An Attorney General of Nova Scotia, J.S.D. Thompson, 1878-1882: Disparate Aspects of Law and Society in Provincial Canada

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Historians are apt to be omnivorous animals, and they can be nourished by all kinds of research. This cheerful eclecticism has the disadvantage of being dangerously subject to naïveté, a disposition which greets as discovery what to others is obvious. Lack of legal training might further lead to some crashing legal solecism; certainly the temerity of this adventure resembles that of a celebrated premier of Alberta who, in 1937, took on the portfolio of attorney general not only without being a lawyer, but without one iota of legal education whatever. Perhaps, since he had once been head of the Calgary Prophetic Bible Institute, it can be assumed William Aberhart needed no law; in any case, his legal talents were known to the Almighty, and that was all that mattered.

The diligent researcher looking for the duties and responsibilities of the attorney general would naturally look to colonial or provincial statutes regulating the office. If the diligent researcher did this, in the colonial statutes of pre-1867 British North America, or in the subsequent provincial statutes of Canada prior to 1886, he would find absolutely nothing. Newfoundland's consolidated statutes of 1872 and 1892 mention only the attorney general's salary. Nova Scotia's revised statutes of 1873 are the same. The New Brunswick consolidated statutes of 1877 do not even have "attorney general" in the index. Prince Edward Island is like New Brunswick. Ontario's revised statutes of 1877 and 1897 are like Newfoundland's and Nova Scotia's, as are Manitoba's of 1880 and British Columbia's of 1897. The first attempt in Canada to set down in statute law the functions and powers of the attorney general was in the province of Quebec in 1886 in the Acte concernant le département des officiers en loi de la couronne, 49 & 50 Vict., c. 99. It was very brief. It defined the functions of the attorney general of Quebec as the law officer of the crown and the official legal adviser to the lieutenant governor; it was his duty to see that the administration of public affairs was in

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acquaintance with the law; he had the regulation and conduct of all litigation for the crown of any public department. To cover all eventualities, it was stipulated that he was to have all the functions and powers that belonged to the attorney general of England, by law or by usage, insofar as applicable to Quebec.

The situation had not differed greatly in the United States. The American colonies before the Revolution did not define the office of attorney general, and the individual states afterward simply followed the old common law traditions. The office was not much studied (apart from a few studies at the turn of the century and a few articles). In 1964 J.Ll. J. Edwards, of the University of Toronto, published a study of the law officers of the crown; Americans were so bereft of information about the attorney general that the National Association of Attorneys General, under the auspices of John Mitchell, issued a study in 1971.1

The penumbra of mystery surrounding the attorney general is not difficult to explain. His powers were unwritten, but very real, being powers at common law. The colonies, both American and British North American, made little or no attempt to define or enumerate the duties, for they accepted the fact that he possessed the common law powers of the English attorneys general, except where these were changed by statute, almost exactly as Quebec states in its 1886 Act. The problem in dealing with the office is that statute law, while declaratory of certain aspects of the common law, did not comprehend, by any means, all or even most of it. In several jurisdictions in Canada and the United States at the present time, the attorney general has statutory powers conferred on him, but it is assumed as fundamental that he is clothed with common law powers and charged with common law duties normally pertaining to the office. One American court in Illinois, in People v. Finnegan (1941), went so far as to declare that the common law power of an attorney general could not be limited by statute. One New York court did undertake in 1868, if not to list such powers exhaustively, at least to indicate the most important.2

In England in the nineteenth century it had been regarded as anomalous that the attorney general should even be a member of an administrative cabinet. The point was to prevent the machinery of criminal justice becoming a pawn of party politics, or subject to political pressures in Parliament. But in the more primitive conditions in North America, the attorney general tended to return to what he had been three hundred years before in the time of Henry VIII, the king's attorney.

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2. 378 Ill. 387, 38 N.E. 2d 715 (1941), cited id., p. 41; People v. Miner, 2 Lans. 396 (1868), quoted id., p. 33.
The powers of the attorney general were originally given by royal prerogative, as the office had been originally the product of royal need. The name, attorney general, came from a time when the term was used indifferently for anyone who represented another. Its modern significance was mostly the result of accidents. The name *attornatus regis* appears in 1265, but the office had been in existence some time before that under the title *procurator*. In 1399 Henry IV appointed William de Lodington "*attornatus regis in communi banco et in aliis locis quibuscunque ad placitum regis.*"\(^3\) By 1461 there was but one king's attorney, and he was styled the attorney general. The office was by that time one of mounting importance. In Tudor times it was the king's attorney who took the bills from the House of Lords to the Commons, and in so doing got them into workable shape. A great deal of Elizabethan and Jacobean legislation was the work of attorneys general such as Edward Coke and Francis Bacon. The king also needed lawyers who were conversant with the political problems of the day, and it is about this time that attorneys general began to sit in the House of Commons. When Francis Bacon became attorney general in 1613, he was already a member of Parliament.

It did not make attorneys general any less ruthless. Sir Walter Raleigh writing from the Tower "A Passionate Man's Pilgrimage" had some reason to know:

No conscience molten into gold,
Nor forged accuser bought and sold,
No cause deferred, nor vain spent journey,
For there Christ is the King's Attorney.

An equally telling example turns up in Hong Kong, in 1857. Attorney General T.C. Anstey was arguing in court for the conviction of Cheong Ah Lum, who had allegedly poisoned bread destined for the foreign residents of Hong Kong. The attorney general was frank and vigorous, addressing the six-man white jury:

We have rather hastily apprehended these men: we found no evidence that would have justified a Magistrate to commit them, so we managed to waive that process; and now that we have rather forced a trial, you must give us a conviction to save our character. Better to hang the wrong man than confess that British sagacity and activity have failed to discover the real criminals.\(^4\)

Happily for Cheong Ah Lum and his colleagues, the white jury refused to go along with this sterling sentiment, and he was acquitted. That

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attorney general was dismissed by the governor two years later, a dismissal confirmed by a long-suffering colonial secretary, who gave a short lecture on the office:

The Attorney General is an officer whose especial function it is to render counsel and assistance to the local Government. If he fails in the discharge of his duty... his dismissal is required.\footnote{Bulwer Lytton to Sir John Bowring, 17 March 1859, cited in full in Norton-Kyshe, \textit{id.} 1: 585–587.}

Early in British North American colonial history, the attorney general became an important part of the executive. The administrator of Upper Canada, in 1799, thought it important to recruit an attorney general, through election to the assembly,

the Members of which are in general ignorant of Parliamentary forms and business, and some of the wild young men who frequently require some person of respectability and experience to keep them in order; I requested that Gentleman [John White] to stand candidate for the Representation of the Counties Addington and Ontario which had been vacated by death, and I promised to defray the expenses of his election [in 1793].... But I am sorry to have to report to your Grace that the low ignorance of the electors has defeated my wish by preferring an illiterate young man of their own level and neighbourhood.\footnote{E. Cruikshank, ed., \textit{The Correspondence of Honourable Peter Russell}, vol. 3 (Toronto, 1936), p. 217. Duke of Portland was Home Secretary 1794–1801.}

It was an office sufficiently important that in 1807 Upper Canada's third attorney general was brought from England. Any difficulty in being elected to the assembly was got round by appointing him to the Legislative Council. The reason such men as William Firth could be induced to come from England was that the office was then profitable—at least as suggested by the Lieutenant Governor Francis Gore in 1805, some £1500 Halifax currency per annum, i.e., about $6,000. Gore was quite specific:

\begin{center}
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Salary & £ 333. 6. 8 \\
Clerk and office & 110. 0. 0 \\
Circuit expenses & 55.11. 1 \\
Services to crown & 287.11. 8 \\
Patent fees & 259. 8. 2 \\
Private practice & 400. 0. 0 (estimated) \\
\hline
Total & 1445.17. 7 \\
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Firth was able, but he had *la morgue anglaise*, contempt for colonists and for colonial lawyers, not excluding colonial judges; even the lieutenant governor did not escape the ostentatious display of the common law learning that Firth had acquired at the Inns of Court in London. Firth left Upper Canada in a fury in 1811 because the lieutenant governor had successfully prevented him from collecting those most important emoluments, fees for prosecuting for the crown on circuit.⁷

In New York, in 1727, there was a statute passed to prevent the attorney general bringing prosecutions on his own motion, except by authority of the governor in council. Probably the motive here was assembly resistance to the power of the attorney general, though attempts to control his fees were mixed up in it. The New York Act went to London, where legal counsel for the Board of Trade and Plantations urged its disallowance:

... the right the Attorney General has to file information is delegated to him from the King, and has been ever thought a most essential and necessary power, with regard to the security of public tranquility. . . .⁸

For similar reasons one attorney general of Nova Scotia (1797–1830), R.J. Uniacke, believed it desirable that the attorney general should be quite free of assembly control.⁹

The office in British North America rapidly became useful, and as early as 1815 the attorney general frequently served as chairman of the executive council. Under responsible government in the 1840s a certain politicization developed. The attorney general for Canada West was forced, in April 1848, just a month after his assumption of office, to appoint six lawyers to act as his agents in the several parts of the province. This practice was ramified in 1857 when crown attorneys were appointed for every county. That these appointments were political was nearly inevitable, a fact underlined even by as high-minded a politician as Robert Baldwin:

I have always been in the strictest sense of the word *a party man* and feel persuaded I shall continue such. It is to the confidence of my party that I owe the position which I occupy, and I think it is my duty to make use of the influence which that position gives me to

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strengthen and support that party, and to the best of my judgement and abilities I shall do so.\(^\text{10}\)

An English contemporary of Baldwin's, Sir Francis Burdett (1770–1844), was certainly persuaded that attorneys general were nothing else but political animals. He claimed that the attorney general was a mere tool of the executive, well capable of “acting under the influence of the political malignity of those whose creature he is.” Burdett had some reason for so speaking, but it was a question over which there could be differences of opinion, as the presiding judge sharply pointed out.\(^\text{11}\) Many attorneys general and their officers recognized that they were officers of the crown and the public, that the attorney general occupied a rather different position from the other ministers of the crown; in other words, that Rechtssicherheit transcended politics.

The history of colonial and provincial attorneys general in Canada is much overshadowed by their political role, even in the two most populous of the English-speaking provinces, Ontario (1.5 million in 1867) and Nova Scotia (0.4 million). In Ontario the administrative files are extensive, but, at least in the post-Confederation period, 1867–1900, the personal papers of the most important attorney general, Sir Oliver Mowat (1872–1896), have disappeared. In Nova Scotia it is worse; there are almost no administrative files at all, and the working of the office has to be gleaned from the personal papers that remain of the attorneys general. The history of the office in Nova Scotia is perforce highly personal and is curious enough, especially in a community more primitive in facilities, character, and administrative techniques than Ontario.

In the 1840s in Nova Scotia, as in Ontario, the attorney general was usually the premier: the Conservative J.W. Johnston (1841–1848, 1857–1860, 1863–1864) or his Liberal opponent, J.B. Uniacke (1848–1854). Uniacke's mark can be seen in his commissioning the great revision of the Nova Scotia statutes (1849–1851), so well done that it was used by the Lower Canada commissioners of 1857 as background preparation for the Civil Code.\(^\text{12}\) Johnston left politics for the bench, Uniacke died in 1858, and the brief tradition of great lawyer premiers in Nova Scotia was dying out. Of their successors as premier Joseph Howe


\(^{12}\) J. Brierly, "Quebec's Civil Law Codification" (1968), 14 McGill L.J. 555–559. It is fair to add that the Nova Scotian Statutes of 1851 owed something to a similar achievement by the Commonwealth of Massachusetts in 1836, which in turn had followed a New York revision in 1828.
(Liberal) was a newspaperman, and Charles Tupper (Conservative) was an obstetrician, and there was precious little law in either of them. Their period marks the beginning of the provincial secretary as the key portfolio for the successful Nova Scotia premier. With few exceptions, Nova Scotian premiers since have usually chosen the portfolio of Provincial Secretary, including W.S. Fielding (1884–1896), who was not a lawyer, and his successor George Murray (1896–1923), who was.

The post-Confederation attorneys general of Nova Scotia were indeed not very distinguished. Some were notorious. Martin Wilkins (1867–1871) presents the picture of an enormous old man sitting in his office with a fly swatter, killing flies, and saying that it was more fun than fishing and a great deal more comfortable. He was better than that cartoon suggests. He was counted an adroit lawyer and had always had a considerable success before juries. He preferred not to know whether clients were guilty—I think he assumed they all were. Justice Doull has a story of how Martin Wilkins, lawyer, successfully got a black client acquitted of stealing a cow. After the trial he asked his client if in fact he had stolen the cow as charged. His client said, “Befo’ I heard you, Mistah Wilkins, I thought I did, but after I heard you I’s sure I didn’t.”

Wilkins did not, however, bring much distinction to the office of attorney general. His immediate successors were worse.

Otto Weeks was perhaps the worst of all. His habits with drink had never been good, and they did not improve with his elevation to office. He was loved by the hard drinkers and hated by the non-drinkers; the moderate drinkers, which included most of the Nova Scotian cabinet, after observing Weeks for a while, came even to sympathize with temperance. Premier Hill’s colleagues demanded Weeks’ resignation; he refused to resign and was finally fired in October 1876. He was succeeded by a Cape Breton Roman Catholic Liberal, Alonzo White. White wasn’t much better. In 1876 the Halifax Reporter suggested helpfully that the office of attorney general no longer required the practical knowledge of the courts acquired from practice at the bar. Most of the criminal prosecutions had for years been turned over to senior Queen’s Counsel. Martin Wilkins, when attorney general had not prosecuted, nor had his successor, H.W. Smith, who held office from 1871 to 1875. In fact, said the Reporter, any lawyer will do, whether familiar with actual court practice or not. As this desperate counsel suggests, the stock of the attorney generalship of Nova Scotia had declined badly. When Alonzo White was appointed finally in January 1877, it was alleged by the outspoken Halifax Herald that the office had been refused “by nearly every decent lawyer on that side [the Liberal] in the province. . . .” Thus the Nova Scotian attorneys general were not

what their English counterparts were alleged to be, "the most eminent counsel of the day, invariably men of indomitable industry, powerful grasp of mind, and tried integrity, and/an office/never obtained by servility."14

The following year the Hill government fell after a general election, and the Conservatives came into power. The new attorney general was a thirty-three-year-old Roman Catholic lawyer from Halifax, J.S.D. Thompson (1845-1894), later Sir John Thompson, prime minister of Canada. The Thompson papers, packed up immediately after Thompson's sudden death in 1894, have survived almost intact. Of three hundred large boxes, two dozen are devoted to the years that Thompson was attorney general of Nova Scotia, 1878-1882.

Thompson brought to the office of the attorney general energy, persistence, probity, intelligence, and courtesy, a spectrum of talents sufficiently rare anywhere, and unique in Nova Scotia. He also brought youth, being the youngest attorney general in the history of the province.

The attorney general of Nova Scotia was the law officer of the crown. It was his duty to oversee the wording of statutes as well as the law they contained. He had to control the legal appropriateness of the administration of the government. He was the official head of the administration of justice in the province. He had, for that reason, the duty of prosecuting, or arranging prosecution, for the crown in criminal and, where necessary, in civil cases. He had the right, and in some cases the duty to (1) institute proceedings by writ of *scire facias* to revoke grants made improperly by the crown; (2) to determine by writ of *quo warranto*, that ancient sword (1278) of Edward I, the validity of any provincial charter; and (3) to protect the rights of lunatics and other wards of the province who were under the attorney general's protection.

For all of this he was paid a statutory salary of $1,600 a year, so meagre that he had to use, by virtue of long-established custom, the right of continuing his own private practice as a lawyer. It was never understood in the British North American provinces before Confederation, or the Canadian provinces afterward, that being the crown's law officer compelled one to abandon one's main source of income, or one's personal liberty of action. If there were a conflict between the hat he wore as crown officer, and the one he wore as a private lawyer, a scrupulous attorney general would be expected to give the crown precedence. But as late as 1920 lawyers compensated for the meagreness of their pay as attorney general by using the office to extend the range and heighten the fees of their private practice.15 There is no indication

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15. See (1920), 40 C.L.T. 82-83. This reference has been brought to my attention by
that Thompson ever needed to do this; his practice was large and growing, and he stepped out of it altogether in 1882 when he became a judge.

The British North America Act gave to Nova Scotia the duty of constituting and regulating the system of provincial courts, both of civil and criminal jurisdiction. Nova Scotia, like other provinces, also established procedure in civil matters and controlled the administration of the system that resulted. The Parliament of Canada, on the other hand, prescribed criminal law and procedure, provided the judicial appointments, and paid the salaries, pensions, and allowances of judges for both Supreme Court and county courts.

The establishment of county courts in 1874 was the first major change of the Nova Scotian legal system since 1841. The civil jurisdiction of the county courts was much needed in the developing hiatus between the Supreme Court, at the upper level, and the summary jurisdiction of the justices of the peace, at the lower. The hiatus had only been partly filled by the old Courts of Quarter Sessions. They were cumbersome, creaking, unable to keep up with an increasing volume of criminal and civil business. The justices of the peace, who composed the sessions, did not necessarily welcome the establishment of the county court system. Members of the assembly for their part had distrusted, sometimes feared, the influence of the justices of the peace.

At the local level, the magistrate, the ubiquitous justice of the peace, was still the workhorse of the Nova Scotian legal system, as he was in most of Atlantic Canada. The name, justice of the peace, calls up English stereotypes: the intelligent, robust, perhaps hard-drinking, English squire, dispensing rude but fair justice to the countryside. It was different in Nova Scotia. In Halifax County, for example, there were ninety justices of the peace sworn in since 1848. They were a highly diverse lot. Four were gentlemen, so described; the rest consisted of: twenty-four farmers, fifteen merchants, seven fish merchants, three auctioneers, one butcher, one hatter, one shipbuilder, one cooper, one insurance broker, one bootmaker, one stipendiary magistrate, one tinsmith, one printer and some twenty-eight assorted others. The only lawyer among them was probably the stipendiary magistrate.

What was true in Halifax County was general through the province. If T.C. Haliburton's Justice Pettifog was an example, the justices of the peace were also apt to be greedy and unscrupulous. Justice Pettifog's horse carried as much roguery as law. In a civil action, the justice nearly always gave judgment to the plaintiff, and, if the poor defendant had an offset, made him sue for it. Justice Pettifog made the

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Professor James Snell, University of Guelph.

law grind both ways for him, both the upper and the lower millstone. In criminal matters, more money could be made by lawyers by defending those charged with crime than by being a justice of the peace. Too many magistrates were weak or powerless, producing in certain parts of Nova Scotia a system where magistrates’ ignorance was mitigated only by their pusillanimity. Thompson’s experience in Nova Scotia led him later, when minister of justice for Canada, to prefer the system of the North-West Mounted Police. There the officers were the magistrates, and the constables, the policemen. There had never been a real complaint about this arrangement, Thompson told the Canadian House of Commons in July 1894. If criminal jurisdiction were handed over to ordinary magistrates, Thompson averred, it simply would not be administered properly. What did one do with a justice of the peace apparently afraid to convict, or to arrange prosecution? Some rocks were thrown through a shop window in Tangier, eastern Halifax County, a shop owned by the magistrate. “...[I]n common with all the rest here,” wrote an outraged local resident to Attorney General Thompson,

[the magistrate] is afraid to move. The effect of every venture of this kind that is done with impunity, is to lead to greater outrages and I think . . . if he is in a position to prosecute, he should be called upon to do so, especially as his position of presiding magistrate here throws upon him a greater responsibility.

Eastern Halifax County could be rough country. Mathilda Thorp, of Beaver Harbour, made complaint to the attorney general that a local fisherman, Henry Hawbolt, had abused her and her sister with bad language, and that he had broken a well-established custom, and probably the law, by fishing on Sunday. She said the magistrate was so afraid of Hawbolt that he would not have him arrested. Thompson was sceptical of this letter and wrote the magistrate to find out what the trouble was. The story was that one Sunday a school of mackerel made their appearance at the cove where Hawbolt fished. Hawbolt and his wife quickly ran a net across the mouth of the cove to hold the fish until Monday, but that Sunday night some person cut the

17. For the delights of Justice Pettifog, see T. Haliburton, The Clockmaker or the Sayings and Doings of Samuel Slick of Slickville (orig. ed. Halifax, 1836). This story comes from the Toronto, 1958 edition, chapter 5, p. 18.
19. The law is in R.S.N.S. 1873, c. 159, that prohibited any shooting, gambling, or sporting on Sunday, “works of necessity and mercy excepted.”
net, and the mackerel got away. Almost certainly this person was Mathilda Thorp, perhaps with the help of her sister or father. Whoever had cut the net, said the magistrate, on the Monday, as Hawbolt was returning home empty-handed past Mathilda Thorp's house, she taunted him from the veranda, lifting up her dress, presenting for his edification her naked bottom, and telling him he could kiss that, for all the good his wicked Sunday fishing was likely to have done him.**20**

Another example of this double-sideness of truth—or ought I more decently to say the ambiguity of evidence—occurs in Antigonish County. The new County Council of Antigonish was elected in 1879 and operating as of 1 January 1880. At its semi-annual meeting, in May 1880, it passed new jail regulations, which the Antigonish municipal clerk considered barbarous:

... it is provided that debtors as well as prisoners awaiting trial on criminal charges—if they [the debtors] be poor and friendless—are to be fed during the whole period of their confinement on “a sufficient quantity of wheat bread or biscuit and a sufficient quantity of pure cold water daily.”

A prisoner could be supplied with food at his own expense or the expense of friends, “if he have any.” Thus prisoners committed to Antigonish jail for petty offences were treated worse than criminals committed to the penitentiary. The Antigonish clerk hoped the government would abrogate such laws. Attorney General Thompson agreed that such regulations should be changed, but that it was better that the county council change them. The defence by the county council is interesting. The warden of the county, T.M. King, agreed that the regulations would have to be amended; but he explained why they were brought in in the first place:

our [County] Council felt the need of some check being placed in the matter of jail expenditure. This institution had almost become a popular boarding house, and it was found difficult to get some of the inmates to leave. While the Council was in Session in May [1880], the jail contained a man put in for neglecting to pay his taxes of $1.00. He remained three weeks at an expense of $6.00 to the County, and had to be turned out... The regulations were more-over not at all new, but are a transcript of those already in force in the Municipality of Kings County...**21**

Imprisonment for debt, referred to above, was a vexed question.

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20. PAC, J.S.D. Thompson Papers, vol. 7, Mathilda Thorp to Thompson, 10 December 1878; John U. Smith to Thompson, 30 December 1878.
21. Id., vol. 17, D. Macdonald to Simon Holmes, 2 August 1880; T.M. King to Thompson, 12 August 1880.
Provincial legislatures before Confederation, and the Canadian Parliament afterward, wrestled with the problem of insolvency. As every lawyer knows, there is a difficult line between insolvency owing to incompetence or bad luck, and insolvency owing to something like fraud. Imprisonment for debt existed at common law; Dickens' novels are full of it. In British North America, colonial legislatures began to place statutory impediments that had the effect of mitigating the common law, something Britain herself did in 1869. This did not end imprisonment for debt. In Nova Scotia it lasted well into the 1880s. In Nova Scotia there was evidence that it was used spitefully by creditors, sometimes urged on by greedy lawyers. This would seem to be the case when amounts were, for example, $0.50 plus $1.90 costs, or $3.17 plus $5.00. One debtor, Francis Cunningham, writing to Attorney General Thompson from the debtor's room in the Halifax county jail, thought it ought to be possible to protect poor debtors, or at least to make a creditor pay something "for the fun of gratifying his spite." Attorney General Thompson's bill for doing just what Cunningham asked for, was reported back in March 1882 by the assembly committee, but not in time to pass at the end of the session.22

There were other problems that no attorney general this side of Heaven could solve. William Currie was justice of the peace at Maitland, at the mouth of the Shubenacadie River. He wrote Thompson anxiously in September 1879. A young unmarried woman in Maitland was delivered of a child, and she applied to Currie for an affidavit to swear out against the supposed father.

This is the third child she has had, she is a worthless character and does not regard an oath consequently will probably swear it on the person most likely to get pay from[.] It is not at all probably she knows who is the father[.] would it be wise to swear her?

Can anything be done with the girl to stop the affair from being repeated[?] she will probably have one every year which the town will have to support as it is doing with the ones she has had.

Could she be put in confinement or sent to the poor House or put out of the way in any manner[.] the matter is getting serious[.] or can she have as many as she chooses and throw them on the care of

22. Id., vol. 24, Francis Cunningham to Thompson, 26 January 1882. New Brunswick had adopted a rule in 1860, incorporated in its revised statutes for 1877, that, after a week in prison an insolvent debtor could ask, and a judge could order, that 5 shillings a week be paid by the creditor to the debtor (R.S.N.B. 1877, c. 124). This was what Cunningham was referring to. For more on Cunningham's adventures, see P. Waite, John A. Macdonald: His Life and World (Toronto, 1975), pp. 47-48; J.S.D. Thompson Papers, vol. 25, Cunningham to Thompson, 13 March 1882; N.S. Leg. Assembly, Journals (4 March 1882), p. 77.
the overseers of the poor and run at liberty. The last one before this she had about a year ago. She took [it] to the house of one of the overseers of the poor and threw it in the door and left and threatens to do the same with this one.

An answer to the above will greatly oblige.

Yours truly,

William Currie.

P.S. The girl is a stranger and we do not know her place of residence.

One would like to know Thompson's reply to that letter. It would have taxed the wisdom of Solomon. It is hard to know for whom to feel the sorriest: the girl, the magistrate, the taxpayers of Maitland, or the three (or more) children.

The attorney general had also the duty of prosecuting for the crown in the Supreme Court trials in Halifax or on circuit. It had once been the custom for the attorney general to prosecute perhaps 10 percent of the cases in Halifax County; some attorneys general did a good deal less than that, and the government paid a crown prosecutor to do the rest. Dr. Duncan Campbell, provincial representative for Inverness County, said it was physically impossible for the attorney general to handle more than one-quarter of the criminal business in Halifax County on behalf of the crown. Thompson proposed to do all of it, if he could do it without sacrificing his own business. In 1879 he did, all but one. Out of twenty-one indictments in Halifax County found by the Grand Jury for the 1879 November term, there was only one case where a charge was made upon the province, and that was owing to a conflict of interest in that particular case.

When the attorney general could not attend the case—and outside of Halifax this was much of the time—the attorney general's responsibility then passed to an old custom, one that had frequently made the administration of justice in Nova Scotia very inefficient. This custom required the presiding Supreme Court judge to select, as crown prosecutor, a Queen's Counsel present in court; if none was present, the judge asked the senior barrister present to conduct the prosecution. The Queen's Counsel regarded this perquisite as important to their status and vital to their income. Were they chosen for their real talents, were the silk gown the rare gift it ought to have been, the seniority rule would not have been so serious. But all too often, as the Morning Herald said, the silk gown in this Province has been known to clothe the grossest

23. Id., vol. 12, William Currie to Thompson, 16 September 1879 from Maitland.
24. N.S. Assembly Debates and Proceedings (17 March 1879) at 44.
25. Id. (13 March 1880) at 70. The cost to the crown was the $30 paid to S.L. Shannon.
ignorance of the law..."26 The system also meant that no one knew what counsel would conduct the prosecution until the session of the court actually opened. A trial might be scheduled for Digby for Tuesday morning. On the day before an aged lawyer, say Black, Q.C., would arrive, expecting that he would have the right to the prosecution and its emolument. The judge might even consult Black about the case; but, on Tuesday morning, when court opened, the still more ancient Grey, Q.C., would be seen, and the judge would be compelled to ask Grey, who would then address himself to the task of preparing indictments and examining witnesses. All too frequently, Grey would go to trial without sufficient evidence.

There was a trial at Guysborough in 1886, of Captain John Berrigan for rape, when there was no Queen's Counsel available to prosecute. One arrived from Halifax the night before the trial opened. But no subpoenas had been issued, and witnesses who lived forty miles from the Guysborough court house arrived two days after the court had adjourned. The accused had been discharged for lack of evidence.27

This was not the case in a famous trial that the attorney general himself took on, perhaps to avoid the miscarriage of justice that might have resulted from the Queen's Counsel seniority rule. It was a case of murder, in Annapolis County, the evidence all circumstantial, requiring the utmost care. The story was this: On Wednesday, 1 September 1880, some farmers cutting hay near Milford, on the Clementsport-Liverpool Road, noticed smoke rising from a place on some rough land two hundred yards away. They went to put the fire out and noticed a smell as of meat broiling. It came from a hollow in the rock, partly covered with stones, where the half-charred body of a woman had been crudely interred. The subsequent autopsy in Annapolis Royal revealed that the woman was about thirty-five years of age, six months pregnant, and still alive when she was burnt. For a time no one knew who she was, but she was eventually identified as Charlotte Hill, a pauper from North Range, Digby County, a little settlement a few miles south of Digby town.

The overseer of the poor for the district had indulged in a custom that had grown up in parts of Nova Scotia, and that was not unknown in the United States, of farming out the paupers of his district to the lowest bidder.28 A local farmer, Joseph Nick Thibault (or Tebo as his name was sometimes spelt locally) had successfully bid for the privilege, and was

26. Morning Herald, 1 November 1880.
27. J.S.D. Thompson Papers, vol. 39, Joseph Coombes to Thompson, 12 May 1886, from Guysborough. Coombes, Thompson's old law partner (1868-1873), wanted to be made a Q.C. so such miscarriages of justice would not happen in future.
28. Both the practice and the fact that the official overseer of the poor could not give the names of those so farmed out, shocked both the lawyers and the Supreme Court judge, Robert Weatherbe. However, T. Haliburton has a comment in chapter 27 of The Clockmaker, supra, note 17, on the custom in Parrsboro, Cumberland County of
duly given $300 per annum for boarding an undetermined number of paupers. One of them was Charlotte Hill. Thibault lived with his wife and children on North Range. He was arrested on suspicion not long after the body was found, for it was discovered that Charlotte Hill was last seen in Thibault's presence, and that when he was next seen, about three hours later, she was not with him. Probably none of this was evidence sufficient to convict; but before the trial started, a man hunting partridge along the same Liverpool–Clementsport road, chased a bird into the woods and there found a basket containing Charlotte Hill's belongings, a basket last seen in Thibault's wagon. This gave the crown new evidence.

The crown had four lawyers, including Thompson, the attorney general; the defence had three. The defence did not try to establish an alibi for Thibault and probably could not have done so. Instead, defence counsel tried to show that the witnesses who saw Thibault before and after the disappearance of Charlotte Hill did not know him, that their evidence was unreliable, and that the events of the affair proved Thibault's involvement only circumstantially.

Thompson's main concern was to marshall the evidence properly. He had his theories about evidence, based mainly on the ideas of David Hume. How far he had developed them before the Thibault trial is uncertain; they were well articulated by 1883. Thompson accepted Hume's view that the belief in the existence of an object by a witness "is neither more nor less than a certain degree of vivacity of the idea introduced by the object in the mind." The degree varied enormously from witness to witness. Yet it was the most central part of the whole judicial process. Thompson was to say later to Dalhousie law students,

> It would be impossible for me to mention any subject in connection with judicial procedure of more importance, and requiring more attention and skill in the advocate than those matters which relate to the recollection of witnesses... a witness who has a weak recollection... will find his opinion moulded by the witness whose interest or passion leads him to think he has a distinct recollection. So that we have great difficulty to contend with—a difficulty which counsel has to prepare for....

Thompson disliked reckless cross-examination of witnesses. It had to be done with great care. He used to say—with Jeremy Bentham, incidentally—that cross-examination fairly and honestly conducted was

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of the greatest utility. If the witness had concocted a story, it could either be strengthened or broken down, depending upon the skill of the cross-examination. A concocted story could not anticipate all questions. A good lawyer could soon discover whether the witness' memory was based upon perceived reality or upon sources that had rubbed out part of that reality and painted a false one in its place.

One witness, Addie Scott, perhaps suborned, was threatened with a charge of contempt of court by Judge Weatherbe for not answering questions. Thompson eschewed such tactics. He did not browbeat witnesses. He was marvellously patient with Addie Scott, coaxing testimony from her about Thibault's house, movements, wagons, and horses. As to Thibault's motive for the murder, Thompson could suggest one, but he felt it would be going beyond his duty as crown officer to do so. He concentrated on the claim of the defence that circumstantial evidence proved nothing. There was not, Thompson said, a single piece of direct evidence that contradicted the circumstantial. The wagon and the horse observed on the road were Thibault's; the driver was Thibault; the basket found had last been seen in Thibault's house. While this all did not mean that Thibault committed the murder, none of it contradicted the assumption that he did. Circumstantial evidence, said Thompson, could be very strong. A man was seen to enter a doctor's office and not seen to emerge. The doctor was convicted of murder on the basis of a set of false teeth found at the bottom of a smelting furnace. The case of the Tichborne claimant tried in 1871–1872, and 1873–1874, was a remarkable demonstration, according to Thompson, of how direct evidence, in this case the identification of a supposed son by his supposed mother, could be broken down by careful and systematic use of circumstantial evidence. Thompson never liked the metaphor, *chain* of evidence, for that suggested something that broke at its weakest link. Evidence was not put together that way. Thompson believed that evidence was like the strands of a rope, weak evidence being intertwined with the strong. Thus, strand by strand, Thompson braided together the evidence around Thibault. He proved that Thibault had left home with Charlotte Hill about midnight of 31 August, had taken a wagon and horses and driven all through the night. Shortly after dawn, they stopped for breakfast and to feed the horses after which Charlotte Hill was never seen alive again.

The defence argued that the manner of her death was absurd; no sensible man would commit a crime in so stupid a way. "Why, in the name of Heaven," said Motton, counsel for the defence, "did he start out

at night, drive for miles and miles on a public road, continue by daylight with his victim, then murder her?" Why not hit her on the head, then drop her quietly into a lake at night, conveniently near home, and where the crime would lie hidden forever? As to motive, it was absurd too; a man does not murder a woman simply because she has become inconveniently pregnant. There were easier ways to solve that kind of a problem, Motton asserted. "Fifty or sixty dollars would have made it all right, without resorting to such a horrible crime. . . ."

Thompson's answer to the question of motive was simple. "Men are never wise," he said, "when they resort to crime. Innocence is the only wisdom." The defence spoke of charity to Thibault: but where, said Thompson, was charity to the friendless and defenceless Charlotte Hill?

He would tell them [the jury] it was not for them to exercise mercy and charity—it was their duty to exercise justice alone. To do that they had been sworn. Mercy and charity! That unfortunate girl he need not tell them was a stranger to mercy and charity and even justice.

The jury found Thompson's argument overwhelming. They were out only an hour and brought in a verdict of guilty.

The attorney general's conduct of this trial was widely praised. He impressed witnesses and the public alike with his sense "of judicial fairness and professional courtesy. . . . His argument was a model of lucid statement, [and] effective massing of evidence. . . ." He resembled what Emlyn calls in his preface to his edition of State Trials, the ideal crown prosecutor,

pressing nothing illegal against the prisoner, nothing hard and unreasonable (however in strictness legal), using no artifices to deprive him of his just defence, treating his witnesses with decency and candour; being not so intent upon convicting the prisoner, as upon discovering truth and bringing real offenders to justice; looking upon themselves, according to the famous saying of Queen Elizabeth not so much retained pro Domina Regina as pro Domina veritate.

32. Morning Chronicle (Halifax), 6 December 1880, reporting the trial at Annapolis Royal of 4 December. It started on 1 December and finished 6 December. Both the Chronicle and the Herald carried extensive accounts of the trial. Both accounts are used here.
33. English common law had a rule that a prisoner in a criminal trial could not testify on his own behalf. In Canada this was abolished in 1893.
34. Morning Chronicle, 8 December 1880, reporting Thompson's speech to the jury of 6 December; also Morning Herald, 7 December 1880.
Thompson was in fact approaching his full powers as a lawyer. Even under stress and excitement, he appeared cool and unruffled. Thompson's apparent *sang froid* astonished one close friend. The friend knew Thompson to be a man of strong passions and acute sensibilities. He asked Thompson about that. Thompson explained that in legal argument “the least excitement disturbs the measuring power of one’s judgement.” He did not claim to be able to dispense with emotion; what he meant was that “it must be crushed and subdued by the will until it left a lawyer’s head as cool and steady as a surgeon’s hand.” In this spirit he did much of his legal work. Given his mastery of his material, his lucid mind, he became nearly invincible in court. J.T. Bulmer said he was too powerful:

He carried the court with him far too often, and when a lawyer was making the best presentation possible of his case, there was a certain suspense about the Court, which seemed to say, “We would admit these common sense propositions at once if it were not that Mr. Thompson is coming after you,” as though Mr. Thompson might disturb the very foundation of this pillared [sic] universe.

A year and a half later, after a brief three-month stint as premier of his native province, Thompson was himself appointed to the bench of the Supreme Court of Nova Scotia at the age of thirty-six.

Thompson was the last of the attorney general premiers of Nova Scotia. Since Thompson’s time very few of the great lawyers of Nova Scotia have made their mark in provincial politics. Either the bench tempted them, or federal politics drafted them. With Thompson it was both in succession, going to the bench in July 1882, and then coming back into politics, as Dominion minister of justice, in September 1885. So he was to remain, adding to it in 1892 the duties of prime minister, until 12 December 1894. That was the day, when Thompson was just forty-nine years old, that all things stopped together.

Thompson left precious few monuments behind him. His sober, square, honest, inconspicuous gravestone in Halifax is characteristic. As legislative monuments he left *The Criminal Code*, 1892, 55 & 56 Vict. c. 29, the first such code adopted in Britain or the Empire; the Labour Day holiday, and a legacy of toughness and determination about Canadian copyright that would take another twenty-five years of pushing to get the British to agree to. His achievements as administrator and politician were largely hidden in the three hundred volumes of his papers and the long administrative records of the Department of Justice. Perhaps he trusted posterity to do him justice. But then he had never worried much about popularity. He would have been contemptuous of it, as power or publicity. He cared almost nothing about power as such, least of all enjoying its use. Power, for him, merely fixed the measure of his duty. T.G. Barnes wrote in 1970, “power is that which authority
gives, while duty is that which authority exacts.” For Thompson the weight came heavily upon duty. He was a Roman Catholic, his bent lying to the high-minded Jansenist side; or perhaps, since Thompson had been brought up a Methodist, he had the profound sense that his religion, Methodist or Catholic, surrounded him in life and that moral improvement was possible. He was a secular Christian valiant for truth; you will find the type both at Port Royal and in John Bunyan. Thompson’s favourite historical character—and a revealing choice it is—was Sir Thomas More.

The function and role of the attorney general of Nova Scotia cannot be determined by the thin evidence of this highly episodic survey. It might even be said that this paper illustrates the danger implied in the title of T.G. Barnes’ 1970 essay, “Largely Without Benefit of Prior Conceptualization.” In any case, the story that emerges from the Thompson papers is only one element in one province’s experience with law, order and society, symbolized by its attorney general.
