James Monk's "Observations on the Courts of Law in Nova Scotia", 1775

In May 1931 Dr. William Inglis Morse purchased for £50 from Bernard Quaritch Ltd. of London, the antiquarian booksellers, a twenty-one-page manuscript in a blue paper wrapper entitled "Observations on the Courts of Law in Nova Scotia". In June 1932 Morse donated it to Acadia University, where today it is found in the William Inglis Morse Collection at Vaughan Memorial Library.[1] Though the work is anonymous, the author's handwriting, idiom, orthography, prolixity and awkward syntax — not to mention anglophilia, legal fluency and perspective — confirm his identity as James Monk, Solicitor-General of Nova Scotia from 1774 to 1776.[2] There is also corroborating external evidence from a letter of Monk to his English patron, Sir Clifton Wintringham, in which Monk promised to send him "some General observations on the state of this Colony".[3] In the same letter, written on 17 November 1775, Monk also promised to send Wintringham the "Votes" of the House of Assembly, which had just been prorogued.[4] It is therefore relevant to note that, at the same time he purchased the "Observations", Dr. Morse also obtained from Quaritch "Nova Scotia. Journals and Votes of the House of Assembly, 1775". Sir Clifton Wintringham died without issue in 1794, long after his protégé had left Nova Scotia. Thereafter the provenance of the Monk manuscripts is obscure until they were acquired by Quaritch. A director of Bernard Quaritch Ltd. has recently voiced the suspicion that "these items...came into and went out of the shop too quickly to be catalogued".[5]

James — later Sir James — Monk was born in Boston in 1745, the son of James Monk and Ann Deering, who brought their family to Halifax in 1749. The senior Monk was one of the original justices of the lower, or County Court (from 1752, "Inferior Court of Common Pleas"), and in 1760 became Solicitor-General, an office he held until his death in 1768.[6] In those early

[1]The author gratefully acknowledges permission from the Librarian of Acadia University to publish the manuscript, and the kind assistance of Edith C. Haliburton, Special Collections Librarian. Credit must also go to Shirley B. Elliott, Legislative Librarian *Emerita* of Nova Scotia, for drawing attention to the manuscript: see "An Historical Review of Nova Scotia Legal Literature: A Select Bibliography" in J.A. Yogis *et al.*, eds., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984) at 208.

[2]Pending the appearance of the article by James H. Lambert in vol. VI of the *Dictionary of Canadian Biography*, the best sources of information about the early career of James Monk Jr. are the Nova Scotia State Papers calendared in *Report on Canadian Archives* (1894) at 318ff. and the Dartmouth papers (MG 23, A 1, Public Archives of Canada [P.A.C.]). The Monk papers (MG 23, G II 19, P.A.C.), although a useful source for James Monk's English legal education, contain no documents whatever relating to his official career in Nova Scotia. (Note that at least one of the legal notebooks in vol. 2 of the Monk Papers is misattributed to James Monk Sr., who had died a few years before his eldest son and namesake went to England to study.)

[3]Sir Clifton Wintringham, Bart., M.D. (1710-1794) was physician in ordinary to King George III and a fellow of the College of Physicians. The source of his connection with the Monk family is unknown.

[4]J. Monk to C. Wintringham, 17 November 1775, Germain Papers, William L. Clements Library, University of Michigan (Ann Arbor).

[5]E.M. Dring to J.B. Cahill, 3 December 1985.

[6]See P.R. Blakeley, "James Monk" in III *Dict. Can. Biog.* (1974) 457.

days, the law officers of the Crown also practised law privately. Monk was virtually obliged to do so in order to support his family as the solicitor-generalship was unsalaried. James Monk Jr. served a six-year apprenticeship in his father's law office from 1761, and was admitted to the Nova Scotian bar in March 1768.[7] Young James had been acting as Prothonotary of the Supreme Court and Clerk of the Crown for some six years, when he obtained leave of absence in 1770 to go to England to read law at the Inns of Court.[8] He was admitted to the Middle Temple in April 1771, and remained in England until 1774.[9] Originally a protégé of the omnipotent Joshua Mauger[10] — member of the House of Commons and formerly Nova Scotia's agent in London and still the Board of Trade's chief unofficial adviser on Nova Scotian affairs — Monk in 1772 obtained not only a mandamus to be Solicitor-General, but also a promise from the Secretary of State, the Earl of Hillsborough, that he should succeed to the Office of Attorney-General on the first vacancy.[11] James Monk arrived back in Nova Scotia in the autumn of 1774, bearing a letter of recommendation from Secretary of State the Earl of Dartmouth, and in September was commissioned Solicitor-General.[12]

Nova Scotia in 1775 was in ferment. American Revolutionary warfare had already broken out, and it was by no means clear whether the Yankee population in the outports would remain neutral in the event of an American attack. Governor Francis Legge, moreover, was determined to reform the fiscal administration of the province — to the extremity of prosecuting those officials who had allegedly helped themselves to public money. He was being opposed every step of the way by the entrenched merchant-official obligarchy, whose members and influence dominated the legislature.[13] Particularly uncooperative was the "supine" Attorney-General William Nesbitt, Speaker of the House, whose incapacity obliged Legge to place the Crown law business entirely in the hands of the young and vigorous Solicitor-General. Sensing the proximity of the attorney-generalship, Monk would stop at nothing to gratify Legge's wishes. In John Bartlet Brebner's inimitable phrase, "it was chiefly Monk who was responsible for setting the Province by the ears".[14] He did so by prosecuting revenue officials, mostly collectors of impost and excise at the outports, whom the auditors of the public accounts found to be indebted to government. One of these officials was Councillor Jonathan Binney, the col-

[7]MG 100, vol. 191, no. 4, Public Archives of Nova Scotia (P.A.N.S.).

[8]No record of Monk's appointment to the office has been found. It is clear, however, that he began to officiate about Easter Term 1764 (RG 39, Series J, vol. 117, P.A.N.S.).

[9]H.A.C. Sturgess, ed., *Register of Admissions to the Honourable Society of the Middle Temple*, vol. I (London, 1949) at 372.

[10]J. Mauger to J. Pownall, 9 December 1773, Dartmouth Papers, 2708-09, P.A.C.

[11]Lord Dartmouth to F. Legge, 11 April 1774, Dartmouth Papers, 155, P.A.C. The mandamus signed by Hillsborough on 31 July 1772 is in RG 1, vol. 347, no. 33, P.A.N.S.

[12]RG 1, vol. 168 at 368, P.A.N.S.

[13]For this and what follows, see J.B. Brebner, *The Neutral Yankees of Nova Scotia: A Marginal Colony during the Revolutionary Years* [1937] (Toronto: Carleton Library Reprint, 1969) at 212ff. Brebner's treatment of Monk's role in Legge's campaign for honesty in government could hardly be bettered.

[14]*Ibid.* at 218.

lector at Canso, whom Monk prosecuted on behalf of the Crown in the spring of 1775.[15] Just as Governor Legge made the fatal mistake of attending the Supreme Court during Binney's trial, so Solicitor-General Monk made a likewise fatal error of accepting appointment as one of the auditors of the public accounts. As Councillor John Butler afterwards wrote to Joshua Mauger in London, "there is now a judge [Charles Morris Sr.], a lawyer who is paid for pleading it [Monk], and the sheriff who comes in for his fees [John Fenton, Provost-Marshal]".[16] Monk thus found himself in the contradictory situation of having to prosecute revenue officials and others, such as Attorney-General Nesbitt, whose accounts he had himself audited and found to be outstanding.

Monk doubted whether lawsuits for the recovery of money owed to the government by delinquent officials could properly or successfully be managed in a common law court. A verdict had been obtained against Jonathan Binney only by the interposition of a special jury handpicked by Governor Legge himself. Anticipating powerful political opposition to the measures he wanted to take, Monk feared nothing more than the interposition of a "popular" jury at a Supreme Court trial. He therefore proposed that the judges of the Supreme Court be formed into a Court of Exchequer, not only because its *raison d'être* was to try "revenue cases arising out of the non-payment or withholding of debts to the crown", but also — much more importantly — because it sat without a jury.[17] The Court of Chancery, where the governor presided, did not have jurisdiction to try Crown cases in equity; Monk could not have filed bills against the defaulters there. The judges of the Supreme Court, however, who knew perfectly well that their court had had exchequer jurisdiction ever since its establishment in 1754, unanimously reported against the Solicitor-General's proposal.[18] Though Article 26 of the Royal Instructions to Governor Legge specifically provided for the erection of a Court of Exchequer,[19] Chief Justice Jonathan Belcher argued in Council that Article 27 of the Instructions — forbidding establishment of any "new" court — overrode the exception granted in Article 26. Monk, however, was able to persuade the Governor that the Court of Exchequer need neither be separate nor distinct from the Supreme Court — it was a convenient judicial fiction — and that its existence, for the time being at least, need be only temporary. Thus, on 20 May 1775 the Chief Justice and the puisne judges of the Supreme Court were commissioned to hold a Court of Exchequer for nine months only.[20]

Some of the revenue officials and their supporters, and one — originally

[15]RG 39, Series J, vol. 3 at 88ff.; vol. 6 at 4, 5, P.A.N.S.

[16]J. Butler to J. Mauger, 6 May 1775, Dartmouth Papers, 253, P.A.C.

[17]*Black's Law Dictionary*, 5th ed., 1979, at 322, s.v. "Court of Exchequer".

[18]RG 1, vol. 164A at 36-7, P.A.N.S.

[19]CO 218/7/197, Public Record Office (P.R.O.).

[20]RG 1, vol. 168 at 413-16, P.A.N.S. The history of Nova Scotia's short-lived Court of Exchequer is well documented. See *Report on Canadian Archives* (Ottawa, 1894) at 329-38. In fact, however, its proceedings were indistinguishable from those of the Supreme Court, the same judges composing both benches. It is probably best to view the Court of Exchequer either as stillborn or as existing merely on paper.

two — of the auditors, held seats in the Assembly.[21] Solicitor-General Monk, eager for an opportunity to confront the Governor's opponents in the legislature, tried to gain entrance there as well. The seat of John Crawley, MHA for Yarmouth, had been declared vacant for non-attendance in December 1774, and Monk stood for election — ostensibly to save a distant constituency the expense of sending up a new member. On 12 June, Monk was admitted to the Assembly and took the oaths. A petition from the Town of Yarmouth alleging undue election was tabled, however, and after consideration it was resolved on the 13th that Monk's seat be vacated.[22] Though he had been a member for only two days, Monk was to return to the House in October 1775, after a subsequent by-election for Yarmouth Township was held.[23]

Relations between Governor Legge and the House of Assembly deteriorated sharply at the June session. Not only did they petition the King in Parliament for redress of grievances, asking among other things "to be delivered from the Oppression of Practitioners in the Law" — a transparent reference to the Solicitor-General, who helped himself to costs and fees in cases which he successfully prosecuted on behalf of the Crown;[24] they also reduced or eliminated most of the outstanding debts allegedly owed by the officials cited in the auditors' report; and, moreover, complained about the gross impropriety of the Solicitor-General and the Provost-Marshal acting as auditors of the public accounts.[25] Such was the political background against which James Monk, midway through his brief, tempestuous tenure as Solicitor-General of Nova Scotia, sketched his "Observations" on its judicial system. The legal-historical background, vitiated though it was by the author's ideological bias — was Monk's fourteen years' experience as a law clerk, then Clerk of the Crown and lawyer, and finally law officer — and the experience of his father before him both as a longtime justice of the Inferior Court and as Solicitor-General. Father and son in their time had ample opportunity of observing the courts of law in Nova Scotia, perceiving abuses and devising remedies.

These "Observations" were written down sometime between the seventh session of the Fifth Assembly, which ended on 20 July 1775, and the eighth, which commenced on 20 October. The proximity of the American Revolution, which Monk expected to spread to Nova Scotia unless Halifax rule were made effective throughout the province — not to mention Legge's and Monk's recent experiences of opposition from a hostile majority in the House of Assembly — may account for the reactionary toryism of Monk's politics. He believed, moreover, not only that the courts were instruments of political and social control, but also that Halifax rule could be made effective by means of a centralized system for the administration of justice. Politics aside, all of

[21] Thomas Bridge and John Day, MHAs for Halifax Township. In April 1775, however, Day resigned — to be succeeded by Monk.

[22] *Journal of the House of Assembly of Nova Scotia*, 12, 13 June 1775.

[23] *Journal of the House of Assembly*, 20 October 1775.

[24] J.B. Brebner, "Nova Scotia's Remedy for the American Revolution" in (1934) XV *Can. Hist. Rev.* 180. The original of the petition is in CO 217/51/209-16, P.R.O.

[25] *Neutral Yankees, supra*, note 13 at 236 (quoting *Journal of the House of Assembly*, 8 July 1775).

Monk's characteristic ideas are strikingly present: the ignorance, incompetence and partiality of the justices of the Inferior Courts of Common Pleas;[26] the permanent establishment of a Court of Exchequer, of which Monk was the main proponent; and especially the Supreme Court circuit act of 1774, in the passage and implementation of which Monk played a leading part. Yet as an early Nova Scotian essay in law reform, James Monk's "Observations" deserve recognition. They are somewhat more than just a manifesto of the man who would be Attorney-General.[27] They are an attempt to diagnose, and to prescribe remedies for, the maladministration of justice particularly at the lower level of Nova Scotia's judicial system.

Monk's informed observations of the courts "of law" — he does not say "of justice", which implies a distinction in his mind between administering the law and dispensing justice — led him to propose reforming the judicial system by abolishing one of the several courts which composed it. The lower court, which had existed since 1750, had jurisdiction only in minor civil causes, but lawyers neither sat on its bench nor, except at Halifax, pleaded before it. To professional men such as Monk, the activity of the Inferior Court of Common Pleas was scandalous. It was the root of all evil, judicially speaking, because judges who were ignorant of the law could not administer justice competently and impartially. There is no denying that the better part of Monk's "Observations" is a diatribe against the Inferior Court, towards which he was plainly biased and to the continued existence of which he was plainly opposed. Allowance having been made for Monk's special pleading in favour of its abolition, there seems no good reason to doubt the substantial accuracy of his grim picture of the Inferior Court of Common Pleas. However shrill, his is the voice of education and experience; the complaint of a 'legal professional' against judicial amateurs. If only because of the remedy he prescribed to cure the ills of the lower court, James Monk may be considered a radical reformer who was some sixty years ahead of his time.

In editing Monk's often convoluted text, I have retained the original orthography, capitalization and paragraph structure while modifying punctuation for the sake of sheer comprehensibility. Monk's own footnotes, indicated here by square brackets, have been inserted into his text at the point where they occur.

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Observations on the Courts of Law in Nova Scotia

With no small degree of truth has it been said, that the general Mind of the People in this Colony were inclined to search after a Liberty so bordering on

[26]Monk shared this idea with fellow lawyer and partisan of Legge, and his successor in 1777 as Solicitor-General, Richard Gibbons; cf. "A Review of the past and present State of the Administration of Justice in Nova Scotia..." (Dartmouth Papers, 2741-56, P.A.C.), submitted to Legge's immediate predecessor as Governor, Lord William Campbell, in August 1774. Like Monk, Gibbons proposed abolishing the Inferior Courts of Common Pleas.

[27]Monk failed in his quest to become Attorney-General of Nova Scotia. In August 1776 he was instead appointed to succeed Edward Southouse as Attorney-General of Quebec (G. Germain to G. Carleton, 22 August 1776, CO 42/35, P.R.O.).

Democracy as to weaken and destroy that authority of the Crown (by a Governor) over the People, which alone can Secure the Peace, the dependence and Advantage of this Province, to Great Britain.

The late proceedings in the House of General Assembly [NOTE: June Sessions 1775], the secret machinations of Individuals and Party;[28] the Common and unreserved sentiments of the many; warrant such a Conclusion.

Nova Scotia, therefore, at this time in its Infancy, may be more worthy [of] the Attention of Administration, for the Establishment of requisite duties to Government, by Civil Society. A moderate exertion of Colony Subordination may at this Time perhaps be more necessary and successful than at any more distant Period.

It is thought regulations should be made to Effect so useful a purpose: many are required, and doubtless will take place. But among the number, none it is apprehended will be more necessary, or more useful, than in the Courts of Law.

In this Province there may be said to be Nine different Courts of Judicature to which the Subject resorts.

1. The Justices of the Peace (who by Temporary Laws) have Cognizance of Causes to the Value of three Pounds[29] — in the determination of a Single Majestrate — somewhat similar to the Courts of Conscience[30] in England.

2. A Court of Quarter Sessions of the Peace.[31]

3. An Inferior Court of Common Pleas, *in Each* County.[32]

4. A Supreme Court, acting with the Powers of the Common Pleas and King's Bench in England;[33] and of Jurisdiction throughout the Province. This Court, by Writs of Error and Certiorari, Corrects and restrains all Inferior Courts in the Province.

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[28] Mr. Monk, tho' removed from his Seat in the last Sessions, by the Clamorous Voices of a _____ Faction, to answer the wicked designs of party and private interest, and tho' opposed in his Re-election by every base & dishonorable Artifice Vice or hypocrisy Could invest, was nevertheless chosen with general Applause by the Independant and _____ People of the Township of Yarmouth, from a Conviction of the Treachery of Mr. Monks opponents, and the Rectitude of his Governmental Conduct:

James Monk's commentary on *Journal of the House of Assembly*, 20 October 1775, William Inglis Morse Collection, Vaughan Memorial Library, Acadia University. This is one of the works which Monk promised in November 1775 to send to Wintringham — the "Observations" is the other.

[29] See e.g., *An Act in amendment of an Act...for the Summary Trial of Actions*, 11 Geo. 3, c. 21 (1771), ss. 1, 2.

[30] The precursor of the modern "small claims court". It was not a court of record, and the bench might consist of a single justice of the peace.

[31] The earliest form of local government in Nova Scotia. For its history in the colonial period, see J.M. Beck, *The Evolution of Municipal Government in Nova Scotia, 1749-1973* (Halifax: Queen's Printer, 1973) at 7-11.

[32] In 1775 Nova Scotia consisted of seven counties — Annapolis, Cumberland, Halifax, Kings, Lunenburg, Queens and Sunbury — each with its own Inferior Court. For the historical background, see S.E. Oxner, "The Evolution of the Lower Court of Nova Scotia" in *Law in a Colonial Society, supra,* note 1 at 59.

[33] Here Monk conspicuously failed to mention "Exchequer", but see *infra.*

5. The Governor and Council sitting as a Court of Errors over the Supreme Court.[34]

6. A Court of Admiralty, as well Provincial as of Appeals, both possessing original Jurisdiction of Causes &c.

7. A Court of Escheats, for the Crown Lands.

8. A Court of Wills and Probates.

9. A Court of Chancery, held by the Governor.

It is to be wished that the Judges appointed to Courts of Judicature in America, were Men of Knowledge, Educated to the Science of Law, and Conversant in that general Policy of Great Britain; which most Men of Jurisprudent abilitys Possess.

That those Judges not only received their appointments, but their Salarys from, and were therein dependant upon the Crown. Such a Regulation would have many happy Effects: among the number this: that whatever Connections, either from party or individual sentiments they were united to, they would not presume to deal out *Liberty* and Constitutional principles to the Multitude — either in public, or in private — to the subvertion of Peace and good Government. It is thought that in this Province the Power granted to a single Majestrate — Character and Situation Considered — to determine Civil Causes, is injurious to the Community. Their Fees oppress the Poor. Their power is too great. The trading Majestrate, and their influence, sometimes make the Majority of the House of Assembly. The Council or Upper House avoid entering into disputes with the lower; eve[n] for small matters. The Governor rests Jurisprudent policy — not contradictory to His Majestys Instructions — with those parts of the Legislature; and hence arrises those Temporary Regulations, those unfit Laws.

If a Court of Conscience were Established in every Town throughout the Province, for the determination of Civil Causes under Five Pounds, with an Appeal to the Supreme Court, above three pounds; and those Temporary Laws, giving the present extensive Power to Majestrates were not suffered to be revived; it would have many happy and good Effects. The People wish it. His Majesty's Instructions to His Governor, not to Errect new Courts,[35] seems only to have prevented the abolition of the Justices' Authority; and the Establishment of Courts of Conscience.

The Inferior Courts of Common Pleas are Evidently seen to be productive of great mischief; and which, if not timely prevented, must increase. These Courts sit in Halifax four times in the Year, in the other Counties twice. They are Composed of Characters unread in the Science of Law, unacquainted with the practice of Courts of Record; and added to this, those Gentlemen who grace those Inferior Seats of Justice are mostly Connected in dealing — in Husbandry and Trade — with the Suitors; frequently have advised the Suit; and are seldom out of a party, in the County where they Reside.

[34]The Governor and Council also sat as a Court of Divorce and Matrimonial Causes.

[35]I.e., Article 27 of the Royal Instructions to Governor Legge, CO 218/7/197, P.R.O.

They are in general Characters of Violence and *Patriotic* principles, making every opportunity to ingratiate themselves with the numerous, under this baneful Mask. The Inferior Court and Quarter Sessions of the Peace sit at the same time, and are nearly the same Justices. The Sessions Court has in general very little business; might and ought to have much less. The Inferior Courts collect the People together: Characters that should be keeped separate, attentive to their particular Vocations; and out of popular meetings as much as possible. The Judges of these Courts receive no Salarys; are under no dependance to Government. They receive a sum of mon[e]y, Fees from each suitor; are in general needy Men; and naturally wish a multitude of suits — and which, as they were in the New England Governments, so are they in these Courts: prosecuted (except in the Town of Halifax) for a trifling expence, and by the Partys themselves.

These Courts become places of Entertainment and pernicious pastime to the Plebeian; each suitor is pleased with his Faculty of Reasoning at the Bar — on Equity, Liberty and Constitutional Justice. The Fees taxed go to the Plaintiff or defendant — as the Judgment may be — acting for themselves in the Cause, and the parties are also allowed two shillings per diem *for* their attendance in Court.

Hence every Rustic and Plebeian who is in any degree Capable of forming his own writ and Complaint (and many there are who do it) becomes a Lawyer, and receives those Fees, which otherwise go to the Country Justice or Clerk; for (except in Halifax) no Attornies practice, or attend in these Inferior Courts — and where, it is to be observed, Cognizance is taken of *all* Civil Actions.

From irregularity, the proceedings of these Inferior Courts are ever set aside on Writs of Error brought to the Supreme Court. This irregularity operates upon the Cause whether the Judgment be just or not; and true it is the Subject and the Crown receive an essential Injury. The suitor in the loss of a Judgment, for perhaps a Just debt — beside the misuse of Time and Labor. Government are Evidently prejudiced, in a great perversion of Character. In place of the industrious husbandman, the subordinate subject, there too frequently appears a litigious artful, "Law and Liberty" declaimer.

The Peasantry of a Country, where the Rudiments of Knowledge are cheap and easy, beget a Fondness for Reasoning — these Courts cherish and improve a disposition for public declamation — and in a short process of Time many a New England Character has been seen to rise from the Plough, and bear the Laurel of "a smart, Cute, Clever, Man" who understands the Liberties of the People, and fit to become a Speecher, or Moderator of a Town meeting "to guard to posterity, the natural Rights of Mankind in Civil Society; and the Constitution of the Province, perhaps, of America."

Of late a happy and good Regulation has taken place, that of the Supreme Court going Circuits thro' the Province, where Roads are passable.[36] The Ser-

[36] *An Act in addition to...an Act for establishing the Times of holding the Supreme Court* [*Supreme Court Circuit Act*], 14 & 15 Geo. 3, c. 6 (1774); for the complete text, see RG 5, Series S, vol. 4, P.A.N.S. The bill was passed in Council and assented to by Governor Legge on 12 November 1774, with a conditional suspending clause. Royal confirmation was signified by order in Council on 20 February 1775. Two months later the Act had been proclaimed.

vice of this Court should at present be Considerable, and might be greatly more so. The Chief Justice is paid from the Parliamentary Grant. The two Assistant Judges from the Province — (I would say by the Voice and donation of the House of Assembly). Yet it is found necessary there should be added to this Court one other assistant Judge:[37] for the more easy management of the business of the Province, and which the Province is able to provide for. The Legislature should by a perpetual Law, fix and settle the Salary to the Judges,[38] at least such quota as the Province are enabled to pay. Those Judges should never be dependent upon the smiles of the populous, or the Clamors of a Junto in a turbulent House of Assembly, Either as Judges or in any other Character. [NOTE: The present assistant Judges are dependant on the House of Assembly, as well for their salary as Judges, as the one for an Annual allowance as Clerk to the House; the other for stationary &c in the Surveyors Office.[39]] The Ill Effects of such a dependance are dayly seen; and have been experienced.

It is humbly submitted that there should be Courts of Conscience, as in England, which would be great relief to the Subject.

That the Governor should be permitted to withdraw the Commissions from the Judges of the Inferior Courts in the Province, where Roads permit the Circuits to be made. [NOTE: Courts of Common Pleas being established in every County in Nova Scotia, it is apprehended is not only inconsistent with the Jurisprudent Constitution of Great Britain, but greatly so with Just principles of Colonization.] That this should appear to the Public as a Temporary expedient, for the Ease of the Subject, the advancement of Justice, the welfare of Society, inasmuch *That the Supreme Court goes the Circuits as often as those Inferior Courts sit. They have a Clerk in every County to Issue process when applied for. The great injury to the Subject from the want of Jurisprudent and practical knowledge in the Judges of the Inferior Courts. The Constant reversal of Judgments, by writs of Error from the Supreme Court; and where the Judgment itself may often be just. The harrassing, distressing an Infant Country with a demand of 48 petit Jury Men, on the General Venire, at every Inferior, besides the Supreme Court — are hardships and inconveniences this Regulation is intended to prevent.*

This would carry an Idea — a sentiment of tenderness in the Crown — for the Ease, the Security and Advantage of the Subject. The Inferior Courts would neither be regreted by the many, or solicited by the few. They most

[37]A development which did not take place in Nova Scotia until 1810 (50 Geo. 3, c. 15).

[38]A development which did not take place in Nova Scotia until 1789 (29 Geo. 3, c. 12). In November 1774, and again in June 1775, the Assembly had promised to render the salaries of the assistant judges permanent. They failed to do so, however, perhaps out of disenchantment with Legge — or annoyance that both the assistant judges supported the government politically, and that the senior of them — Morris — was one of the auditors.

[39]The junior assistant judge, Isaac Deschamps, MHA for Newport Township, had been Clerk of the House since 1765. The senior assistant judge, Charles Morris, had been Surveyor-in-Chief since 1749.

assuredly should be abolished,[40] which would not only in fact grant Relief to the subject; but it is evidently to be seen would accomplish an alteration in the Character and Conduct of Men now artful, indolent, declaiming and dishonest — who hereafter may become industrious, quiet, and useful subjects.

It is thought, should those Inferior Courts be abolished, and the Supreme Court and Quarter Sessions take the public business, the good Consequences immediately would be that such impolitic meetings of the Multitude so led up and educated; without an Authority of Control, or a disposition for decorum; far less subordination to Government; often heated with Liquor, and at full Liberty to meditate and execute popular, violent measures destructive to good Government — would be Averted.

The Supreme Court would perform all the legal public business of the several Counties, and the Quarter Sessions might meet merely to adjourn; without calling to retain a Grand or other Jury but on Special occasions, which seldom happens, and which might be greatly prevented by the Supreme Court taking to themselves all the business which Could be brought within their Jurisdiction. And as there are not Civil Trials at the Quarter Sessions, there would not be occasion for the Multitude to Collect, under the guidance of Liberty and *Patriotic* Justices.

The Supreme Court would not only Correct every undue proceeding in their own Court, but maintain a degree of dignity and Authority that would overawe, punish and prevent any tumultuary meetings; the Attempts of the populous; or the Incendiary.

To attain and secure this useful Authority, it may not be thought unnecessary that an order be given That all the Judges and officers of the Supreme Court should (at least for three years) attend every Circuit, and preserve all degree of Dignity, as well in appearance as conduct. That the Judges of the Supreme Court should not wear the appearance of Country Attorneys Sojourning for an Existence.

It is evidently perceived that such Regulations would not less effectually prevent distant, tho' apparent Confusion, than be a mean to keep the Clamorous and disaffected in quietude, duty and subordination.

Some Regulations in the Supreme Court are yet wanting; they are growing into necessity and doubtless will take place — when, this Court will become of Real dignity, Power and respect among the Multitude, who will square their Conduct, not by the Licentious Voice of a Drayton,[41] but under the gentle monition of those, suited to Rule, as well with tranquility and Justice as for the preservation of harmony and good Government.

[40] A development which did not take place in Nova Scotia until 1841 (4 Vict. c. 3). The jurisdiction of the inferior courts was transferred to the Supreme Court. It is ironic — and coincidental — that the same man who was advocating the abolition of the inferior courts elsewhere in the province put his whole weight behind the bill to establish an Inferior Court of Common Pleas in Yarmouth Township. The Act (15 & 16 Geo. 3, c. 5) was passed at the October 1775 session of the legislature — the only one which James Monk attended as MHA for Yarmouth.

[41] I.e., William Henry Drayton (1742-1779), South Carolina revolutionary leader. See V *Dict. Am. Biog.* (1930), 448.

If the Governor and Council, the Court of Errors, were permitted to Issue Writs of Error to the Supreme Court, from Fifty or one hundred pounds and Upwards,[42] it would be an useful regulation and satisfy the wishes of the Subject. Not that the business of the Governor and Council would be much increased: the People in this Country do not see Writs of Error in so favorable or useful a light, as to pursue them after they have had a regular and fair Trial by the Country. [NOTE: The Costs of a Writ of Error greatly exceed the Value of a Temporary delay in the payment of a Just debt.] And this regulation would remove the appearance of the Supreme Court retaining as well the original as the Ultimate Jurisdiction of Civil Causes.

The Judge of Probate of Wills requires additional Authority to be granted by Law. He should be a Character learned in the Profession, and *over* whom the Chancellor should preside. But at present the Governor holds the Office of Judge of Probate *and* Chancellor. [NOTE: It is to be observed that appeals lay from the decisions of the Judge of Probate to the Governor and Council. It is therefore rather improper the Governor should retain the office of Judge of Probate — Province Law 32 Geo. 2 ch. 11 & 17[43].]

If there were a Master of the Rolls appointed, a Gentleman Educated in the Science of Law, it would greatly Relieve a Governor, who from not being led up in the profession must frequently ground his determinations on the Law abilitys and assistance of some persons about him — most generally his Masters in Chancery — who are not always Lawyers.[44]

It is thought no Character would be more, if so proper and Convenient to Government, to fill the appointment of Master of the Rolls, as the Attorney General.[45] The Salary he receives from the Crown, might require the duty, as the Fees arrising to a Master of the Rolls must be inconsiderable. Those to the Solicitor and Council (which Character the Attorney General ever fills) are considerable; and as he is generally presumed a Man of the first abilities in his profession, is concerned on the one side, or the other, in all causes.

It is to be wished that the Attorney General ever filled a Seat in the House

[42]The official minimum figure, specified in the Instructions, was £300.

[43]32 Geo. 2, c. 11 (1758) was *An Act relating to Wills, Legacies, and Executors, and for the Settlement and Distribution of the Estates of Intestates.* The reference to chapter 17 of the statues of 1758, however, would seem to be mistaken.

[44]The Masters in Chancery at the time were Charles Morris, assistant judge of the Supreme Court and Richard Bulkeley, Secretary of the Province; neither of them was a lawyer. In 1777, Attorney-General Nesbitt became a Master in Chancery, the first lawyer to be so appointed.

[45]The Master of the Rolls presided as judge of the Court of Chancery in his capacity as chief of the Masters in Chancery and as "legal assistant" to the Governor, who was *ex officio* Chancellor. The first holder of the office in Nova Scotia was Secretary Bulkeley, appointed in 1782. Though Bulkeley continued as Master of the Rolls for nearly eight years after he had retired from the secretaryship, during the next three decades the former office was virtually an adjunct of the latter. The office of Master of the Rolls lapsed in 1813, however, after the death of Secretary Samuel Hood George and during the nonage of his successor. In 1818, Lieutenant-Governor the Earl of Dalhousie tried to appoint Chief Justice Sampson Salter Blowers to the office, but the appointment was disallowed by the Crown. The office was not formally revived until 1825 (cf. 7 Geo. 4, c. 11), when the Solicitor-General of the day, Simon Bradstreet Robie, a distinguished lawyer, was commissioned Master of the Rolls. At no time during the 73-year history of the office — it was abolished by provincial statute in 1855 (18 Vict., c. 23) — was it held by the Attorney-General. Can it be that Monk saw himself as Attorney-General, presiding in the Court of Chancery?

of Assembly, and were the Custos Rotulorum,[46] presiding in the Quarter Sessions of the Peace, in the County of Halifax. For it is highly necessary he should be thrown into all popular Assemblys, with the best authority and as much among their meetings and debates as possible.

His being a Man of Interest, and Ability to lead or Counteract, must be found useful to Administration and good Government.

Observations on the present practice of the Circuit Courts, in Execution of the late Province Law, 15 Geo. 3.[47]

It has been considered that in establishing the Courts of Justice in Nova Scotia no preferable Model Could be taken than those of Great Britain, as far as local Circumstances and a due regard to Subordination would permit.

The proposed Establishment of Courts of Justice layed down in the foregoing pages, has been grounded upon the Example which the Courts of Westminster Hall, and others in Great Britain have afforded.

The Novelty in the Constitution of England, of Courts of Common Pleas being established in each County, and under Judges of Influence and residence in the County [...]. In this Country the ill tendency of the institution of these Courts, and their insufficiency to administer Justice, is not less Evident than that the Supreme Court, acting under the powers of the Kings Bench, Common Pleas, and Exchequer in England — and making Circuits and Assizes through the Province — render[s] those Courts of Common Pleas not only unnecessary; but has Evinced the Injury to the Subject, and the manifest ill policy of Government in suffering them so long to remain — whatever might have been the good Reasons for their Commencement, and Temporary Continuance.

The Supreme Court very apparently will Administer Justice with infinite greater security & satisfaction to the subject. And it is matterial That the Justices of this Court are the immediate officers of, and look up to, the Crown for support. That they take particular Care, as well, that Justice be distributed, as that peace and good order be preserved.

On the one hand with Intention to hold up to public View the great insufficiency of those Inferior Courts, and as well to satisfy the desires of, as to Convince the Subject, resorting to them for Justice would rather be an oppression than a Relief. And on the other hand, with a desire to throw the Judicial

[46]Attorney-General William Nesbitt had sat in the House of Assembly continuously since 1758, and had been Speaker since 1759. On 13 June 1775, on the petition of the Clerk of the Peace, Attorney-General Nesbitt was appointed *custos rotulorum* of Halifax County, a position usually held by the first justice of the Inferior Court of Common Pleas. Nesbitt was too ill to officiate, however, and John Creighton, first justice of the Inferior Court of Common Pleas for Lunenburg County, replaced him: RG 1, vol. 189 at 307, 314, P.A.N.S.

[47]*An Act in addition to...an Act for establishing the Times of holding the Supreme Court*, 14 & 15 Geo. 3, c. 6 (1774). Cf. "Considerations on a bill for directing the Supreme Court of Nova Scotia to sit in the counties of Halifax, Kings County, Annapolis and Cumberland" (enclosed in Monk to Dartmouth, 16 November 1774, CO 217/51/66, P.R.O.). There was hardly time for the circuit to have taken place between the proclamation of the *Supreme Court Circuit Act* and the writing of the "Observations". Monk, however, is known to have been to Kings County in the spring of 1775 conducting Crown prosecutions (J. Monk to F. Legge, 28 April 1775, CO 217/51/194-97, P.R.O.).

Powers of Government wholly into the possession of Men uninfluenced by popular motives, of Jurisprudent knowledge, Wisdom and attachment to the Crown — was the Solicitor's motive for Aiding into the Execution the Act of the 15. of his present Majesty; directing ye Supreme Court performing the Circuits into the several Counties of this Province, where there are Roads.[48]

There were Legislative Characters who opposed the measure, from personal Considerations — the Utility of which, however, was most generally acknowledged. Yet opposition destroyed a useful, perhaps a necessary part of the Law.[49]

The Chief Justice excused himself going the Circuits; and was Cold and averse to every effort for regulation.[50] It may be said, tho' without dishonor to the Gent'n, the present assistant Judges are persons not of those Jurisprudent abilitys as will enable them to form Judicial Systems, or regulate a practice which may Cover Ill conveniences in a Law — if they were so inclined.[51]

Under these disadvantages the measure required being Closely followed, and attended to; lest by design or Ignorance the Corner stone should be buried in the Ruins of Error, or artful declamation.

The Solicitor General, by the Request of some leading members in the House of Assembly and of the Assistant Judges, formed a Code of practice for these Courts; to render them the most useful and perfect that Considering the insuffiency of Roads, want of Posts &c. Could at present be adopted.

The Supreme Court sits at Halifax *four* Terms in the Year, goes the Circuits *twice*. The Inferior Courts in the Several Counties have but *two* Terms in the year, which make the Recovery of debts Tedious.

Similar to the practice of Wales,[52] and from local circumstances of this Country, an office of Prothonotary or Clerk is established for the Supreme Court in each County, where that Court makes the Circuit.[53] Every possible Information is given to this officer: for granting Writs & process to the Subject, in any Case that may occur. Those Writs are made Returnable at *Halifax* where the defendant must Enter his appearance, and by which means the Sub-

[48]Monk could not forebear acknowledging his own contribution to implementing the *Supreme Court Circuit Act* — although in the third person. Had not at least one of the law officers been on circuit, no Crown prosecutions could have taken place.

[49]Monk was doubtless referring to section 2 of the *Supreme Court Circuit Act*, according to which two of the judges, neither of whom had to be the Chief Justice, might compose the bench of the Supreme Court on circuit. This was the loophole through which both Belcher and his successor, Bryan Finucane, excused themselves from circuit duty. It was not until the early 1790s that a Chief Justice of the Supreme Court — Thomas A.L. Strange — actually went on circuit.

[50]J. Monk to Lord Dartmouth, 10 November 1774, CO 217/51/69, P.R.O.

[51]Neither Judge Morris nor Judge Deschamps was a lawyer. Both, however, had been chief justices of the Common Pleas, of Halifax and Kings County, respectively, before their elevation to the Supreme Court bench.

[52]Coincidentally, James Monk Sr. was a native of Wales. It may well have been he who was responsible for introducing the term "prothonotary" into Nova Scotia's judicial system, where it has survived ever since.

[53]In the spring of 1775, George Henry Monk, who had succeeded his elder brother as Clerk of the Crown and Prothonotary of the Supreme Court, went on circuit duty. He later memorialized the House of Assembly for payment of his expenses. (*Journal of the House of Assembly*, 13 July 1775).

ject has *four* Terms in the County, by applying to the Supreme Court, in preference of *two* at the Inferior. The Cause is pursued at Halifax as in all other Cases; the Plaintiff or defendant do not come to Town to Conduct their suit. If there be a default, Writ of Inquiry goes into the Country, and is there executed upon Notice; judgment is made up *at Halifax* in Term Time, and Execution thence Issues.

If the Case be for Trial, all the proceedings are prepared at Halifax. The Record goes into the County with the Judges, and Trial being had, Judgment is made up in Term Time in Halifax, and Execution there Issues.

It must be acknowledged, if the Judges transacted the business of the Circuit and Assizes more similar to the practice of England — and returned their proceedings into the Supreme Court, there to be examined on motions for new Trials &c. — it would be more regular, perfect and useful; and, should such a Regulation be thought necessary or advisable, in the Course of a little Time hence it may be accomplished.

It is apprehended many Advantages as well to the Subject as to the Crown would arrise from Constituting the Judges of the Supreme Court a Court of Exchequer.[54]

This Court the Subject appears pleased with, as bearing the appelation and Powers of a Court of Equity;[55] and which unless the Fees were Exhorbitant, the People in this Province would be rejoiced at the Establishment of.

Since making the above Remarks the great necessity is shewn for an order "That all the officers of the Supreme Court should attend the Circuits".[56] The Chief Justice and Attorney General ever — The Provost Marshal and Assistant Judges, at Times — have Excused themselves, from attending the Circuit Courts; and the business has even sometimes been committed to the aid of Country Justices (by special Commission) at this Important Time. And when not only business of a Criminal nature, was to be brought before those Courts

[54]The judges of the Supreme Court had been constituted a Court of Exchequer in May 1775, but only for nine months.

[55]Monk was aiming at the permanent establishment of a Court of Exchequer, which the Instructions permitted, and which would obviate the bad consequences of the fact that the Court of Chancery — the only court with equity jurisdiction — was without a trained lawyer. Unlike the Court of Chancery, the Court of Exchequer had both a common law and an equity side, it being open in fact — if not in principle — to all suitors in actions for the recovery of debt.

[56]These words seem to indicate that the first Supreme Court circuit (April/May 1775) had not been to Monk's satisfaction. In December, after the second — autumn — circuit had taken place, he was to write,

> The Circuit Law passed in 1774; was given to the Judges to fix the Times of holding the Courts. They altered Mr. Monks Arrangement, and settled it to their inclinations in June 1775 [15 Geo. 3, c. 8]. They discovered Error in their desires. The sittings were once again altered by Law [15-16 Geo. 3, c. 12]. In October 1775, they discover that the Sessions are established on days so Closely following each other, as render their sitting on those days Impossible.
>
> Mr. Monk sincerely wishes the _____ Learned Gentlemen would not place so many clogs and difficultys upon a measure so Essentially useful to the Crown and the good Government of this Province:

Monk's commentary on *Journal of the House of Assembly*, 15 November 1775, *supra*, note 28.

for Trial and Judgment — but at a Time when the dignity, the Authority, and Consequence of this Court, should disseminate its Power and Influence among the Multitude, for the preservation of quietude and subordination, to that Government they have so long and so happily lived under, by their repeated acknowledgments. And which in truth, at present they are but too ripe to lay aside for the *Liberty* Conduct, the Continuance and Support, of American Violence.

Proposed Alterations

— The Justices' authority to Try Civil Causes to be Restrained by Erecting Courts of Conscience — and not reEnacting the temporary Laws which give Power to the Majestrate to try Causes &c.

— Abolishing the Inferior Courts of Common Pleas, in the Counties.

— To order the Chief Justice, assistant Judges, Attorney General, Provost Marshal or Sherif, to attend and perform every Circuit; or in other words — that the whole Supreme Court be directed to do the duty of the Supreme Court, whether in Halifax or the Country.

— One more Assistant Judge to be appointed to the Supreme Court, and this Court to be armed with the Powers of ye Court of Exchequer.

— The Judges of the Supreme Court to be independant of the House of Assembly, for their Salaries — or any other donation or Stipend whatever. [NOTE: The Governor & Council, the Court of Errors, to be permitted to retain Writs of Error, or appeals in all Causes from £50. and upwards.]

— A Master of the Rolls to be appointed — & proposed that the Attorney General should fill this appointment.

— The Attorney General to be appointed Custos Rotulorum for the County of Halifax.

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