

“A Hard Disciple of Blackstone”: David S. Kerr, 1809-1886

Nineteen Eighty-Six marks the centennial of the death of David Shank Kerr, one of the most influential members of the 19th-century New Brunswick bar. Because he never succeeded to political or judicial office, Kerr is something of a phantom in historical accounts; yet by 1880 he was regarded by students, junior barristers and judges alike as the grand old man of the profession. A sketch of his 50-year practice, as the Saint John *Daily Sun* reported, “would in effect be a history of the business of the Provincial courts”.¹ His career also sheds light on a largely unexplored topic, the role of lawyers in 19th-century New Brunswick. The scion of a Loyalist family, Kerr entered the profession in an age when lawyers were best known for providing political leadership and social stability. New Brunswick was a frontier colony, lacking both municipal institutions and responsible representative government, where much litigation was handled by Crown-appointed justices of the peace. In the 1830s lawyers from Saint John and Fredericton travelled by horse or stagecoach to attend court sessions in the eastern and northern shiretowns. By the close of Kerr’s career, New Brunswick had established a system of county courts with lawyers travelling to the distant counties by railway.

The son of Captain James Kerr, an officer in the Queen’s Rangers, a Loyalist regiment active in the American Revolutionary War, Kerr was born in Parrsboro, Nova Scotia in 1809, the youngest of 16 children. His father’s active military record and the death of his brother fighting Americans at the battle of Lundy’s Lane during the War of 1812 influenced Kerr’s outspoken allegiance to Loyalist tradition. As a young man he apprenticed under two brothers who dominated the profession in the New Brunswick-Nova Scotia border area — Alexander Stewart of Amherst, later appointed master of the rolls and judge of the Nova Scotia Vice-Admiralty Court, and James Stewart of Dorchester. At that time students-at-law spent five years of legal drudgery before being examined as attorneys and a further apprenticeship of two years to qualify as barristers. Kerr was admitted to the Nova Scotia bar in 1835, whereupon he moved to Fredericton to assume the position of attorney. Called to the New Brunswick bar at age 28, he entered into partnership with Lemuel Allan Wilmot, a young Reform assemblyman destined for an important political career.²

In 1840, on the recommendation of the judges of the colony, Kerr was appointed reporter of the decisions of the New Brunswick Supreme Court, thus assuring his intimate connection with the province’s legal history. He continued to practice and in 1844 married Elizabeth Briscoe, daughter of the collector of customs at Saint Andrews. Two years later as a bencher and founding member, Kerr was involved in a major step toward legal professionalism, incorporation of the New Brunswick Barristers’ Society which established a

¹[Saint John] *Daily Sun*, 7 August 1886. The “Blackstone” reference in the title is taken from an obituary. Kerr is mentioned only briefly in J.W. Lawrence, *Judges of New Brunswick and Their Times* (1907) (Fredericton: Acadiensis Press, 1985).

²[Halifax] *Morning Herald*, 9 August 1886; J.M. Beck, “Alexander Stewart”, IX *Dict. Can. Biog.* 747.

library for the use of the bench and bar. Kerr's reports for the period 1839-1848 summarized a wide variety of cases, many involving the reporter, and ensured his reputation as "a learned jurist".³ To Kerr, the common law involved more than technical questions of criminal prosecutions or disputes over property; it was of social and historical utility:

Every one will admit that there are certain obligations owing from living generations to those who are to succeed them, and that it ranks among the highest duties of the former to preserve and transmit every thing which pertains to the settled rights and liberties of the latter.⁴

The preface to his first volume, in a characteristic style, enumerated ten reasons justifying legal reporting, including the necessity of providing a check to the bench and bar, and the importance of chronicling the evolution of New Brunswick law as distinct from British and American. Judges and lawyers eulogized Kerr's legal scholarship, but journalists stressed more his capacity for hard work than his intellectual gifts.⁵

One of Kerr's favourite court room themes was the individual's right to be protected against arbitrary action on part of the state; thus he made frequent reference to Magna Charta and the English Bill of Rights. During his Fredericton period he conducted his most famous case, contributing significantly to the spirit of "British justice" by establishing the legal precedent for freedom of speech and freedom of the press in the province. The central issue was the right of the Legislative Assembly to order the arrest and imprisonment of citizens who had allegedly libelled the House or its members. In 1844 editor Thomas Hill and printer James Doak of the Conservative *Loyalist* were summarily incarcerated by order of the Speaker of the House of Assembly for having criticized Kerr's erstwhile partner, Wilmot. Through Kerr's instigation, Hill and Doak were released on an application for *habeas corpus*; the issue of freedom of speech became a *cause célèbre*. The *Loyalist* editor retained the services of Kerr and English-trained George Frederick Street in a successful civil suit against the Speaker and the Sergeant-of-Arms. Kerr and Street convinced Chief Justice Ward Chipman that the Assembly had no right to punish citizens for so-called breaches of parliamentary privilege that took place outside the House.⁶

In 1855 Kerr, "in the full vigour of his manhood", relocated to Saint John, where he soon built a considerable practice in criminal and commercial law. As the commercial capital of the colony, the city had traditionally contained most of New Brunswick's legal fraternity. One prominent barrister estimated that the city supplied four-fifths of the province's legal business.

³[Saint John] *Daily Sun*, 10 August 1886; Briscoe CB: New Brunswick Museum; *An Act to Incorporate the Barristers' Society of New Brunswick*, S.N.B. 1846, c. 48. See also J. Nedelsky & D. Long, "Law Reporting in the Maritime Provinces: History and Development" (1981) [manuscript available from Canadian Law Information Council, Ottawa].

⁴1 Kerr xi, 3 N.B.R. xi. The preface was written in 1840.

⁵CB C9, 171: New Brunswick Museum.

⁶*Hill v. Weldon et al.* (1845), 3 Kerr 1, 5 N.B.R. 1; [Fredericton] *New Brunswick Reporter*, 4 July 1845; (1844), *Journal of the House of Assembly* 232-39; G. Fenety, *Political Notes and Observations* (Fredericton, 1867) 96-100; D. King Hazen, "The Development of Freedom of Speech and of the Press in New Brunswick" (1951): Hazen CB, New Brunswick Museum.

After two decades in Fredericton, Kerr was dismayed by the democratic tone and casual atmosphere of Saint John courts, where barristers, Queen's Counsel included, refused to appear in formal legal attire or pay proper deference to circuit judges. Kerr also encountered something that had become rare in New Brunswick — anti-lawyer social commentary in the press. Within several years, because of his extensive practice, his court room demeanour and numerous letters to newspaper editors, Kerr became one of the best-known lawyers in the city. Two of his sons followed his example, one migrating to the United States, the second, John, remaining in Saint John. The senior Kerr's only fraternal ties appear to have been with the Masonic order.⁷

Although Kerr was remembered as "a practitioner of the old English school, sorrowing a good deal of late that the formal etiquette and immemorial customs of the bar were falling into disquietude", he was also noted for his biting wit and brusque manner.⁸ In 1875, following a verbal interchange at the Albert County Court House, a judge refused Kerr's request that the court be recessed to allow the veteran barrister and his youthful opponent to "fight it out".⁹ Kerr was both an ardent admirer of the province's judicial heritage and a sharp critic of judicial impropriety. In 1864 he was ordered out of court by Stipendiary Magistrate H.T. Gilbert for insisting that a policeman had committed perjury. Kerr responded in a series of letters to the press that referred to Gilbert as "a most unprincipled scamp, with neither standing nor business at the Bar" and to the Police Court's "scourging oppression and cruelty upon the poor and unfortunate". Not surprisingly, Kerr was the foremost legal critic of local police methods; the rights he championed, however, were not those of the poor, but of tavern owners. One of his most important Saint John cases, *Harvey v. Marshall* — which found the chief of police guilty of trespass for having entered a dance hall suspected of illegally selling alcohol — proved to be a major setback to the enforcement of the city's liquor licensing law.¹⁰ In 1881 he was embroiled in similar controversy after publishing letters accusing a judge of partiality. The Fredericton legal establishment, personified by the attorney-general, reacted by proceeding on a charge of contempt, providing Kerr with further ammunition in his criticism of the links between judges and political representatives.¹¹

Although Kerr's politics are more difficult to ascertain than his views on law, reflecting the fluid state of 19th-century political allegiances, his combined devotion to the Loyalist tradition and Whig liberty typified contemporary political culture. His active involvement in the New Brunswick Society for the Encouragement of Agriculture, Home Manufacturing and Commerce

⁷[Saint John] *True Humourist*, 19 August 1865; [Saint John] *Daily News*, 9 & 16 March, 17 May 1880; [Saint John] *Sun*, 21 December 1885. In 1880 father and son entered into their most publicized and lucrative case, an insurance fraud involving the alleged scuttling of a locally-registered vessel.

⁸CB C9, 171: New Brunswick Museum; [Halifax] *Morning Herald*, 9 August 1886.

⁹[Saint John] *News*, 30 July 1875.

¹⁰[Saint John] *Morning News*, 28 October, 2 November 1864; [Saint John] *Morning Freeman*, 5 & 12 November 1864, 24 January 1865; G. Marquis, "The Police Force in Saint John, New Brunswick, 1860-1880" (MA Thesis: University of New Brunswick, 1982) 113-14.

¹¹[Saint John] *News*, 23 April, 4 May, 17 June, 1881.

fed his political ambitions. In 1850 he had unsuccessfully contested a York County seat against Attorney-General L.A. Wilmot, losing by 68 votes, despite the noted Reformer's absence from the colony. His second attempt, against the candidate of Sir John A. Macdonald's Conservative government for the Saint John City and County riding in 1872, also ended in failure. In his speeches and letters to the press Kerr advocated free trade in natural products, the encouragement of "infant industries", the construction of a canal through the Isthmus of Chignecto and the development of the Saint John harbour. Although a supporter of Confederation, he nevertheless advocated "Better Terms" for the province within the federal union.¹²

The last great case of Kerr's career arose out of the 1875 disturbances in Caraquet, Gloucester County, where Acadians were resisting the controversial *Common Schools Act*¹³ that established a system of state-supported non-sectarian education highly unpopular with Roman Catholics. The deaths of an Acadian "rioter" and an anglophone "volunteer" assisting the sheriff in quelling disorder lead to the indictment of a number of Caraquet residents for murder. Although a supporter of free education, in 1872 Kerr had urged the provincial government to adopt a policy of moderation, such as allowing religious artifacts and apparel in government-funded schools. Now in 1875 he assisted Premier and Attorney-General George King in prosecuting several Acadian prisoners charged with murder. Roman Catholic spokesmen regarded the trials as highly political and accused the Attorney-General of irregularities, including packing the jury. The Crown faced Acadian lawyer Pierre-Amand Landry and Saint John's Samuel R. Thompson, the latter described by the *Morning News* as "one of the most brilliant criminal lawyers at the Dominion Bar".¹⁴ The prosecution won an initial victory before the Gloucester Circuit Court; in the face of 48 objections by the defence, the convictions were quashed by the Supreme Court in 1876. Kerr subsequently published a pamphlet to clarify his arguments in the case.¹⁵

David Kerr was a promoter of legal professionalism and formalism, claiming that an independent bench and bar were the cornerstones of "a free and enlightened community".¹⁶ Although he did not live to see two watersheds in the development of the profession, the establishment in 1892 of the Saint John Law School and the emergence of the Barristers' Society as a self-regulating body free from judicial supervision in 1903, he took a life-long interest in improving the standing of the bar. In Kerr's opinion, proper training and professional etiquette were keys to advancing the fraternity. By the mid-1860s he and fellow senior barristers were convinced that standards had

¹²[Fredericton] *Head Quarters*, 6 February, 19 June 1850; [Saint John] *New Brunswick Courier*, 6 July - 21 September 1861; [Saint John] *News*, 5-13 August 1872; [Saint John] *Morning Freeman*, 6-13 August 1872.

¹³S.N.B. 1871, c. 21.

¹⁴G.F.G. Stanley, "The Caraquet Riots of 1875" (1972), 2 *Acadiensis* (#1) 21-28; [Saint John] *Freeman*, 23 September 1875; [Saint John] *News*, 10 December 1875. King was appointed to the Provincial Supreme Court in 1880 and to the Supreme Court of Canada in 1893.

¹⁵*The Queen v. Joseph Chasson* (1876), 3 Pugsley 546, 16 N.B.R. 546; David Kerr, *Review of the Judgement of the Supreme Court in the Queen v. Joseph Chasson* (Saint John, 1876).

¹⁶[Saint John] *Telegraph*, 13 December 1866.

declined, resulting in an overcrowded and poorly-trained profession. Kerr himself was reputed to be one of a handful of lawyers who made efforts to instruct their students properly.¹⁷ The blame was placed on the Barristers' Society which, according to Kerr, had suffered from lack of leadership and organization following the institution of Responsible Government. In 1866 Kerr and George Botsford revised the rules of the Barristers' Society after studying the regulations of the Upper Canadian and Nova Scotia bars. In 1867 the New Brunswick bar established its first regularly constituted board of examiners and took the controversial step of prohibiting students from practicing in the inferior courts for fees or from receiving other remuneration. The intent of the regulation, relaxed in 1870, was to limit legal study to those of independent means — Kerr's formula for raising professional standards. As outraged students pointed out, limiting access to the bar to the sons of the wealthy was contrary to the spirit of age.¹⁸

In 1878 Kerr was instrumental in the incorporation of the Saint John Law Society, the formation of which reflected the fact that one-third of the province's lawyers lived in Saint John County. Local barristers had suffered heavily in the Great Fire of 1877, which destroyed the city's private law libraries, including Kerr's extensive collection. In many ways the Law Society was a partial declaration of independence from the New Brunswick Barristers' Society. During the next few years Saint John lawyers lobbied for Equity chambers, a local sitting of the Supreme Court and the relocation of the provincial law courts to the port city.¹⁹ In Kerr's opinion, the Saint John Law Society, whose immediate task was establishment of a law library, was more important to the development of the profession than was the Barristers' Society. Its members aimed to establish a uniform schedule of fees, suggest improvements and amendments of the law, maintain professional etiquette and promote legal education. By 1882 local students-at-law were benefiting from a series of lectures delivered by practitioners.²⁰

In late 1885 Kerr closed his career with characteristic flourish — and controversy — by organizing a dinner for the bench and bar. He was criticized within the profession and press for refusing to invite a black lawyer, "a cultured gentleman of irreproachable personal and professional conduct and an alumnus of the best law schools in America" on the doubtful legal authority of Shakespeare's *Othello*. The event, modelled on traditional English bar gatherings, was a success, giving the "survivor of the giants of the last genera-

¹⁷[Saint John] *Freeman*, 16 January 1867; [Halifax] *Morning Herald*, 9 August 1886; H.O. McInerney, "Notes on the Law School History" (1948), 1 *UNB LJ* (#2) 14; G.A. McAllister, "Some Phases of Legal Education in New Brunswick" (1955), 8 *UNB LJ* 33.

¹⁸[Saint John] *Telegraph*, 1 December 1866; [Saint John] *Freeman*, 4 December 1866, 16 February 1867; *An Act Further Relating to the Admission of Attorneys to the Supreme Court*, S.N.B. 1870, c. 26; [Saint John] *Sun*, 21 December 1885. In 1885 Kerr recalled that the contents of the original Barristers' Society law library had been seized by the sheriff and sold for debt.

¹⁹[Saint John] *Freeman*, 15 May 1878; *An Act to Incorporate the Saint John Law Society*, S.N.B. 1878, c. 62; [Saint John] *News*, 27 February 1880, 11 May 1881; *Census of Canada*, 1881.

²⁰[Saint John] *Sun*, 2 February 1882, 21 December 1885.

tion of lawyers" a chance to reflect on the history of the New Brunswick bar.²¹ Above all, he deplored the liberalization of the terms of study which the Legislature had shortened from seven to five years for those without college degrees and to four years for graduates. Kerr preferred the old school of practical training at the law clerk's desk under the guidance of a senior barrister. Although not adverse to the institution of formal legal training, he was not convinced that college education produced a better class of lawyer.²²

The death of David Kerr in 1886 closed a chapter in New Brunswick legal history. As a young man he had pleaded before the province's famous Loyalist judges; later in life he appeared before men who had earned their political spurs in the Confederation era. His participation in two of the most important political trials in 19th-century New Brunswick — the *Loyalist* case and the prosecution of the Caraquet rioters — highlighted a career marked by controversy. The "hard disciple of Blackstone" stands as interesting contrast to the "great men" of the bar who through experience as assemblymen, members of parliament or attorney-general succeeded to the bench. Kerr deserves to be rescued from obscurity because he was a lawyer's lawyer, devoted to the promotion of the bar as an independent, learned and honourable profession. As legal reporter, advocate, publicist and senior member of the New Brunswick Barristers' Society and the Saint John Law Society, he provided continuity to a profession whose members were too often distracted by political ambition and pursuit of economic gain.

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²¹[Saint John] *Sun*, 16 & 18 December 1885. The black lawyer in question was presumably Abraham B. Walker, later editor of the black literary magazine, *Neith*. See also D. Duman, *English and Colonial Bars in the Nineteenth Century* (London: Croon Helm, 1983).

²²[Saint John] *Sun*, 21 December 1885.

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