Law in a Colonial Society: The Nova Scotia Experience, edited by P.B. Waite, Sandra Oxner and Thomas Barnes, Toronto: Carswell, 1984. Pp. *xii*, 212. $42.50 (cloth).

It is no disservice to *Law in a Colonial Society: The Nova Scotia Experience* to observe that the volume's chief importance is that it has appeared at all. The 1980s have witnessed the birth of legal history as a distinct field of scholarly inquiry in Canada, but to date, this scholarship — epitomized by the Osgoode Society's two volumes of *Essays in the History of Canadian Law* (1981, 1983) -- has focused parochially on 19th-century Ontario.[1] Despite Nova Scotia's notoriety as the first "Canadian" colony to be granted an elective assembly, being the first to achieve responsible government and probably the only jurisdiction in the common law world ever to have impeached a majority of its Supreme Court, and despite some notable work in its legal history in times past,[2] the colony's experience was ignored by the Osgoode Society essayists. The present volume comes, therefore, as a welcome surprise. Its principal importance is not so much in expanding the frontiers of knowledge, as in fostering a community of interest in Nova Scotia's legal heritage where none existed before.

Law in a Colonial Society prints most of the contributions to a 1983 legal history symposium held at Dalhousie Law School, and the University of California, during the Dalhousie centennial. It includes two essays which do not deal with Nova Scotia,[3] an eccentric but useful bibliography of the province's legal literature and an important historiographical document.[4] Of the seven Nova Scotia essays,[5] one is truly outstanding: Thomas Barnes' assessment of the sources of formal law and the administration of justice at the founding of Halifax (1749). Barnes is a mature historian attuned to the larger contours of 18th-century imperial scholarship, which he brings to admirable focus on the decision to garrison Nova Scotia with a Protestant population. Among the issues he addresses are the extent to which pre-1758 Nova Scotia was (and was intended to be) a "soldier-colony", the infinitely complex issue

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[1]Analysed in D.G. Bell, "The Birth of Canadian Legal History" (1984), 33 U.N.B.L.J. 312 at 317.

[2]For example, Brian Cuthbertson, *The Old Attorney General: A Biography of Richard John Uniacke* (Halifax: Nimbus, 1981); John Willis, *History of Dalhousie Law School* (Toronto: U. of T., 1979); J.M. Beck, *Government of Nova Scotia* (Toronto: U. of T., 1957).

[3]The two contributions not dealing with Nova Scotia are D.T. Konig, "The Theory and Practice of Constitutionalism in Pre-Revolutionary Massachusetts Bay: James Otis on the Writs of Assistance" (note that this is not the contribution listed on the Contents page) and M.J. Pritchard, "Crime at Sea: Admiralty Sessions and the Background to Later Colonial Jursidiction".

[4]Beamish Murdoch, *Essay on the Origin and Sources of the Law of Nova Scotia* (Halifax, 1863).

[5]The Nova Scotia essays are: Thomas G. Barnes, " 'As Near as May be Agreeable to the Laws of this Kingdom': Legal Birthright and Legal Baggage at Chebucto, 1749"; Sandra E. Oxner, "The Evolution of the Lower Court of Nova Scotia"; Judith Fingard, "Jailbirds in Mid-Victorian Halifax"; Michael S. Cross, " 'The Laws are like Cobwebs': Popular Resistance to Authority in Mid-Nineteenth Century British North America"; J. Murray Beck, "Rise and Fall of Nova Scotia's Attorney General: 1749-1983"; James G. Snell, "Relations between the Maritimes and the Supreme Court of Canada: The Patterns of the Early Years"; and P.B. Waite, "An Attorney General of Nova Scotia, J.S.D. Thompson, 1878-1882: Disparate Aspects of Law and Society in Provincial Canada".

of the reception of English law,[6] the "Virginia precedent", and the fascinating question of the administration of justice before and for a few years after 1749. Though handicapped by working with only printed sources,[7] he confronts the most basic of issues (what was the law and how was it administered?) in a way that throws suggestive new light on the subject. In addressing himself to the *colonial* character of 18th-century Nova Scotia law, he illustrates an approach to Canadian legal history that strikes me as more serviceable than the knee-jerk "Horwitzianism" of the Osgoode Society volumes.[8]

The remaining Nova Scotia contributions are of lesser moment. All but one are footnotes to more substantial studies. The most polished is P.B. Waite's on Sir John Thompson as attorney-general of Nova Scotia, 1878-1882. Although Thompson himself is scarcely mentioned, Waite's paper is notable for its well researched comparative analysis of the role of the attorney-general in a number of jurisdictions. As such, Waite's incidental treatment of the office eclipses J.M. Beck's "Rise and Fall of Nova Scotia's Attorney-General: 1749-1983". Beck's essay, an afterthought to his superb *Government of Nova Scotia* (1957) laments that, like Bourbon Spain, the status of the attorney-general is almost always declining. Although he never actually discusses what it was an attorney-general did that was always on the decline, Beck does perceptively observe that post-Confederation Nova Scotia's major problems were fiscal, accompanied by a corresponding enhancement of the finance portfolio, at the expense of all others.

Judge Sandra Oxner's paper on the evolution of lower courts in Nova Scotia is a gallant attempt to give a comprehensive overview of the colony's most important court in the 120 years before Confederation. Although Oxner provides some patches of interesting detail, her paper is generally threadbare and disjointed. Adequate delineation of the rise and fall of inferior courts in Nova Scotia would require a longer and much better-informed study. James Snell's analysis of the relatively minor question of the early relations between the Supreme Court of Canada and the Maritimes is more competent. Snell's study — presumably part of a forthcoming general history of the Supreme Court — contains no surprises. He does, however, repeat some interesting gossip about the very mixed crew of Maritimers who won their patronage appointments to the court in the late 19th and early 20th centuries. His balanced assessment of Sir William Johnstone Ritchie — the only New Brunswicker to become chief justice of Canada — is a useful corrective to the hagiographical

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[6]Curiously, Barnes does not discuss Nova Scotia's leading reception case: *Uniacke* v. *Dickson* (1848), 2 N.S.R. 287.

[7]Barnes misses one important printed document: T.B. Vincent, "Jonathan Belcher: Charge to the Grand Jury, Michaelmas Term, 1754" (1977), 7 *Acadiensis* (#1) 103.

[8]As noted in Bell, "Birth of Canadian Legal History", *supra*., note 1, the dominant approach to legal history is that developed by Morton Horwitz in his brilliant *Transformation of American Law, 1780-1860* (Cambridge MA: Harvard U.P., 1977). Horwitz's thesis is that the antebellum American judiciary creatively "transformed" the common law so as to make it an instrument facilitating commerce, industrial development and the emergence of a national economy. To an almost embarrassing extent, the Osgoode Society essays were intended to find this same creative, instrumentalist facilitation of economic development in the common law of 19th-century Ontario. In my view, the essays demonstrate precisely the opposite: that Canadian judges were too unreflectingly colonial in their thinking to give capitalism the law it "needed". As individual productions the Osgoode essays are often superb. It is the editor's attempt to force them into a pre-conceived Horwitzian mould that I suggest is unprofitable.

treatment in Lawrence's *Judges of New Brunswick*.[9]

Finally, the collection includes two contributions to Canadian social history. The best part of Michael Cross' "Popular Resistance to Authority in Mid-Nineteenth Century British North America" is its title. The content is a random sampling of often-familiar instances of articulate crowd violence followed by a one-paragraph conclusion which, however interesting, is not connected to the evidence. If Cross' piece is a diffuse Canadian footnote to George Rudé,[10] Judith Fingard's "Jailbirds in Mid-Victorian Halifax" is a focused Canadian footnote to David Rothman.[11] As with the contributions of Cross, Beck, Waite and Snell, this is a distinctly second-string production, in which an accumulation of facts is garnished with a figleaf of analysis. The facts, however, are fascinating. Fingard begins with an unforgettable litany of the various custodial institutions on the Halifax peninsula, and follows with six case histories of frequent offenders. The result is the rare kind of essay that both educates and entertains.

All contributions to knowlege are gratefully received and, whatever the strengths of these Nova Scotia essays as individual pieces, the real achievement of *Law in a Colonial Society* is in creating a climate that will encourage further work in Maritime legal historiography. Without lessening the solid satisfaction this volume brings, its focus does give rise to one larger concern. The title *Law in a Colonial Society* was probably chosen for its all-encompassing blandness. That is fair enough. Yet it is disappointing to find that only one essay in seven (that of Barnes) even bothers to address the fundamental predicament captured (perhaps inadvertently) in the title: the "colonialness" of the English-Canadian legal experience.

To my mind, the colonial and derivative character of Canadian legal thinking, early and late, is its prime characteristic. As such, the case of the law simply mirrors the psychological and cultural colonization of English-Canadian society in general. But while Canadian society as a whole has always been the product of simultaneous interaction with two colonizing cultures — British and American — in shifting proportions over time, Canada's legal culture has until the present generation been almost exclusively English in its orientation. Perhaps no aspect of Canadian culture — not even the Anglican Church — has been more energetically colonial than the legal system. It is the very nature of cultural colonialism that imported values substitute for creative local thinking. Legal judgments are not framed as independent deductions from first principles; they are made, as far as possible, the image and transcript of the jurisprudence of England. Ideally, the common law was to be declared in York County, New Brunswick and in York County, Ontario, as if in Yorkshire England.

All this is indisputable. The consequences are two-fold. First, the work of 19th-century Canadian judges (the focus of the new legal historiography) was

[9]D.G. Bell (ed.), *Lawrence's Judges of New Brunswick* (1907) (Fredericton: Acadiensis, 1985) 482-506.

[10]George Rudé, *The Crowd in History* (New York, 1964).

[11]David Rothman, *Discovery of the Asylum: Social Order and Disorder in the New Republic* (Toronto: Little, Brown, 1971).

not characterized by a creative, "instrumentalist" response to the needs of the capitalist class such as one finds in England,[12] and as Morton Horwitz found in the United States. Hence, the Osgoode essayists' desperate search for Horwitzian instrumentalism in 19th-century Ontario was doomed to failure from the outset. Columbus-like, they succeeded in establishing legal history as a new realm of scholarly inquiry in Canada but, like Columbus, the New World they pointed out was not the one they went looking for. Second, if the primary characteristic of Canadian legal history is its "colonialness", then the colonial mind set cries out for study. Apart from Barnes' essay, this is what the ironically-named *Law in a Colonial Society* does not even attempt to do. Perhaps no collection of essays could have fulfilled the promise of such a title. The Nova Scotia volume is nonetheless a welcome one, a shrewd manipulation of the Dalhousie centennial to serve an important scholarly end. One hopes we will not have to await the UNB centennial (1992) for a similar volume on New Brunswick.

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[12]For example, P.S. Atiyah, *Rise and Fall of Freedom of Contract* (Oxford: Oxford U.P., 1979).

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