobite Melodies: A Collection of the most popular Legends, Ballads, and Songs of the Adherents of the House of Stuart, from 1640 [to] 1746 (Edinburgh: William Aitchison 1823), which is held by the Legislative Library of Nova Scotia.

leadership, Murdoch was not one to overestimate the value of his own work. He rightly concluded that his talents lay in other literary forms and pursued them assiduously, while remaining a staunch advocate of poetry as the highest form of literary expression and collecting a wide range of poetic works for his own library.

Murdoch's role as cultural impresario and promoter of a Nova Scotian identity is best illustrated by his superintendence of the The Acadian Magazine, a literary periodical published at Halifax between July 1826 and January 1828. The magazine's editorials were unsigned, and it was not until the late 1970s that Murdoch's identity as editor was discovered. Even Murdoch's friend Joseph Howe did not know of his involvement, initially at least, although he did know that the magazine was "to be conducted . . . by some of the Lawyers," revealing the reflexive connection between law and letters made by contemporaries.¹⁹

In creating The Acadian Magazine Murdoch wished to further the goals of both internal improvement and external promotion. In the preface to the first number, Murdoch hoped that the success of the venture would "advance the literary standing of the Country, and tend to efface the impression which has been far too prevalent abroad, and particularly in the Mother Country, that we were comparatively ignorant and barbarous." Within Nova Scotia, Murdoch sought to "promote the extension or diffusion of science, and the improvement of morals, or [to] afford amusement without violating

¹⁹ Joseph Howe to Agnes Burgess, 9 April 1826, Burgess Papers, MG 1, vol. 162a. On Murdoch's role, see Gwendolyn Davies, "The Editorship of The Acadian Magazine July 1826 - January 1828," Canadian Notes & Queries 26 (December 1980), p. 10.

propriety and decorum." With the advance of schools and public libraries in the province and with "the general spirit of improvement now in full operation," the magazine could assist young people "to improve in all useful branches of literature."

Whether external audiences were much aware of The Acadian Magazine may be doubted, but within Nova Scotia its appearance marked an important milestone in the evolution of provincial literature. In 19 issues comprising 768 double-columned pages, The Acadian Magazine contains dozens of articles on a wide variety of subjects: travel, current events at home and abroad, science, philosophy, biography, history, architecture. Poetry, short fiction, criticism and essays are also well represented. Most contributors remained anonymous, but authors are known to have resided at Saint John, Pictou, Truro, Windsor, Annapolis Royal and in Cape Breton, as well as Halifax, revealing the journal's broad regional appeal. In fact, over three-quarters of all contributions were locally written, and the January 1827 issue contained solely the work of local authors.²⁰

Murdoch had proved that provincial authors were capable of generating sufficient material, at least in terms of quantity, to fill a literary review. With respect to literary merit, the most extensive examination to date of The Acadian Magazine's content has provided a balanced but generally positive assessment, noting the "skill and competence displayed" in a number of the poems. In general the periodical catered to a conservative and somewhat sentimental taste, but the most talented contributors show "evidence of the creative and critical skills of the many writers in the province who have been

²⁰Tom Vincent, "The Acadian Magazine," in William Toye and Eugene Benson, eds. The Oxford Companion to Canadian Literature, 2d ed. (Toronto: Oxford University Press 1997), p. 4.

overshadowed and forgotten because of the reputations of Howe, Haliburton and Goldsmith."²¹ In addition to providing a training ground for such authors, the non-specialized format of The Acadian Magazine established the pattern for regional periodicals in the 1830s and 40s.

Running a law practice, launching a political career, working with various philanthropic societies and managing a monthly literary journal, were enough to tax even Murdoch's energies. At some point in mid-1827 the direction of The Acadian Magazine passed to another lawyer, Murdoch's friend J. Scott Tremain, but Murdoch likely continued to play a supporting role until publication ceased early in 1828. Competition from newspapers, which also published locally-authored fiction, poetry and essays, dictated that Maritime literary periodicals of the nineteenth century would lead short lives. Dissatisfaction with the loss of focus on indigenous writing, which occurred after Murdoch's departure, may also have played a role in the magazine's demise.

Murdoch's endeavours in the latter part of the decade shifted away from the purely literary and towards the kind of historical and legal writing which would make up the bulk of his output in future decades. The one exception was his possible contribution to the papers of "the Club," a group of friends who had their satirical sketches on provincial life published in Joseph Howe's Novascotian between May 1828 and October 1831. Tradition associates Murdoch's name with the Club, but there is no proof that he was part

²¹Gwendolyn P. Davies, "A Literary Study of Selected Periodicals From Maritime Canada, 1789-1872" (Ph.D. dissertation, York University, 1979), p. 92.

of the circle.²² The lawyer figure of Frank Halliday has more in common with T.C. Haliburton or Lawrence O'Connor Doyle than Murdoch. The atmosphere of cigars-and-brandy male camaraderie celebrated in the Club papers strikes one as uncongenial to the abstemious Murdoch, who would soon become active in the temperance cause. It is possible, however, that the image of Murdoch as a paragon of rather dull respectability relates more to his later years, and that he was more convivial in his youth. For the moment, Murdoch's participation in the Club must remain an open question.

Election to the House of Assembly spurred Murdoch to employ his pen in the cause of law reform on a topic with special meaning for him: imprisonment for debt. In 1827 he circulated among his colleagues a pamphlet on the subject, of which no copy is known to have survived. His efforts to change the law while a member of the House having proved fruitless, Murdoch issued a second enlarged edition addressed to the public in 1831. The pamphlet contains a 20-page essay by Murdoch, followed by a 40-page appendix of extracts from legislative debates on the subject in Upper Canada and the United States and other supporting documents. The essay shows Murdoch at his best as a prose stylist.

Murdoch's objections to imprisonment for debt are voiced eloquently and with conviction, and his refutation of contrary arguments is stated in a clear and convincing manner. His opposition to imprisonment for debt was based not on economics but rather

²²Gwendolyn Davies, "The Club Papers: Haliburton's Literary Apprenticeship," in her Studies in Maritime Literary History, 1760-1930 (Fredericton: Acadiensis Press 1991). See also Carrie MacMillan, "Colonial Gleanings: 'The Club' Papers (1828-31)," Essays on Canadian Writing 31 (1985), p. 51.

on constitutional and moral grounds. The institution allowed property to be valued above human liberty, put "arbitrary . . . power into hands the most likely to abuse it," and was incompatible with the requirements of Christianity and civilization. Imprisonment for debt meant that the creditor took no responsibility for extending credit in doubtful cases, and provided no way of distinguishing the genuinely feckless debtor from those who were honest but unfortunate. It served no real deterrent function in an economy where the need for credit was a fact of everyday life. Moreover, "[a] jail may teach or foster vicious habits, but it is a poor seminary for improvement of the human character" -- a clear reference to his father's unhappy encounter with debtors' prison.

In Murdoch's view, law reform and literature were both part of the mission civilisatrice which professional men were bound to foster in this post-war period of peace and relative prosperity.²³ Both were based, ideally, on a sense of shared values and identity. By 1830 Murdoch appears to have resigned himself to the fact that his contribution to belles-lettres would be slight. Other forms of literature beckoned, through which he might better explore the contours of a Nova Scotian identity.

²³Murdoch was appointed along with four others to a law reform commission in 1832, when the Assembly determined that it was "necessary to revise the Civil and Criminal Codes of the Province, and to render the practice of the Courts of Law and Equity more simple and less expensive;" Statutes of Nova Scotia 1832, c. 42. For unknown reasons, perhaps related to the rifts associated with the emergence of the Reform cause, the work of the commission did not progress. The Assembly revoked its mandate in 1837, declaring that the commissioners had "not proceeded in the discharge of the duties . . . committed to them;" Statutes of Nova Scotia 1837, c. 55.

Law as Literature: An Epitome of the Laws of Nova-Scotia

As the Jewish proverb states, "When one door closes, another opens." Although bitterly disappointed by his defeat at the polls in 1830, Beamish Murdoch was too full of ideas and ambition to remain in a state of depressive inactivity for long. Within months he had turned his energies to his most ambitious project to date: a multi-volume treatise on the law of Nova Scotia. In February 1831 Joseph Howe was pleased to observe that Murdoch was not moping after his defeat, but devoting himself to a worthwhile purpose.²⁴ The prospectus of the work stated that its object was "to give a brief and clear outline of the elements of English law as it is at present in force in this colony; and to arrange the statute law of the province in methodical order." In addition to its appeal to professional men, Murdoch hoped the work would be of utility to "members of the Legislature, magistrates and militia officers . . . as well as [to] those who wish to form an idea of the laws by which they are governed." At a time when articling students were expected to wade through Blackstone's Commentaries, Tidd's Practice, and other weighty tomes on English law, Murdoch also hoped that his proposed work "might be useful as an introduction to the study of provincial law."²⁵

In addition to these earnest and public-spirited motivations, Murdoch undoubtedly had more personal considerations in mind as well. A clue to these is provided in the dedication of the work:

²⁴ Novascotian, 24 February 1831.

²⁵ Ibid.

to the Hon. S.S. Blowers, Chief Justice, and President of H.M. Council, this essay on the laws of a colony, over whose tribunals he has long presided, is by his kind permission, inscribed, in token of respect and veneration for his public services, high judicial qualities, and inflexible integrity, which are interwoven with the author's earliest recollections.²⁶

Murdoch had good reason to be thankful to Blowers, whose decision in the Market Wharf litigation was a crucial turning point in the history of the Beamish family fortunes. Hope for the chief justice's intercession with regard to some future appointment, possibly even a judgeship, was undoubtedly mingled with gratitude in inspiring this fulsome dedication. While kinship ties counted heavily under the oligarchy, the regime had some meritocratic elements. Had the advent of responsible government not shaken the province's political order, it is possible that Murdoch might eventually have received some official appointment in recognition of his legal and political services.²⁷ Joseph Howe, even after his political disagreements with Murdoch, could state in 1840 that the Epitome "ought, long since, to have entitled the author to some especial mark of approbation from the local Government."²⁸

The prospectus for the Epitome stated that the work would be published as soon as a sufficient number of subscribers had been found. Having suffered a large loss with his publication of Haliburton's History, Joseph Howe was not about to take such a risk

²⁶Epitome of the Laws of Nova-Scotia, 4 vols. (Halifax: Joseph Howe, 1832-33), i, p. iii.

²⁷Murdoch's appointment as commissioner and secretary to the Central Board of Education in 1841, discussed in chapter 7, was a step in this direction, but the Board expired in 1845. Murdoch's main appointment thereafter was not a provincial one, but the municipal office of Recorder of the City of Halifax.

²⁸Novascotian, 23 January 1840.

again. He agreed to publish the Epitome on a contractual basis only, with Murdoch assuming all the risk. In November 1831 Howe announced that "a number of Subscribers adequate to the expenses of the Work having been obtained, Mr. Murdoch's Epitome of the Laws will go to Press immediately."²⁹ In reality this was not the case. The Epitome carried no list of subscribers when it was published, and Murdoch remained personally responsible for all the publishing expenses. He was able to persuade Howe to take a note for a large part of the cost, which was not ultimately settled by Murdoch for many years. Allowing debts to go unpaid over a long period was not unusual at the time, but the subsequent political antagonisms between Murdoch and Howe probably contributed to the delay in this case.³⁰

The exact number of copies of the Epitome printed by Howe remains a mystery, but around 500 sets seems likely. Murdoch's record of his account with bookbinder George Phillips refers to 2071 "copies," which presumably means individual volumes rather than 4-volume sets.³¹ So understood, some 518 sets would have been printed. The prospectus anticipated that each volume would contain about 200 pages, but they exceeded that mark by a fair margin, containing 239, 300, 244 and 251 pages

²⁹Novascotian, 30 November 1831.

³⁰Beck, Joseph Howe, i, p. 100 states that Howe took notes from Murdoch for £460, upon which he did not receive final payment until 1850. It has not been possible to verify the reference in the Joseph Howe papers upon which this statement is based.

³¹MG 3, vol. 1836A, f. 24.

respectively, for a total of 1034 pages.³² The volumes were handsomely produced, well-indexed, contained very few errors, and were small enough in size to be easily handled and transported. The cost to subscribers was to be 8s per volume "half bound" (i.e., in calf) or 6s 6d in boards, and the work could be obtained through agents in Windsor, Pictou, Annapolis, Sydney, Lunenburg, Kentville and Truro, as well as in Halifax. How many copies were actually sold is unknown, but there is reason to believe the Epitome was never a best-seller. The underwhelming response to the appeal for subscribers is one clue. Another is that C.H. Belcher was still advertising the Epitome for sale in Halifax in 1842, a decade after the first volume appeared.³³

Some observers saw the work as part of an emergent provincial literature. The author of a letter to the Novascotian responded to the prospectus with the observation that "[e]very attempt of this kind which adds to the small pile of our native productions should be liberally encouraged [, to] give a noble spur to our native literati to exert themselves."³⁴ Treating the Epitome as a contribution to local literature is entirely appropriate, as it is not just a dry compilation of provincial laws (though it is that at some points) but also an attempt to articulate both a Nova Scotian legal culture and a provincial identity.

³²A fifth volume, to be devoted to local and private legislation (i.e., laws dealing with the powers of particular local governments or institutions, the incorporation of individual companies or churches, etc.) was promised when vol. 4 was issued, but it never appeared: Novascotian, 4 September 1833.

³³Advertisement in Halifax Times, 5 April 1842; and see below, note 103.

³⁴Novascotian, 24 March 1831.

As Benedict Anderson has said, in explaining the rise of nationalism in the republics of Latin America, "administrative organizations create meaning."³⁵ He might have added "legal systems," and it is rather puzzling that Anderson did not look more closely at local legal orders in developing his analysis. At a time when law was seen as imbricated within daily life, and legal regimes illustrative of national characteristics, Murdoch's extrapolation of a provincial identity from Nova Scotia's legal order was uncontroversial. Modern assumptions about law as an autonomous domain of inquiry separate from the humanities and social sciences have led historians to ignore legal texts from the colonial era, and the contribution of lawyers to the culture, broadly defined, of that era. Insofar as law and history were "the most important sources of metaphor and example" through which British North Americans understood themselves,³⁶ the study of legal texts can contribute to a better understanding of cultural, political, and intellectual history of any era.³⁷

The main themes in the Epitome have been analyzed elsewhere by the author.³⁸ In this context, it is the work's treatment of the distinctiveness of the Nova Scotia legal

³⁵Anderson, Imagined Communities, p. 53.

³⁶Greg Marquis, "In Defence of Liberty: 17th Century England and 19th Century Maritime Political Culture," University of New Brunswick Law Journal 42 (1993), p. 42.

³⁷An increasing body of European, British and North American scholarship explores this approach. For a particularly good example, see G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire," Law and History Review 5 (1985), p. 286. For another suggestive analysis, see A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature," University of Chicago Law Review 48 (1981), p. 632.

³⁸"Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his Epitome of the Laws of Nova-Scotia," Law & History Review 11 (1993), p. 101.

tradition that deserves consideration, for it provides a fine example of Nova Scotia as an "imagined community." An initial comparison of the Epitome with Joseph Howe's Western and Eastern Rambles: Travel Sketches of Nova Scotia³⁹ and with Thomas Chandler Haliburton's The Old Judge; or, Life in a Colony⁴⁰ reveals three different views on Nova Scotian identity. Haliburton's thesis is that Nova Scotians, lacking the stabilizing elements of a landed aristocracy and established church, have become as individualistic and democratic as the Americans. They are Americans without the same initiative and resourcefulness. Nova Scotians are allergic to hierarchy, and as a result the province has been in a state of decline which will only accelerate with responsible government. This severe view is leavened only by reference to the survival of various folk traditions among farmers and fishermen, as portrayed in the ghost stories and tall tales which punctuate The Old Judge.⁴¹ Howe's judgment of his compatriots is much less severe. He finds them sturdy and independent, mostly hard-working but able to enjoy life too. If they are committed to equality, it is to the British variety (equality before the law) rather than the Jacksonian (one man, one vote).

Murdoch's view of the provincial character in the Epitome has much more in common with that of Howe than that of Haliburton, and in fact provides some answers

³⁹M.G. Parks, ed., Western and Eastern Rambles: Travel Sketches of Nova Scotia, (Toronto: University of Toronto Press, 1973).

⁴⁰First published in 1849, The Old Judge is most easily available in the 1978 Tecumseh Press reprint of the 1860 London edition, edited by M.G. Parks.

⁴¹The Old Judge; or, Life in a Colony (1849); Colin Boyd, "'The Great American Mammoth Circus': The Old Judge and Democracy in Nova Scotia," in Richard A. Davies, ed., The Haliburton Bi-centenary Chaplet: Papers presented at the 1996 Thomas Raddall Symposium (Wolfville: Gaspereau Press, 1997), p. 269.

to the critiques which Haliburton would make in subsequent decades. Murdoch saw liberty and equality as the principal features of provincial law, and as fundamental Nova Scotian values. He argued in the Epitome that Nova Scotian law improved upon English law in its more rigorous commitment to civil equality in the sphere of private law. Murdoch was no more enamoured of American-style democracy than Haliburton, but he could accept the individualism of Nova Scotians because it had to be exercised within legal bounds. For Murdoch, the response to Haliburton's lament that Nova Scotians had no English-style stabilizing institutions was to point to the law. Law provided the key to distinguishing between liberty and anarchy, and could also provide a sense of shared values in a diverse population. For Murdoch, understanding Nova Scotia's legal culture provided an essential key to its identity. Law, perhaps even more than newspapers or market relations, was an integrative force within the province, its web of institutions, procedures and personnel bringing together people of different backgrounds and beliefs. Curiously, Haliburton has relatively little to say about the law as an institution of social order, and is content to adopt a kind of populist anti-lawyer sentiment in The Old Judge.⁴²

It is in Murdoch's discussion of the question of the reception of English law that he began to make his case for a distinct provincial legal tradition. The first step in his argument was to restrict the process of reception: "[t]he common and statute law of

⁴²Barry Cahill, "The 'Old Judge' in The Old Judge: Nostalgic Tory-Loyalism as the Key to Understanding Nova Scotia's Pre-Modern Legal Culture," in ibid., p. 251.

England," Murdoch asserted, "are not, as a whole, suited to our situation as a colony."⁴³ Murdoch made it clear that much of the common and statute law was inappropriate for Nova Scotia because local conditions were different, not necessarily simpler. In addition, much of the English law was frankly undesirable on its merits: thus Nova Scotia was spared the "unnecessary and artificial distinctions between real and personal property," "the unjust rules of primogeniture," and the "arbitrary legislation" that shackled marriage in the mother country.⁴⁴

According to Murdoch, a British statute could not be deemed suitable unless it had already been incorporated into provincial law through express reenactment or statutory recognition, a local judicial decision, or through "the general usage of the people at large."⁴⁵ This restrictive attitude to the question of reception served both professional and philosophical ends. On the one hand, it prevented "dormant" British statutes from suddenly being declared in force, to the possible chagrin of local lawyers and their clients. More generally, this stance reinforced the "Nova Scotia-ness" of Nova Scotian law and retained the primary responsibility for its promulgation in the assembly rather than the courts.⁴⁶

⁴³ Murdoch, Epitome, i, p. 33.

⁴⁴ Ibid., i, pp. 35-36.

⁴⁵ Ibid., i, p. 34.

⁴⁶ Murdoch's views were echoed in the most important case on reception to be decided by Nova Scotia courts in the colonial period: Unjacke v. Dickson (1848), 2 Nova Scotia Reports 286, which was prosecuted for the Crown by the son of Murdoch's patron. Chief Justice Brenton Halliburton decided that Tudor statutes imposing a Crown lien upon the lands of customs officers in cases of defalcation could not be considered in force in Nova Scotia in the absence of reenactment by the local legislature. On reception generally, see

This emphasis on the local legislature as the main regulator of the reception of British law was consistent with Murdoch's views on legislative supremacy. Nonetheless, he made a distinction between public and private law in this context. He was well aware that most of the British public or constitutional law had not been specifically reenacted in Nova Scotia or declared in force by judicial decision. "[Y]et," he declared, "what are generally esteemed the most valuable portions of British law, have been transplanted into our land,—the Habeas Corpus,—the freedom of the Press—the trial by Jury—the Representative Branch of legislature,—the viva voce examination of witnesses; all those branches of public law . . . , we possess."⁴⁷ Reenactment of these statutes on public liberty was unnecessary because of the nature of the original compact between the Crown and the early inhabitants: "the national faith and royal authority pledged to the first settlers [is considered] to have confirmed them in the indisputable possession of that portion of the laws of England."⁴⁸ Murdoch's admiration for British constitutional law exceeded even his respect for legislative supremacy. In effect he was proposing a kind of federalism, where fundamental rights would be "entrenched" at the imperial level while the regulation of "property and civil rights" would remain within the legislative purview of the local government.

T. G. Barnes, "'As Near as May be Agreeable to the Laws of this Kingdom': Legal Birthright and Legal Baggage at Chebucto, 1749," in Law in a Colonial Society: The Nova Scotia Experience, P.B. Waite et al., eds. (Toronto: Carswell, 1984); Barry Cahill, "'How Far English Laws are in Force Here': Nova Scotia's First Century of Reception Law Jurisprudence," University of New Brunswick Law Journal 42 (1993), p. 113.

⁴⁷ Epitome, i, p. 35.

⁴⁸ Ibid., i, p. 43.

For Murdoch, the distinctiveness of Nova Scotia law thus lay in private, not public, law. Murdoch echoed many writers in English and American circles in lamenting the fact that feudalism had been overthrown in the sphere of English public law, but lingered in its private law, especially in the law of real property. The beauty of Nova Scotian law was that it breathed the spirit of the free British constitution into the private law. Nova Scotia had the best of both worlds, possessing the British constitution but "freed from many [laws] that have formed the subject of constant objection in the mother country."⁴⁹ The game laws and tithe laws, representing the privilege of class and Church respectively, were unknown. So was the "expensive and unnecessary variety of Courts" found in England. "[T]he comparative simplicity of our legal forms, in conveyancing and in law suits, would astonish an English practitioner," asserted Murdoch, as would "the cheapness of [our] law proceedings." Equal division of an intestate's property among his or her children was preferable to primogeniture, while Nova Scotia's liberal divorce law was preferable to the English parliamentary divorce, a "system [that] seems to favor the wealthy by holding out . . . a remedy from which all in middle or humble life are debarred."⁵⁰

⁴⁹ Ibid., i, p. 35.

⁵⁰ Ibid., i, p. 23. On divorce generally, see Kimberley Smith Maynard, "Divorce in Nova Scotia, 1750-1890," in Essays in the History of Canadian Law, vol. III, Nova Scotia, P. Girard and J. Phillips, eds., (Toronto: University of Toronto Press for the Osgoode Society, 1990).

Murdoch's main purpose in the Epitome was to inspire pride and confidence in local rather than imperial traditions. This he did by praising the ingenuity of previous generations in erecting a distinctive provincial code admirably suited to local conditions:

I may refer to every chapter of this book to show, that having an opportunity of establishing a Provincial Code with the benefit of the experience and philosophy of older countries, our forefathers have not failed in their duty; but have transmitted to us a system simple and concise, founded on the best principles, and that, except on a few points, they have left little to their successors beyond the duty of preserving, polishing and throwing light upon, the useful result of their labour.⁵¹

Just as the pioneering generations had conquered the wilderness, replacing it with the rudiments of civilization, so had they pruned the tangled undergrowth of the English common law into the "simple and elegant structure of laws which long experience has rendered an object of public attachment."⁵² Loyalty to the British constitution and loyalty to provincial law were like Chinese boxes, nestling comfortably one inside the other. If matters of municipal regulation occasionally required rejecting the British model, that was understood never to put in question the overarching constitutional bond.

If the provincial code was a book in which the Nova Scotian character might be read, what did it reveal? Some of Murdoch's key words have already been referred to - "simple," "elegant," "free" — but their nuances need to be explored. The word "simple" in particular is apt to mislead. Murdoch did not mean that Nova Scotians were a rustic lot with only rudimentary legal needs; the "pioneer days" were long over in Nova

⁵¹ Epitome, i, p. 36. Murdoch was so concerned to emphasize the distinctiveness of Nova Scotia's legal code that he barely referred to the governor's power of suspension and the crown's prerogative of disallowance of colonial legislation: i, p. 31.

⁵² Ibid., i, p. 59.

Scotia by the time Murdoch sat down to write in 1830. By 1830, the provincial population was 120,000, well over double the figure at Murdoch's birth, and Halifax sheltered some 15,000 souls. While not large by the standards of cities in the United States, Halifax compared favourably with York, Saint John, and Quebec. From about the time of Murdoch's birth, Halifax had been adding stately stone structures to its original complement of wooden buildings, leaving at least some visitors with an impression of solidity, refinement, and even grandeur. Visiting Halifax in the summer of Waterloo, Bishop Plessis of Quebec found that the city's buildings vied with each other in "the beauty of their situation and the variety of their structure," though his account of appalling conditions of poverty elsewhere in the region makes for grim reading.⁵³ For Murdoch, such conditions of inequality (which existed in Halifax as well) did not affect his perception that most of the province had been "civilized" for as long as he could remember.

Thus when Murdoch spoke of a "simple" code of provincial law, he did not mean "primitive" or "underdeveloped." Rather, he used the word with both an aesthetic and a political connotation. A simple code avoids unnecessary technicalities and distinctions, thus allowing an immediate grasp of the basic principles at work. Accordingly, the Nova Scotia law of property provided the minimum number of distinctions between realty and personalty, and the law of succession treated all of a deceased's property as a fund to be shared among his or her heirs, contrary to the complexities of English law. What

⁵³Cited in Cyril Byrne, "The Maritime Visits of Joseph Octave Plessis, Bishop of Quebec," Collections of the Nova Scotia Historical Society 39 (1977), p. 38.

appealed to Murdoch here was not only the justice of the Nova Scotian solution, but its aesthetics.

Blackstone and Murdoch were at one in believing that the common law had an aesthetic appeal. Daniel Boorstin has shown how Blackstone encompassed two somewhat contradictory conceptions in eighteenth-century aesthetics: the "beautiful," which emphasized order, symmetry, and rationality; and the "sublime," associated with disorder, grandeur, and irrationality.⁵⁴ We have already seen that Murdoch's aesthetic reflected this dichotomy, associating beauty with the built environment and sublimity with the natural environment. His ideals of beauty might best be captured in architectural terms, as Georgian classicism in its rather austere Palladian incarnation. Throughout the Epitome, Murdoch tried to reflect this aesthetic by explaining terms of art, translating Latin and law-French maxims, and writing in a direct and unadorned style.⁵⁵

In his devotion to these ideals, Murdoch was by no means alone. Joseph Howe, with his constant classical allusions, was to the political world what Murdoch was to the legal. Indeed, some have argued that the canons of eighteenth-century classicism still dominate the aesthetics of Maritime literature.⁵⁶ Murdoch would have imbibed these

⁵⁴ Boorstin, The Mysterious Science of the Law, chap. 4.

⁵⁵ His aim seemed to be misunderstood by a Saint John lawyer, who complained that the work had "an air of extemporaneous speech." Its informal style he regarded as a drawback rather than an asset: Halifax Monthly Magazine (July 1832), p. 1 (reproducing a review in the Saint John Courier). An emphasis on plain speaking and informality was the stylistic hallmark of the literature of the period, as in "The Club" papers, the work of Thomas Chandler Haliburton and Thomas McCulloch's The Letters of Mephibosheth Stepsure (1821-22, repr. Halifax, 1860).

⁵⁶Janice Kulyk Keefer, Under Eastern Eyes: A Critical Reading of Maritime Fiction (Toronto: University of Toronto Press, 1987), pp. 66-67.

values at the Halifax Grammar School, and he had only to look around him to see them everywhere manifest in architecture. His friend T. C. Haliburton's Clifton estate at Windsor, his mentor's summer home at Mount Uniacke, the graceful Town Clock surmounting the Citadel, his own place of worship, St. George's Round Church, all radiated the stately confidence in symmetry and proportion of the Georgian aesthetic ideal. It was probably Murdoch himself who remarked of the newly opened Province House that "[a]n uniformity and neatness pervades the outside of the building, [which] . . . is said by strangers, in correctness of proportion, to exceed any edifice in America" — a judgment confirmed, incidentally, by posterity.⁵⁷ For Murdoch, it was no coincidence that this Palladian building should generate a legal order of Palladian simplicity and elegance.

Nova Scotians had a "simple" code for a "free" people. All Nova Scotians were equally free in the eyes of the law, including Roman Catholics and blacks. At its most basic level, freedom meant freedom from enslavement: "[t]his was fully recognized by the decision given many years ago at Annapolis, when the doctrine was acted upon that slaves brought into this country became free ipso facto upon landing."⁵⁸ In fact, the decision of Chief Justice Blowers was not quite this bold, but Murdoch was prepared to see it as illustrative of the broader principle.⁵⁹ It is unlikely that Murdoch accepted blacks as social equals, but he did accord them legal equality. There is also no evidence

⁵⁷ The Acadian Magazine (1826), quoted in Elizabeth Pacey, Georgian Halifax (Hantsport, N.S.: Lancelot Press 1987), p. 43 ("the best use of a Palladian compositional formula found in Canada").

⁵⁸ Epitome, i, p. 43.

⁵⁹ D.G. Bell, "Slavery and the Judges of Loyalist New Brunswick," University of New Brunswick Law Journal 31 (1982), p. 9.

that he shared the overtly racist ideas of Haliburton or Chancellor Kent who, while anti-slavery, considered "the African race . . . essentially a degraded caste, of inferior rank and condition in society."⁶⁰ Murdoch's insistence that there was now "no religious distinction remaining in our Provincial code" demonstrated an important aspect of his attempt to shape a distinct provincial character.⁶¹ The British national character was inextricably bound up with protestantism, in spite of the recent "toleration" of Roman Catholics, and Murdoch's attempt to distance Nova Scotia from that tradition was a significant contribution to the debate over the provincial identity.

His emphasis on equality did not extend to the acceptance of the Mi'kmaq as full members of provincial society. Nova Scotia was a self-consciously New World society, but its original inhabitants were to have only the most marginal place within it. One fact especially put them beyond the pale: they "had [no] idea of property (of an exclusive nature) in the soil, before their intercourse with Europeans." Murdoch's views on the Mi'kmaq would change over the ensuing decades, but in 1832 he portrayed them as barely distinguishable from beasts at the time of European contact. While they might have grievances, said Murdoch, these were now "matter for the historian, rather than for the jurist."⁶²

⁶⁰James Kent, Commentaries on American Law, 4 vols., 2d. ed. (New York: O. Halsted, 1832), i, p. 464. On Haliburton's racism, see George Elliott Clarke, "Must We Burn Haliburton?" and Greg Marquis, "Haliburton, Maritime Intellectuals and 'The Problem of Freedom,'" in Davies, ed. Haliburton Bi-centenary Chaplet.

⁶¹Epitome, i, p. 65, but see below, note 75.

⁶²Ibid., ii, p. 57. Murdoch's changing views on the Mi'kmaq are explored below.

Murdoch believed that the commitment of the legal order to simplicity and freedom reflected the Nova Scotian character, epitomized in the yeoman ideal who informed his legal, political, and historical vision. Provincial literature of the period celebrated the "humble and vigorous" Nova Scotian, contrasting images of an aged and decadent mother country with those of colonial youth and virtue, in a striking parallel to American imagery of the revolutionary period.⁶³ In insisting upon the quiet and sturdy virtue of the Nova Scotian character, Murdoch and his contemporaries sought to discountenance the earlier aristocratic norms disseminated from Halifax's garrison culture, norms that involved conspicuous consumption, public drunkenness, and licentiousness from the Governor and his lady on down.⁶⁴

A sober and respectable representative of the middle classes, Murdoch sought to reconstitute the provincial identity in his own image. His project, whether he was fully conscious of it or not, was to claim for the useful and industrious middle classes the virtue that the eighteenth century had seen as reposing in the landed gentry. Yet the distinction between the "gentry" and the "middle classes" was not so sharp in Murdoch's mind. He himself always tried to project a gentlemanly image and to move in the appropriate social circles, seeking to demonstrate a cultural affinity with certain aristocratic values even as he sought to distance himself from others.

⁶³ See, e.g., Halifax Monthly Magazine (March 1831), p. 397.

⁶⁴Brian Cuthbertson, The Loyalist Governor: A Biography of Sir John Wentworth (Halifax: Nimbus 1983).

Murdoch found an organizing principle for the innovations of provincial law in "the civil law of Rome [, which] has a greater share in the composition of our laws than it has in those of the mother country . . . [and to which] we must often look for aid as an interpreter."⁶⁵ The qualities of Roman law which attracted Murdoch were the justice of its solutions, its aesthetic, and its apparently more scientific arrangement. As M. H. Hoeflich has recently written, "the Roman and civil law systems in the Anglo-American legal world [served as] sources of jurisprudential inspiration, as models of intellectual elegance, and as a comparative basis for law reform efforts."⁶⁶

The appeal of the Roman law is described in these terms in a text that Murdoch (certainly) and Kent (probably) both relied upon: Arthur Browne's A Compendious View of the Civil Law, being the substance of a course of lectures read in the University of Dublin (London, 1797-99).⁶⁷ This appeal of civil law was always subject to one caveat. Browne's second lecture "On the Comparative Excellence of the Civil and Common Laws" restated the common wisdom among English-speaking writers, to the effect that

⁶⁵ Epitome, i, p. 35. For examples, see Girard, "Themes and Variations," pp. 118-119.

⁶⁶M.H. Hoeflich, Roman Law and Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century (Athens and London: University of Georgia Press, 1997), p. 132.

⁶⁷ Murdoch refers to this work as Browne's "Civil and Admiralty Law." A second London edition appeared in 1802-03, and the first United States edition was published in 1840. Browne was born in Rhode Island of Anglo-Irish stock, left North America to study at Trinity College Dublin at the age of sixteen in 1772, and spent the rest of his life in Ireland, where he achieved high legal, political and academic honours, including his appointment as Regius Professor of Civil and Canon Law at Trinity College in 1785: Joseph C. Sweeney, "The Admiralty Law of Arthur Browne," Journal of Maritime Law and Commerce 26 (1995), p. 59.

the civil law was preferable in matters of private law, while the common law was preferable in public law. The civil law was thought to contain an arbitrary spirit in matters pertaining to the liberty of the subject, in contrast to the panoply of rights and privileges afforded to English citizens. Murdoch dissented radically from these views, presenting the whole period of European control of Acadia as a unity. "[F]rom the earliest settlements of the French in 1603 to the present time," he stated, all inhabitants of the colony have enjoyed all essential civil and political liberties."⁶⁸ Murdoch did not portray the conquest of Acadia as representing the triumph of superior British law over the reactionary regime of the French.

There were probably two reasons for Murdoch's more generous approach. First, it shows him as a consistent proponent of the environmentalist explanation of cultural change.⁶⁹ Murdoch explained the high value afforded liberty in the provincial context by the necessity of coping with a bracing climate and, originally, a virgin wilderness. What was sauce for the British goose would have to be sauce for the Acadian gander. This environmentalism happily provided a formula for harmonious relations between the two "founding peoples," which could be applied not only in Nova Scotia but in Canada. Decades later, Murdoch would write to Henry Morgan that the strife between English and French Canadians "must by and by be merged in the common love of the land of their

⁶⁸ Epitome, i, p. 42.

⁶⁹On Haliburton's environmentalism in his Historical and Statistical Account of Nova-Scotia, see M. Brook Taylor, Promoters, Patriots and Partisans: Historiography in Nineteenth-Century English Canada (Toronto: University of Toronto Press, 1989), p. 49.

birth or adopted residence."⁷⁰ Murdoch's lifelong preoccupation with the Acadian question meant that he also followed events in Canada with great interest, as he correctly saw Anglo-French tensions as one of the mainsprings of Canadian history.⁷¹

In addition to his environmentalism, it was the necessity for the two "races" to live in harmony that caused Murdoch to adopt an organic approach to provincial legal history. He knew that the Acadians would never be able to forget the events of 1755; his respect for their history made the adoption of a triumphalist interpretation of the British presence impossible.⁷² In his brief political career, Murdoch did what he could to bring the Acadians more into the mainstream of provincial political life by championing the cause of Catholic relief and by appealing in French to potential Acadian constituents.⁷³

The quality that distinguishes the Epitome from most other works of the period is the nature of its intended audience. Many of Murdoch's contemporaries wrote with one eye on a British audience, actual or virtual — one thinks of Haliburton especially in this context. Whether to raise the profile of Nova Scotia in England, to create a larger market for their product, or to demonstrate their cultural loyalty, these writers tried to

⁷⁰ Beamish Murdoch to H. J. Morgan, Sept. 28, 1865, H. J. Morgan Papers, National Archives of Canada, MG 29D 61, vol. 47.

⁷¹For Murdoch's private views on the Acadian question, see Alice R. Stewart et al., "A Nova Scotia-Maine Historical Correspondence, 1869," Acadiensis 14(2) (1985), p. 108.

⁷² On pre-1749 attempts by the British administration to come to terms with Acadian civil law, see Thomas G. Barnes, "'The Dayly Cry for Justice': The Juridical Failure of the Annapolis Royal Regime, 1713-1749," in Girard and Phillips, Nova Scotia Essays.

⁷³ An example of his campaign literature from the election of October 1840 survives: "A Messieurs les Électeurs Français Acadiens du comté d'Halifax, demeurants en Chezetcook," N.S.A.R.M. Library, Akins Collection.

communicate with their own fellow citizens in a way that would also be understood and accepted by a British audience. This fact inevitably shaped their writing, sometimes subtly, sometimes in more important ways.

In reading the Epitome, one does not feel the presence of a British audience. The work is addressed to Nova Scotians, in Nova Scotian terms. No doubt Murdoch would have been highly gratified to know that the work was read in Britain, but that was not his goal. He employed a British model because it was familiar to him and his readers, not to please or attract a British audience. For someone who followed the colonial tradition of referring to Britain as "home," he seems to have been interested in Britain solely as a cultural phenomenon, not as an actual place. He never visited the mother country. This exclusive focus on a local audience illustrates a respect for his compatriots and a commitment to place that is seldom matched in the literature of the period. A third-generation Nova Scotian, Murdoch was "at home" in Nova Scotia in a way that Haliburton perhaps never was; only of Joseph Howe could the same be said. The Epitome of the Laws of Nova-Scotia is a truly indigenous literary work from first to last.

It has become an article of faith in the postmodern world that all identities are constructed rather than inherent. In spite of his commitment to a certain environmental determinism, common to legal historians since Jean Bodin in the sixteenth century, Murdoch would probably have agreed that at some level, identity in a New World society like Nova Scotia was a matter of selection. This selection can be questioned. Was Murdoch's vision of Nova Scotians accurate? Self-serving? Was Murdoch's Nova Scotian identity "imaginary" rather than "imagined?" In her description of Haliburton's

Windsor, Gwen Davies has exposed the contrast between the town's appearance, "genteel and pretty as one of Jane Austen's Regency English villages,' and the "[d]ebt, death, murder, illness, scandal, racism, arrogance, misogyny, [and] class ostracization . . . [that] lurk[ed] beneath the surface."⁷⁴ How does one reconcile the optimistic Enlightenment humanism of the Epitome with the underlying reality which, as in Windsor, lurked beneath the surface of provincial life?

The answer lies in the role that law and identity are supposed to play. The law is a human institution which has measurable effects on individuals and on society. It must come to terms with many unpleasant human situations: debt, murder, scandal, racism and so on. It can only do so if it is animated by a clear set of values, in the statement of its principles and rules, in the minds of its personnel, and in the minds of the public who are subject to it and who look to it for protection. In a free society there will always be debate about some of the law's principles; others, like the proscription of murder, will command wide allegiance. In a general treatment of Nova Scotia law, we should not expect to find an exhaustive catalogue of social failings, because these are more or less taken for granted. The fallibility of human beings is why law exists in the first place. It is appropriate for such a work to focus on the ideals which animate the law, rather than the instances where those ideals may have been subverted or ignored. The more widely the ideals are diffused among the population, the more likely they will be respected and enforced.

⁷⁴"Haliburton's Windsor," in Davies, ed. Haliburton Bi-centenary Chaplet, p. 76.

With regard to the issue of identity, it is perhaps more legitimate to criticize Murdoch for glossing over the defects in provincial society. Any identity will be composed of negative and positive traits, and Murdoch accentuates the latter almost to the point of excluding the former. He lauds Nova Scotians' commitment to freedom without any recognition that this "freedom" was differentially experienced by women, the poor, blacks, Acadians, the Mi'kmaq, and non-Anglicans. Arguably, when Murdoch spoke of the qualities of simplicity and freedom that he saw in the provincial character, he was creating an identity of aspiration rather than one which actually reflected Nova Scotian society. In contrast to Haliburton, for example, Murdoch attempted to create an identity for Nova Scotians in which all religions⁷⁵ and racial and ethnic groups, with the glaring exception of the Mi'kmaq, could participate. The identity proposed by Murdoch is recognizably British, but in an inclusive rather than exclusive sense. The qualities of tolerance and ecumenism that Murdoch purported to find in the provincial character did have some basis in fact, even if not universally observed.⁷⁶

⁷⁵While Murdoch was correct in noting the general trend towards equal treatment of Anglicans, Dissenters and Catholics, he did not acknowledge that some residual distinctions between Anglicans and others remained in provincial law until 1850; Susan Buggy, "Churchmen and Dissenters: Religious Toleration in Nova Scotia 1758-1835" (M.A. thesis, Dalhousie University, 1981).

⁷⁶For a suggestive treatment of the development of tolerance as a response to diversity, see Barry Moody, "Growing Up in Granville Township, 1760-1800," in Margaret Conrad, ed. Intimate Relations: Family and Community in Planter Nova Scotia, 1759-1800 (Fredericton: Acadiensis Press, 1995).

Provincial Historian

By 1860 Murdoch was ready to devote himself to a project he had begun forty years earlier: a history of his native province.⁷⁷ His retirement from the recordership in 1860, along with his gradual withdrawal from his law practice after 1860, meant that for the first time in his life he could devote himself virtually full-time to such research and writing as he chose. The death of his father in 1855, for whose support he was completely responsible, had removed a major drain on his finances and perhaps too a certain emotional burden.⁷⁸ With no dependents and relatively modest needs, Murdoch was presumably able to live comfortably on the income from his share of the Market Wharf, supplemented by his savings.

The time was right not only for Murdoch but for Nova Scotia as well. Whether one approved or disapproved of the change, the achievement of responsible government signalled a new era, which allowed the previous period to be seen more clearly as a unity. A whole generation had grown up since the publication of Haliburton's History in 1829, and Haliburton himself had long since retired and moved to England. A more numerous, assertive, and discerning middle class were ready for a new and comprehensive look at the province's past, as is revealed by the commercial success of Murdoch's History.⁷⁹

⁷⁷In the 1820s Murdoch had helped Haliburton with his own history of the province, and had begun his own research on the history of the British North American colonies: Beamish Murdoch Papers, MG 1, vol. 726, "Historical Memoirs of the British North American Provinces since His Present Majesty's Accession."

⁷⁸See chapter 1.

⁷⁹Three hundred sets were sold on a single day in 1867, plus a further three hundred were purchased by the provincial Department of Education to be used as prizes: Anon., "Friday the Thirteenth," Journal of Education 15:3 (5th ser.) (May 1966), p. 23.

On the substantive and methodological side, many important documents had come to light which permitted a fresh look at key events in Nova Scotian history, especially the deportation of the Acadians. The emergence of the Acadian question as a focus of international controversy in the 1850s after the publication of Longfellow's Evangeline, also spurred Murdoch to explore the issue as thoroughly as possible.

Murdoch's treatment of the Acadians and the role of his History in Canadian historiography have attracted the interest of a number of historians in recent years, and it is not the purpose of this chapter to revisit those questions.⁸⁰ The History is here examined as Murdoch's final and most extensive work of literature, the final expression of his Nova Scotian patriotism. In thematic terms it presents a continuation of Murdoch's ideas about the efflorescence of British civilization in Nova Scotia, based on what Patrick Clarke has called "his idées-fixes of liberty, loyalty, and progress."⁸¹ Within this general pattern of continuity, however, Murdoch shifted his views on two topics, the effect of responsible government and the role of the Mi'kmaq in provincial history.

Murdoch devoted his entire soixantaine to his work on the History. In the preface to vol. III, penned in January 1867, he states that he began work on the project eight years earlier. Volume III of the History appeared in the spring of 1867, but Murdoch continued to work on a projected fourth volume until early 1869 at least, when he wrote

⁸⁰M. Brook Taylor, Promoters, Patriots, and Partisans: Historiography in Nineteenth-Century English Canada (Toronto: University of Toronto Press, 1989), pp. 187-207; Patrick D. Clarke, "The Makers of Acadian History in the Nineteenth Century" (Ph.D. dissertation, Université Laval, 1988); Clarke, "Beamish Murdoch: Nova Scotia's National Historian," Acadiensis 21:1 (1991), p. 85.

⁸¹Clarke, "Makers of Acadian History," pp. 258-59.

to the Maine historian John Edwards Godfrey that he had completed vol. IV down to 1842 (vol. III had ended at 1827) and hoped to take events down to 1866 "if spared."⁸² As with the projected but never-completed fifth volume of the Epitome, Murdoch's energy could not measure up to his initial enthusiasm.

The non-appearance of vol. IV of the History, however, may have reflected more than a dearth of energy on Murdoch's part. He had, after all, completed the manuscript down to 1842. Dealing with that period would have forced Murdoch to revisit the most painful episodes of his political life, and to deal with his troubled relationship with Joseph Howe. Given Murdoch's penchant for circumspection, the fact that he managed to deal with these matters even in manuscript form occasions some surprise. The manuscript has unfortunately not survived, depriving us of a valuable perspective on one of the most important periods in Nova Scotia's political life. One can only suspect that Murdoch found it impossible to deal with the period without causing offence to some persons still living, and rather than risk re-opening old wounds, decided to follow his usual instincts and refrain from publication.

Although volume IV is lost to us, Murdoch does provide a kind of retrospective on responsible government in volume II, in which he grudgingly admits that his fears have not come to pass.

⁸²Murdoch to Godfrey, 22 February 1869, reproduced in Alice R. Stewart, James B. Vickery and Edward S. Kellogg, eds. "A Nova Scotia-Maine Historical Correspondence [Document]," Acadiensis 14:1 (1985), p. 108.

We must not be surprised to find that, in representative governments, tumults, passion and party views occasionally disturb the working of the machinery -- that popular excitements and restless demagogues sometimes induce doubts in the reflective mind of the real blessings of liberty; while on the other hand, influence, private ambition and pitiful subserviency may give to a country with a free constitution the aspect of servility, sycophancy and slavery. But all these oscillations proceed from the people themselves and not from any defect in the principles of free government. They are also short-lived evils, and rarely last long enough to inflict a permanent injury on the constitution.⁸³

Gone is the language of the One, the Few and the Many. The steady state of the balanced constitution has been replaced by a more turbulent polity which will experience "oscillations:" excesses of liberty and attempts to capture the state for private gain. Yet in the end these are only epiphenomena, which do not indicate "any defect in the principles of free government." Murdoch refrains from saying what those principles are, but the whole thrust of the passage is to accept the doctrine of popular sovereignty, which had been anathema to him two decades earlier. Having seen that responsible government seemed only to increase the attachment of Nova Scotians to the monarchy, rather than the reverse - witness the spectacular success of the Prince of Wales's visit in 1860 - Murdoch must have been reassured that the changes of 1848 had not imperilled the colony's relationship with the Crown.

Murdoch was not one to change his views lightly, but the History contained a public examination of conscience - if not a full confession - with regard to his views on the aboriginal inhabitants of Nova Scotia.⁸⁴ It will be recalled that in his Epitome

⁸³History, II, 325-26.

⁸⁴The following line of inquiry was stimulated by D.G. Bell, "Maritime Intellectuals and Aboriginal Dispossession," paper delivered at the Fourth Planter Studies Conference,

Murdoch, normally a paragon of restraint, had permitted himself to characterize the Mi'kmaq in an overtly racist fashion, by appearing to deny their very humanity and refusing to admit that they might be "civilized." It is worth quoting the passage in full to contrast it with Murdoch's later views:

I will not enter into any inquiry as to the justice of the invasion of the agricultural and comparatively civilized countries of the southern continent by the Spanish and Portuguese nations, but confine myself to the case of the Northern regions, where our own nation and that of France took possession of an uncultivated soil which was before filled with wild animals and hunters almost as wild. It might with almost as much justice be said that the land belonged to the bears and wild cats, the moose or the cariboo, that ranged over it in quest of feed, as to the thin and scattered tribes of men, who were alternately destroying each other or attacking the beasts of the forest. But the course of events has nearly extirpated them from the soil; and the subject of their wrongs, for many they had to complain of, is now matter for the historian, rather than the jurist. I do not think that they themselves had any idea of property (of an exclusive nature) in the soil, before their intercourse with Europeans. Much injustice however was done to those simple creatures by those who communicated to them the artificial vices of civilized society.⁸⁵

The treatment of the Mi'kmaq in the History was, on the surface, diametrically opposed to that in the Epitome. The reader is advised that the Mi'kmaq "have usually been honest, frank, brave and humane, and they exhibited these qualities as well before as since their conversion to the Christian faith." Further, it should not be "supposed that the Indians . . . were the ignorant, naked savages some persons may have imagined." In fact their material culture was advanced and appropriate for their needs, and Murdoch singled out

Acadia University, Wolfville, N.S., 27 September 1997. See generally L.F.S. Upton, Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867 (Vancouver: University of British Columbia Press, 1979).

⁸⁵Murdoch, Epitome, ii, p. 57.

for special praise their canoes, wigwams, moccasins, baskets and snowshoes. Finally he bestowed the ultimate accolade: the language of the Mi'kmaq was "so complete, . . . so musical and refined, as to lead to the inference that they had long been a civilized and thinking race of people."⁸⁶

Murdoch proceeded to give some analysis of what might be called the legal culture of the Mi'kmaq. After the initial conflicts with the English in the post-1749 period, Murdoch found that the native people "adher[ed] most strictly to their engagements, [and were] most scrupulous and attentive to abstain from doing the slightest injury to the white people or to abstract the value of one penny of their cattle or goods, showing that they deeply respected and well understood the rights of property." Far from being savage brutes, the Mi'kmaq understood the fundamental concepts of contract and property. "The only difference of opinion that remained," continued Murdoch, "was, that the Indian believed he had a clear right to cut down or bark a tree in the unfenced and uncultivated wilderness -- while those who held a written grant or deed, in some rare instances grudged him this privilege, and considered him a trespasser."⁸⁷ Finally, in a display of cultural relativism which many Nova Scotians must have found shocking, Murdoch opined that Governor Lawrence's bounty on Indian scalps was much worse than the Mi'kmaq practice of scalping, which was simply part of their war customs and justified by their own laws

⁸⁶History, i, pp. 38-39 (emphasis added).

⁸⁷History, ii, pp. 430-31. For the incident on which this observation is probably based, see the Novascotian, 6 April 1846.

under certain circumstances.⁸⁸ No such justification could be advanced by Lawrence, according to Murdoch.

What can explain this apparent volte-face? The answer appears to be simple: further research and Mi'kmaq demographics. When Murdoch wrote the impugned passages in the Epitome in the early 1830s, he merely parroted the prejudices of his society, and little literature was available to refute such views. In a long footnote to the passage quoted above, Murdoch cited Kent's Commentaries as being in agreement with his views, and noted that Kent based his opinion on Vattel's Le Droit des Gens, ou Principes de la Loi Naturelle . . . (1758). Murdoch's passage is pure Vattel in two respects: the distinction between the conquest of the "civilized empires of Peru and Mexico," which Vattel regarded as a "notorious usurpation," and the North American situation; and the clear inference that agriculturalists can legitimately displace hunter-gatherer societies in order to enhance productivity and feed the earth's population. Hunter-gatherers, said Vattel, "usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have . . . no reason to complain, if other nations, more industrious and too closely confined come to take possession of a part of those lands." The tribes of the extensive tracts of North America "rather ranged through than inhabited them," an expression which Murdoch mimics with reference to the fauna of Nova Scotia.⁸⁹

⁸⁸History, ii, pp. 308-09.

⁸⁹Quotes taken from the English translation, The Law of Nations, or Principles of the Law of Nature . . . (London: G.G. & J. Robinson, 1797), pp. 36-37. The copy of this edition in the Sir James Dunn Law Library at Dalhousie University contains two pages

Murdoch failed to note, however, that Kent regarded Vattel's position as highly theoretical in New England, where in practice "the colonists were not satisfied . . . to settle the country without the consent of the aborigines, procured by fair purchase, under the sanction of the civil authorities. . . . [T]he prior Indian right to the soil of the country was generally, if not uniformly recognised and respected by the New-England Puritans."⁹⁰ Kent also discussed the seminal decision of Chief Justice Marshall in Johnson v. McIntosh (1823),⁹¹ where "the natives were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it."⁹² Concerned about upsetting land titles in the province, Murdoch wished to avoid characterizing Mi'kmaq land rights as justiciable.

In the ensuing decades a number of publications provided valuable new information and insights about the region's native peoples. Foremost among these were works by Murdoch's good friend, the New Brunswick lawyer and natural historian Moses Perley, and by the Rev. Silas Tertius Rand, linguist, missionary and pioneer

of writing in a hand very similar to Murdoch's. The first page lists 23 writers on international law. The second contains a number of specific references to Vattel of a mostly laudatory nature, including the notation that Sir William Scott called him "the most correct . . . of modern Professors of Public Law."

⁹⁰James Kent, Commentaries on American Law, 2d ed. (New York: O. Halsted, 1832), iii, p. 389.

⁹¹21 United States Reports 543.

⁹²Kent, Commentaries, iii, p. 379. The second edition contains a lengthy discussion of subsequent decisions of the U.S. Supreme Court, Cherokee Nation v. Georgia (1831) and Worcester Nation v. Georgia (1832), but these would not have been discussed in vol. III of the first edition, which appeared in 1828 and which was probably the volume Murdoch was using.

anthropologist.⁹³ Perley travelled extensively among the Mi'kmaq and Maliseet, and published a number of detailed reports on the reserves in the 1840s in his capacity as commissioner of Indian affairs for New Brunswick. Sharply critical of the government's Indian policy, Perley was removed from his post in 1848.⁹⁴ Joseph Howe's reports as commissioner of Indian affairs for Nova Scotia also made available more reliable information about the Mi'kmaq in the 1840s. It was probably Rand's 1849 lectures on behalf of the Micmac Missionary Society,⁹⁵ and his later lectures on "The Claims and Prospects of the Indians," given at Halifax on 17 and 24 October, 1854, that most stimulated Murdoch to reconsider the views on the Mi'kmaq he had voiced in the Epitome. Rand presented Nova Scotia's European population with the fullest and most sympathetic account of Mi'kmaq culture ever to appear in the province down to that date, and spoke in terms of plunder and compensation. Murdoch referred to Rand's work in

⁹³Dorothy Lovesey, To Be a Pilgrim: A Biography of Silas Tertius Rand 1810-1889 (Hantsport, N.S.: Lancelot Press, 1992). Prior to Rand's publications, the main source of published material in English on the Mi'kmaq was Haliburton's General Description of Nova Scotia (Halifax, 1823), pp. 45-61. On early philanthropic work with the Mi'kmaq, see Judith Fingard, "English Humanitarianism and the Colonial Mind: Walter Bromley in Nova Scotia 1813-25," Canadian Historical Review 54:2 (1973), p. 123.

⁹⁴W.A. Spray, "Perley, Moses Henry," D.C.B. VIII, 628-32. Perley and Murdoch were corresponding in 1832-33, and both Murdoch and T.B. Akins visited Perley and his family in Saint John on separate occasions during this time; Perley to Murdoch, 7 November 1832 and 23 February 1833, Thomas Beamish Akins Papers, MG 1, vol. 8, nos. 22, 23. A letter from Perley to his mother dated 6 September 1833 refers to the recent visit by Akins, stating that "[h]e is very like Murdoch, and like him, has never been abroad until now;" New Brunswick Museum, Moses Perley Cabinet Document. It is difficult to imagine Perley approving of Murdoch's remarks on the Mi'kmaq in the Epitome.

⁹⁵A Short Statement of Facts relating to the History, Manners, Customs, Language and Literature of the Micmac Tribe of Indians, of Nova Scotia and P.E. Island (Halifax: James Bowes & Son, 1850).

the preface to vol. III of his History, but once again circumspection prevailed; he neither considered the issue of possible compensation nor discussed ongoing Mi'kmaq complaints about encroachment on reserve lands.⁹⁶

Demographic change might also have urged Murdoch to study the Mi'kmaq more closely. When he wrote the Epitome, the last of the Beothuks in Newfoundland, Shawnadithit, had just died in 1829, and the disappearance of the Mi'kmaq was thought to be a distinct possibility. In the passage from the Epitome quoted above, Murdoch stated that the native people had been "nearly extirpated . . . from the soil." Subsequent references to the Mi'kmaq are all in the past tense, as if they had already disappeared. It may be that Mi'kmaq grievances are referred to as "matter for the historian, rather than for the jurist" because Murdoch expected the imminent extinction of the race to make their claims academic in law. A decade after the Epitome, Joseph Howe had predicted the extinction of the Mi'kmaq within forty years, if present trends continued. By the 1860s, it was clear that they were not going to die out, and that a role would have to be found for them in provincial society. Murdoch noted in his History that a recent census had revealed 1407 Mi'kmaq in the province, a figure which, while not large, precluded any thought of extinction in the foreseeable future.⁹⁷

⁹⁶History, iii, p. vii.

⁹⁷Estimates are reviewed in Virginia Miller, "The Decline of Nova Scotia Micmac Population, A.D. 1600-1850," Culture II(3) (1982), pp. 107-20. Miller suggests that the nadir occurred about 1840, with definite population increase after 1840. The 1871 Census of Canada recorded 1666 Mi'kmaq in Nova Scotia.

By March 1864 Murdoch had completed a 200-page Mi'kmaq-English dictionary which included a ten-page account of the rules of Mi'kmaq grammar.⁹⁸ Language of course holds the key to the mentalité of a people. Conversation with Mi'kmaq people would have provided a window on their culture and history which may have obliged Murdoch to alter his views. An obvious channel of contact existed: the Old Nova Scotia Society arranged for the participation of Mi'kmaq representatives in all important public ceremonies in early and mid-Victorian Halifax. During the celebrations attendant upon Queen Victoria's marriage in 1840, for example, Mi'kmaq men and women, some with babies on their backs, marched in a procession organized by the Society, and two Mi'kmaq youths carried the Society's banner. Afterwards, they were treated to a "great repast" of fish dishes (it being a Friday) on the Grand Parade.⁹⁹

A cynical interpretation of Murdoch's account of the Mi'kmaq in the History might stress that, at bottom, his position remained the same as in the Epitome. Aside from Lawrence's bounty, Murdoch still did not suggest that there was anything questionable in the treatment of the Mi'kmaq by the British Crown or the Nova Scotia

⁹⁸The dictionary is in the Beamish Murdoch Papers, MG 1, vol. 727A, no. 1. Sources for this work are unclear. The only published account of the Mi'kmaq language as of 1860 was Walter Bromley's brief glossary of Mi'kmaq terms, published in Haliburton's General Description in 1823. Murdoch may have consulted his friend Moses Perley, who knew the Mi'kmaq well. There must also have been some correspondence between Dr. Rand and Murdoch, but no trace of it survives today: personal communication with Dr. Dorothy Lovesey, 30 November 1994. Rand's own dictionary was not published until just before his death: Dictionary of the Language of the Micmac Indians (Halifax: Nova Scotia Printing, 1888).

⁹⁹Novascotian, 7 May 1840. Some particulars can also be gleaned from Bonnie Huskins, "Public Celebrations in Victorian Saint John and Halifax" (Ph.D. dissertation, Dalhousie University, 1991).

government. He suggested that after about 1770 the Mi'kmaq were satisfied with their relationship with the Crown, when he must have known of at least some of the various petitions to the Crown and to the region's legislatures complaining of illegal dispossession.¹⁰⁰ Murdoch criticized the individual settler who might begrudge an Indian the right to cut down a tree on undeveloped private land, without referring to possible Mi'kmaq claims against unsettled Crown land. Although Murdoch was aware of the Royal Proclamation of 1763, he did not address the issue of how settlement was allowed to proceed after that date without any attempt to deal with the claims of the indigenous people.

In Murdoch's defence, it might be said that at this particular juncture in provincial history, the humanization of the Mi'kmaq in the eyes of the settler population was a necessary prelude to any discussion of legal claims. Education would have to precede activism. Murdoch's own attitude was perhaps the best illustration of this process. Having once applied his mind to the question, he was prepared to abandon the prejudices he had displayed in the Epitome and to adopt a much more sympathetic attitude to Nova Scotia's native people. He and Silas Rand were two of the few intellectuals in mid-century Nova Scotia to advocate more respectful and humane treatment of the Mi'kmaq.

In erudition the History probably surpasses the Epitome, but in originality and in its treatment of the Nova Scotia identity, it must be said that the Epitome is the superior

¹⁰⁰Some of these are reviewed in Jennifer Reid, Myth, Symbol and Colonial Encounter: British and Mikmaq in Acadia, 1700-1867 (Ottawa: University of Ottawa Press, 1995), p. 78.

work. While the strain of covering simultaneously his literary, sociological and legal bases is all too evident in the Epitome, Murdoch returns to his key themes often enough to sustain interest. The relative simplicity and informality of its style contrast favourably with the plodding chronometricity of the History, while the circumspection and obliqueness which are so pronounced in the History are much less evident in the Epitome. As a perspective on the Nova Scotia identity as seen through its legal culture, the Epitome's account, while idealistic and prettified, contains nonetheless a good deal that is convincing.

The principal defect of the work, and one of the probable reasons for its failure to thrive by means of subsequent editions, was its somewhat backward-looking nature, even as it was published in 1832. Although at times critical of English law "at home," the Epitome gives few signs of being aware of criticisms of the operation of particular laws or courts in Nova Scotia. It does state that the division between the courts of common law and that of Chancery "produces much practical evil," and advocates the fusion of the two which ultimately came to pass in 1855, after the achievement of responsible government.¹⁰¹ On such a highly-charged topic as imprisonment for debt, however, on which Murdoch's reform views are well known from other writings, he made only the mildest of critiques.¹⁰² Murdoch was too astute an observer not to see that provincial society was on the cusp of a period of escalating change, generated by increased immigration, freer trade, and the passage of the first Reform Bill in England,

¹⁰¹ Epitome, iv, pp. 48-49.

¹⁰² Ibid., iv, p. 17.

and manifested in the stirrings of reform in Nova Scotia itself. Perhaps he thought that anchoring provincial law solidly in the past was all the more necessary in such a period of flux. If so, he was mistaken. The Augustan verities of the Epitome would soon mark it as belonging to a vanished era, as the early Victorian lawyer reached for the latest edition of Kent's Commentaries on American Law, brought in by steamship from New York or Boston.¹⁰³

¹⁰³ On the disappointing reception which awaited the Epitome, and the popularity of Kent's work in Halifax, see Girard, "Themes and Variations," pp. 130-135.

Chapter Nine

Twilight

In the fall of 1863, the Acadian Recorder began a series entitled "Sketches of Our Bar" with a profile of Beamish Murdoch. "Max," who confessed himself to be "something of a physiognomist," provided the following portrait of Beamish Murdoch as he approached the final decade of his life:

[A] long life of generous sentiments has given to Beamish Murdoch the soft-toned, almost girlish sweetness of expression which draws you to the man in spite of yourself. . . . He keeps so quiet in these feverish, democratic times that he might soon sink out of sight. . . . I should think he likes to live well. Here he stands in the Court this autumn day with a heavy great coat and a huge scarf wrapped with slovenly carelessness about his throat. . . . [He is now] walking, as is his custom, erect, and how tenderly using his stick as he uses all things animate and inanimate May he go gently down the street we are all going, to the inevitable gate.¹

Courteous, gentle, quiet, proud, careful of his health, a little careless of his appearance, as a Victorian bachelor might be, Murdoch was no doubt instantly recognized as he tapped his way cautiously about the streets of Halifax. The reference to him sinking out of sight was surely a reference to his public career, not his physical presence. A contemporary photograph confirms the physical impression left by "Max": the subject is balding, with a high forehead, mutton-chop whiskers, wispy beard and pedant's paunch. He sits stiffly erect, but still gives an impression of frailty. The eyes are small and indistinct; the years of study and copying have taken their toll.²

¹Acadian Recorder, 31 October 1863.

²The photograph is part of the N.S.A.R.M. photograph collection, and is reproduced in Carol Wilton, ed., Inside the Law: Canadian Law Firms in Historical Perspective

The Acadian Recorder's tribute confirmed that the year 1863 had been an annus mirabilis for Beamish Murdoch, during which he was showered with honours and accolades by his professional peers and juniors, his government and his fellow citizens. The legal profession welcomed him once again, making him vice-president of the Barristers' Society in 1863-64, after excluding him from its governance for a period of nearly four decades.³ Murdoch's role as a kind of elder statesman was also acknowledged by the younger generation of articled clerks, who invited him to give a lecture "On the Origins and Sources of Nova Scotia Law" on 29 August 1863.⁴ In a magnanimous gesture, it was the government of Joseph Howe which, in its dying days, conferred the distinction of Queen's Counsel on Beamish Murdoch on 1 May 1863.⁵ The wounds created during the struggle for responsible government had finally begun to heal, albeit just in time for new ones to be inflicted in the run-up to Confederation. A few years later, this list of honours would be completed with an honorary D.C.L., awarded by King's College in June 1867 as a tribute to the author of A History of Nova-Scotia, or Acadie.

Murdoch had moved by the 1860s from Brunswick Street to the more salubrious precinct of Spring Garden Road, where he could take the air in the nearby Public

(Toronto: University of Toronto Press for the Osgoode Society, 1996), p. 58.

³Belcher's Farmer's Almanack notes the membership of the executive of the Society from its inception, and Murdoch appears on the executive committee only in the year 1827, before again appearing in 1863-64.

⁴Although apparently not published at the time, the lecture must have circulated in manuscript form. For details of its later publication, see Appendix A.

⁵Executive Council Minutes, RG 3, vol. 1, no. 166, 1 May 1863.

Gardens. He and aunt Harriette rented a house at the corner of Queen Street and, as they had always done, hired a live-in maidservant to look after their domestic needs. The house was located just a block away from the Supreme Court's splendid new quarters, which had opened with great fanfare during the visit of the Prince of Wales in 1860. The city over which Murdoch had presided as Recorder was evolving, physically and socially, in ways which he must have found gratifying. To be sure, poverty was by no means abolished, and class and sectarian antagonisms at times boiled to the surface. Earlier in the year 1863, citizens and soldiers had come to blows in one of the periodic bouts of rioting that was the price of having a British garrison. Gradually, though, the raffishness of old Halifax with its drunken soldiers, brawling sailors and upper-class rakes was giving way to the middle class regimen of order, sobriety and respectability. New gas lighting, a better water supply, improved streets and sidewalks, the laying out of the Public Gardens and the spacious new Camp Hill Cemetery, all made the city a more attractive and, to some extent at least, a safer place by mid-century than it had been two or three decades earlier. A series of new buildings, from churches to prisons, sprang up to define the Halifax skyline for the next century.

By 1863 Murdoch was effectively the head of the Beamish family. His uncle Thomas Ott Beamish had died in 1860, as had aunt Sarah. Maria had died in 1851, leaving aunt Harriette Ott Beamish as the last survivor of her generation. Aside from Akins, with whom he continued to share many interests, Murdoch's closest contacts were with his cousin Charles Ott Beamish, partly because of their joint ownership of the Market Wharf. Each of the aunts had groomed one of their numerous nephews as heir. Maria

had chosen Charles, the eldest son of her eldest brother, to whom she left her interest in the Market Wharf. Harriette of course had chosen (or been "assigned") Beamish, and Sarah had left her share in the Market Wharf to Akins.⁶

Charles was much more at home in the "feverish, democratic times" of the 1860s than his relative. Something of an entrepreneur, and connected with coal mining and real estate investment, he had married well in 1853. His wife Sarah was the daughter of T.W. James, the deputy provincial secretary. They had five children, but only a daughter, Maria Theresa (b. 1858), survived to adulthood. Beamish Murdoch planned to follow family tradition by selecting Charles as his sole heir, rather than sharing his estate among his numerous cousins. Cousin Francis Stephen Beamish, who had articulated with Murdoch and been called to the bar in 1847, might have seemed a more obvious choice, but he had left Halifax for Cleveland, Ohio in the 1850s. He returned to Halifax about 1864, but went back to Cleveland once more a decade later, seemingly for the rest of his life. For Murdoch, who had never ventured further than Saint John, such gadding about must have been difficult to understand.

Murdoch did indeed "sink out of sight" during the Confederation era. Although he no doubt followed the debates, his major preoccupation throughout the decade was the completion of his History. By 1870, Murdoch had abandoned any plans to publish his fourth volume, and he could finally begin to plan for a true "retirement." When he formulated his plan to retire to Lunenburg is not known, but he did not depart until aunt

⁶Will of Maria Ott Beamish, Halifax County Court of Probate, no. 1403; will of Sarah Catherine Ott Beamish, no. 1931 (mfm. at N.S.A.R.M.).

Harriette expired, aged 82, on 8 April 1872. If all had gone as planned, Harriette should have left her 5/28 interest in the Market Wharf, valued at \$12,000 at her death, to Beamish Murdoch. Indeed, she did so in a will dated 25 May 1854. The will survives, in her hand but not witnessed (and therefore legally invalid), with the pencilled notation "29 April 1872. Found this. BM." It is hard to believe that even the imperturbable Beamish Murdoch was not annoyed at this turn of events, this act of negligence or pique by the woman with whom he had shared his daily life for over fifty years. Harriette's death intestate meant that her interest in the wharf would be shared among eleven nieces and nephews.⁷

Perhaps aunt and nephew had begun to tire of one another after their lifelong co-residence. Perhaps Murdoch resented having to remain in Halifax and care for Harriette when he would have preferred to spend his well-earned retirement differently. At any rate, after Harriette's death Murdoch very hastily liquidated her estate, settled most of his own affairs in Halifax and moved to Lunenburg. Closing Harriette's estate raised some delicate issues. When Murdoch applied to the Court of Probate to be administrator of the estate, he listed his aunt's next-of-kin as himself, Akins, and the nine surviving children of Harriette's deceased brother Thomas Ott Beamish. He thus excluded the surviving children of her long-deceased brother Frederick Ott Beamish, who included Charles Beamish. Murdoch regarded Frederick's children as illegitimate, which they probably

⁷For the holograph will, see MG 100, vol. 109, no. 18. Beamish Murdoch was appointed administrator of his aunt's estate: Halifax County Court of Probate, no. 1924 (mfm. at N.S.A.R.M.).

were.⁸ As such, they were legally excluded from inheriting on the intestacy of a relative; they could have taken an interest only if specifically named in a will. Although Murdoch was, in strict law, correct, his manner of proceeding must have rankled with Charles Beamish, and may have contributed to tensions which became evident between them a few years later.

Undaunted, Murdoch pressed on. On 1 June he bought for \$6120 the portion of his aunt's interest in the Market Wharf which had descended to the children of Thomas Ott Beamish. On the 12th he sold this interest to Akins and Charles Beamish. On the same day he, Akins and Charles Beamish also sold a parcel of land adjoining the Market Wharf to two merchants for \$6400. On the 11th the three men discharged the last remaining mortgage on the Market Wharf, on which some \$12,500 principal was still owing. Within days Murdoch took up residence in a hotel in Lunenburg, and by the 12th of July he had bought a house there.

Murdoch purchased his new home from his friend Senator Henry Adolphus Newman Kaulbach. The source of their friendship is obscure, and on the surface it seemed an unlikely one. Kaulbach was thirty years Murdoch's junior and "one of the largest land proprietors and shipowners in Lunenburg County . . . [, with] a reputation for

⁸In his will, Frederick Ott Beamish referred to the woman with whom he cohabited as "my friend Margaret Langille," and left his estate to her and to his six "natural children" by her; will of Frederick Ott Beamish, Halifax County Court of Probate, no. O79 (mf. at N.S.A.R.M.). "Natural" was a legal synonym for "illegitimate" in this context. In documents executed after Beamish's death, Margaret referred to herself as "Margaret Langille, spinster," when she surely would have described herself as "Margaret Beamish, widow" if she had believed herself to have been legally married to Frederick Ott Beamish.

unsympathetic, unfair and sharp dealing."⁹ The Kaulbachs had been one of the leading families in Lunenburg since the Creation, and H.A.N. Kaulbach (LL.B. 1857) was one of the first aspirant lawyers in the province to attend Harvard Law School. Elected to the House of Assembly in 1863, his support of Confederation led to defeat in 1867, but Kaulbach received his reward with a Senate appointment in March 1872.¹⁰ Soon after Murdoch died, Kaulbach would erect the "ostentatious yet elegant" Medway Hall, "the most splendid residence ever built in Lunenburg."¹¹

In the summer of 1872 the Kaulbachs had five children, ranging in age from 14 years to a few months. Murdoch particularly enjoyed the company of the senator's wife, Eunice Sophia, and began to spend a considerable amount of time at the Kaulbach residence. The presence of an eccentric old bachelor amid this bustling family must have caused some difficulties, which could only have been exacerbated by Murdoch's becoming indebted to Kaulbach for some \$3000 by early 1873.¹² A falling-out with the Kaulbachs ensued, upon which Murdoch sold his house in the spring of 1874 and returned to Halifax to live with Charles Beamish. Murdoch stayed long enough to dispose of the Market

⁹J.M. Beck, "The Last Days of Beamish Murdoch," (unpublished ms., 1993), at p. 7, N.S.A.R.M., V/F, vol. 376, no. 28.

¹⁰The appointment was handled by Joseph Howe, then secretary of state for the provinces; Beck, Joseph Howe, ii, p. 278.

¹¹Beck, "Last Days," p. 19.

¹²Kaulbach sued Murdoch to final judgment for these debts in February 1873, and Murdoch paid them off by August 1874: Halifax County Registry of Deeds, RG 47, book 190, p. 500 (mf. at N.S.A.R.M.).

Wharf in August for \$53,200, of which his share was about \$11,500.¹³ By the fall, however, he had quarrelled with Charles Beamish and returned to Lunenburg, where he purchased a second house from Kaulbach. From this point on, Murdoch was a fixture at the Kaulbach residence, and appears to have greatly enjoyed this exposure to the kind of family life he had never had. In July 1875, when the Kaulbachs' house was destroyed by fire, Murdoch insisted they come to live with him, which they did.

Murdoch's physical health declined rapidly in the fall of 1875, but he continued to attend to most of his own business and to receive visitors. He was plagued by a series of strokes, but soldiered on. His last postcard, addressed to Maria Beamish, was ominous but strangely cheery. Dated 13 January 1876, Murdoch reported that he had "barely escaped death from paralysis of the brain," but was now on the mend. He died less than a month later, on 9 February.

From the summer of 1874, the final two years of Murdoch's life begin to take on a surreal air. According to several sources, this pillar of Victorian propriety seems finally to have succumbed to the demons of sex and alcohol which he had eluded, with at least apparent success, for his entire life. Whether the causes of these behavioural changes were physiological (some form of senile dementia) or psychological (disorientation after leaving his lifelong home at Halifax) can never be known. Whether the extent and nature of this new behaviour was exaggerated for the purposes of litigation also cannot be known. The major sources for this unlikely transformation are the 300-page transcript of

¹³Agreement of sale between Beamish Murdoch, Thomas Beamish Akins and Charles Beamish of the first part and Edward Morrison of the second part, for the sale of the Market Wharf, MG 100, vol. 160, no. 11c.

evidence taken in the litigation arising out of a challenge by Charles Beamish to his cousin's last will, and the reasons for judgment of the Nova Scotia Supreme Court in the cause.¹⁴

During the two years leading up to his death, the elderly lawyer seems to have lost his moorings. Charles Beamish reported that while Murdoch lived with him briefly in Halifax in 1874, he proposed to Henrietta James, a young kinswoman of Charles's wife. During the litigation over his cousin's will, Charles Beamish alleged that Murdoch had become possessed of "a diseased and insane passion for the wife of [H.A.N. Kaulbach]." Even a poem which Murdoch wrote for little Rupert Kaulbach in 1874, "On seeing my little friend Rupert Kaulback nestling on the bosom of a young lady," had an unusually erotic flavour.

He is but five, but he's all alive
To female beauty's charms;
She may be fifteen, but she is his queen
While she folds him in her arms¹⁵

There were also various reports of attempted sexual improprieties with housekeeping staff in Halifax and Lunenburg. Sexual harassment of female domestic staff was a widespread Victorian vice, in which it is possible that Murdoch may have previously indulged, although there is no evidence for it before the move to Lunenburg. The terminology of

¹⁴The case was eventually appealed to the Supreme Court of Canada, and the appeal book was printed as Appeal From the Supreme Court of Nova Scotia. In the matter of . . . the last Will and Testament of Beamish Murdoch . . . (Halifax: William MacNab, 1879). The decision of the Supreme Court of Nova Scotia is reported as In re Beamish Murdoch's Will, Nova Scotia Reports 12 (1878), pp. 428-456.

¹⁵Reproduced in full in Appendix B.

effeminacy with which many descriptions of Murdoch are laced points quite in the opposite direction.¹⁶

Then there was the alcohol problem. Mr. Justice Alexander James found as a fact that the Kaulbachs supplied Murdoch with two gallons of whiskey per week, besides champagne, sherry and claret. This portrait of a former temperance advocate spending his last days soaked in alcohol makes one pause. It is difficult to believe that in a small community such as Halifax, where few vices remained private for long, Murdoch could have been a temperance leader and closet alcoholic. The evidence points rather to the onset of the problem late in life. Given the strong and recurring hints of problems with alcohol on the part of Murdoch's father and grandfather, the possibility of a genetic predisposition cannot be excluded.¹⁷

Further evidence of uncharacteristic behaviour came from neighbour Edmund Tobin at the trial. Tobin recounted an October 1875 conversation in which Murdoch told him that he "had had a grand conflagration, and burnt up a lot of his papers a few days previous."¹⁸ Possibly Murdoch felt the need to be liberated from the mountains of paper with which he had surrounded himself for much of his life, but such a need would have been highly novel for him. It is difficult to understand how Murdoch the historian could commit such an act without giving his cousin Akins at least the chance to rescue items

¹⁶See, e.g., the description by "Max" quoted at the outset. At the height of the mud-slinging between Murdoch and Howe in 1842, the latter often described Murdoch as an "old woman." Novascotian, 8 July, 28 July 1842.

¹⁷I thank Barry Cahill for drawing this possibility to my attention.

¹⁸Appeal Book, p. 28.

of value for posterity. The symbolism of the bonfire -- a literal burning of bridges -- in dissociating Murdoch from his past, however, cannot be denied.

The real story of Murdoch's last days will remain forever unknowable, since the trial transcript is full of diametrically opposed testimonies given by witnesses who were either interested in the outcome or related through friendship, blood or affinity to the principal parties to the suit. One fact stands out, however, and that is the growing influence of the Kaulbachs over their house guest. The five wills made by Beamish Murdoch during the last ten months of his life tell the story clearly. The first, dated April 1875, left roughly half his estate to "my best and tried friend, my cousin" Charles Beamish and appointed him executor, and gave the other half to Charles in trust for Eunice Kaulbach for her separate use. In this will Murdoch left all his books to Akins. The second will, dated June 1875, was made at New Ross while attending a wedding with Mrs. Kaulbach. She now received three-quarters of Murdoch's estate, Charles Beamish one-quarter. Two wills made in August were not substantially different. By this point the Kaulbachs were living with Murdoch after the loss of their house.

When will five was made on 15 November 1875, the Kaulbachs were still living with Murdoch. Charles Beamish was totally excluded, and Senator Kaulbach and lawyer William Owen were appointed executors. Thomas Beamish Akins was allowed to select 20 books of his own choosing from Murdoch's large library. Eunice Kaulbach was to have a life interest in the residue of Murdoch's estate, with remainder to her four children.

This will was eventually upheld by the Nova Scotia Supreme Court, but not without a struggle.¹⁹

Charles Beamish was granted probate of the April 1875 will by the Halifax County Court of Probate and challenged the November 1875 will on the basis of undue influence and incapacity when Kaulbach presented it for probate at Lunenburg.²⁰ The probate judge, George Thesiger Solomon, had apprenticed alongside Murdoch in the Uniacke law office sixty years before. It probably did not hurt the Kaulbach cause that Solomon's son, Edward H. Solomon, was a witness to the impugned November 1875 will. The validity of the will was upheld by Solomon after witnesses were examined for three tedious weeks spread over the summer of 1876.

Charles Beamish then appealed to the Supreme Court of Nova Scotia, which had to sift through evidence which the judges found "in the last degree contradictory and irreconcilable."²¹ The majority judgment of Chief Justice William Young, with whom Justices Desbarres and Smith concurred, did not really attempt to reconcile the evidence, and at least the first two judges appear to have relied more on their own personal impressions of Murdoch than on the evidence. Desbarres stated that he had known Murdoch "from early boyhood, and, from what I know of him, I do not think he was likely to be swayed or influenced by any person in the disposition of his property." He

¹⁹All the wills are reproduced in the Appeal Book.

²⁰Lunenburg County Court of Probate, Probate Acts, vol. 2, p. 93 (mfm. at N.S.A.R.M., reel 19924).

²¹In re Beamish Murdoch's Will, p. 436.

added that, of course, he had decided the case only on the basis of the evidence.²² In the end Young was content to rely on the testimony of Dr. Jacobs, who testified that Murdoch was of sound mind on the 15th of November, and on that of a number of clergymen who stated they had never seen Murdoch under the influence of spirits or in any way disoriented. With regard to Murdoch's "insane passion" for Eunice Kaulbach, Young opined that it was "doing injustice to [Murdoch's] memory to infer from some rash or thoughtless expressions a criminal and insane desire, and a deliberate purpose to disturb the domestic peace of those whom he regarded as his best friends."²³

Justice Alexander James agreed in the result, but came very close to dissenting. He went into the evidence much more thoroughly than Young, and purported to reconcile it by proposing that Murdoch "used the liquor as DeQuincy used opium, to bring himself up to a standard of intelligence and mental activity." Murdoch "was at his best when he had consumed a large quantity of ardent spirits," and those witnesses who described him as "dejected, weak, tottering, dirty and imbecile" had seen him when he was not under the stimulus of drink, but rather going through withdrawal.²⁴ James was troubled by the fact that Kaulbach was Murdoch's solicitor in fact, and was closely involved in the preparation of his last three wills. However, he was unable to find that Kaulbach had actually kindled or exploited the imaginary grievances against Charles Beamish which led Murdoch to exclude him from his bounty. Kaulbach's conduct came close to the line, but in the end

²²Ibid., p. 445.

²³Ibid., p. 441.

²⁴Ibid., p. 450.

Murdoch had acted as a free agent. As Chief Justice Young said, "a will, however capricious or harsh, cannot be set aside if it be the act of a volition free and untrammelled."²⁵

In spite of all the evidence of uncharacteristic behaviour, the case for Murdoch's alleged testamentary incapacity is unconvincing. Letters written by him as late as three weeks before his death are entirely cogent and go into financial matters in some detail. The charge of undue influence was more to the point. Undue influence has always been hard to prove, but the coupling of Kaulbach's role in drafting the will while acting as de facto solicitor to Murdoch, with the latter's increasing weakness and dependence on the younger man, should have established it. It is hard to believe that anything other than Kaulbach's elevated social position prevented the court from finding otherwise.

A final appeal to the Supreme Court of Canada followed, which was quashed since the Supreme and Exchequer Court Act allowed appeals to the highest court only from decisions which had originated in superior courts (the probate court was considered an inferior court).²⁶ Probate was granted to Senator Kaulbach, William Owen having resigned as executor, on 3 November 1879. It was a pyrrhic victory in one sense, as Eunice Kaulbach had died earlier in the year. Her husband remarried the next year, and the funds from Murdoch's estate were presumably given to the Kaulbach children as they came of age. In the end, almost the sole asset of Murdoch's estate (aside from his library) remained what he had inherited on birth: the sale price of his interest in the

²⁵Ibid., p. 442.

²⁶Charles Beamish et al. v. Kaulbach, Supreme Court Reports 3 (1879), pp. 704-706.

Market Wharf. His professional income had supported him in comfort all his life, and covered his political and publishing ventures, but had resulted in no visible savings.

Little Rupert Creighton Sawyer Kaulbach, who had so charmed Murdoch as a child, followed in the paternal footsteps. He is a perfect example of a pattern which emerged clearly in the later nineteenth century, whereby scions of old "gentry" families acquired professional qualifications from universities in order to solidify and legitimate the influence they exerted in their home communities.²⁷ Rupert Kaulbach attended Harvard Law School in 1891-94 (though without graduating) and acquired B.A., M.A. and LL.B. degrees from Dalhousie before returning to Lunenburg to practise law for the rest of his life. He was also a good example of the growing emphasis on sport which evolved to provide a masculine image for the new professionalism; Kaulbach's 1956 obituary was more intent on describing his exploits in cricket, hockey, football, figure-skating and golf than in the legal arena.²⁸

Our principal interest in Rupert Kaulbach is to trace the fate of Beamish Murdoch's library, which seems to have remained in the possession of Senator Kaulbach until his death on Parliament Hill in 1896. Many books currently held by Dalhousie University libraries contain Beamish Murdoch's signature or stamp, followed by the inscription "to H.A.N. Kaulbach" in the latter's handwriting. Rupert was called to the bar

²⁷On this phenomenon, see Philip Girard, "The Roots of a Professional Renaissance: Lawyers in Nova Scotia, 1850-1910," Manitoba Law Journal 20 (1991), pp. 148-180.

²⁸Chronicle-Herald (Halifax), 13 April 1956.

in 1898 and presumably took possession of the library or part of it at some point thereafter. In 1926 Rupert Kaulbach, K.C.

generously presented to the [Dalhousie] Arts Library 107 volumes, containing an interesting very old edition of Euripides; and to the Law Library 110 volumes, mostly dealing with French Law. These books are from the library of Beamish Murdoch, historian of Nova Scotia and are of special value on that account.²⁹

Unfortunately this donation did not get catalogued for many years, and was then mingled with other large collections, making it very difficult to reconstitute this substantial fragment of Murdoch's library. The fate of the remainder of Murdoch's library retained by Kaulbach is obscure. As for Murdoch's personal papers, those that remain at the Nova Scotia Archives are very modest in quantity and quality, aside from a few items of greater historical interest referred to in this thesis. Presumably these had remained, fortuitously, in Akins's custody and thus escaped the "grand conflagration" of October 1875.

Like his father and grandfathers before him, Beamish Murdoch came to an inglorious end. The difference was that he had managed to accomplish much more than they had, in terms of both public service and private endeavour, before the final reckoning. In historical terms, the last two years of his life represent not farce but tragedy. The destruction of most of Murdoch's personal papers and the dispersal of his library which resulted from his final acts of pique, have deprived posterity of a range of

²⁹Excerpt from the 1926 Annual Report of Dalhousie University, as communicated by Ms. Karen Smith, Special Collections Librarian, Dalhousie University, 5 August 1997. I would like to thank Ms. Smith for sharing her research on this point, and also for preparing a list of 14 volumes in the Killam Library's Rare Books Collection which bear Beamish Murdoch's signature. The volumes, published between 1693 and 1832, are on diverse subjects, from forest planting to travel literature to the Lettres of Cardinal Richelieu (Paris, 1695); half are in Latin or in various modern European languages.

valuable sources. For social history the loss is not severe. For legal history, the absence of these documents deprives scholars of the opportunity to trace the private opinions, correspondence and intellectual development of one of the few lawyers to have thought carefully and at length about the nature of the colonial legal order before responsible government. Ironically, Murdoch's "grand conflagration" greatly enhanced the value of his Epitome as a window on that same world.

Conclusion

The contours of the legal order in colonial British North America have become much clearer in recent years, but there are still many areas of obscurity. Quantitative studies of civil court records are in their infancy in Canada for any historical period, but in some instances the state of surviving records is better for the early colonial era than for subsequent periods. Lawyers form another pillar of the legal order, and indeed of colonial society, that deserve closer study. British North America before 1850 would probably not have been much different if there had been no physicians or clergymen. It would have been a very different place without lawyers, and indeed is unimaginable without them once the period of initial settlement had passed. In spite of this, much of what passes for commentary on lawyers in this period can be described in pairs of opposing caricatures: statesmen of elevated principles versus self-interested placemen; ornaments to learning versus backwoods pettifoggers; midnight toilers versus lazy parasites. No doubt there were some of both, but what is missing is a window on the life of the "average" lawyer, who did not rise to the summit of the profession but was not so unlucky or so unskilled as to abandon it.

This study has attempted to fill that gap, largely through the painstaking process of reconstituting the professional life of a single lawyer. It is probably the case that no other such study exists for any lawyer in North America during this period. As Robert Gordon has observed, reasons for this silence are not difficult to find. "The details of day-to-day practice often seem trivial, repetitious and boring even to those whose living

depends upon them; to outsiders, the details are potentially interesting only when aggregated and used as guides to underlying structures or tendencies, a task demanding the patience and skill to pick jewels out of mountains of junk."¹ It will be for the reader to judge whether any jewels have been picked out of the mountains of junk perused in the course of preparing this thesis. Four nuggets of possibly semi-precious quality will be suggested by way of conclusion.

The first finding of significance has been the nature of Beamish Murdoch's clientele. For many years the bulk of his clients came from the artisanal and lower middle classes, and even when some of the larger merchants and capitalists sought his aid it was for occasional services of a rather traditional nature. Furthermore, his clients did not necessarily remain with him over the long term, such that he was constantly compelled to seek out new business. These findings provide evidence of fairly widespread access to legal services, with obvious implications for the history of the legal profession and the broader study of colonial society. They also suggest that lawyers had to be in touch with the needs of all classes of their communities if they were to prosper.

This "community role" of the lawyer leads into the second finding of significance, which is the very broad range of activities engaged in by lawyers "outside" the law. Even if the reach of Beamish Murdoch's intellectual, cultural and political aspirations exceeded his grasp, the fact that he never ceased attempting to realize them must be appreciated. Lawyers did not "just" practise law. Many, perhaps even most, were engaged in various

¹Robert Gordon, "The Devil and Daniel Webster," Yale Law Journal 94 (1984), p. 446

forms of social leadership, and were encouraged to do so: witness the rapid increase in the proportion of lawyers as members of the House of Assembly during the 1820s. Certainly the "exposure" provided by these leadership roles was commercially useful to lawyers in their professional practices, but linkages went in the other direction as well. Some lawyers used the legal profession as a stepping-stone into leadership roles where the practice of law might be left behind, as seen to some extent in Murdoch's career as office-holder and municipal official in the 1840s and '50s. As community studies and rural history become more popular as a mode of historical study, the role played by lawyers in a particular community or rural hinterland should be kept in view.

The quantitative study of lawyers in the 1820-1840 period undertaken in Chapter Four provides the third major theme which may be relevant to the future study of colonial society in British North America. The theme of the changing nature of authority is of particular relevance to the Atlantic region, where the Georgian constitution, with its reliance on legally untrained justices of the peace as agents of social order, had a longer period to become rooted and mature. The nature of authority in rural society was undergoing a major shift during these decades, with which the coming of the lawyers was definitely associated. The exact nature and timing of that shift, and the contribution of other causes besides the spread of lawyers, remain to be investigated.

The question of authority leads, finally, to the reassessment of the historiography on responsible government, undertaken in Chapter Seven. A fruitful avenue of inquiry suggested by this chapter is a comparison of the nature of the old regime in Upper and Lower Canada with that in the Maritimes. The old regime had its shortcomings and

abuses, both systemic and idiosyncratic, in all the British North American colonies, but only in the Canadas did these result in outright rebellion. It is difficult to find events in Nova Scotia to compare with the many outrages which shook the legal and constitutional order in Upper Canada in the 1810s, '20s and '30s, as detailed in the work of Paul Romney, Robert Fraser, and a generation of earlier historians.² The change in the Maritimes was bitter and divisive, but not violent. Is it possible that the old order in Nova Scotia, for example, with all its failings, was more responsive and held in more respect than its analogues in the Canadas? Certainly Beamish Murdoch thought that only incremental reform was necessary, and he was far from alone in Nova Scotia.

By way of envoi, a few remarks are hazarded on later developments which explain the origins of the obscurity in which the entire colonial legal order was soon enveloped. Within a decade of Beamish Murdoch's death the legal profession would be well on its way to transformation. The major features of the twentieth-century profession were all established in Halifax by the end of the 1880s: university legal education (1883); statutory delegation of regulatory authority over the profession to a Barristers' Society which would now include all lawyers compulsorily (1882); and the creation of the modern multi-partner law firm with a growing focus on corporate clients and corporate law

²Paul Romney, "Upper Canada (Ontario): The Administration of Justice, 1784-1850," Manitoba Law Journal 23 (1995), pp. 183-213; Robert Fraser, Provincial Justice: Upper Canadian Legal Portraits (Toronto: University of Toronto Press for the Osgoode Society, 1992), pp. xxi-xcii.

(1886).³ Although many sole practitioners in rural and small-town areas would continue to practise law more or less the way Murdoch had (though now assisted by a female secretary with a typewriter), the ethos of the profession was shifting quickly to a more modern model. A new emphasis on expertise, business acumen, and party-political activity, replaced the older ideals of scholarship, gentlemanly independence and statesmanship.

To some extent this may appear a matter of semantics. Lawyers were always seen to possess some kind of specialist skills and knowledge, most knew a thing or two about business even during the colonial period, and lawyers were just as active in the quest for connectional patronage as they would later become in seeking party patronage. Yet the shift in paradigms did make a difference, especially when the needs of a new corporate clientele created the modern law firm, and corporate law began to offer the kind of financial rewards that had not been seen since the heady days of Vice-Admiralty practice during the Napoleonic Wars. Law had always been an instrument to some extent, but legal education in the new university law schools came to concentrate on the "what" and "how" of law, rather than the "why" or "whence," displacing the older ideals of the gentleman-scholar. One may wonder whether anyone ever gave a lecture "On the origins and sources of Nova Scotia law" in the Dalhousie Law School of the 1880s or 1890s.

The launching of the modernization process by lawyers in the 1880s was so swift that someone like Murdoch would have seemed an incredible anachronism had he

³The first was the partnership of Weatherbe & Graham, in which Robert Borden and William F. Parker were salaried "associates" in the modern sense.

survived another decade. By the turn of the century the pre-responsible government period was being reinvented as a jurists' golden age by judge-historians like Sir Charles Townshend, but within the law schools and the bar the real history began only with Confederation. The pre-1850 legal order fell further and further into the shadows as the region's documentary history was discarded, lost or sold to astute collectors in the United States. The legal order of the old regime would be almost impossible to study today were it not for the efforts of a few visionaries such as Thomas Beamish Akins and John Thomas Bulmer, who went to enormous lengths to secure copies of both legal and non-legal texts and manuscripts produced in the Maritimes. Without their work, and that of a few contemporaries in other provinces, the process of exploring the legal profession and law and society in the world before responsible government could never have begun.⁴

⁴Brian Cuthbertson, "Thomas Beamish Akins: British North America's Pioneer Archivist," *Acadiensis* 7:1 (1978), pp. 86-102; Philip Girard, "'His life was one continual warfare': John Thomas Bulmer, Lawyer, Librarian and Social Reformer," *Dalhousie Law Journal* 12 (1990), pp. 376-405.

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APPENDIX B

"On seeing my little friend Rupert Kaulback nestling on
the bosom of a young lady"

Lunenburg, January 1874

Oh Love, supreme, invincible,
What wonders you display!
Here's an innocent babe quite sensible
To the charms of darling May

He is but five, but he's all alive
To female beauty's charms;
She may be fifteen, but she is his queen
While she folds him in her arms

His dark brown eyes show no surprize
But love and trust and joy --
Who can escape from Cupid's darts,
When they wound this harmless boy.

Like a little Venus, no harm she means us,
But kills us all the same.
Rupy's not Cupid, nor half so stupid,
While hugging and kissing's his game.

unsigned, but attributed to Beamish Murdoch and in his handwriting
Source: N.S.A.R.M., MG 100, vol. 35, no. 96

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 - RG 47 - Registry of Deeds
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 - Archibald Family Papers
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 - King-Stewart Papers
 - Beamish Murdoch Papers
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 - White Family Papers

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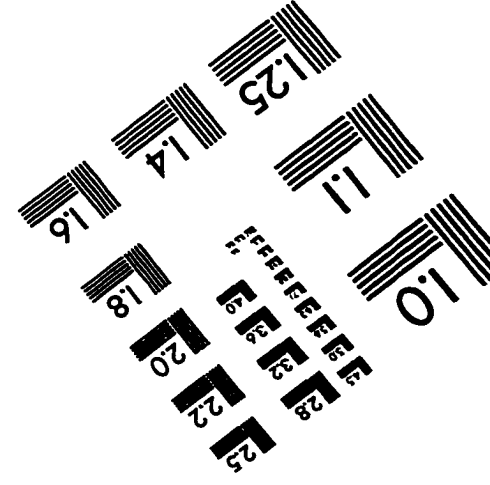
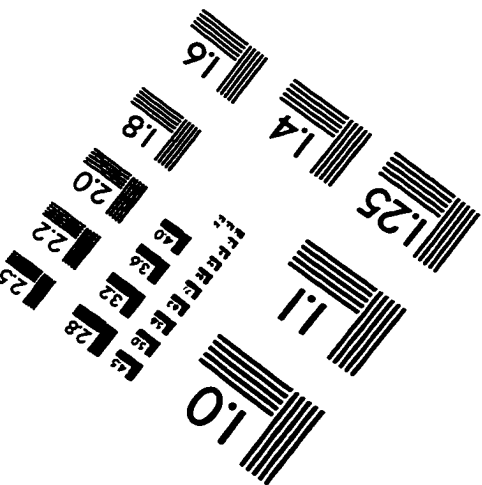
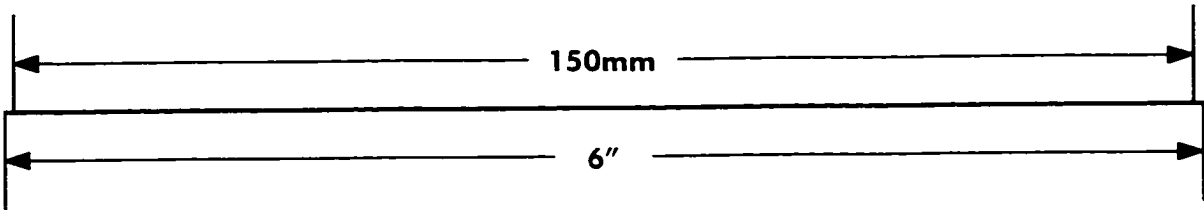
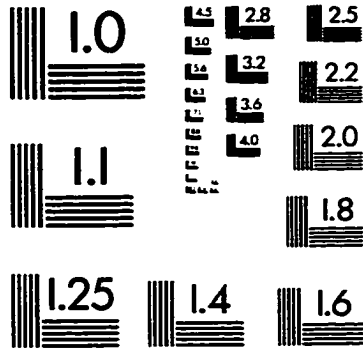
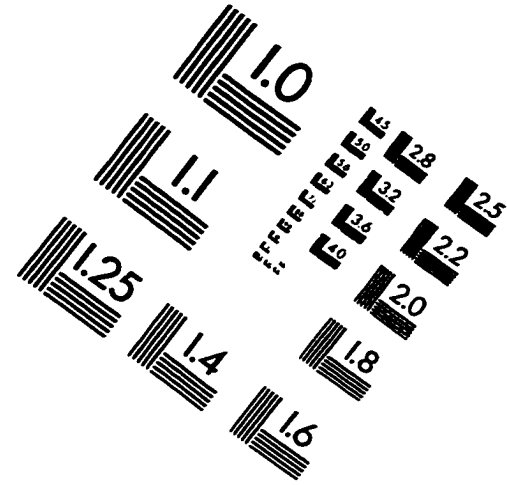
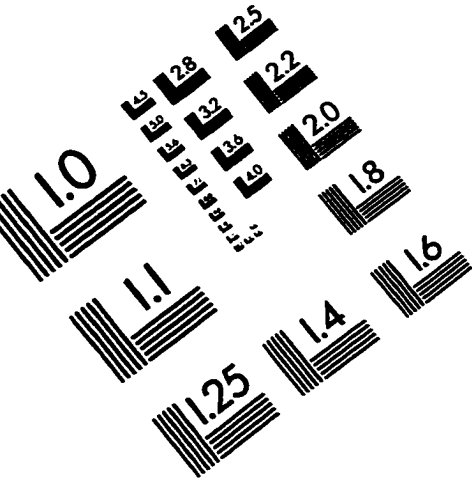
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