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Barry Cahill*

Sedition in Nova Scotia:
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The author analyses a "rare" prosecution for seditious libel in early nineteenth century Halifax. He argues that it is a paradigm example of the invocation of the repressive apparatus of the state by the political and legal elites, which has the ideological impact of stymieing reform initiatives. Parallels and differences are drawn with another famous Nova Scotian case, R. v. Howe, and similar cases in Upper Canada.

"I cannot help thinking that the severities exercised towards him [Robert Gourlay] were injurious to the public peace, and, along with other acts of a similar complexion, helped to originate an extreme party in the Upper province [Upper Canada] of a radical or rather democratic character. . . . I think it right to notice occurrences of this kind occasionally, as the progress of opinion in a colony often acts upon the feelings of other communities where the constitutions are alike. The infringement of the laws which protect the subject's rights in one province is calculated to alarm all those in neighbor colonies who set a value on their legal privileges."

—*Beamish Murdoch QC, 1867*

"He [Joseph Howe] had seen the Family Compact strike down one reformer after another in Canada, New Brunswick, Prince Edward Island and Nova Scotia, by means of an indictment for criminal libel."

—*D.C. Harvey, 1939*

"As occurred in Upper Canada in the case of the rabble-rousing Robert Gourlay, those in power in Nova Scotia opted to squelch this shrill voice of protest [William Wilkie]."

—*D.A. Sutherland, 1994*

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Introduction

Writing in the posthumously published final version of his historical chronicle of early Halifax town, lawyer-archivist Thomas Beamish Akins condemned the infamous 1820 state trial, *R. v. Wilkie*, in these memorable words:

An anonymous pamphlet was published from the press of A.H. [Anthony Henry] Holland, charging the magistrates of the town with malpractices, which caused much excitement. It was discovered to have been written by Mr. William Wilkie, of Halifax. He was indicted for libel, tried at the Easter term of the Supreme Court [17 April 1820] and sentenced to two years imprisonment with hard labor in the House of Correction [Bridewell]. This was esteemed a most tyrannical and cruel proceeding on the part of the government. The pamphlet was a very paltry offence, such as at the present day [1839] would be passed over with contempt. Wilkie, though not a person of much esteem, yet being a member of a respectable family in the community, should have been spared the indignities thrown upon him by Chief Justice [Sampson Salter] Blowers and the other Judges of the Supreme Court. After the sentence was known, the sympathy in his favor was very general throughout the town.¹

Akins's jeremiad begs to be contrasted with a later, perfunctory treatment of the same event by the lawyer-chronicler, Beamish Murdoch, whose narrative history of Nova Scotia contains a rather obtuse account which omits mentioning the accused by name or even specifying the crime:

At the April term [1820] of the Supreme Court at Halifax, a young man, who had published a pamphlet, imputing blame to the magistrates in pecuniary matters, and to H. M. council, for neglect of duty in not auditing their accounts according to law, was sentenced to two years imprisonment in the house of correction, at hard labor.²

1. T.B. Akins, "History of Halifax City" (1895) 8 NS Historical Society *Collections* [hereinafter *Collections*] at 195. (Akins's "History" originated as a paper read to the Halifax Mechanics' Institute in 1839 and was first published in pamphlet form in 1847.) Akins himself, having been born in 1809, was not old enough to have formed a personal opinion of the merits of *Wilkie* at the time. A bibliomane, Akins's private library at one time held two copies of "Wilkie's": S.I. Stewart, comp., *A Catalogue of The Akins Collection of Books and Pamphlets* (Halifax: PANS, 1933) at 79.

2. B. Murdoch, *A History of Nova-Scotia, or Acadie* (Halifax: J. Barnes, 1867) vol. 3 at 454. Murdoch's intention may well have been to spare the feelings of William Wilkie's elder brother, the merchant James Charles William Wilkie (1788–1867), who was a prominent and highly-regarded citizen of Halifax, having served for many years as clerk, then cashier/accountant, of the Halifax Banking Company ["Collins's Bank"]. The "young man" in any case was identified by the Murdoch annotator, William John Stirling, as "A worthless profligate named Wilkie," Public Archives of NS [hereinafter PANS], RG 1, vol. 525^{ib} at 454 [marginalium]. Stirling, however, had an axe to grind: he was the son of the late Dr. John Stirling, who had been party to a sensational Supreme Court case in 1819, which Wilkie ridiculed in his pamphlet as a "judicial farce"; see *infra*.

R. v. Wilkie is also conspicuous by its absence from Murdoch's much earlier *Epitome of the Laws of Nova-Scotia* (1832–33), though 'Nova Scotia's Blackstone' was at the time serving his pupillage in the office of Attorney-General Richard John Uniacke, and routinely took shorthand notes of important trials in the Supreme Court. Even forty years after the event, when his memory of the trial and conviction of Wilkie must have begun to fade, Murdoch was capable of treating *Wilkie* only with extreme circumspection. Murdoch rose conspicuously and eloquently to the defence of the Upper Canadian, Gourlay; why not also to that of his fellow Nova Scotian, Wilkie?

The exceedingly meagre historiography of *Wilkie* rests on the dual basis that William Wilkie was the Nova Scotian parallel to Robert Gourlay, "the best-known radical" of the pre-Rebellion era,³ and the precursor of Joseph Howe.⁴ While there is something to be said for these arguments from analogy—Gourlay was twice tried unsuccessfully for seditious libel on the eve of Wilkie's prosecution, and Howe was tried and acquitted of seditious libel fifteen years after—neither approach addresses the significance of *Wilkie* as a legal proceeding for a crime against the state, nor analyses it as a successful exercise in the official repression of political dissent.⁵ This is not to say that the local impact of the trial exceeded its comparative historical value; simply that the conviction,

Against Murdoch's discreet uninterest in *Wilkie* must be set his muscular critique of Upper Canada's *Seditious Meetings Act* and *Sedition Act*, and his defence of Robert Gourlay ("Gourlay was certainly a radical reformer of the extreme English type of that period,—friend and follower of [William] Cobbett, [William] Hone, &c."): *Ibid.*, at 428–29.

3. See for example, D.A. Sutherland, "Wilkie, William," *Dictionary of Cdn. Biography* [hereinafter DCB], vol. 5 at 853–54; "The Merchants of Halifax, 1815–1850: A Commercial Class in Pursuit of Metropolitan Status" (Ph.D. thesis, University of Toronto, 1975) at 117–18, 134 (nn. 59–62), "1810–1820: War and Peace" in P.A. Buckner & J.G. Reid, eds., *The Atlantic Region to Confederation: A History* (Toronto & Fredericton: University of Toronto Press 1994) 234 at 258–9. Here, for the first time, *R. v. Wilkie* is correctly identified as a case of "seditious libel."

4. G.V.V. Nicholls, "A Forerunner of Joseph Howe" (1927) 8 CHR 224–32. No attempt is made in the course of this ambitious undergraduate article to develop the promising theme of its title. S.D. Clark, *Movements of Political Protest in Canada 1640–1840* (Toronto: University of Toronto Press 1959), who has heard of Gourlay, knows nothing about Wilkie or Howe. The Nova Scotian segment of Clark's account (at 131 *et seq.*), which confines itself to the period up to and including the War of 1812—before there were any movements of political protest in Nova Scotia—thus begins too early and ends too soon to realize the stated purpose of his inquiry.

5. On this subject see J.S. Martell, "Origins of Self-Government in Nova Scotia: 1815–1836" (Ph.D. thesis, University of London, 1935) at 178–80, 375–76. It is suggestive of the misconceived relative importance of the two trials that *Wilkie* was completely ignored by both Howe himself and historians of *Howe*, though *Howe* has by no means been ignored by historians of *Wilkie*. The only student of *Howe* to have pursued the comparison was its centenary historian, George Farquhar:

penal sentencing and apparent banishment of Wilkie administered a quietus which deferred for ten years the movement towards law reform. It was also a premature birth, or false start, to the movement for political reform.

The reform movement began in earnest as a result of the bitterly-contested "Brandy Election" of 1830, in which the struggle between the executive-cum-legislative-cum-judicial Council of Twelve and the representative Assembly precipitated the final collapse of the Loyalist Ascendancy, which had subsisted for nearly forty years. The second reform movement also climaxed in a seditious libel prosecution—of the vanguard of the "emergent opposition press," Joseph Howe—whose newspaper, the *Novascotian; or Colonial Advocate* was to Halifax what William Lyon Mackenzie's *Colonial Advocate* was to York-Toronto. The attempt to silence Howe failed as spectacularly in 1835 as the attempt to silence William Wilkie by the same means had succeeded in 1820, largely because Howe confined his attacks to the magistrates of Halifax. Wilkie, on the other hand, commenced with the local magistracy but then broadened the scope of his attack to include every institution of government, save only the lieutenant-governor. Wilkie, a mere eight years older than Howe, epitomized the young man of destiny in a hurry; he was sadly out of his depth and ahead of his time.

The significance of *Wilkie* for criminal justice history lies in the fact that, while it was by no means the first state trial to have taken place in the province, it was almost certainly the first prosecution for 'public' or 'political' libel.⁶ This paper attempts to superimpose on the Nova Scotian evidence the theoretical apparatus deployed by Barry Wright in his recent, ground-breaking study, "Sedition in Upper Canada: Contested Legality,"⁷ by focusing on the Wilkie sedition trial as the oligarchy's instinctive response to the challenge of published public criticism. That this response assumed the form of legal proceedings for a crime against the state—seditious libel—is hardly surprising, in view of the fact that

For Howe knew only too well the hazards that he ran, as only a short [*sic*: fifteen years] time before William Wilkie was sentenced to two years' imprisonment with hard labor for the identical offence which Howe dared to perpetrate in defiance of a tyrannous authority and in protest against the oppression of the people:

G. Farquhar, "Centenary of Triumphant Battle for Freedom of Nova Scotia's Press" (1935) 3:1 *Port and Province* at 13. With the sole exception of Farquhar, nowhere in the substantial literature on the Howe sedition trial is the precedent Wilkie trial referred to.

6. Among the eighteenth-century Nova Scotian precedents were *Hoffman* (1754) for seditious conspiracy, *Houghton* (1777) for seditious slander, and the treason trials consequent on the patriot investment of Fort Cumberland [Beauséjour] in 1776.

7. *Labour/Le Travail*, 29 (Spring 1992) at 7–57.

three of the four judges of the Supreme Court, as well as the attorney-general, were at that time members of the Council, which one early twentieth-century wag likened to Nova Scotia's Star Chamber.⁸ The prosecutorial and judicial functions of the administration of criminal justice could not be considered in any degree separate or even separable. Procedurally speaking, the integrated oligarchical structure of colonial government affected the administration of criminal justice in a manner which accentuated the interoperation, rather than the separation of powers. The crown prosecutorial and judicial authorities were interdependent, rather than independent of government (of which they formed the most influential, if not the most important part).

The two Nova Scotian seditious libel cases—unlike Upper Canada, there was not a concatenation of cases—permit only a qualitative analysis of the significance of political prosecutions in the criminal courts, not their quantification. The thirty-four common-law sedition prosecutions in Upper Canada between 1794 and 1828, tabulated by Wright,⁹ correspond to only one in Nova Scotia during the same period. Another major divergence between the two colonies is that while in Upper Canada, "[c]ourts were not resorted to after 1828,"¹⁰ in Nova Scotia the second and historically more important of the two proceedings did not take place until 1835—after the second, effective reform movement was well underway. The fifteen years which elapsed between the seditious libel trials of William Wilkie and Joseph Howe suggest that sedition proceedings in Nova Scotia, unlike Upper Canada during the same period, were indeed "isolated or extreme exceptions."¹¹ They signified the points at which *sedition* crystallized in the government's mind as seditious *libel*, thanks to the print medium, whether pamphlet or newspaper.

8. J.S. Macdonald, comp., *Annals [of the] North British Society [of] Halifax, Nova Scotia . . . 1768 [to] 1903* (Halifax: McAlpine Pub., 1905) at 37. To make matters worse, Loyalist Solicitor-General Robie—he was elevated to the Council in 1824—was Speaker of the House of Assembly, and therefore by implication himself an object of Wilkie's critique. Nor would Wilkie have endeared himself to the solicitor-general by his gossipy, 'insider' comments on the contested Speaker's election of 1819; see *infra*.

9. *Supra* note 7 at 24. The table excludes proceedings under the provincial *Sedition Act*. The Nova Scotian cases also differ from the Upper Canadian in that the surviving documentation includes no archival court records. *Howe*, unlike *Wilkie*, was stenographically reported; the report was printed verbatim in *Howe's* newspaper, and then almost immediately thereafter reprinted in small-book form. In neither instance, however, is the original court case file extant—Halifax Supreme Court criminal records of any denomination are scarce between 1815 and 1850—and 'pleas of the crown' ceased to be entered in a separate record-book in 1804. Documentation of *Wilkie* is limited to contemporary newspaper accounts, chiefly the government organ, the *Nova Scotia Royal Gazette*; see *infra*.

10. *Supra* note 7 at 24. This development nearly coincided with the ultimate repeal of Upper Canada's *Sedition Act*.

11. *Ibid.* at 8–9.

The divergence between sedition in Upper Canada and sedition in Nova Scotia was the cumulative effect of: Nova Scotia's proportionally smaller immigrant population; less cross-border American influence; the general absence from the relatively benign, paternalistic oligarchy, of the psychopathology of "hysterical intolerance" and the paranoid siege mentality generated by Upper Canada's collective trauma during the War of 1812 (Nova Scotia scarcely suffered at all, but rather experienced an economic boom through war profiteering); and Nova Scotia's evolving and "accommodative political culture."¹² Indeed Nova Scotia was far worse affected by the postwar recession, which created the climate of economic hardship and uncertainty in which tradesmen, whose cause William Wilkie philanthropically espoused, suffered the most. In other respects, however, Wright's evocation of the "social pretensions and political hegemony" of Upper Canada's 'Family Compact' in the 1820s applies to Nova Scotia's ruling élite. Ideologically united by tory-loyalism, both oligarchies

favoured a paternalism entailing a preoccupation with a stable social order and a sensitivity to dissent. . . . [The oligarchy's] power derived from the monopoly of government offices and patronage, facilitated by the colonial structure of government administration.¹³

The members of Nova Scotia's Council of Twelve were no less sensitive to criticism, however justified, which they considered to be beneath their collective dignity. The whiggish lawyer MHA, Thomas Chandler Haliburton—born the same year as Wilkie—was to satirize the Council

12. P.A. Buckner, *The Transition to Responsible Government: British Policy in British North America, 1815–1850* (Westport, Conn: Greenwood Press, 1985) at 237.

The legal culture of Nova Scotia was perhaps more conservative—certainly less accommodating—than the political culture. Whereas the attorney-general of Nova Scotia appeared to have no difficulty obtaining from the grand jury on either occasion—*Wilkie* or *Howe*—a true bill on the indictment for seditious libel, his counterpart in Upper Canada was often compelled to proceed by way of ex officio information, grand juries being sufficiently astute not to take over-seriously "the substantial political use of criminal law": Wright, *supra* note 7 at 25. As a prerogative prosecutorial instrument the ex officio criminal information did not need to be resorted to in Nova Scotia in order to bypass the 'potential obstacle' posed by the grand jury, which as a matter of course accepted indictments preferred by the crown on behalf of the government. In other words, the very nature of the prosecution—public rather than private—made returning a true bill more or less *de rigueur*. The role of the grand jury in such instances was merely to conduct a pro forma preliminary inquiry and then to rubber-stamp the indictment. Even more anomalous than the political role of the grand jury was the use in Nova Scotia of special juries for criminal trials on indictment, which was an indirect consequence of the fact that ex officio informations were almost entirely beyond the pale of Nova Scotia's criminal procedure. Substantive jury reform did not take place until after *Howe*, in connection with which the grand jury did what was expected of them; the special jury summoned to try the accused, however, let the government down by finding *Howe* not guilty as charged.

13. Wright, *supra* note 7 at 29, 11.

in 1827 as an ossified gerontocracy: "They consist of twelve dignified, deep read, pensioned, old ladies . . . filled with prejudices and whims like all other antiquated spinsters. They are the Sybilline oracles of Nova Scotia . . ."¹⁴ As Wright points out,¹⁵ the sedition prosecution was intended not only to muzzle the critics, but also to discredit criticism by stigmatizing it as subversive and by making an example of the critic through condign punishment. For the purpose of instituting and successfully carrying through a sedition prosecution, moreover, it was very convenient that the attorney-general and three out of four Supreme Court judges were all members of the government.

Given its primacy and exceptionality in the Nova Scotian context, *Wilkie* both exemplifies the judiciary's role in official repression, and instantiates the importance of what Wright calls "the ideological mechanisms of the criminal law"¹⁶ in prescribing the outer limits of legitimate political discourse. This paper examines the first known use by the government of Nova Scotia of the eighteenth-century, judicially-invented misdemeanour of seditious libel¹⁷ in order to silence and punish criticism of the ruling élite.¹⁸ As Nova Scotia had neither indigenous case-law, nor statutory legislation to supplement and reinforce the common law offence—Upper Canada's *Sedition Act* (1804) was still in full vigour, despite unsuccessful attempts having been made to repeal it—the powers that were in Halifax had to exploit to the full existing English case-law.

14. *The Novascotian [Halifax]* (29 March 1827) [Supplement], quoted in B. Cuthbertson, *The Old Attorney General: A Biography of Richard John Uniacke* (Halifax: Nimbus, 1980) at 127. Like Wilkie before him, Haliburton was commenting on the Council's obstructive behaviour in rejecting Assembly bills.

15. *Supra* note 7 at 13.

16. *Ibid.* at 8.

17. Wright succinctly describes it as "an imported English judicial doctrine devised in the eighteenth century to limit civil liberties flowing from the Revolution Settlement [1688]": *ibid.* at 9–10.

18. Sutherland's characterization of the ruling clique as a 'merchantocracy' (*supra* note 3) cannot be retrojected to the period preceding the collapse of the Loyalist Ascendancy in 1830, except at the risk of anachronism. (The "Brandy Election" completed the triumph of the mercantile élite over officialdom.) When the oligarchic Council was augmented from twelve to fifteen members in 1832, the new accretions were all prominent merchants. At the time when Wilkie's "seditious pamphlet" was written, however, the ratio of officials to merchants was 3 : 1. In addition to the chief justice (president, *ex officio*), there was the non-resident bishop (*ex officio*), the treasurer, the attorney-general, the surveyor-general, the second puisne judge of the Supreme Court, the imperial collector of customs, the first puisne of the Supreme Court [brother-in-law of the second, *supra*], the commissioner of H.M. Naval Dockyard and three very substantial merchants (Charles Hill, John Black and James Fraser). In one case—Treasurer Michael Wallace (quondam administrator of the government)—the senior official was also a considerable merchant. In 1819, therefore, the government of Nova Scotia was far from being a merchantocracy, though the process of its becoming one was admittedly underway.

To paraphrase Wright's summary, the sedition case of *Wilkie* illustrates "the repressive uses of criminal law as well as the possibilities and limits of counter-hegemonic struggles in the criminal courts. [It underlines] the importance of the criminal law as a repressive social ordering mechanism."¹⁹ Resorting in the first instance to criminal law was intended not only to undermine, but also to 'delegitimize' public criticism of official actions and institutions.

I. *The Protagonist*

Though Wilkie was speaking on behalf of others whom he viewed as an oppressed minority in the political economy of Nova Scotia—"tradesmen" in general, and butchers in particular—it is fairly clear that he did not himself belong to the class whose rights he had, with the condescending airs of the disinterested philanthropist, taken it upon himself to assert and defend. In view of the fact that Wilkie had connections to the ruling élite through his brother-in-law, a prominent Halifax lawyer, one gets the impression that he coveted entry into the oligarchy's "self-recruiting corporation, the legal profession."²⁰

The family of William Wilkie were Anglo-Scottish 'old settlers' who had neither participated in, nor directly benefited from, the Loyalist Ascendancy. The family, whose origins were skewed by the *Dictionary of Canadian Biography*,²¹ can in fact be reconstituted with a high degree of probability. Wilkie's paternal grandparents, Dr James Wilkie and Mary [née Coltheart?]²²—formerly Mrs. James Roach [Roche]²²—resided at Annapolis Royal, where in 1765 James Wilkie was licensed to be the schoolmaster and where, after her husband's suicide by poisoning in 1768, his widow ran a grocery store and rum shop. Mary Wilkie died in 1780, two years before the marriage, in Halifax, of her master mariner son, Walter Coltheart Wilkie (ca. 1759–1844), to his former Annapolis neighbour, Jane Rodda (1754–1847). These were the parents of the future radical reformer and seditionist, who was born in Halifax in May 1796—the youngest of six or seven siblings—and christened apparently in

19. *Supra* note 7 at 10.

20. *Ibid.* at 11.

21. Wilkie's father was *not* "descended from the pioneer [Halifax] settlers of 1749": Sutherland, *supra* note 3 at 853.

22. Her posthumous grandson, William Henry Roach MHA (1784–1861), was to figure prominently not only in William Wilkie's "seditious pamphlet" of 1820, but also in Joseph Howe's self-defence to the charge of seditious libel in 1835: J.A. Chisholm, rev. & ed., *The Speeches and Public Letters of Joseph Howe* (Halifax: Chronicle Publishing Co., 1909) vol. I at 47 *et seq.*

honour of his paternal uncle, William, a shipmaster.²³ Though William Wilkie's occupation is not known, David Sutherland's inference from Wilkie's vicarious defence of the economic rights of tradesmen that Wilkie "belonged to and identified with the shopkeeper stratum of Halifax society"²⁴ is groundless. Sutherland's later conclusion, however, that Wilkie "received what was, for the time, an above-average education and probably went to work as a clerk in a merchant counting-house"²⁵ is possible, though the evidence—both internal and circumstantial—suggests that he was probably a law clerk.

The pamphlet's substantive proposals for reforming the administration of justice suggest that Wilkie, whose brother-in-law was the influential Halifax barrister and placeman, David Shaw Clarke,²⁶ was (in today's parlance) a paralegal. Not only his critical interest in the administration of justice and advocacy of law reform,²⁷ but also his knowledgeable treatment of technical aspects of criminal procedure (such as *nolle prosequi*) and his learned commentary on legal proceedings suggest that

23. The chief source of information about Wilkie family history is the commonplace-book of Stephen Rodda (1715–post 1806), William Wilkie's maternal grandfather, who appears to have spent his final years with his daughter and son-in-law Wilkie in Halifax: Canadian Parks Service, Fort Anne National Historic Site, Annapolis Royal (mfm. at PANS). See also PANS RG 1, vol. 165 [licence- and order-book] at 385, under date 1 August 1765; St. Paul's Church [Ang.] Halifax: marriage register, 10 December 1782, and baptismal register, 24 May 1796 (mfm. at PANS); W.A. Calnek, *History of the County of Annapolis* (Belleville, Ont, Mika Studio, 1972 [repr. of 1897 ed.]) at 154, 156, 158, 580–81; A.E. Marble, comp., *Deaths, Burials, and Probate of Nova Scotians, 1749–1799, from Primary Sources* (Halifax: Genealogical Association of Nova Scotia, 1990) vol. 2 at 130, 204: s.v. "Wilkie, James", "Wilkie, Mary". (I am grateful to Dr Marble, Associate Professor of Surgery at Dalhousie University, for generously sharing with me the results of his research on surgeon James Wilkie.)

24. *Supra* note 3 at 853.

25. *Ibid.*

26. Clarke (1781–1850), who had married Wilkie's widowed sister Mrs. Jane Mary Bowlby, in 1816, was so well regarded at Government House that he was appointed Herald for the proclamation of King George IV at Halifax. This coincidence is enough to suggest the possibility that Wilkie, who went out of his way to praise Lieutenant-Governor Lord Dalhousie's conduct of affairs, thought that he could publish his criticisms of Court, Council and Assembly while enjoying virtual immunity from public prosecution. Wilkie was conspicuous in his support of the legislative initiatives of the lieutenant-governor, who was at loggerheads with the Assembly over what he perceived to be their disrespectful attitude towards the executive branch: Letter of Lord Dalhousie to S.B. Robie [Speaker] (13 April 1820), PANS MG 1, vol. 793, lib. iii, doc. 37 (Simon Bradstreet Robie fonds). As clerk of the peace (secretary to the Court of Sessions), an office which he had held since as early as 1803 and which became hereditary in his family, David Shaw Clarke was the senior judicial administrator for the District of Halifax. The Halifax town and district courts, in all of which Clarke officiated as registrar, exercised both civil and criminal jurisdiction; see *infra*.

27. In this Wilkie diverged widely from Howe, who was more concerned with the magistrates as a non-elective municipal council, so to speak, than as partial or incompetent administrators of urban justice.

Wilkie was by no means lacking in legal expertise. This assumption of knowledge may well have been responsible for inducing Wilkie to ask to be allowed to conduct his own defence.

II. *The Alleged Libel*

The spring of 1820—when William Wilkie was arrested, charged, held without bail, tried, convicted and sentenced, for having published a seditious libel “aspersing almost all the constituted Authorities in this Country”—was a time of ferment in the politics of Nova Scotia. The death in January of the old King George III ended the nine-year Regency of the profligate Prince of Wales and converted the prorogation of the legislature into a premature dissolution on 20 April, three days after Wilkie’s trial. The accession of the new King George IV was ‘heralded’ at Halifax on 7 April by Wilkie’s brother-in-law, lawyer Clarke, and Lieutenant-Governor the Earl of Dalhousie—less than four years in the province—was unexpectedly promoted governor-general of British North America. Under such heightened circumstances the appearance in town, apparently sometime between January and March 1820, of Wilkie’s twenty-page incendiary pamphlet, caused a tempest in the Halifax teacup.

Wilkie had undertaken that the *Letter* should “be published in a cheap pamphlet, so as [*sic*] the poorer class may have an opportunity of purchasing it; I therefore do not wish to swell it to a volume.” He had also “promised to a great many respectable individuals that this statement should be as concise as possible and if I had acted otherwise I would have basely betrayed the trust reposed in me by them.”²⁸ Wilkie was informed, after his arrest, “that a large majority of the inhabitants of this town are already deciding upon the merits of the” work.²⁹ The pages are mis-numbered, however, and the type so poorly composed that one is led to suspect that the composition was done either in haste by an apprentice or by an amateur. The sheets were obviously neither copy-edited nor proofread. Two significant typographical errors occur in the cover title

28. Quoting pages 9 and 21 of *A Letter to the People of Halifax, Containing Strictures on the Conduct of the Magistrates with Regard to the Police Court, Court of Quarter Session[s], Work House, Poor House, Jail, &c. Also Strictures On the Court of Commissioners, Supreme Court, &c.; Also, Strictures on his Majesty’s Council and House of Assembly, Bank Bill, Militia, issuing Tickets for Flats [sic: Seats] Digby Election, raising the[ir] Pay, &c. &c. By a Nova-Scotian* (Halifax: Printed for the Author, 1820) [CIHM 67268]. A full bibliographic description with indispensable notes and references is given in P.L. Fleming, comp., *Atlantic Canadian Imprints, 1801–1820: A Bibliography* (Toronto: University of Toronto Press, 1991) at 138–39 [§ NS183].

29. Letter of W. Wilkie “To the People of the town of Halifax,” *Acadian Recorder* [Halifax] (25 March 1820) at 3:6.

itself. The occasional errors in orthography and grammar, for which the author apologized profusely, are outnumbered by errors in typography; clearly the work had been rushed into print. The newspaper publisher, commercial printer and paper-miller—Anthony Henry Holland—to whom production of the work has traditionally been ascribed, published (after Wilkie's arrest, of course) a disclaimer alleging that the pamphlet had not even been printed in Halifax.³⁰ Though published most likely in the late winter of 1820, "Wilkie's"—as the notorious imprint became known locally—shows internal evidence of having been written in October 1819 at the earliest.³¹ Something of a precedent had been set earlier that year by the publication of a treatise written under a *nom de plume* by a disgruntled former country MHA, lawyer and would-be judge, John George Marshall.³² The second half of Marshall's vengeful diatribe was very critical of the entrenched mercantile interests, whom Marshall blamed for retarding the province's socio-economic development and, implicitly, for contributing to his defeat in the election of 1818.³³ No legal proceedings were taken against Marshall, however, who carefully refrained from criticizing any level of government, and who returned to the Assembly in the election of 1820, only to depart for the bench in 1823.

Unlike Marshall, who as the son of a prominent Loyalist was himself part of the Ascendancy élite, Wilkie was not in the main concerned with subversion and economic espionage by a cadre of leading merchants. His *Letter* attempts chiefly to focus public attention on the maladministration of justice, both criminal and civil, by the lay magistrates of Halifax's district and township courts: the Police Court [criminal], the Commissioners Court [civil] and the General Court of Quarter Sessions of the Peace [criminal and civil]. The only tribunal left unscathed was the district Inferior Court of Common Pleas [civil]. Wilkie adduces three

30. *Acadian Recorder [Halifax]* (25 March 1820) at 3.

31. "In the last Michaelmas term [1819] . . .", *supra* note 28 at 12.

32. Fleming, *supra* note 28 at 129 [§ NS160].

33. Sutherland, *supra* note 3 at 116–17. Sutherland sees Wilkie's pamphlet [which was published in 1820 not 1819, as stated at 117] as expressing "in even more passionate terms" the "outrage" articulated by lawyer Marshall in his "radical," anti-merchant "diatribe" of the previous year. Marshall, to whom Sutherland grants far more credit (and credibility) than he deserves, was an intending placeman concerned chiefly with reactivating his career in electoral politics. He had nothing to say about the maladministration of urban justice or the desirability of procedural or institutional law reform; his own urban law practice was far too lucrative for him to be anything other than a reflex establishmentarian. The reform agenda was exclusive to the inarticulate victims of the systemic status quo—or their spokesmen, such as Wilkie—not its lawyer-profiters. Marshall was a sanctimonious, self-pitying whinger, who feared (unnecessarily, as it turned out) that the custom of sexennial legislatures would defer his return to the Assembly until 1824. There seems little justification for comparing Marshall with Wilkie, a free-thinking radical reformer whose motives were as disinterested as his ideas were dangerous to express.

separate proceedings in support of his arguments, one criminal prosecution apiece in the Quarter Sessions and the Supreme Court, respectively, and one private action for debt in the Supreme Court.³⁴ The pamphlet also furnishes an interesting and important commentary on the first of the only two sessions of the Eleventh Assembly, which convened in February 1819 and was dissolved in April 1820. Nor is the pamphlet lacking the author's peculiar autograph: Wilkie's diatribe against the Assembly's rejection of the medical practitioner's bill,³⁵ as well as his metaphorical use of the motif of death by poison,³⁶ are clear allusions to his paternal grandfather, the Annapolis surgeon-schoolmaster, who killed himself in a fit of alcohol-induced depression over debt, twenty-eight years before William Wilkie was born.

Wilkie commenced his institutional critique of the administration of urban justice with the Police Court, ultimate progenitor of today's Provincial Court, which was presided over by the *custos rotulorum* [chief magistrate] of the District of Halifax.³⁷ Wilkie's chief objection was to the exorbitant salary paid the clerk of the court, David Shaw Clarke—Wilkie's brother-in-law—an 'establishmentarian' who made a very good living as Halifax's de facto municipal clerk-cum-solicitor. Perhaps this accounts for Thomas Beamish Akins's memory of Clarke as "the most corpulent man in town."³⁸ As clerk of the peace [secretary to the Court of

34. The first two cases are identified; the third probably could not have been, without incurring the risk of criminal defamation, because it involved lawyer Clarke as defendant. Having doubtless antagonized his influential brother-in-law by the pointedness of his criticism, Wilkie perhaps did not want to add insult to injury by publicly embarrassing his own sister, Mrs Jane Mary Bowlby Clarke, née Wilkie.

35. *Supra* note 28 at 17.

36. *Ibid.* at 7, 14.

37. The chief magistrate of Halifax was John George Pyke CR (ca. 1743–1828), who had been a justice of the peace since 1777, and who had assumed the office of "*custos* of the County" about 1806, on the retirement of his even longer-lived predecessor, John Newton: A. Robb, "Pyke, John George," DCB, vol. 6 at 621–22. The Governor in Council appointed the *custos rotulorum*, who in turn appointed the clerk of the peace. The *custos*, who had precedence of the first justice of the Inferior Court of Common Pleas, the offices having formerly been combined, simultaneously served as ex officio president of the Court of Quarter Sessions. For the office of *custos rotulorum*, see Murdoch, *infra* note 45, vol. 1 at 133.

38. Akins, *supra* note 1 at 207. Akins also stated that "No man was better known or more popular for about thirty years in Halifax than David Shaw Clarke." Perhaps it was Clarke's very popularity which was instrumental in Wilkie's downfall. "The duties of Mr Clarke are to attend daily at the Police office—to take all examination relative to assaults, Felonies and other business brought before the Magistrates to fill up the various Bonds Sums to Keep Books of records—and whatever is required in the office": 'Names of Police officers / Their duties / Amount of Income and Fees / How derived' [1839]: PANS RG 34–312 series J, file 11 [draft; printed in the Journal of the Legislative Council, 1840, Appendix No. 36 at 79]. In 1841 Clarke was to carry into retirement as a lifelong annuity his £300 salary as clerk of police, the office of police magistrate having been abolished by the *Town of Halifax Incorporation Act*.

Sessions], which office he had held at least since 1803, lawyer Clarke served as ex officio registrar of all the magisterial courts. Not until after the anti-magistrate verdict in *Howe* was any attempt made to involve lawyers directly in the administration of urban justice; previously they were mere judicial administrators (registrars, clerks, etc.) rather than equal or sole judges.³⁹ Having begun by criticizing the administration of justice in a municipal court, Wilkie immediately broadened the scope of his attack to address the maladministration of municipal government by the magistrates collectively, whom he accused (*inter alia*) of “illegal imprisonment.” The Bridewell (alias House of Correction), to which Wilkie himself would afterwards be sentenced, was allegedly being used by the magistrates as a reformatory for detaining public nuisances and social outcasts, rather than as a correctional centre for housing petty offenders serving custodial sentences.⁴⁰

The next tribunal to come within Wilkie’s purview was the Quarter Sessions, which was also presided over by the aged ‘custos of the county.’ In order to illustrate vividly the inconsistency and partiality of the magistrates, Wilkie adduced the case of *R. v. Caton [sic: Keating] et al.*, for common assault, which had come before the Sessions at their last September term (1819). The three accused were all found guilty; the one who was sentenced to pay a fine, not having the wherewithal, was

39. A momentous change occurred in 1835, indirectly as a result of the acquittal of *Howe*, when the then *custos*, James Foreman (who had tendered his resignation previous to the sedition trial) was replaced by lawyer William Quincy Sawers, who was chief justice of the Eastern Division of the Inferior Court of Common Pleas and president of the Court of Sessions. Sawers’s duties included a “general superintendence of all the municipal affairs & public institutions, the sole management of the Bridewell, the trial of all causes in the Sessions & Police & under the Statutes which give jurisdiction to magistrates in certain cases . . .”: *supra* note 38. This step represented the first attempt to integrate the administration of urban justice into the wider municipal court system; see P. Girard, “The Rise and Fall of Urban Justice in Halifax, 1815–1886” (1988) 8:2 *Nova Scotia Historical Review*, at 57 *passim*.

40. Concerning Bridewell, which was established by act of the legislature in 1815 for the accommodation of vagrants and disorderly persons convicted and sentenced in the Police Office, and which was placed under the direct control of the Court of Sessions, see Akins, *supra* note 1 at 166. Wilkie’s views on the purpose and function of this penal institution were years ahead of their time.

It can be difficult to distinguish between Bridewell and the Workhouse, which had existed since 1759; in North American (as opposed to British) usage, which Akins appears to be following, the latter might also mean a correctional centre for petty offenders. That the County Bridewell became a political football during the course of the 1819 session of the legislature is suggested by the fact that Pyke CR and the other Halifax magistrates petitioned for provincial relief from the oppressive municipal tax burden which they had had to impose in order to support the institution; their initiative led to the appointment of a select committee: *Journal of the House of Assembly [hereinafter JHA]* (24 February & 25 March 1819). The only material result, however, seems to have been that at the session of 1820 MHAs voted to continue the quinquennial *Act for establishing a Bridewell*.

committed as if to debtor's prison at the instance of a judgment creditor. One of the two who had been given a custodial sentence purchased his liberty through greasing the magisterial palm; the consideration was less than half the stipulated fine ultimately paid by Keating.⁴¹

Wilkie then proceeded to condemn the sessional administration of the workhouse; he candidly admitted the virtual impossibility of obtaining legal redress against those magisterial peculators, who "coercively plundered the pockets of the laborious labourer."⁴² Wilkie was no less aware than any legally conversant Upper Canadian radical of the potentially unlimited use by the law officers of the device of *nolle prosequi* to stave off private prosecutions embarrassing to the government—in other words, the magistrates "acting under commissions from the Executive authority": "a more subtle measure because the political reasons for terminating the case were easily obscured."⁴³ The second penal institution subject to Wilkie's critique of the abuse of magisterial authority was the County Jail, concerning which he flatly accused the magistrates of the misappropriation of public funds; but he was able to adduce only hearsay evidence.⁴⁴

The third tribunal coming within the purview of Wilkie's critique of the administration of urban justice was the Court of Commissioners, which Wilkie rather exaggeratedly depicted as a microcosm of the infamous Tudor-Stuart High Commission Court.⁴⁵ He dwelt on the

41. Wilkie's probable source of information was his older brother James Charles William (*supra* note 2), who was deputizing for the clerk of the peace, lawyer Clarke: "Cashins fine was paid to Mr Pyke he paid it to the County Treasurer on the 22 Sept. The Clk of the Peace was indisposed & Mr James Wilkie acted for him": PANS RG 34-312 series P vol. 9: 'Minutes of the / Court of / Quarter Sessions / Halifax County / Dec 1814 to Dec 20 1820. / at 203 [marginalium].

42. *Supra* note 28 at 7.

43. Wright, *supra* note 7 at 51. "Nay, I will go further," declaimed Wilkie. "I will so punish them [the magistrates], that they themselves shall acknowledge in their hours of tribulation, that tho' a *nolle prosequi* might have screened them from the bar of justice . . . : *supra* note 28 at 8, 7. Wilkie cast himself as Nemesis in order to see justice done to both the petit bourgeois and the working-class victims of oppressive municipal taxation and the maladministration of urban justice.

44. *Supra* note 28 at 8.

45. The High Commission was a prerogative "court of ecclesiastical jurisdiction, established and united to the regal power by the Act of Supremacy 1588. . . . [T]he High Commission Court exercised extraordinary and despotic powers of fine and imprisonment. Nor did it confine its jurisdiction altogether to cases of spiritual cognisance. For these reasons the Court was abolished in 1640. James II afterwards attempted to revive it, but it was finally declared illegal by the Bill of Rights 1688": E.R.H. Ivamy, ed., *Mozley & Whiteley's Law Dictionary*, 10th ed. (London: Butterworths 1988) at 218. (The High Commission is not to be confused with the Court of Star Chamber, which was also abolished by the *Habeas Corpus Act, 1640*.) Wilkie's analogy is more apparent than real, for the HCC was a superior court of criminal jurisdiction, while the Commissioners Court was "a court for the summary trial of actions"—a small claims court—unique to Halifax township. It had been established by act of the legislature in 1817,

difficulty of poor people obtaining equal or natural civil justice, regardless of whether they had "good and sufficient cause of action." Again Wilkie honed his argument by reference to a particular action—alas both unidentified and unidentifiable—in which a miscarriage of justice was alleged to have occurred. The commissioners numbered five, two of whom were magistrates. Wilkie was not in favour of abolishing the court, but of septupling the number of commissioners. Though Wilkie conceived the justices more as arbitrators than as judges, he seems to have been unaware that the route of appeal or rehearing lay from the Commissioners Court directly to the Supreme Court.

At this point Wilkie temporarily suspended his critique of the municipal courts in order to launch a defamatory personal attack on the progressive merchant John Albro, MHA for Halifax township and a pillar of the mercantile establishment. Wilkie did not name Albro but describes him so accurately that his identity is unmistakable.⁴⁶ Albro, who had entered the Assembly at the general election of 1818, was damned alliteratively by Wilkie for "[p]rostituting the principles he professed previous to his election."⁴⁷ While Albro's biographer, Allan Dunlop,⁴⁸ suggests that Albro's "career in the House of Assembly was not spectacular, for he was no more than a faithful supporter of measures pursued by the Halifax business élite," Wilkie took the view that Albro ("a prostituted member of the House of Assembly, &c.") was virulently corrupt and hypocritical, and chiefly responsible for those oppressive municipal tax increases required to finance the members' increasing their "sessional indemnity" by two-thirds. Wilkie could scarcely have used stronger language to deliver his execration of John Albro. It is possible, moreover, that his 'strictures' against the honourable member for Halifax were taken seriously by the freeholders of the township, for Dunlop discovered evidence of prognostications that Albro would be beaten in the snap election of 1820. Albro's Assembly colleague, lawyer and intending banker, Henry Hezekiah Cogswell, stood down and Albro himself was

about two years after the Police Office: B. Murdoch, *Epitome of the Laws of Nova-Scotia* (Halifax: J. Howe, 1832–33) vol. 3 at 63–64. The statutory creation of these tribunals, the former civil the latter criminal, both of which were staffed by lay magistrates, resulted from the government's attempt to reform and regularize (but not to professionalize!) the administration of urban justice in Halifax.

46. *Supra* note 28 at 11; the attack is reprised, with no less violence, at 19. Concerning Albro, see A.C. Dunlop, "Albro, John," DCB, vol. 7 at 12–13. A long-time Halifax magistrate, towards the end of his life Albro would be one of the Twelve Magistrates signing the formal complaint to the lieutenant-governor which led to the prosecution of Joseph Howe for seditious libel.

47. *Ibid.*

48. *Supra* note 46.

finally defeated at the general election of 1826 by another young lawyer-politician ‘on the make’—Beamish Murdoch. In 1820, however, despite Wilkie’s best efforts to assassinate his character and destroy him politically, Albrow led the poll in town.

Wilkie next reprised the theme of law reform by drawing the attention of his readers “to a defect in our judicial proceedings”: capital punishment as a penal sanction for burglary. Wilkie argued that though the sentence was imposed it was no longer carried out, and ought therefore to be expunged from the statute-book as a dead letter.⁴⁹ Wilkie’s complaint that convicted burglars were set at liberty rather than executed is borne out by the case of Sampson Fox (Pictou, 1817), who was ordered released despite having been convicted of burglary and sentenced to death.⁵⁰

While he was “upon the subject of jurisprudence,” Wilkie proceeded to address “an evil which exists in our supreme court, which calls loudly for redress. That is the numerous special juries summoned every term, which . . . interrupts the justice of the country.”⁵¹ By moving for the empanelment of a special jury, arranging for one or more of the twelve not to appear, and then declining to complete the number by writ of *tales*, both criminal and civil defence counsel who were unable or unwilling to go to trial, could procure vexatious continuances. Special juries were authorized by the English statute—(1730) 3 Geo. 2, c. 25, s. 15—which was construed as applying to criminal indictments for misdemeanour, such as assault and battery and sedition. The provincial act—(1796) 36 Geo. 3, c. 2, s. 6—enlarged on its imperial prototype by providing for special juries in *any* criminal or civil proceeding in the Supreme Court.⁵² In support of his argument Wilkie adduced the *cause célèbre*, *Sterling v. Hoffman* (Michaelmas 1819), which was defended by James William Johnston; attorney and counsel for the plaintiff were William Quincy Sawers (the future *custos*) and Archibald KC.⁵³ After “retiring for a number of hours,” wrote Wilkie,

49. *Supra* note 28 at 11.

50. PANS RG 1, vol. 173 at 403 [notice to sheriff].

51. *Supra* note 28 at 11–12.

52. Murdoch, *supra*, note 45 at 3:175–78. Wilkie’s stricture that the prospective foreman of the special jury in *Stirling v. Hoffmann* had had to travel twenty miles to attend court in Halifax (*supra* note 28 at 12) was addressed by an act of 1827, which waived the obligation unless the prospective juror lived within fifteen miles of town: *ibid.*, vol. 3 at 176. Wilkie shows himself better acquainted with the civil procedure rule (Easter 1782), according to which “any party wishing a special jury must move for it on the first day of the term,” than with the act of 1796, which “made it imperative to direct a *tales*, wherever an incomplete jury appeared”: *ibid.*, vol. 3 at 177 and note.

53. PANS RG 39 “J” vol. 104, at 551^b, under date 29 Dec. 1818 [‘Original Entries’]; v. 121 at 148, under date 14 Oct. 1819 [minutes of proceedings]. The case file is not extant. The action was for exemplary damages (£500) for assault and battery. It originated in a quarrel, attempted

this jury returned with a verdict, 'If the parties will agree to pay each of them half of the expences, attending this suit, *then* we have come to a decision.' This of course could not be recorded. The Judges [Blowers CJ, Halliburton and Stewart JJ] laughed at their ignorance; the lawyers grumbled at their presumption; and the audience swore at their demerits, insignificance and deceit. This judicial farce ended by one of the jury fainting when they were all dismissed, to the entire satisfaction of judges, lawyers and audience. Now does not this prove the futility of summoning special juries? Did any petit jury ever offer, or attempt to form such a stupid, disgraceful and ignorant verdict?⁵⁴

The official court record states simply that the suit was extinguished upon the withdrawal of a juror by consent of parties. No doubt the defence stratagem of which Wilkie complains had been used to procure continuances from Hilary to Easter to Trinity to Michaelmas Term 1819. It is certainly ironic that among Wilkie's law reform proposals was the abolition of special juries, by which he probably—and Howe certainly⁵⁵—were both to be tried. In *Howe* a prospective juror was allowed to stand down because he was a magistrate and therefore interested in the prosecution. On that occasion, however, Attorney-General Archibald (as he had since become) did not hesitate to move for a writ of *tales* so that the trial could proceed.⁵⁵

Having concluded his critique of the administration of justice with a vivid 'life study' of civil litigation in the Supreme Court, Wilkie moved on to consider the conduct of the two divisions making up the legislative branch of government: Council and Assembly. Again he applied the heuristic method, drawing on the 1819 session for materials with which to construct his argument. With regard to Wilkie's animadversions on the Council, it must be carefully noted that he was criticizing the Council not in its *executive* but in its *legislative* capacity and character, and that the three judges who sat for his trial were all active and influential members

horsewhipping and threatened duel involving two prominent Halifax ex-Navy surgeons, who later became close collaborators: Matthias Francis Hoffmann [DCB, vol. 8 at 398–400] and John Stirling. Related to what Dr Hoffmann doubtless perceived as vexatious litigation by his professional rival was the malicious prosecution by Hoffmann of Dr Stirling's lawyer, William Quincy Sawers, whose brother—Alexander Fraser Sawers—was another prominent physician, for having allegedly assaulted Hoffmann: I. Longworth, *Life of S. G. W. Archibald* (Halifax: S.F. Heustis, 1881) at 22–25. *R. v. Sawers*, in which Solicitor-General Robie appeared for the crown and Archibald KC for the accused, resulted in an acquittal.

54. *Supra* note 28 at 12.

55. Chisholm, *supra* note 22 vol. I at 24. He could not enter a *nolle prosequi*, which in any case would only have stayed the proceedings rather than withdrawing the charge. Failing to move for a *tales*, which in any case was contrary to the statute, would have rendered the trial nugatory. Even otherwise it would have been an impossible course for the attorney-general to follow, as *Howe* (like *Wilkie* before it) was a public prosecution approved and ordered by government, not a private prosecution discountenanced by government.

of Council. As objects of Wilkie's criticism in their legislative capacity, therefore, Chief Justice Blowers (president, *ex officio*), no less than Justices Halliburton and Stewart, could scarcely have been impartial towards Wilkie when he came before them accused of seditious libel. "This council," wrote Wilkie, ironizing with faint praise, "is composed of twelve of the most respectable and honest inhabitants of Halifax; but I intend to argue, that they are also too *wealthy*."⁵⁶ Having declared in favour of a legislative council separate from the executive—a constitutional reform not implemented in Nova Scotia until 1837–8—Wilkie proceeded to rehearse the failure of the Halifax Bank Incorporation Bill, which was agreed to by the Assembly but rejected by the Council.⁵⁷ Though he deplores the failure of such a progressive economic measure as the incorporation of a commercial bank, Wilkie misunderstands the pretext for the Council's refusal to agree, which was not only an act of cut-throat competition among Council businessmen, but also a belated *quid pro quo*: in 1801 the Assembly had rejected a bill "to incorporate the Subscribers to the Bank of Nova Scotia."⁵⁸ The memory of this defeat still rankled in the minds of those councillors who had been among the prospective incorporators and subscribers of the original bank.

So distressed was Wilkie by the political infighting which led to the final defeat of the Bank Incorporation Bill that he went so far as to advise the lieutenant-governor to consider dismissing those members of Council

56. *Supra* note 28 at 13.

57. "A Bill intituled An Act to authorize the Incorporation of the Subscribers to a Bank at Halifax [An Act to authorize the Establishment of a Bank at Halifax]" / Bill No. 19: PANS RG 5 "U" [Unpassed bills] box 6 (1818–1819). "I have read the bill, that passed through the House": *ibid.* One wonders how Wilkie could have got hold of a copy of an unenacted law; legislative bills were usually not printed until they had passed both Houses and received viceregal assent; perhaps his cousin Roach, whom he feigned not to know, was the intermediary.

58. JHA, 1801 at 4, 6, 10; Akins, *supra* note 1 at 133; Murdoch, *supra* note 2 at 205; Letter of J. Wentworth to S. Bernard (10 April 1801): PANS RG 1, vol. 53, at 203. A further attempt was made in 1811, sponsored by the Halifax Committee of Trade: Murdoch, *ibid.*, 308. Among the provisional directors of the first, stillborn Scotiabank was the merchant James Fraser, who about 1810 (after a successful career in commerce and politics in New Brunswick) had removed to his former domicile—Halifax—and in 1818 had been appointed to the Council of Nova Scotia. Complicating the Council's rejection of the 1819 Assembly bill, moreover, was the fact that Fraser, who had been involved in both previous failed promotions (1801 and 1811), was also the principal prospective incorporator of the new bank. One can only attribute the failure of the bill to the influence of Fraser's business competitors within and outside the Council, which in 1819 was still very far from being a homogeneous merchantocracy.

"But they [the Council] tell us they rejected the bill, on the representations of some very respectable merchants": Wilkie, *supra* note 28 at 13. On "the conflict and compromise of the session in 1819," see especially J.S. Martell, *A Documentary Study of Provincial Finance and Currency 1812–36* (Halifax: PANS, 1941) at 10–11.

who had opposed it.⁵⁹ Wilkie also lamented the fact that legislative sessions of the Council were not open to the public—nor were their journals printed until 1838—so that Council debates could not be reported in the newspapers, and it was therefore impossible to determine which of the Twelve were traitors to the bankless people of Nova Scotia. The ad hoc legislative council was nothing more than the executive council very ineffectively disguised, a constitutional anomaly which permitted judges to function in all three branches of government. In Upper and Lower Canada, on the other hand, the executive and legislative councils had been separated at birth.

However annoyed Wilkie may have been that the legislative sessions of Council were conducted in camera, he was incensed by the Assembly's attempt to regulate admission to the front seats in the gallery of the new Province Building by issuing tickets. Wilkie's lament on behalf of "[o]ne of our citizens [the dry goods merchant Alexander Izat]," who

for his temerity to gain admission into the front seat, was by these truly *faithful* representatives sent to jail, until he should with bended knees, and uplifted hands, implore their forgiveness. This he refused to do and glad am I of it; for they discharged him without [his] submitting, to so servile and ignominious a homage.⁶⁰

Wilkie concludes his account of the incident by describing himself as having "watched the proceedings of the House of Assembly with a vestal's vigilance," though not perhaps from a front seat in the gallery.

Moving from the gallery to the floor of the House, Wilkie proceeded to criticize the Assembly's conduct of the Digby Township disputed election. His vigorous advocacy of the cause of a wronged relative, William Henry Roach MHA,⁶¹ suggests that Wilkie had access to detailed

59. Wilkie overlooked the protocol that the lieutenant-governor (for obvious reasons) did not attend legislative sessions of the Council, and that Council votes were not recorded. Very little could be inferred from a prosopography of those ten members of Council who happened to be in attendance the day the bill was considered in committee of the whole and voted down: JLC, 3 Apr. 1819: PANS RG 1, vol. 218^{kk}.

60. *Supra* note 28 at 14–15. Wilkie refers to an incident which took place on 3 March 1819, when "[t]he house arrested a person for contempt committed in their presence. He was sitting in the gallery, which then ran round three sides of the room, and spoke aloud in terms offensive to a member [John Albro?]. He remained in jail until 25 March, when the house ordered his discharge": Murdoch, *supra* note 2 at 436; JHA (3 and 25 March 1819); *Acadian Recorder [Halifax]* (20 March 1819) at 2. Cf. "No instance has been known in this province, of the Council arresting any person for contempt of their House, though the Lower House [Assembly] has often done so": Murdoch, *supra* note 45, vol. 1 at 67.

61. Mrs Mary Roach Wilkie (d. 1780), who had been twice married and widowed, was their paternal grandmother. As a Halifax magistrate Roach was to sign the joint declaration against Joseph Howe in 1835, and (as then acting chief commissioner of Bridewell) was also to be Howe's *bête noire* during the sedition trial defence: Chisholm, *supra* note 22, at I:47 *et seq.*

inside information. His coyness about his blood relation rings perhaps a little hollow: "A gentleman of the name of Wm. H. Roach. . . ."⁶² Wilkie attributed the election 'trial,' which claimed much of the Assembly's attention during the session of 1819, to malice on the part of lawyer Thomas Ritchie, MHA for Annapolis County, whom Roach declined to support in the contested Speaker's election against the incumbent, Solicitor-General Robie, earlier the same year. Roach's seat was ordered vacated but he was returned in May 1819, "after a long and severe[ly] contested election,"⁶³ only to take his seat a mere two months before the legislature was dissolved and he had to face the voters again for the third time in two years. In Wilkie's spirited defence of his cousin it is difficult not to see him defending the family honour.⁶⁴

Wilkie saw the politics of interpersonal rivalry raise its ugly head not only in the Digby Township controverted election, but also in the Assembly's contemptuous rejection of the Lieutenant-Governor's plan for renewing the militia establishment. Wilkie viewed a well-regulated provincial militia as being a counterweight to, as well as obviating the necessity for, the British army garrison, which he apprehended as a potential instrument of tyranny and oppression: "We have a numerous standing force always at hand, and we do not know how soon they may be called upon to annihilate our rights and liberties, especially when we consider the *complexions* of their characters."⁶⁵ Worse still was the Assembly's deferral of the bill to regulate medical practitioners,⁶⁶ as a result of which Wilkie feared an infestation of barber-surgeons. The

Concerning the disputed election for Digby Township see B. Cuthbertson, *Johnny Bluenose at the Polls: Epic Nova Scotian Election Battles 1758-1848* (Halifax: Formac, 1994) 140-41.

62. *Supra* note 28 at 15.

63. *Ibid.* at 16.

64. Concerning Roach's distinguished career in politics see Calnek, *supra* note 23 at 409-12. It is of comparative interest that Roach, like Wilkie himself, made his name as a law reformer, whereas lawyer MHAs such as Ritchie were extreme Tories preoccupied by the quest for preferment. Being on the wrong side not so much of politics as of Joseph Howe, nevertheless, Roach—a progressive and independent liberal—was written out of whig triumphalist history and omitted from the Reform pantheon in the *Dictionary of Canadian Biography*.

65. Wilkie, *supra* note 28 at 16-17. The irony was lost on Wilkie that the lieutenant-governor, of whom he appears to have thought so highly, was a lieutenant-general on the active service list who had served under Wellington in the Peninsula, and (as a matter of wartime imperial policy sustained in the postwar period) united in himself the civil and military commands.

66. Bill No. 24, "An Act to ascertain the qualifications of Persons practising as Physicians, surgeons and apothecaries in this province and to regulate the practice of the same": PANS RG 5 "U" box 6 (1818-1819); JHA (1819) at 58, 59, 64; Wilkie, *supra* note 28 at 17. Allan Marble points out that the bill was in response to a petition from the medical doctors in Halifax: A.E. Marble, *Surgeons, Smallpox and the Poor: A History of Medicine and Social Conditions in Nova Scotia, 1749-1799* (Montreal: McGill-Queen's University Press, 1993), at 167. The regulatory bill did not pass until 1828; unsurprisingly, an amendment the following year introduced a grandfather clause.

doctors proved almost as resistant to statutory regulation as the legal profession ten years before. Having been regulated themselves since 1811, however, the lawyers were now keen to subject the doctors to a similar regimen: the bill was introduced in the Assembly by Archibald KC.

Worst of all was the hyperinflationary attempt by MHAs to raise their honorarium by two-thirds, at a time of economic stasis induced by the continuing postwar depression: public indebtedness as well as “a *diminished* revenue, *exorbitant* taxes, an *enormous* civil list of upwards of 16000l.!”⁶⁷ Wilkie approved the course of action adopted by governor and council in not rejecting the *Appropriation Act*, which could not be amended except by the Assembly, where it originated; such a course would have deprived the province of supply and provoked yet another constitutional crisis. Wilkie went so far as to propose turning constitutional convention on its ear by having money bills originate in the Council, rather than in the Assembly.⁶⁸ He ominously warns his readers against the consequences of taxation without equal representation, implicitly comparing the situation of Nova Scotian taxpayers relative to an electorally unrepresentative House of Assembly, with that of the Thirteen Colonies relative to Parliament before the American Revolution.⁶⁹ Politically, it is clear that Wilkie was a believer in enlightened despotism or benign, paternalistic tyranny. He was not so much a tory democrat as an anti-democrat since he had even less confidence in representative government than he had in oligarchy. Moreover, the notion of Responsible Government was anathema to his political economy. The only official in whom he seems to have had unfettered confidence was the Earl of Dalhousie, whose side he very conspicuously took in the lieutenant-governor’s political struggle with the lawyers who led the Assembly. Democracy for Wilkie meant rule by faction; it was the anarchic alternative to constitutional government under the aegis of the imperium. In general Wilkie viewed representative government, as it had existed in Nova Scotia since ‘1756’ [*sic*], as positively antithetical to peace, order and good government. Representative government could only be justified under a meritocracy, which was the principle of sociopolitical organization to which Wilkie adhered and which he desired to introduce in Nova Scotia. His zeal for radical reform suggests that Wilkie was a utopian socialist, not a social democrat, but whether of the extreme Right or the extreme Left is difficult to tell. At all events, Wilkie was a radical reformer in polar opposition to the ‘conservative reformers’ of the 1830s

67. *Supra* note 28 at 17–19.

68. *Ibid.* at 20.

69. *Ibid.* at 19–20.

and 1840s, whose efforts resulted in the achievement of Responsible [i.e., party political] Government in 1848. He presciently forecast that government "will be transferred into the hands of the Representatives of the people, and then we will be governed by a democratic faction, in *direct* contradiction to the principles of our invaluable constitution."⁷⁰ It is little wonder that Howe (an instinctive conservative—Murray Beck's familiar 'mild tory'—who gradually became a conservative reformer and never became a radical reformer) did not view Wilkie as his 'forerunner.' As real or imagined reformers, they were running at unequal speed in different directions.

Wilkie concludes his "strictures" with a page-and-a-half of afterthoughts (General Remarks), which he devotes chiefly to reprising his attack on fat lawyer Clarke, this time in his capacity as clerk of the Commissioners Court.⁷¹ Wilkie accused Clarke of having

had the confidence or impudence . . . to defend an action brought against him in the supreme court, brought by a printer [Anthony Henry Holland], for the amount of printing summonses &c. for that court. Now his defence was, that the printer ought to obtain the amount of his demand from the *grand jury*; pretty language this, that the public should pay for these very writs, that he receives for each 2s. 6d. or 3s. 9d. yet this doctrine was forced; but judges and jury gave it a decided negative. Here then we see what *would* be done, if the powers of the magistrates was [*sic*] exerted without controul.⁷²

70. *Ibid.* at 18.

71. *Ibid.* at [21].

72. *Holland v. Clarke* (S.C. 1819): PANS RG 39 "C" [HX] box 143 (1818)—case file; cf. RG 39 "J" [HX] vol. 121 at 92—minutes of proceedings; the judgment *per se* was not recorded. The professional colleague who had the "confidence or impudence" to conduct Clarke's defence to the action was William Quincy Sawers, the future *custos* of Halifax; counsel for the plaintiff was Archibald KC. To some extent the concept of judicial review of the Court of Sessions acting in its judicial capacity already existed, for criminal proceedings could be and often were removed by *certiorari* from the Quarter Sessions to the Supreme Court. Judicial oversight of the lay magistrates courts did not become judicial superintendence until 1835, when a sitting judge [Sawers] was appointed to preside in the courts of the District of Halifax, their having been expressly excluded from the *Equal Administration of Justice Act*, (1824) 4 & 5 Geo. 4, c. 38; this act provided that divisional first justices would have to be barristers of at least ten years' standing and continuous practice.

Wilkie, the gadfly, would have been apoplectic if he had survived long enough to see the legislature in 1824 add three more judges to the provincial establishment at a cost of £1200 per annum, thus providing comfortable berths for three lawyer-MHAs: J.I. Chipman, T. Ritchie and W.H.O. Haliburton KC [father of the novelist]. A fourth lawyer-MHA, J.G. Marshall (*supra* note 33), had already been looked after the previous year through being awarded a judicial suzerainty over the whole of Cape Breton Island. Whereas lawyer-critics of the mercantile elite, such as Marshall, were willingly silenced by means of judgeships, lower-middle-class critics of the Establishment, such as Wilkie, were prosecuted for crime against the state. Chief among the manifestations of the repressive nature and unequal administration of criminal justice was the 'incontestable illegality' of sedition.

Wilkie here tosses off the rather serious implication that the Court of Session, in yet another of its judicial incarnations,⁷³ was permitting the clerk of the peace, its senior administrative officer, to indulge in vexatious litigation in order to square accounts with the grand jury, which had no power whatever directly to disburse funds.

Wilkie, who may perhaps not have been sensible to the dangers of a criminal prosecution, either private or public, attempted to avoid actionable defamation by not naming either of the individuals—Clarke and Albrow—whom he had libelled, while describing them in such a manner as to render them all too easily identifiable. In this regard Wilkie perhaps obtained a pyrrhic victory, though he grossly miscalculated the odds against his being prosecuted by the government for seditious libel. Perhaps the ‘worst case scenario’ he had envisaged was a private prosecution for defamatory libel, to which his confrère, the “Whig Radical” dry goods merchant, Thomas Forrester (1790–1841), would be subjected by tory merchant-magistrates in 1825.⁷⁴ If Wilkie presumed to capitalize on relationship-by-marriage to the extent of denouncing Ascendancy office-holders, such as lawyer Clarke, and trying to exploit his family connections with them in order to ensure immunity from prosecution, then pride went before his fall.

III. *R. v. Wilkie*

Unlike William Wilkie, the self-professed author (and de facto publisher), Anthony Henry Holland—the putative printer—was able to escape the legal consequences of his action by publicly disavowing it in the same issue of his newspaper which carried Wilkie’s righteously indignant letter from prison.⁷⁵ Holland was also able to lend the colour of credibility to his denial through the fact that the title-page of the pamphlet indicated *for* whom—not *by* whom—it had been printed. In other words, it had been privately published—a material fact in libel, where “it is the publication which constitutes the offence.”⁷⁶ Holland had reason to be concerned. He had already attracted some hostile attention for both publishing and widely advertising and disseminating lawyer Marshall’s pamphlet, almost exactly a year before Wilkie’s. No one, however—

73. In fact only two of the five commissioners appear to have been JPs at the time.

74. See D.A. Sutherland, “Forrester, Thomas,” DCB, Vol. VII at 307.

75. *Supra* note 29. The disclaimer appearing on the same page as Wilkie’s missive begs the question of why Holland was prepared to print the letter at all, and suggests the possibility that Wilkie and Holland were clandestine ‘fellow travellers.’

76. This point was also to be made against the accused by the crown attorney in *Howe: Chisholm*, *supra* note 22, vol. I at 25.

neither pen-named author nor named publisher—was charged with libel on that occasion. Holland understandably was not about to identify himself in print as the anonymous printer of Wilkie's, in view of the adverse publicity attending the Marshall imprint. There is in any case no indication that the government was contemplating the prosecution of Holland, either instead of or in addition to Wilkie, or that Wilkie attempted to implicate him as an accessory before the fact. Even before Wilkie was arraigned, tried, convicted and sentenced, therefore, "Holland had decided that Wilkie's cause could not be safely supported."⁷⁷ The legal position in *Howe* was to be the reverse of *Wilkie*: in the former, the avowed publisher (Howe) was prosecuted, though Attorney-General Archibald, prosecuting in person, insisted that "had the author been given up, [he] would not have proceeded against the publisher."⁷⁸ In the latter, the pen-named author-cum-publisher was prosecuted, while the alleged printer disavowed all knowledge and was not prosecuted as an accessory. Just as Wilkie, at trial, acknowledged himself the author of the alleged libel, moreover, so Howe was to acknowledge himself the publisher. Determining whom to prosecute for a seditious libel was inevitably more a political than a legal decision, which had to be made before the indictment reached the grand jury.

Whether or not the alleged libel was seditious, it was certainly defamatory, and the judicial development of sedition law had established the principle that defamatory libel against magistrates was *ipso facto* seditious.⁷⁹ Bearing in mind that all the members of the governing Council were ex officio JPs whose writ ran throughout the province, it is hardly surprising that—sometime before 24 March 1820—William Wilkie was arrested and charged with libel, pending the grand jury's return on the crown's indictment.⁸⁰ Whether the same strategem as would be used five years later to apprehend Forrester on a charge of private defamatory libel—namely, a bench warrant issued out of the Quarter

77. G. Tratt, "Holland, Anthony Henry," in DCB, Vol. VI, 321, at 322.

78. This was in response to an interruption by the defendant (Howe), who "stated that he had full permission to give up the author whenever he pleased, but, contrary to the practice in all such cases [*Wilkie*!], the name had never been demanded": Chisholm, *supra* note 22, vol. I at 77. Even in Nova Scotia it was unusual for either of the law officers to conduct libel prosecutions in person, that task normally devolving on the resident K.C. *Howe*, in which Attorney-General Archibald appears to have intervened personally as a compliment to the accused, formed an egregious exception to the general rule.

79. On this subject see especially Paul Hamburger's monolithic 1985 article cited by Wright, *supra* note 7 at 14, n. 14 and, more recently, M. Lobban, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c. 1770–1820" (1990) 10 *Oxford J. Legal Stud.* 307.

80. Sutherland (*supra* note 3) states that "Halifax's merchant-dominated Grand Jury indicted Wilkie on a charge of criminal [*sic*] libel."

Sessions at the request of the grand jury, who had returned a true bill on the indictment⁸¹—was used to arrest Wilkie, seems unlikely. An indictment for sedition was preferred by the law officers on behalf of the government, not by the grand jury on behalf of the injured party. In any event Wilkie did not, or could not, post bond. Whether bail was refused by the JP before whom Wilkie was brought—on the grounds that a misdemeanour, such as seditious libel, was a non-bailable offence—or sureties did not come forward to secure the recognizance, moreover, is also unclear. Wilkie's internment pending trial is probable evidence of the seriousness with which the government perceived the challenge, which, though not emanating from the voiceless urban proletariat, was confessedly offered not only on their behalf, but also on that of the petit bourgeoisie. Wilkie offered himself as spokesman for both classes: the one oppressed, the other (witness Wilkie's special pleading on behalf of the butchers) discriminated against. Though the government's rationale was to be no different in 1835 from what it had been in 1820, Howe's legal rights were not trampled upon like Wilkie's: he was not arrested and forced to enter a recognizance for his appearance in court, nor remanded in the custody of the sheriff pending the grand jury's preliminary inquiry. But then Howe's 'libel' was not against the executive government, only the local magistracy and generally not in their administration-of-justice mode. Howe's critique involved little more than the mismanagement of fiscal affairs and municipal public welfare institutions.

William Wilkie was indicted on the same common law basis which, according to the Epitomist Murdoch, provided that "[s]candalous writings against the government or individuals are called libels," all of which are comprehended under the Blackstonian notion of "misdemeanours that tend to the public injury."⁸² If the common law misdemeanour of seditious libel was the crime for which Wilkie stood indicted, then *The Libel Act 1792*⁸³—the purpose of which "was to remove doubts respecting the functions of juries in cases of libel"—was to inform both Wilkie's self-defence and Chief Justice Blowers's charge to the jury. Received

81. PANS RG 34-312 series P vol. 7, at 190-91 ['Register of the Clerk of the Peace / from / December 1820 to September 1825'].

82. Murdoch, *supra* note 45, vol. 4 at 163, 177.

83. (U.K.) 32 Geo. 3, c. 60, popularly known as "Fox's Act." See M. Greenwood & B. Wright, 'General Introduction: State Trials, the Rule of Law and Executive Powers in Early Canada,' in *idem*, eds., *Canadian State Trials : Volume One : The Early Period, 1670-1837* (forthcoming) [Toronto: University of Toronto Press and The Osgoode Society for Canadian Legal History], at §4.(ii)—Sedition Law; cf. Wright, *supra* note 7 at 13 et seq. See also T.A. Green, "The Jury, Seditious Libel and the Criminal Trial," in *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* (Chicago: University of Chicago Press, 1985) at 318 et seq.

English criminal law and procedure comprehended seditious libel, but (unlike the legal position in Upper Canada)⁸⁴ it was evidently thought to be 'reformed' by *The Libel Act*—the principle in Nova Scotia being that the reception of remedial English criminal statutes was continuous rather than instantaneous. The 'invention' of seditious libel in Nova Scotia was unaffected by the reception question because the province had neither a prescribed statutory, nor a common-law *terminus ante quem* determining the receptibility of English statute law. The legal position in favour of continuous selective reception had been stated more or less *ex cathedra* by Chief Justice Blowers in 1800,⁸⁵ in which year Upper Canada legislated a retroactive terminal date for the reception of English statute law. Blowers's commitment to the doctrine of statutory mitigation of the rigours of the common law would inspire his charge to the Wilkie sedition trial jury. The chief justice was quite prepared to instruct the jury that they were under no obligation to convict the accused merely on the basis of his own 'admission of guilt'—so to speak—and to bring *The Libel Act* directly to bear on the proceeding. Blowers thus anticipated the 'verdict according to conscience,' which would be rendered fifteen years later in

84. Wright, *supra* note 7 at 16.

85. Letter of S.S. Blowers to W. Chipman, (April 1800?: NA MG 23 D 1, vol. 1, series i, at 145 et seq. (Chipman family fonds). The rule of the Massachusetts lawyers, as Blowers called it, achieved the level of *stare decisis* in *Uniacke v. Dickson et al.*, (1848) 2 N.S.R. 287 (Ch.) at 290 *per* Halliburton CJNS—the much misconstrued leading case on reception law in Nova Scotia:

My venerable predecessor, Chief Justice Blowers . . . inclined to the opinion, that those [English] statutes only which were in amelioration of the common law, and increased the liberty of the subject, were in force here; and though . . . my memory [aet. 75] does not enable me to mention any particular case [e.g., *Wilkie*] which he decided upon that principle, I well recollect that he was invariably influenced by it in all cases to which it was applicable [e.g., *Wilkie*].

Though *The Libel Act 1792*, as 'declaratory' (or rather clarificatory) of the criminal law of England, had always been in force in Nova Scotia because of the unique judicial phenomenon of continuous reception at common law, its application was governed by Murdoch's tenth rule of statutory construction ('Remedial statutes are to be construed liberally'): *supra* note 45, vol. 1 at 24. But the deployment of this Act in cases of seditious libel did not necessarily increase the likelihood of an acquittal: Wright, *supra* note 7 at 16, n. 25. There was one settled aspect of the common law which stood in no need of confirmation or clarification, and which *The Libel Act* did not affect: the accused could not plead the truth of the statements made as a defence to seditious libel. It is evident from the newspaper accounts of the trial that Wilkie, whom the court 'indulged' by allowing to conduct his own defence, thought that the truth of his 'strictures' might be pleaded as justification. Howe appeared to make the same procedural error, but the jury in good conscience forgave him. With all the forensic sophistication which Wilkie's argument presumably lacked, Howe distinguished between proving 'the truth of a libel,' which was not material in law or fact, and disproving seditious intention, which was a good defence in law and which lay within the jury's fact-finding purview.

favour of Joseph Howe, whose acquittal of the same charge Blowers lived to see.

The crown took quite a different view. Though there was no question of proceeding by way of ex officio information, which was beyond the pale of Nova Scotia's criminal procedure—nor had the grand jury presented Wilkie as a public nuisance—the author of the alleged seditious libel was indicted and publicly prosecuted by the crown on behalf of the government. On 5 April, the day after Easter Term commenced, the grand jury examined three witnesses and returned a true bill on the indictment.⁸⁶ The trial, however, probably due to the volume of civil business, did not take place for twelve days, until near the end of term; the only other criminal business on the docket was two prosecutions for larceny and one for murder.⁸⁷ Acting as crown attorney under delegation by the law officers was Samuel George William Archibald KC; it is not altogether clear why neither of the law officers prosecuted personally, the practice of king's counsel acting as crown attorneys being officially limited to the Supreme Court circuits.⁸⁸ The day before the trial, crown attorney

86. PANS RG 34–312 “P” vol. 8 (‘Grand Jury Room Book’).

87. PANS RG 39 “C” (HX) box A, file 3 (calendar of criminal proceedings, 1811–1828).

88. King's counsel were first appointed in 1817, in order to relieve the law officers of the onerous burden of leaving Halifax and travelling the circuits personally to prosecute cases on behalf of the Crown. The measure was designed to complement the appointment in 1816 of an associate circuit judge, its rationale being that if there was a Supreme Court judge who presided only on the circuit, then there should also be Crown attorneys who prosecuted only on the circuit. Archibald, for example, conducted *all* criminal prosecutions on the Supreme Court's eastern circuit, which from 1820 onwards included Cape Breton Island. In the official hierarchy, KCs stood just below the attorney- and solicitor-general [King's Counsel, ex officio]—to both of which posts Archibald in due course succeeded. In practice, however, the temptation to draw upon Archibald's outstanding ability as Crown counsel was too great for the law officers at home in Halifax to resist—the more so in that Archibald had trained for the bar in the law office of Robie, who became solicitor-general in 1815, and who (from 1817 to 1824) was preoccupied with his duties as Speaker of the House.

The year before *Wilkie*, Archibald had been compelled—on account of the conflict-of-interest situation in which his superiors found themselves—to prosecute the prominent lawyer son and namesake of Attorney-General Richard John Uniacke for murder, for having killed his opponent in a duel (“Dick's unfortunate affair”). Given the extraordinary circumstances of both prosecutions, it is understandable that neither *Uniacke* (1819) nor *Wilkie* (1820) was cited by Archibald in his “Petition . . . praying a remuneration for his services as King's Counsel at Law between the years 1817 and 1823”: PANS RG 5 “P” [‘Governor's Petitions’], vol. 41, doc. 32. *Uniacke* and *Wilkie* provide examples of sensational or politically sensitive cases which the resident King's Counsel was ordered to prosecute on behalf of the Crown because neither of the law officers could—without impropriety—or wished, to become directly involved. The law officers clearly arrogated to themselves, and were prepared to exercise, a discretionary power of delegating to the King's Counsel, as senior Crown attorney, select criminal prosecutions in the Supreme Court at Halifax. Thus, in the long history of Nova Scotia's public prosecution service, King's Counsel and Crown attorneys share the same aetiology.

Archibald received an anonymous letter from 'A Freeholder,' threatening him with defeat in the forthcoming general election if the accused Wilkie were not tried by an impartial jury.⁸⁹

Whether or not the (special?) jury as empanelled was impartial, the accused was "allowed to challenge any of the Jury he pleased";⁹⁰ that was standard procedure. Following Archibald's stating the prosecution's case, the accused "acknowledged himself the author of the libel [thus obviating the need for crown witnesses],⁹¹ and undertook to repeat and comment upon it, in terms so much more offensive than the mere language of the libel itself, . . ."⁹² (The same account could have been given of Howe's defence, substituting only the word "publisher" for "author.") As there were no defence witnesses and neither law officer was prosecuting in person, the crown waived the right of reply to the prisoner's address. The trial thus proceeded expeditiously to the judge's charge to the jury, the content of which was far more significant than either Archibald's opening for the crown or Wilkie's speech in his own defence. Chief Justice Blowers "instructed the Jury if they could, in their consciences, believe, that this publication was written with an innocent intention, and with a view to the public good, to acquit the Prisoner."⁹³ Though the jury proved by their verdict that they held no such belief, the principle enunciated was that on which a later jury would acquit Howe of an identical charge; this despite the fact that Blowers's successor as chief justice—Halliburton J, who sat with him for *Wilkie* and who would preside alone for *Howe*—was to be far less candid about the law, and less careful of the rights of the accused in sedition, than Blowers had been.⁹⁴ In 1820 Wilkie was convicted despite Blowers's concise and pellucid

89. (16 April 1820): PANS MG 1, vol. 89, doc. 55 (Samuel George William Archibald fonds). In the event, Archibald was handily re-elected in his native Colchester District, which then formed part of greater Halifax County.

90. *Nova Scotia Royal Gazette* (Halifax), 19 Apr. 1820, at 3. If Wilkie did in fact challenge any of the prospective jurors, one can only assume that Archibald moved for a *tales* in order to complete the number, so that the trial could proceed. Archibald was obliged to do so in *Howe*, when a prospective member of the special jury (a former magistrate who was perhaps unsympathetic to the complaint against the accused) asked to be excused and was allowed by the court to stand down: Chisholm, *supra* note 22, vol. I at 24.

91. This admission, which Howe too was to make, could not possibly have been made by the accused in a libel proceeding before the passage of *The Libel Act 1792*, because the trial jury was directed by the court to find the defendant guilty on proof of publication, and of the sense ascribed to it in the indictment.

92. *Supra* note 90.

93. *Ibid.*

94. As much is clear from a collation of their respective charges to the jury in *Wilkie* and *Howe*. For Halliburton's in the latter, see Chisholm, *supra* note 22, vol. I at 79–82.

statement of the English statute law applicable to the case,⁹⁵ while in 1835 Howe was to be acquitted despite Halliburton's failure properly to instruct the jury. The quality of jurisprudence in the Supreme Court seemed to have deteriorated commensurately with the chief justice's continuing involvement in the high politics of government.⁹⁶ Halliburton was not the excellent practical lawyer Blowers had been (and Archibald was); nor was he the just judge. It was a matter of inferior lawyers making even more inferior judges.

The trial jury took only half the time (about five minutes) to convict Wilkie of seditious libel, as a later one would take to acquit Howe. There is no record of Wilkie's having made a motion in arrest of judgment, the only form of criminal appeal existing at common law, and one which was expressly confirmed by the provisions of *The Libel Act 1792*. Two days later, on 19 April, Wilkie was sentenced to "Two years' Imprisonment in the House of Correction [Bridewell]—there to be kept at hard labor,"⁹⁷ in the very penal institution which he had complained was being abused by the magistrates for purposes of the illegal imprisonment of vagrants. Chief Justice Blowers was sufficiently uneasy about the propriety of the verdict, not to mention the severity of the sentence which he was bound to impose, to announce publicly during the course of his sentencing speech that "[i]f at the expiration of one year, he should be satisfied that his [Wilkie's] habits had become so corrected, as to merit the indulgence, he would himself apply to the Governor, and obtain a remission of one year of the sentence now passed on him."⁹⁸ Blowers was as good as, if not better than his word. Despite the punitive sentence meted out to him, the return of Bridewell for the third quarter (July–September) of 1820 makes clear that Wilkie had already been paroled, if indeed he had served any part of his custodial sentence at all.⁹⁹ The remission of sentence which Wilkie undoubtedly received must have been conditional on his leaving the province for good: in effect, lifelong ostracism from hearth and home.

95. "On the Trial of an Indictment for a Libel, the Jury may give a general Verdict upon the whole Matter put in Issue . . .": (U.K.), 32 Geo. 3, c. 60 [marginalium].

96. To make matters worse, Halliburton had not been appointed to the Council until eight years *after* his elevation to the bench. By 1835 the chief justice, president ex officio, was the only judge remaining on the Council.

97. The scope of the penal sanction was regulated by the provincial *Criminal Punishments Act*, (1816) 56 Geo. 3, c. 6, according to which a convicted misdemeanant could be imprisoned in the House of Correction for any period not exceeding seven years. The customary sanction for sedition was imprisonment and fine.

98. *Supra* note 90.

99. The Quarterly Return of the County Bridewell/of Halifax September 5th 1820: PANS RG 34–312 series J, file 4. William Wilkie was not among the eleven convicts who had been sent down from the Supreme Court.

Scarcely had sentence been passed upon him than at least one of the Halifax weeklies was reporting a 'deathbed conversion' on the part of the convicted prisoner: "But we are told, that a very perceptible alteration has already taken place, both in the language and conduct of the present youthful offender; in which case we confidently trust, that the utmost lenity will be extended to him."¹⁰⁰ Clearly, it was.

There were other developments in addition to the pseudonymous pre-trial letter to the prosecutor which make clear that Wilkie had sympathizers in town who were prepared to resort to extralegal means to defend him. The day after Wilkie was sentenced, the meeting of Council—at which all three of the judges who had sat for the trial were present—was informed that

anonymous threatening letters have been lately sent to the Justices of His Majesty's Supreme Court, and to others in Authority [Archibald?], for the purpose of intimidating them from the performance of their duty. Ordered that the Crown officers be directed to prepare the draft of a proclamation offering a Reward of One Hundred Pounds for the discovering the author or authors of such letters.¹⁰¹

A few days later, the worm had turned: "The Judges," wrote the lieutenant-governor with obvious relief, "have thought better of the Proclamation & requested it may be withheld for the present. I believe Mrs. [Judge Brenton] Halliburton & Mrs. [Judge James] Stewart [née Halliburton] had been alarmed by the letters, & their good fool husbands had been obliged to pacify them by the offer of reward."¹⁰² Uxorious discretion proved to be the better part of judicial valour.

Of Wilkie's subsequent personal history as an ex-convict, nothing is known. His penal sentence having been remitted, according to old and partly verifiable tradition Wilkie "was soon released and went away and never returned."¹⁰³ The fact that his nephew and namesake, William

100. *Weekly Chronicle [Halifax]* (21 April 1820); the newspaper's editorializing proprietor, Loyalist William Minns, was a member of the Commissioners Court, which Wilkie had severely criticized.

101. Minutes of Council, 20 April 1820: PANS RG 1, vol. 193 at 437. Another version of this event was confided by the Earl of Dalhousie to his journal:

A fellow named Wilkie, of Radical Politicks, has lately made some noise here by a slanderous libel published against the Magistracy, & some associates have been writing threatening letters to the Judges, during this man's trial. I thought them altogether unworthy of notice, but the Judges do not think so, and a sum of £100, a large sum for this community, was ordered in Council by Proclamation to any person who shall lead to the conviction of the offenders. . . .

M. Whitelaw, ed., *The Dalhousie Journals* (Ottawa: Oberon, 1978) vol. 1 at 191.

102. *Ibid.*, 191–92.

103. W.M. Brown [1811–1888], "Recollections of old Halifax," (1908) 13 *Collections* 75 at 79; Sutherland, *supra* note 2, at 854. Brown, a younger contemporary of both Akins and

W[alter?] Wilkie, died in Brooklyn, New York, aged twenty-two, in June 1852, may possibly suggest that the uncle was residing there.¹⁰⁴ If William Wilkie indeed emigrated to New York—the circumstantial evidence suggests that he did—it is inconceivable that he would not have been among the fifty to sixty Nova Scotian expatriates resident there, who subscribed the cost of the silver pitcher presented to Howe in May 1835 to commemorate his victory in the sedition trial.¹⁰⁵

IV. *The Meaning of the Proceeding*

How then does one make sense of the sedition proceeding against William Wilkie? Its unprecedented nature, and the ‘political Excitements’ occasioned by any prosecution for sedition,¹⁰⁶ suggest that it was not an integral part of provincial experience. As a tribunal on which all six of the judges were Loyalists or their sons, and two were brothers-in-law, could scarcely be thought properly balanced, the Ascendancy, through its leadership élite, preserved and protected legal officialdom from public criticism. If “rare sensational acquittals . . . not only embarrassed the authorities but raised radical consciousness and helped fuel reform efforts in the political sphere,”¹⁰⁷—witness the results of *Gourlay* in Upper Canada, on the eve of *Wilkie*, and *Howe* in Nova Scotia fifteen years after—then the equally sensational conviction and punitive penal sanction with which *Wilkie* concluded not only lowered ‘radical consciousness,’ but also severely retarded the movement towards political reform, as well as extinguishing for the moment any hope of law reform.

The historiographical problem thus lies in determining whether Wilkie had any significance beyond being Nova Scotia’s *Gourlay*, or Howe *avant la lettre*. While historians must indeed avoid presentism, they must also be wary of prolepsis—interpreting *Wilkie* as mere prototype. When Howe was tried, the *Wilkie* case was moot. Howe and his supporters had excellent political and psychological reasons for not disturbing the status quo. As far as Howe and the other ‘conservative reformers’ of the 1830s

Murdoch, like the latter, forebore identifying William Wilkie by name. Though Brown’s account was written after the death of Wilkie’s elder brother in 1867, Brown nevertheless describes the seditionist obliquely as “a brother of [the] late Mr. James C.[W.] Wilkie.” Brown had access to a copy of the pamphlet, from which he quotes a typical passage.

104. J. Holder, comp., *Nova Scotia Vital Statistics from Newspapers, 1852–1854* (Halifax: GANS 1988) at 35: § 522.

105. G.E. Fenety, *Life and Times of the Hon. Joseph Howe* (Saint John, N.B.: E.S. Carter, 1896) 104 et seq.

106. Paraphrasing Attorney-General John Beverley Robinson, as quoted by Wright, *supra* note 7 at 45.

107. *Ibid.* at 10.

were concerned, it was as though *Wilkie* had never taken place. “Reformers of the 1830s, such as Joseph Howe,” writes David Sutherland, “never brought up his [Wilkie’s] name when building their critique of Nova Scotia’s oligarchy.”¹⁰⁸ Given the obvious fact that Wilkie was as radical as they conservative, why should they have dropped *his* name? The discontinuity between Wilkie and Howe was entirely political, the continuity entirely legal. Howe would not have wanted to emulate the tragic example of one who prematurely failed and was compelled to leave the province; nor would he have wished to emulate Wilkie’s intemperate approach. In light of the cautionary tale of *Wilkie*, it is small wonder that Howe was desperate to find a lawyer to defend him, and that one could not be found. The wisdom of hindsight had taught the Halifax bar that state prosecutions for libel were not defensible.

Similarities between *Wilkie* and *Howe* begin with the nature of the charge and end with the ad hoc nature of the defence. The first of the two seditious libel prosecutions embroiled the oligarchy in no controversy more serious than popular resentment against executive overkill. William Wilkie, though intelligent, well-informed and articulate, was neither a successful newspaper editor and proprietor, nor the son of an influential and highly respected magistrate. Wilkie’s father was a master mariner, a rough-and-ready sort who had once pleaded guilty to assault in the same court in which Joseph Howe’s Loyalist father was a senior magistrate.¹⁰⁹ John Howe Sr had also been king’s printer and postmaster. The unequal sons of unequal fathers, the pamphleteer Wilkie and the editor Howe were scarcely comparable in occupational, personal or political terms. *Wilkie* nevertheless was what the powers that were intended *Howe* also to be: an exemplary show trial. Despite Wilkie’s concern with reforming the administration of justice, and despite the fact that he was himself to be victimized through “executive influence over the prosecution process, the jury, and the judiciary,”¹¹⁰ he was naive enough to suppose that sycophantic praise of the Supreme Court judges (three-quarters of whom were also members of Council)¹¹¹ would preserve him from the criminal consequences of his actions or, failing that, guarantee him equal justice under the law.

108. *Supra* note 2 at 854.

109. PANS RG 34–312, series P, vol. 9 at 20 (9 June 1815). Yet Captain Wilkie was respectable and temperate enough to have served two years later on the grand jury: Sutherland, *supra* note 2, at 853.

110. Wright, *supra* note 7 at 48.

111. Wilkie’s anacoluthic, stream-of-consciousness style and perversely ironic tone may have been deliberately inflated, intended to provoke: “But the judges, I am sure, can explain it [‘a defect in our judicial proceedings’] to the satisfaction of EVERY person; for men of stricter integrity is [*sic*] not to be found in any part of the inhabitable globe”: *supra* note 28 at 11.

What Wilkie failed to appreciate was that criticizing any aspect of the administration of justice was tantamount to attacking the most powerful and influential members of the government, whose aim was to stop the mouth of any articulator of popular grievances or propagator of notionally 'radical' ideas. How could a system which was already 'perfect' be rationally reformed? In striking contrast to sedition in Upper Canada—as elucidated by Wright—the use of sedition law in Nova Scotia was “simply a matter of elite conspiratorial manipulation or even instrumental control.”¹¹² As a locus of *indirect* political interaction between government and people, the criminal courts in Nova Scotia at the beginning of the 1820s must be seen as an arena controlled by the executive through *direct* political interaction between the Council and the bench.¹¹³

Despite the alienness to the Nova Scotian environment of high prerogative instruments such as the ex officio criminal information,¹¹⁴ the crown's proceeding by means of indictment served exactly the same purpose if the grand jury could always be depended upon to return a true bill. The crown viewed the grand jury function as merely adjunctive to the prosecution process; grand juries were more easily and effectively manipulated than petit juries—even special ones—and could be 'packed'. The fact that the government had “resort to criminal law as the means of repression,”¹¹⁵ did not necessarily yield opportunities for contesting legality. However unjust and oppressive it may have been, the criminal proceeding against Wilkie was not illegal. The chief reason why a sedition law was not enacted in Nova Scotia was that the common law offence of seditious libel,¹¹⁶ despite the brakes applied by *The Libel Act 1792*, was still perfectly adequate to the government's purpose; it yielded no scope for contesting legality, which statute law, such as Upper Canada's *Sedition Act*, manifestly did. *The Libel Act* did not delimit the crown's freedom of action or the jury's freedom of choice, as the verdict

112. Wright, *supra* note 7 at 49.

113. Executive oversight of the administration of criminal justice would not finally end until 1837, when the 'dis-integration' of the old, undifferentiated Council into two distinct boards provided the occasion for getting rid of the old chief justice, who did not by any means go willingly. Upper Canadian developments, moreover, were reflected in the fact that after 1830 judges were no longer eligible for appointment to the unreconstructed Council. This progressive measure was taken during the administration of Lieutenant-Governor Sir Peregrine Maitland, 1828–1832, who had been translated from Upper Canada to Nova Scotia.

114. *Supra* note 45, vol. 4 at 182. The *ultra vires* character of ex officio informations figures prominently in the Epitomist's critique of 'the learned commentator' (Blackstone). See generally P. Girard, "Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his *Epitome of the Laws of Nova-Scotia*" (1993) 11 Law and History Rev. 101.

115. Wright, *supra* note 7 at 50.

116. That is, the judicial theorem 'Sedition + Libel = Seditious Libel.'

of guilty in *Wilkie* makes clear. Though *The Libel Act*, which 'arguably applied to British North America as common law,' remedied judicial abuses of criminal procedure, it did not affect the character of seditious libel as substantive criminal law.¹¹⁷

Though *Wilkie* was not the subject of a malicious prosecution, he was clearly the victim of official repression as a result of the government's headlong rush to suppress his too-well-informed criticism of the executive-legislative-judicial complex. Through the attorney-general's membership in the Council, the government directly controlled the public prosecution service, and despite *Wilkie's* being allowed both to challenge prospective jurors and to conduct his own defence, he was not "able to exploit the ideological platform of the proceedings to . . . embarrass the authorities in his trial for seditious libel." As *Wilkie's* plight—even more so than *Gourlay's*—demonstrates, "the executive's prosecutorial monopoly and judicial control . . . meant that the struggles were defensive reactions involving fragile claims which in the end could not withstand" the unprecedented nature of the prosecution.¹¹⁸ Despite the many and obvious parallels between *Wilkie* and the *Gourlay* affair, as analysed by Barry Wright, there are also dissimilarities which suggest a much stronger basis for comparison between *Gourlay* and *Howe*. Of the two Nova Scotian cases it is *Howe*, not *Wilkie*,¹¹⁹ which furnishes the analogue. In Wright's terms, a systematic examination of the discourse of 'contested legality' found in *Howe* not only reveals the legal sophistication of the accused,¹²⁰ but also suggests the prominence of natural justice in the popular conception of law.

One must beware of an inherent bias in the archival record, however, which could lead any student of sedition in Nova Scotia to construe *Wilkie* in too negative a light and *Howe* in too positive. A stenographic report of *Howe's* defence is available, while all that survives of *Wilkie's* defence is a brief, hostile press synopsis. Yet despite the tenuousness of the evidence, it is clear that *Wilkie's* defence strategy was essentially the same as *Howe's*, and that it arose out of the scope and potential of *The*

117. An argument could be made that the principles ultimately entrenched in *The Libel Act 1792* were articulated in direct response to the Mansfieldian tendency—combated not only by Thomas Erskine, but also by Lord Chancellor Camden—to convert fact into law as a means of keeping the general issue out of the jury's hands.

118. Wright, *supra* note 7 at 50.

119. An historically significant coincidence between the two proceedings is that the same Halifax magistrate—merchant Richard Tremain (J.P. 1810)—who in 1835 was to instigate the prosecution of *Howe* for seditious libel, in 1820 had been foreman of the grand jury which returned a true bill on the *Wilkie* indictment. See D.A. Sutherland, "Tremain, Richard," *DCB*, vol. VIII at 891–92.

120. Wright, *supra* note 7 at 50.

Libel Act 1792 for allowing the accused in a libel case to appeal to the jury to render a 'verdict according to conscience'. Wilkie no more denied that he was the author of the alleged libel, than Howe that he was the publisher of it. Yet they both undertook to enlarge upon the contents of the publication in order to exculpate themselves from the 'legal inference' of having expressed a seditious intention. Though Chief Justice Blowers was careful to instruct the jury as to the legal grounds for acquittal, moreover, the jury was not swayed by the truth and public benefit defence mounted by the prisoner. Truth was neither a defence to seditious libel, nor did proving it impute public benefit, contrary to Wilkie's sanguine expectations. The prosecution of Wilkie, though unique in its time and for fifteen years afterwards, did not call "into question the legality and constitutionality of the repression."¹²¹ Instead it raised doubts about the political expediency of repressive over-reaction.

The resources of law which lay at the government's disposal had not changed during the time elapsing between *Wilkie* and *Howe*, though the attorney-general was no longer a member of the ruling clique. Yet the verdict in *Wilkie* strengthened the government's position both legally and psychologically in dealing with apprehended sedition. Before *Wilkie* seditious libel was unheard-of; after *Wilkie* there was a precedent. The conviction of *Howe* was anticipated as a foregone conclusion, not because the public prosecutors were no longer members of Council, but because Wilkie had been convicted fifteen years earlier on the same charge. Even persons prosecuted for defamatory libel¹²² were routinely convicted; a fortiori, someone charged with public libel and prosecuted on the orders of government. The 'reception' of seditious libel as part of the criminal law of England, and the implications of the full integration into government of both the public prosecution service and the judiciary threw issues about the impartial administration of criminal justice into sharper relief for Wilkie than for Howe. As in Upper Canada so in Nova Scotia, the government not only "controlled the initiation of criminal proceedings" but also, through the attorney-general's membership in the Council, exercised a virtual monopoly over prosecutions, both private and public.¹²³

121. *Ibid.* at 51.

122. There is only known to have been one such prosecution between *Wilkie* and *Howe*: *R. v. Forrester* (1825), for criminal defamation.

123. Wright, *supra* note 7 at 51. John Beverley Robinson was in a weaker position than his Nova Scotian counterpart in that he was not a member of the Executive Council while attorney-general. This abuse of power ended in Nova Scotia in 1830, five years before *Howe*, when Attorney-General Uniacke died, after having spent twenty-two of his thirty-three years in

If the successful prosecution of Wilkie in 1820 encouraged the government to proceed against Howe for seditious libel in 1835, then Wilkie's principled insistence on representing himself diverged widely from Howe's unsuccessful quest for a lawyer to represent him. Wilkie's ghost would have deterred Howe from representing himself—except, of course, as a last resort. Little wonder that the two or three lawyers whom Howe tried to retain assured him, in declining his brief, that seditious libel could not be successfully defended.¹²⁴ It had not been in 1820; *post hoc, ergo propter hoc*. Whether Wilkie's self-advocateship, like Gourlay's, "reflects an exploitation of popular anti-lawyer sentiment and a lack of confidence in counsel's ability to properly exploit the platform of the proceedings"¹²⁵ seems doubtful, in light of his knowledge of criminal procedure and his determined interest in law reform. All that is known for sure is that Wilkie was permitted by the court to challenge prospective jurors; whether he found reason to do so is unknown. It is unlikely that a special jury, which Wilkie strongly opposed in civil actions, was empanelled because there was other criminal business down for the term. (Howe, by contrast, was the only criminal business down for the term in which it was tried.) Indeed the right to an ordinary jury trial was perhaps more firmly entrenched in Nova Scotia than in Upper Canada, at the time when Gourlay and Wilkie were being tried for seditious libel. In Upper Canada the *Sedition Act* of 1804 extinguished the common law right to trial by jury.¹²⁶ Judicial control of the sheriff, who not only picked—or, on occasion, packed—juries, but who also was the chief constable of the county, was more palpable. The implication that the sheriff, whose office was renewable annually, was a mere creature of the judges is highlighted by the obsequious tone of the letter of resignation which Thomas Maynard, sheriff of Halifax County from 1816 to 1821, sent to Chief Justice Blowers, in whose patronage gift the office appeared to lie.¹²⁷ The sheriff was controlled by the executive through the judges, who were themselves prominent members of the executive. An awkward question

office as a member of Council. His successor, Archibald, who in 1825 replaced Robie both as Speaker of the House and as solicitor-general, was never elevated to the Council; his anti-Council stance during the "Brandy Election" of 1830, which was also to rob Archibald of the chief justiceship in 1833—the successful candidate (Halliburton J.) had been a member of Council for nearly twenty years—effectively precluded Archibald's being invited to replace Uniacke the Elder on the Council.

124. Chisholm, *supra* note 22, vol. I at 23. The lawyers' reasoning, of course, was purely inductive.

125. Wright, *supra* note 7 at 52.

126. *Ibid.* at 54.

127. T. Maynard to S.S. Blowers (3 September 1821): PANS RG 1, vol. 411, doc. 101.

arises: who ordered the county sheriff to arrest Wilkie and hold him without bail pending the grand jury's return on the indictment?

The independence of the judiciary might potentially have formed the basis for 'contested legality,' as was true of Upper Canada, had it not presupposed the exclusion of the judges from the Council. Administratively and politically such an exclusion would have been difficult to achieve, not only because the chief justice was ex officio president of the Council and an influential participant in both executive and legislative business, but also because two of the three Supreme Court judges belonging to the Council in 1820 had been members of that body before their elevation to the bench. The same provincial act of 1809 which excluded judges from the House of Assembly,¹²⁸ explicitly provided for maintaining the status quo on judicial membership in the Council,¹²⁹ which persisted until 1837. Given the presence of Lord Chief Justice Ellenborough in the British cabinet in 1806–7, it is hardly surprising that colonial judges were not declared ineligible for Council membership. Both Wilkie and Howe were therefore tried by the ex officio president of the same body as made the purely political decision to order a seditious libel prosecution. Judges could scarcely have been independent "from the influence of the provincial executive"¹³⁰ while remaining active members of the Council. The republican constitutional separation of powers into three distinct executive, legislative and judicial branches simply did not exist in Nova Scotia in 1820, though the movement towards it had begun a decade earlier. The process accelerated in 1830, when Whitehall decided that judges henceforth would not be appointed to fill vacancies in the Council, but it was not yet complete by 1835, when Joseph Howe was tried by Chief Justice Halliburton, who was then in his twentieth year of Council membership.

Seditious libel proved so successful an instrument in silencing the voice of reform in 1820, during the Loyalist Ascendancy, that it was ill-advisedly used again in 1835, after the Ascendancy had ended. As in Upper Canada so in Nova Scotia, trials for sedition were designed to "portray criticism as disloyalty, powerfully delineating the loyal community and its enemies for popular contemplation."¹³¹ The paradox was that in Nova Scotia, where the need for an imperial statutory counterweight to repressive provincial legislation did not exist, *The Libel Act 1792* was considered in force because it bulked large in both the 1820 and the 1835

128. S.N.S. 1809 c. 15, s. 8.

129. The third puisne, appointed pursuant to the *Judges Act* *ibid.*, was, within four years of its passage, also appointed to the Council.

130. Wright, *supra* note 7 at 54.

131. *Ibid.* at 56.

sedition proceedings. Wilkie attempted unsuccessfully to use the act 'to contest the repression'—a defence strategy to which the paternalistic Chief Justice Blowers was not unsympathetic, and which he forthrightly acknowledged in his charge to the jury; Howe's powerful evocation of *The Libel Act* inspired the jury to disregard the opinion and direction of the trial judge and render a general verdict in his favour. Whereas in Upper Canada, those subject to sedition proceedings had two strikes against them in the enforcement of the provincial *Sedition Act* and the ambiguous status of *The Libel Act 1792*, in Nova Scotia the opposite was true. The only sedition law there was in Nova Scotia was common law, ameliorated by 'declaratory' acts such as *The Libel Act*. Executive regulation of political discourse did not extend so far as to deny to anyone accused of seditious libel the benefits of a remedial statute, construed liberally.

Contemporaneous with the first third of the nineteenth century, T.B. Akins's perspective on *Wilkie* was coloured by the subsequent acquittal of Howe—an event to which Akins was an eyewitness. The conventional wisdom of hindsight—post *Howe*—led Akins to assert that public opinion—post *Wilkie*—had convicted the government of extreme tyranny and cruelty for its treatment of the accused. Akins's conclusion, "The pamphlet [Wilkie's] was a very paltry offence, such as at the present day [1839] would be passed over with contempt,"¹³² was politically naive. Howe's own 'very paltry offence' had not been 'passed over with contempt' a mere four years before Akins delivered history's verdict on *Wilkie*; instead Howe was charged with the same crime of which Wilkie had been convicted. The government had not changed its mind in the interim; the jury simply brought in a different verdict. Paraphrasing Barry Wright, opposition legal victory in the form of an acquittal did indeed embarrass the government in a very public way, and the counter-hegemonic success arguably discouraged resort to sedition prosecutions after 1835.¹³³ Legal struggles, such as *Wilkie* and *Howe*, did not figure prominently in the pre-Responsible Government experience of Nova Scotia; indeed, there would not be another prosecution for seditious libel until *McLachlan* in 1923. Yet the historic acquittal of Howe retroactively conferred historical significance on Wilkie, who had proffered similar criticism of the vested interests and who made a similar legal defence of his fundamental right to do so. Thus does the rehabilitation of *Wilkie* really begin with the verdict in *Howe*. As history is written by the victors,

132. *Supra* note 1.

133. Wright, *supra* note 7 at 56–7.

and orthodoxy—no less in history than in theology—is the view that prevails, *Wilkie* came to be understood strictly in terms relative to *Howe*.

Taken together, *Wilkie* and *Howe* demonstrate that the judicial definition of sedition in early nineteenth-century Nova Scotia comprehended a seditious libel. Unlike the situation in Upper Canada during the Gourlay affair, 1818–19, legal proceedings for sedition in Nova Scotia did not advance beyond the first stage involving prosecutions for seditious libel, which led to a jury acquittal only in the second of the two trials. The earlier case, especially, highlighted the fact that no distinction was drawn between sedition and what Murdoch called “libels against the executive government.”¹³⁴ *Wilkie* throws into sharp relief the contours of the legal terrain because it was the *Urtext*—isolated, unprecedented and almost unique. Had *Wilkie* been acquitted, as Gourlay was, the affair might have become no less celebrated than the *Howe* sedition trial fifteen years later. As matters turned out, however, *Wilkie*’s conviction led effectively to ostracism, de facto banishment and oblivion, while the original, seditious character of *Howe* was lost to history. The so-called ‘libel trial’ assumed the qualities of cultic myth—thanks to *Howe*’s subsequent transfiguration as political messiah—providing an object lesson in history as iconography. This is not to say that *Howe* was not immeasurably more than *Wilkie* redux: the second prosecution for seditious libel “backfired badly” and provided a much-needed fillip to the unfocused, leaderless and amorphous reform movement in Nova Scotia, which had stagnated since *Wilkie*’s downfall. What was true in Gourlay’s case, moreover, applied equally to both *Wilkie* and *Howe*: the only alternative to a trial for sedition was not to prosecute at all,¹³⁵ which would perhaps have made more sense both legally and politically.

At least in *Wilkie*, the gerontocrats who were in such high dudgeon over the scope of *Wilkie*’s “strictures” that they were determined to avenge themselves on him for publishing them, were spared the embarrassment of a jury acquittal. Yet *Wilkie*’s immolation by the oligarchy prepared the way for *Howe*’s “counter-hegemonic triumph,” because the same solution to what was thought to be the same problem, under what were thought to be ideally unchanged conditions, was again resorted to with every expectation of success. Chief among the major differences between *Wilkie* and *Howe* is that one was a radical reformer, while the other a ‘conservative reformer.’ *Howe* had friends and admirers among the lawyers of his time—one of them was Attorney-General Archibald, who prosecuted—while *Wilkie* seems to have gone out of his way to

134. *Supra* note 45, vol. 4 at 181.

135. Wright, *supra* note 7 at 32. •

alienate lawyers and make for himself dangerous enemies within the legal-official clique. He underestimated the degree of fusion of judicial authority and coercive state power in the operation of the public prosecution service. The legal profession closed ranks around their persecuted brother, lawyer Clarke, and repaid Wilkie, whom the press tended to patronize as a juvenile delinquent, in his own currency. Wilkie's thoughtful proposals for reforming the administration of justice,¹³⁶ in the interests of 'equal protection and equal benefit of the law without discrimination . . .,' were viewed by lawyer-politicians and judge-politicians alike as being the stuff of which sedition is made.

Wilkie, like Howe after him, believed that that right to bona fide public criticism of governance and the administration of justice, which now forms an 'Exception' to the Criminal Code strictures against sedition,¹³⁷ could be upheld in the courts. In terms of its negative impact on the political struggle for reform, moreover, the failure of Wilkie was no less great than the success of Howe. Legal contests such as *Wilkie* and *Howe*, despite their very different outcomes and consequences, were show trials and propaganda exercises which "remind us about the limits of action within the pre-modern political culture of British North America in the first third of the nineteenth century."¹³⁸

136. Indeed, Wilkie's animadversions on sundry aspects of the administration of justice may be interpreted as a critique of the first, tentative postwar steps towards penal law reform and statutory law revision, of which Wilkie was perhaps a little overcritical. On the prehistory of law reform, and for a consideration of the circumstances which may have given rise to Wilkie's interest in the subject, see J. Phillips, "The Reform of Nova Scotia's Criminal Law, 1830–1841," typescript, 44 p. (paper presented at the Canadian Law in History Conference, Carleton University, June 1987). I am grateful to Dr. Phillips for allowing me to consult this unpublished paper, which forms part of a larger work-in-progress on the history of the criminal justice system in Nova Scotia, 1749–1815.

137. Section 60. Much the same point was made by Chief Justice Blowers in his charge to the jury in *Wilkie*.

138. J.M. Bumsted, *The Peoples of Canada: A Pre-Confederation History* (Toronto: Oxford University Press 1992), vol. I at 232. What is true of 'the *Novascotian* case' [*R. v. Howe*] is truer still of *Wilkie*. The memory of Wilkie remained green in radical reform circles in Halifax. Writing in Howe's newspaper, the *Novascotian*, on 19 November 1834, 'The People' [George Thompson] commented on "[t]he odium that has hitherto attached to the character of professed reformers"—a transparent reference to William Wilkie. The second letter from 'The People,' published on 1 January 1835, resulted in Joseph Howe's being charged with seditious libel.