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On the origin and sources of the Law of Nova Scotia

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APPENDIX

“Nova Scotia’s Blackstone” on the Origins of Nova Scotia Law

Beamish Murdoch (1800–1876) has been called “Nova Scotia’s Blackstone,”¹ a deserved appellation for the legal scholar who first undertook a comprehensive treatment of the law and legal institutions of Nova Scotia in four volumes, 1832–1833, entitled *Epitome of the Laws of Nova-Scotia*.² Murdoch explicitly imitated Sir William Blackstone’s *Commentaries on the Laws of England* (1765–1769) in four volumes, though he prudently eschewed Blackstone’s somewhat forced quadri-partite division of Rights of Persons, Rights of Things, Private Wrongs, and Public Wrongs.³ In his preface to volume one of the *Epitome*, Murdoch also acknowledged the usefulness of the four volume *Commentaries on American Law*, which James Kent, Chancellor of New York, published between 1826 and 1830. Murdoch, like Kent, was much concerned with the pressing problem of “reception” of English law. His device for dealing with it was to found Nova Scotia’s law firmly on the Province’s statutes, construing them in the light of English law, both common and statutory, and according to English law recognition only of so much of it as clearly remained in force in Nova Scotia because of the want of Nova Scotia statutory enactment. Perforce, such an undertaking was an exercise in legal history—a very obscure and confused legal history at that. His success was remarkable: none since has attempted to supersede the *Epitome* or to replicate it for subsequent Nova Scotian legal developments. Beamish Murdoch can justly be called the first—and greatest—legal historian of Nova Scotia.

1. Professor D.C. Harvey, “Nova Scotia’s Blackstone,” (1933) 11 Can. Bar Rev., pp. 339–344; the major biographical note on Murdoch.
2. Published by (who else?) Joseph Howe in Halifax. Happily, a photo-facsimile of the original edition of the *Epitome* is available from Wm. W. Gaunt & Sons, 3011 Gulf Drive, Holmes Beach, Florida, 33510.
3. Volume I of the *Epitome* contains an introduction to law (in general, of England, and of Nova Scotia including reception), government, and the laws of agriculture, trade, religion-morals-charity-education, health and amusement, and the military; Volume II, families and domestic relations, and property; Volume III, conclusion of property, and civil courts and their procedure; Volume IV, conclusion of civil courts, equity, divorce, and admiralty, and crime and criminal jurisdiction. There are numerous editions of Blackstone available, including a facsimile edition in paperback published in 1979 by the University of Chicago Press, with introductions by S.N. Katz, A.W.B. Simpson, J.H. Langbein, and T.A. Green, and leatherbound facsimile published in 1983 by Gryphon Editions, Birmingham, Alabama, with introductions by T.G. Barnes.

Despite the pressures of a busy practice, including the recordership of Halifax, 1850–1860, Murdoch maintained his historical interest and pursuits, broadening his perspective while deepening his knowledge. In 1867 he produced a masterful narrative descriptive history of Nova Scotia, replete with the topographical and antiquarian emphases of Victorian historiography at its best.⁴ This encyclopedic knowledge married to his legal learning informs the following lecture which Murdoch gave to the Law Students Society in Halifax in 1863. In it, Murdoch came down squarely for the centralness of the influence of legal experience in other North American colonies, particularly Massachusetts, in the early development of Nova Scotia law. That argument might require revision. It certainly demands much more investigation than it has received. It did not figure prominently in his *Epitome* of thirty years before, being a product of his subsequent and wider-ranging research in the political and social history of Nova Scotia. Because this argument has become an orthodoxy in Nova Scotia historiography generally, we include it here.

The Editors are grateful to the Honourable Ian M. MacKeigan, Chief Justice of Nova Scotia, for providing them with the text of this rare lecture, printed as a pamphlet, from his own library. He has since given the original to the Legislative Library in Province House, Halifax.

4. B. Murdoch, *History of Nova Scotia*, 3 vols. (Halifax, 1865–1867).

An Essay

**on the Origin and Sources of the Law of
Nova Scotia**

**Read on Saturday 29 August, 1863, before
the Law Students Society, Halifax, N.S.**

The Hon: Mr. Justice Bliss presiding

by

Beamish Murdoch, Esq.. Q.C.

On the origin and sources of the Law of Nova Scotia

The subject of the present inquiry, is to point out the origin and sources of the laws in force in Nova Scotia, in other words, the rules by which we are to be guided in ascertaining what portions of the English Common and Statute Law, and decisions of the British courts, are to be held obligatory in the tribunals of justice in this province.

Blackstone informs us, that in conquered and ceded countries that have already laws of their own, the King may alter and change those laws; but until he does actually change them, the ancient laws of the country remain.

1 B. C. 107.

The legislative power of the Crown over conquered and ceded territories is plainly shown by Lord Mansfield in the case of *Campbell v. Hall*. Cowper, 204. He says (p.211) "No question was ever started before but that the King has a right to a legislative authority over a conquered country; it was never denied in Westminster Hall, it never was questioned in parliament. Coke's report of the arguments and resolutions of the judges in Calvin's case lays it down as clear. If a King (says the book) comes to a Kingdom by conquest, he may change the laws of himself without the consent of parliament. (7 Reb. 17b). It is plain he alludes to his own country, because he alludes to a country where there is a parliament".

Acadie, or Nova Scotia, was conquered by General Nicholson in 1710, and was ceded in 1713, by Louis 14, to Queen Anne by the Treaty of Utrecht prior to which it was governed by the edicts and orders of the King of France.

From 1710 to 1749 (when a Government was established at Halifax) the administration of the government was vested in a Governor and Council at Annapolis Royal.

Little or no change was made in the position of the French inhabitants who held their land under the ancient Seigneurial tenures. No juries were summoned, no legal judges or prosecuting officers were appointed. In the disputes which frequently arose about possessions and boundaries, and in other private civil suits, the Governor and Council at

Annapolis acted as a Court of Justice under the name of the General Court. They also held, but rarely exercised a criminal jurisdiction; but this did not extend to cases of a capital nature, nor had they power under the Kings' instructions to inflict capital punishment, and I believe that no instance can be found of the punishment of death being carried into effect within this period of forty years with the exception of one or two cases where military execution was resorted to under extreme circumstances.

During this period, each of the French Settlements, viz., that of the Annapolis River, Mines, Piziquid and Chignecto, elected annually a number of deputies. It was the duty of the deputies to wait on the Governor and Council at Annapolis Royal, and they formed a medium of communication between the Government and the people, receiving and publishing orders, etc., and it was considered to be their especial duty to carry into effect the orders of the Government.

Prior to the Treaty of Utrecht in 1713, the province was governed by the orders and edicts of the French Monarch; and in matters of law, I believe the *coutume de Paris* was followed in Acadie, as it was in Canada, both of which were included under the name of New France.

On the conquest and subsequent cession of this country to the English Crown, the Monarch of England became sole lord and proprietor of the dominion, with the full right of legislating for the land and its inhabitants. This power was exercised only as far as necessity demanded, and only by means of the commissions issued by the Crown to the several Governors and the royal instructions given in connection with them. Directions were usually given with them to appoint a Council of twelve members selected from the principal inhabitants and settlers. Governor Philipps, in 1720, was obliged to fill up this number chiefly from the military and civil officers of the garrison of Annapolis, as the noblemen and chief inhabitants had abandoned the country on the conquest and the remaining inhabitants were not only wanting in the education and property requisite to qualify them for the position, but being Roman Catholic were considered ineligible by law under the tenor of the royal instructions and the acts of parliament then in force. Some of the Governors were desiring to appoint inhabitants to the office of justices of the peace, but they were forbidden to carry this into effect by the replies they received from the Lords of Trade and Plantations, who at that time formed a board for the management of colonial affairs.

The royal instructions also authorized the establishment of Courts of Justice in the colony. Under this authority the Governor and Council formed themselves into a *General Court*, with civil and criminal jurisdiction, sitting in four terms annually, without juries of any kind. This Court was held at Annapolis. The Governor also acted as Judge of Probate; and at Canso, where the English colonists held possession and resorted in numbers every summer for the fishery, Justices of Peace were

appointed, and a committee chosen by the people acted in some respects as an Assembly.

The Council continued to be chiefly composed of the military Officers until 1749, and even then several were appointed in the first Council at Halifax.

In the instructions to the Governor of Nova Scotia there were always directions to call an assembly of the people, but owing to the almost entire absence of British inhabitants this instruction remained long inoperative.

In 1749 Colonel Cornwallis arrived at this place then called Chibucto, with a body of settlers and several regiments and founded the town of Halifax. Courts of Law, with grand and petit juries were then established and from that date the civil and criminal laws were strictly administered agreeably to the Common Law of England, modified at first by the adoption of some of the laws of Virginia, the oldest English possession in North America, being a royal establishment and called "the old dominion"—which was referred to in the royal instructions as a model. Courts of Common Pleas and Sessions of the Peace were erected. The Governor and Council acting then both as a Court of Appeal and as a Criminal Court to try the higher class of offences.

Not long after, at the suggestion of Governor Lawrence, a lawyer was appointed Chief Justice of Nova Scotia. This was Jonathan Belcher, Esq., son of Governor Belcher of New England, and it happened that a question arose before him on the validity of a duty imposed upon goods by an ordinance of the Governor and Council. His opinion was that they had no power to impose a tax, and the question being referred to the Attorney and Solicitor General of England in 1755, they stated that the Governor and Council of Nova Scotia had no authority from His Majesty to make laws.

The expediency of raising revenues here, beyond that which was collected under the Acts of the British Parliament, was felt by the Government, and at length they gave the Governor positive directions to call an assembly of the representatives of the people. The first House of Assembly met accordingly in 1758, all the freeholders of the province uniting in the elections at Halifax, as if it were one county. From this time forth legislation proceeded regularly, and the popular branch of government has gradually obtained the control of all the revenue and Crown property of the province.

Our assemblies, like those of several of the older British provinces, have been modelled in some respects after the Parliament of England; the Governor forming one branch as representing the Sovereign—His Majesty's Council sitting as a House of Lords—and the representatives as a House of Commons. Colonies thus governed were (before the American revolution) called Crown Colonies, to distinguish them from those who had, like Massachusetts, a constitution under written charter

from the King, or like Pennsylvania, a lord proprietor with peculiar rights and privileges.

Mr. Chief Justice Belcher appears to have drafted many of the early Acts of the Provincial Legislature, in which were incorporated the chief provisions of very important English Statutes, such as the Statutes of Treasons, Felonies, Frauds, Wills, etc. A small sized edition of English Statutes, having his pen marks in connection with these enactments is, I believe, still preserved in our Law Library. Among other early Acts of Assembly of importance will be found the Act regulating distributions of intestate estates, real and personal; the Act authorizing the attachment of absent debtors' property; the Acts authorizing ordinary writs of attachment and that directing executions levied on real estate and its sale for payment of debts. Many of these were borrowed from the laws then in force in Massachusetts and other colonies of the continent.

But, directing attention more closely to the precise subject of our inquiry, it may be stated that British subjects, founding a colony, carry with them the *Common Law of England* and all statutes that declare, define and corroborate its principles. Statutes, although passed in England before the founding of a colony, if they are grounded on special local circumstances of the mother country, not analogous to the provincial condition, or if they are closely interwoven with the interests of an advanced and artificial life, essentially different from colonial society, can hardly be considered as law in the new state of life in which colonists find themselves. Blackstone says, "The artificial refinements and distinctions incident to the property of a great and commercial people—the laws of police and revenue, such especially as are enforced by penalties,—the mode of maintenance for the established clergy, the jurisdiction of Spiritual Courts, and a multitude of other provisions are neither necessary nor convenient for them and are therefore not in force."

I think it is laid down that the bankrupt laws, the game laws, the laws of mortmain, etc., are not in force in the colonies, and I would deem it correct to say that English penal statutes in general may be regarded as not being in force among us. "What are applicable to our social condition"—"What are suitable to our local wants" are the phrases used on this subject to shew what Acts of Parliament are binding on us. At the same time it may be accepted as a rule very generally agreed on, that Acts of the British Parliament passed subsequently to the establishment of our own colony and more especially those enacted since we have had a local representative legislature do not bind us, unless they expressly include the colony in terms.

The idea is, that in founding a province, we receive and adopt the general English Common Law, together with such ancient statutes as are considered to virtually form a part of it, such as the statutes of Magna Carta, Westminster, etc., for example; and that from the time of

the erection of our local legislature, we take the Acts passed in the province only as imperative, unless where the Parliament in England, acting in the capacity of a Sovereign legislature over the whole British dominions or empire and nation expressly directs the clauses of a law to be in force in the colony.

We are also bound by a rule of great importance, in the observation of such decisions of the Courts of Law in the mother country, as elucidate the doctrines of the Common Law, define the privileges and prerogatives of the Crown, or throw light on statute law in force among us, either British or Provincial Acts.

When it is considered that Great Britain has possessed colonies on this continent governed by laws justly and wisely administered for above two centuries, it is obvious that there must be assimilation in the questions that may daily arise among us, and those which have occurred and still occur among the other communities of British origin in North America. Although changes of sovereignty have happened in a large proportion of the older colonies of England, yet, we find much valuable information bearing directly on our legal learning in the large number of American treatises and reports of the Courts of Law in the United States. In like manner the decisions of the Supreme Court in the sister province of New Brunswick are well worthy of our attention.

It is to be borne in mind however, that the cases decided in the United States on questions of common law, or on statute law in force in both countries, are not binding on our courts, but derive any force they may have here only from the weight of reason they may display or from the legal and moral reputation of the judges who may have given them.

The same may be said, I think, correctly, of decisions in our sister colonies; but when a question of law has been thoroughly argued and solemnly decided by the Superior Courts in England, such a decision is received generally as an obligatory interpretation of law in all the dominions of the British Crown, more especially if the sanction of the highest tribunal has been given to it, that is to say, of the House of Lords on appeal in civil cases,—the twelve judges of England, in a question of criminal, or the Judicial Committee of the Privy Council on an appeal from the colonial Courts.

It may not be amiss to remark in this place on the weight of authority which is to be given to authors of law treatises. Some of the older writers, of whom Lord Coke is the most eminent, have held and still hold so high a position, that their text in general may be relied on as sound law. Lord Coke in particular condensed an immense amount of research and learning from the older cases in the year books, and his views will be found ever sound, connected and consistent. He may be said to have made a science of the Common Law.

Among more modern books, I may name Buller's *Nisi Prius*, and the best editions of Saunders' reports, as instances of works that have

obtained the repute of great authority. Blackstone's commentaries as a work of instruction on our constitution and as giving a lucid outline of the most prominent features of English Law can hardly be surpassed; and on special subjects of Law, there are very many English works, which the practitioner finds valuable in various degrees. While some of these are very clear and accurate, others have apparently been mere loose compilations. It is just to acknowledge that in modern times the jurists of America have contributed largely to this branch of law literature, and no lawyer's shelves can well be without such works as those of Kent, Story, Angell and Greenleaf.

The reports of our provinces are of great value to the Bar here and to the public, as they often embrace judgments on points of our own colonial law and practice, and it is a subject of just regret that they do not extend further back and are not at present continued here. The most valuable results of inquiry, argument and mind, without the permanent records secured by the press, are often after a little while entirely lost, and the well earned reputations of jurists on the bench and at the Bar becomes at length but a vague and perishing tradition, when the arguments and decisions they have prepared with intense application are not preserved or accessible to those who come after them.

Returning to the subject of English Statutes, I should suggest the following rules to aid us in ascertaining in any particular case, whether any enactment made there is, or is not in force here.

1. I would conceive, that all English Acts passed since 1758, the date of our first legislative assembly, may be rejected as not binding on us, except where there are clear words in it, or an inevitable implication from its tenor, shewing the intention of the Imperial Legislature to extend its operation to the dominions of the Crown in general, or to our Province in particular.
2. If the Act in question appears to have been framed in contemplation of the more complicated mechanism of the society, magistracy or interests of England, and to be plainly unsuited to provincial affairs, it may be considered as not in force here. This doctrine of non-applicability might prove very difficult and perplexing in practically using it; but we are somewhat relieved by different text writers and some ruled cases, from which we gather that the bankrupt laws,—tithe laws,—game laws,—the laws of mortmain, etc., did not take effect in the colonies.
3. Wherever the Provincial Legislature has passed a law, apparently designed to embrace all the regulations and provisions requisite on a particular subject, the inference is obvious that such a legislation is intended to supersede any English Acts of parliament on the same matter, and we may reasonably conclude that any such English Acts may be considered as virtu-

ally repealed thereby, or that the Provincial law amounts to a declaration that the English Acts on the same subject did not extend to or operate in this province. Thus the Provincial Acts respecting wills having provided for the devising power, the mode of attestation of wills, and almost every matter of any importance relating to wills and devises, may be justly deemed as excluding from operation in this Province all English Statute Law on these points. In like manner our early Provincial Acts respecting treasons and felonies (now in substance incorporated in the revised Statutes or Code) having been condensed from a variety of English Acts of Parliament, declared certain offenses to be felonies and affixed punishments for every such offence. They are to be construed as excluding from efficacy among us all the English Statutes of treasons and felonies, except as far as the Nova Scotia Acts themselves have enforced them, and also as declaratory laws, shewing that no offences created by English Statute Law could be subject here to punishment, other than those marked out by the colonial enactments.

The very important change in the law of real estate created in the colony by the Provincial law which deprived the eldest son of his exclusive claim and divided the lands among all the children of an intestate was copied in Nova Scotia from the laws of the colony of Massachusetts and some other Provinces in the year 1758 by the provincial Act 32, Geo. 2, c. 11., s. 12. This law (subsequently amended in 1842 by Act 5 Vict., c. 22, s. 18, so as to make the shares of all the children of an intestate in his real estate equal) has gone very far to assimilate our laws of descent and administration with the Roman or Civil Law, and more recent enactments abolishing the Chancery Court and also abolishing estates in tail have been steps in the same direction. In the one case, the natural obligation of the parent to support and provide for all his offspring, without artificial distinctions or undue partiality has been recognized, and will be enforced hereafter in all cases where he has not made a will; and in the other instance the rules both of law and of that equity which flows from it and should accompany it will be administered simultaneously by the tribunals of justice.

We may, therefore expect that much valuable aid will be derived from the rich civil code of ancient Rome on many points of the law of inheritance, and of that of contracts, aided by the more liberal laws now in force as to testimony; while the most valued principles of personal and public liberty, drawn from the Saxon, Norman and Feudal institutions remain perfect and intact.

Looking at the particular subject of our inquiry, in a purely practical view, I would say, that when a question of law is to be solved the first thing to be ascertained is, "What is the Law in England on the

point," excepting of course such cases as depend on English Statutes not adopted here. If there be not clear decisions or texts of authority in English writers to solve the problem, our attention should be next directed to the reports of decisions in New England and other States, originally English colonies, to find out whether a decision or practice may not be contained in them to throw light on the point, as most of the adjudged cases in the United States, especially in New England, have been heretofore grounded on the ancient principles and maxims of the English Common Law, and modified by the circumstances and emergencies of new countries. The Statutes of our own Province, where they have a bearing on the inquiry and the cases reported in this and the sister provinces, are of course to be consulted.

That the sovereign legislative power of the Crown was not abandoned or supposed to cease on the erection of a Provincial assembly in Nova Scotia may be gathered from the several Acts of Government which occurred at different periods since, and which have all been acquiesced in.

1. The changes from viewing the province as one county with a Provost Marshal General, into several counties with Sheriffs, and from the election of all the representatives in a body by the freeholders of the province to representatives chosen by counties, districts and to townships, by act of the Crown (by order of Council in 1759).

2. A change (1765) from two members for every township to one member, by Act of Government, which, though complained of, was submitted to and confirmed by Provincial Act of that year.

3. The severance of New Brunswick in 1784 into a distinct province, the same being part of the territory of this Province and having its representatives in our assembly. This was effected by order of the Crown, without even notice previously to the Government or to the Assembly of Nova Scotia.

4. The island of Cape Breton was annexed to Nova Scotia in 1763, severed from it in 1784, and again annexed to it in 1820, all those changes were made by orders of the King, without any legislative interference.

5. In 1838, the constitution of the Government and Legislature were changed by orders of the Sovereign. The old council of 12 was abrogated and two councils substituted, and executive council and a legislative council, the latter a greater number of members than the old council.

Here are several organic changes in form of Government and in territory which were all completed without Acts either of the English or of the Provincial Parliament by the sole and exclusive authority of the Crown, and they are all subsequent to the calling of our first assemblies, and have occurred at distant periods in the last and present centuries.

In illustration of the principles already named, I would refer to an

opinion given on Ecclesiastical Law at an early period. A very important Act, the 27 Eliz. c 2, which imposed the penalties of treason on any Englishman who was a priest or ecclesiastic of Rome, remaining in the realm after an appointed time, unless he had taken the oath of supremacy under 1 Eliz. c. 1, s. 19.—being in its terms extended to all the Queen's dominions, was held to apply to the colonies. 1 Chalmers' Opinions, 12, 26. This Act and others of the same nature, and the construction put on them, were greatly instrumental in preventing the submission and contentment of the French Acadians from the date of the conquest in 1710 to the period of war between the French and English, which broke out in 1754, after forty years of peace, and they so far prepared the way for the unhappy expulsion of the Acadians in 1755.

It would be superfluous to our present inquiry, and occupy too much time indeed, to enter into an examination of the long and numerous clauses of the royal instructions which accompanied the commissions of the different British Governors to the present times. Those who are desirous may find access to them in the provincial archives. The present arrangement of legislative and administrative authority has become so far settled and adjusted, and is now so well understood, that it is not probable, that any organic or essential change in our mode of government or legislation would be attempted, or would be sanctioned by the Crown, without the fullest consent and approbation of the representative assembly of the people previously obtained.

Situate as our tribunals of justice are, without any appeal from our provincial court, except in cases of a certain magnitude, having the bench of our Supreme Court composed of gentlemen born and bred in the colonies, and fully informed by long practice at the bar and by service in the provincial parliament and on the bench, and thus expert in dealing with every peculiarity that may deserve consideration in the questions that arise before them we have a right to be proud that the very idea of an appeal from the judgment of the Supreme Court of Nova Scotia, rarely if ever occurs in the minds of our legal practitioners. The patience, uprightness and disinterestedness of our judges, ever since the settlement of Nova Scotia, have been very remarkable. Among them, the memories of Chief Justices Belcher, Strange, Blowers and Halliburton have attracted universal respect for the virtues of justice and impartiality identified with their names; while the bench and bar may feel pride in recalling such names as Monk, Hutchinson, Hill, Uniacke and Archibald, colonists and officers or judges of the laws, having so many gratifying recollections of their learning, talents and eminent qualities. To most of you, young gentlemen, with regard to any of them, *state nominis umbra*. They reach your minds only by faint tradition. Yet the honour yet paid their memories, by those who had the pleasure of hearing their vivid eloquence may prove some incentive to exertion in the cultivation of your faculties.

Looking at the diversity of talent and erudition that has from time to time given lustre to the profession in Nova Scotia, many of the elder members of the Bar regret that so little has been secured in a shape capable of preservation of the history, the labors, the legal efforts and the skill of such a long succession of men of genius, ability and merit.

I would take the liberty of reading a paper or two from a book I wrote some years since.

I Murdoch, *Epitome* pp. 30 to 32.

I would also refer to some passages in Cowper's reports pp. 208 to 213. *Cambell v. Hall*, *ibidem* 167, 168, 180 and to 4 T. R. and 1 Chalmers Opinions pp. 12, 28, 58.

In conclusion I desire to crave indulgence from the honorable Chairman and from the members of the Society for the imperfections I am sensible of in these remarks which have been prepared during intervals of time not sufficient to enable me to do full justice to a very interesting topic.

In considering the various sources of our provincial law, it is satisfactory to think that it has now attained to something like a system, complete in its parts, and partaking of much consistency and harmony, while it is growing more clear and simple. It is to you, gentlemen, and your compeers in age and acquirements, that the province must look for its future supply of jurists, of orators, and of legal men of every kind. On you will rest the obligation and labor of tracing up our law to its sources, and downwards to its results—of vindicating its excellence and practically illustrating its usefulness in your lives and labors, and of preserving as patriots the palladium of law and liberty from the encroachment of power on the one hand and of anarchy on the other.