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The Evolution of the Lower Court of Nova Scotia

Sandra E. Oxner*

The evolution of the Supreme Court of Nova Scotia has been well described elsewhere.¹ This paper will describe the evolution during the colonial period of the main civil and criminal lower courts of Nova Scotia. Omitted are such courts as the Vice Admiralty and Probate Courts. These require separate examination.

This paper traces the development of the courts of General Sessions of the Peace and the Inferior Court of Common Pleas, the main criminal and civil lower courts of the period, from the time of their inception shortly after the founding of Halifax in 1749. The examination of these courts ends in 1841 when the Inferior Court of Common Pleas was dissolved and its functions were assumed by an enlarged Supreme Court. At the same time the Supreme Court assumed the major criminal jurisdiction of the Court of General Sessions of the Peace, leaving the latter as a non-jury² court (outside of Halifax County) with jurisdiction only in minor criminal matters and small civil actions.

Some of the forces that led to the fall of these eighteenth century courts were also at work helping to change the lower judiciary from a volunteer to a paid body. With the waning of the volunteer judiciary came the rise of the professional — the paid, legally trained — justice. The creation in 1815 of the Halifax Police Court with a salaried legally trained justice of the peace presiding over a court held daily was a significant step in this development.

Following the success of the early Police Court came the appointments in 1823 and 1824 of the legally-trained First Justices of the four districts of the Inferior Court of Common Pleas. The first Justices also

* Sandra E. Oxner, LL.B., is Judge of the Provincial Court, Halifax, and a Governor of the Canadian Institute for Advanced Legal Studies.

1. Townshend, C.J., "Historical Account of the Courts of Judicature of Nova Scotia", 19 Canadian Law Times, 1899, 25.

2. In 1841 the Act incorporating the City of Halifax, — Stats. N.S. 1841, c.55 — transferred from the Justices of the County of Halifax to the newly elected City officials the responsibility for the administrative and judicial facets of local government. However, the concurrent Act — Stats. N.S. 1841, c.3 — which removed the major criminal jurisdiction of the Sessions Court in the rest of the Province excluded Halifax County and left the Halifax County Sessions continuing to exercise the pre-1841 jurisdiction, sitting with the Grand and petit Jury, in what remained to them of the County.

It also should be noted that the Sessions Courts continued to sit on occasion with a jury of three. *Infra*, note 83.

became the presidents of the courts of General Sessions of the Peace within their districts. While the creation of their offices was controversial, it was acknowledged that they effected a great improvement in the administration of justice in the colony. As mentioned above, the year 1841 saw the abolition of their court. The same year also saw a Nova Scotian flirtation with an elected judiciary with the replacement of the Halifax Police Magistrate by the Mayor and Aldermen under the provisions of the new Halifax City Charter. The future looked bleak indeed for the professional salaried lower court judge in the early 1840's. However, the recollection of the general satisfaction they had given the community prevailed and the concept re-emerged in 1867 with the creation of the office of the Halifax City Stipendiary Magistrate. This position was restricted to barristers and its salary and security of tenure — during good behaviour — were protected by statute. Together with its antecedents it cast long shadows on the development of the modern Canadian justice system.

The commission appointing the Honourable Edward Cornwallis Governor of Nova Scotia bears the date May 6th, 1749. Lord Cornwallis and his settlers arrived in Halifax on June 21st, 1749. On the 14th of July the civil government was organized, the council members were sworn in and the first Council meeting was held on board the transport "Beaufort".³

It is of interest to consider the composition of the eighteenth and early nineteenth century council as it was this body which was to determine who among their fellow citizens possessed the necessary qualifications "of good life and well affected to His Majesty's Government and of good estates and ability and not necessitious Persons"⁴ and should be appointed to the office of justice of the peace. An analysis done by Dr. Murray Beck indicates that the council was chiefly composed of persons who held offices of, and were in receipt of salaries from the government. Dr. Beck also suggests that with two or three exceptions all councillors between 1760 and 1830 could be linked together by family ties of blood and marriage. Two other qualities marking the council were its steadily increasing commercial character and the fact that it was dominated by Halifax members.⁵ This was a council one would expect to make appointments supportive of the *status quo* and which could be expected to ensure their appointments to public office and the magistracy would mirror and protect their interests.

On the 6th of December 1749, the council turned its attention to the subject of laws for the Provinces and of regulations for the courts.

3. Akins, T.B., *History of Halifax City*, (Bellville, 1973) 9.

4. This was the qualification for the office set out in Governor Hopson's Commission. Council minutes, August 3, 1752 P.A.N.S., R.G. 1, V. 186, 193.

5. Based on Beck, J.M., *The Government of Nova Scotia*, (Toronto, 1957), 18 to 23.

Councillors Green, Salisbury and Davidson were named to a committee to examine the colonial practice and make recommendations for Nova Scotia. With admirable dispatch, they presented the following report to council on the 13th of December:

... the Committee are of the opinion that the form of Government in Virginia being the nearest to that of Nova Scotia the regulations there established for the General Court and their County Courts would be the most proper to be observed in the Province. The Committee have therefore collected from the Laws of Virginia the following regulations with regard to the General Court and the County Court and the forms to be observed therein.⁶

In the event of any difficulty reference was to be made to the laws of Virginia.

No mention is made of the Court of Sessions but the records show such a court to be in session by 1750. Justices of the peace who sitting together comprised this court were first appointed on July 18, 1749.⁷

Pursuant to the committee's recommendation, the Governor and his council were constituted a General Court of both original and appellate jurisdiction equivalent to the higher British courts.⁸

At the same time a County Court was established⁹ consisting of five or more justices of the peace, commissioned by the Governor (three of whom were sufficient for a quorum). Its jurisdiction extended to all criminal causes except those where the sanction was death or dismemberment or out-lawry, and except civil causes of less value than twenty shillings. These latter were to be heard by one justice of the County Court and were not subject to appeal. The County Court was to sit the first Tuesday of every month, continuing until the list was completed. The First Justice was authorized to call special sessions when necessary. There was an appeal for any matters of £5 Sterling and above.

The justices of this court took their oaths of office on December 27th, 1749 and sat for the first time as the County Court on January 2nd, 1750.¹⁰ It would appear from the records that those justices of the peace commissioned at the council meeting on July 18th, 1749, — John Brewse, (Bruce), Robert Euwer, John Collier and John Dupont, — were the first judges of the County Court. The regulations for the County Court were published by the Provost Marshal reading them after the beat of a drum through the settlement and on the first day of the court's sitting.

6. Council minutes Dec. 13, 1749, P.A.N.S., R.G. 1, V. 186, 31.

7. Council minutes July 18, 1749, R.G. 1, V. 186, 5.

8. Council Minutes, Dec. 6, 1749, P.A.N.S., R.G. 1, V. 186, 33.

9. *Ibid.*, 37.

10. *Supra*, note 1, 88.

Mr. John Brewse [Bruce]¹¹ was an engineer, who, with Charles Morris the Government Surveyor, laid out the Township of Halifax. The Honourable John Collier (as he was to become when he was appointed a member of council on January 27, 1752) was a retired army officer who came out with Cornwallis. He was also a captain of the Halifax Militia. He died in Halifax in 1769. A glimpse of his character may be seen when the Assembly demanded an accounting of fees taken in the Inferior Court of Common Pleas and Justice John Collier replied he held the office pursuant to an Imperial Commission and subject to no obligation to the Assembly. Lieutenant Euwer was a captain of the Halifax militia. Mr. Duport was an attorney, the only lawyer on the first council. He, also, came out with Cornwallis and performed the duties of secretary of the council for many years. In February 1753 he was appointed a second assistant judge of the Supreme Court of St. John's (P.E.I.) and in 1770 was elevated to the Chief Justiceship.

While settlers from the old world founded Halifax the great influx of settlers arriving in considerable numbers from New England in the first few years after Halifax's founding soon constituted an important element in the new town. Friction arose between the new world and the old world settlers. One matter of discord was the lack of local self government and the failure to adopt other New England practices which the New England settlers asserted they had been promised.

The influence of the New Englanders can be seen by the change in March 1752 when the Virginia model County Court became a New England model Inferior Court of Common Pleas,¹² meeting not monthly, but quarterly, on the first Tuesday in March, the first Tuesday in June, the first Tuesday in September and the first Tuesday in December, at the same time as the Sessions Court. It appears from subsequent records that the court became a civil court only, of concurrent civil jurisdiction with the General Court.

At the time of the creation of the Inferior Court of Common Pleas the appointees were, — Robert Euwer, John Duport, Charles Morris, James Monk, Joseph Scott, William Brown, Sebastian Zonberluhler, Joseph Gerrish, John Creighton and Edward Crawley. This began a practice of appointing senior justices of the peace, particularly those with legal training, to the Inferior Court of Common Pleas.¹³

The animosity bubbling between the New England and other

11. Biographical information taken from Akins, T.B., *supra*, note 3.

12. Haliburton, T.C., *An Historical and Statistical Account of Nova Scotia*, (Halifax, 1829), I, 165.

13. While the justices were appointed as justices of the Inferior Court of Common Pleas as far back as February 1752, it was not until May 29, 1752 that the Order in Council was passed, changing the name from the County Court to the Inferior Court of Common Pleas, P.A.N.S., R.G. 1, V. 186, 176; Murdoch, Beamish, *Epitome of the Laws of Nova Scotia*, (Halifax, 1832-33), V. 3, 58.

settlers boiled over in December of 1752 when ten charges of partiality were made against some of the justices of the Inferior Court of Common Pleas, — Charles Morris, James Monk, John Dupont, Robert Euwer, and William Bourn.¹⁴ The document containing the allegations and asking for a public hearing was signed by a number of Halifax's most influential citizens. The major charge was that the justices were interpreting Nova Scotia laws in accordance with Massachusetts practice.

All parties were summoned before the council and heard at great length. The decision of the council was in favour of the justices but the many inter-connections of the justices with the council made it difficult for its decision to appear unbiased. To appease public opinion more "old comers" or non New Englanders were added to the Bench.

Such complaints about the justices of the peace who manned the courts caused Governor Hopson to plead in his dispatches for legal personnel. The response to this was the appointment of Jonathon Belcher as Chief Justice of Nova Scotia in 1754.

With this the General Court ceased to function as a common law court and the court structure in Nova Scotia became a Supreme Court of Original and Appellate jurisdiction, an Inferior Court of Common Pleas of civil jurisdiction almost concurrent with the Supreme Court and a Sessions Court for criminal causes. The Sessions Court generally committed the more serious offences to the Supreme Court.

All the trial courts sat originally with a jury.¹⁵ Difficulties in persuading jurymen to serve, even under the threat of sanction for non attendance,¹⁶ caused the courts to be given an ever increasing civil summary jurisdiction — sitting without a jury.

A summary procedure for causes of action up to £10 was bestowed upon the Supreme Court and Inferior Court of Common Pleas in 1765.¹⁷ The Act contained the proviso that if the facts appeared doubtful the court could order a jury. It would seem from this that the traditional British faith in the protection of a jury still existed. The same Act seems to authorize justices of the peace to hear civil actions not exceeding £3 summarily and one justice to summarily hear civil actions not exceeding 20s. By 1774¹⁸ they without doubt had power to determine summarily small claims where the cause of action did not exceed £3, and by 1864¹⁹ the summary jurisdiction of a single justice in debt actions was \$20.00 and that of two justices sitting together was \$80.00 or less. A Commis-

14. Minutes of Council, P.A.N.S., R.G. 1, V. 186.

15. By trial courts, I refer to the Supreme Court, The Inferior Court of Common Pleas and the General Sessions of the Peace, when they were hearing contested matters involving a determination of facts.

16. Stats. N.S. 1796, c. 2, s. 4.

17. Stats. N.S. 1765, c. 11.

18. Stats. N.S. 1774, c. 15.

19. R.S.N.S. 1864, c. 128, s. 1.

sioners Court had been established in Halifax in 1817 for the summary hearings of small claims not exceeding £10.²⁰

This summary small claims jurisdiction made the justices an even more important part of community life. Contemporary records indicate that the people were often dissatisfied with the results of these courts of summary jurisdiction. It seems quite possible that one reason for the dissatisfaction could be a natural suspicion of this new procedure which did not give the defendant the familiar protection of a jury of his peers.

This certainly was the view held by Lieutenant Governor Thomas Carleton of New Brunswick, who in the latter part of the eighteenth century felt that the English jury system at the local level provided stability and respect for the law — “the Court of General Sessions hearing and determining cases by jury appears in every respect so greatly preferable to the disorderly meetings before a single Justice at which the Colonists have been hitherto accustomed to attend that I am in hopes it will prevent a wish for them being reestablished”.²¹

In 1785 difficulties caused by lengthy periods of incarceration of prisoners led to the rather startling authorization for three justices to hear criminal cases in a summary way.²² This power was restricted to matters of simple larceny or matters which did not extend “to life or limb”. Furthermore it seems that under this power the justices could only acquit. A proviso section prevented them from imposing any sanction unless convicted by a jury.

Another difficulty facing the administration of justice was the failure of the justices to attend court. A perusal of court minutes shows that the courts often could not open for lack of the attendance of the requisite two justices. An Act was passed in 1792²³ establishing a Rotation Court with designated justices to attend at designated times. The records indicate that this was little more successful than the Statute which tried to improve the justices’ attendance by enjoining it on pain of removal.²⁴

A provision of a Statute which fettered the power of the Halifax justices out of session to incarcerate²⁵ indicates that problems had arisen in the exercise of this discretion as well.

As the settlement of the province necessitated the creation of new counties, Courts of General Sessions of the Peace and Inferior Courts of Common Pleas were created in the new counties to serve the local

20. Stats. N.S. 1817, c. 11.

21. Donovan, Kenneth, “The Origin and Establishment of the New Brunswick Courts” — *Journal of the New Brunswick Museum* (Saint John, 1980) 61.

22. Stats. N.S. 1785, c. 2 — This Act also required the presence of three rather than the usual two justices. One had to be “of the Quorum”.

23. Stats. N.S. 1792, c. 14.

24. Stats. N.S. 1799, c. 10.

25. *Supra*, note 23, s. 8.

population.²⁶ The Supreme Court continued to sit only in Halifax.

A Supreme Court sitting only in Halifax could not adequately serve the legal needs of a community such as Nova Scotia with its isolated settlements, undeveloped road systems and severe winter weather. Special Commissions of *Oyer and Terminer* and *Gaol Delivery* were sent to try serious criminal cases outside of Halifax, manned often by the Justices of the Inferior Court of Common Pleas.²⁷ This was an *ad hoc* arrangement that did not achieve great satisfaction. Bringing the prisoners and witnesses in serious criminal matters to Halifax for trial was tried.²⁸ The hardship this caused the accused, the witnesses and their families ensured a short life for this scheme. In 1774²⁹ the present system of Supreme Court circuits began in Horton, Amherst and Lunenburg. Until 1834³⁰ two judges were required to constitute a valid court. The assistant judge was often a Justice of the Inferior Court of Common Pleas.³¹

Pursuant to the authority to do so given by the Cornwallis Commission the council early turned its attention to appointing justices of the peace. Firstly, they appointed themselves. This began a Nova Scotia practice of the members of the council being first named on all Commissions of the Peace (the document of appointment) and therefore justices of the peace throughout the Province. The justices of the peace of a county sitting with a member of the quorum³² constituted the Court of General Sessions of the Peace and were charged with the conduct of the administrative and judicial affairs in their area.

There were no qualifications stipulated for the office of the justice of the peace in the Cornwallis Commission. By the Hopson Commission the justices were to be "of good life and well affected to His Majesty's Government and of good estates and ability and not a necessitous person".³³

The older English Statutes required that the justices should be of "the best reputation and the most worthy men in the country" and that they must be resident in their counties and must own lands to the value of £20 per annum.³⁴ It is obvious that the residential requirement was

26. E.g. Stats. N.S. 1769, c. 5 — in relation to Lunenburg County.

27. Beamish, Murdoch, *Epitome of the Laws of Nova Scotia*, (Halifax 1832-33), V. 5, 166.

28. Stats. N.S. 1768, c. 9.

29. Stats. N.S., 1774, c. 6.

30. Stats. N.S. 1834, c. 4.

31. *Supra*, note 27, V. 3, 56.

32. For the court to be properly constituted the presence was required of at least two justices, one of whom was designated in his Commission as being of the Quorum. Burn, John, *The Justice of the Peace*, (London, 1788) 196.

33. *Supra*, note 4.

34. *Supra*, note 27, I, 131.

not followed in Nova Scotia as otherwise the members of council could not have had jurisdiction throughout the Province. Furthermore, a perusal of the almanacs indicates the same names listed for more than one county.

The office was held during the pleasure of the Crown and the Justice of the Peace had to take all the usual oaths of office, Impartial Discharge of Office, Supremacy and Allegiance. Roman Catholic justices of the peace took the oath of 1783.³⁵

While the office was held at pleasure, many Nova Scotians held the appointment for their life. It could be terminated, however, either expressly or by implication by the issuing of a new Commission leaving off the names of the former justices. Certainly there were dismissals for cause, — some responding to letters and petitions sent to the Governor by residents of the area involved. Then there were other dismissals such as Governor Wentworth's 1774 removal of several justices of the peace for participating in the calling of meetings to protest his dismissal of William Cottnam Tonge as Naval Officer.³⁶

The Cornwallis Commission introduced to Nova Scotia the office of the justice of the peace as it was in England in 1749. In the words of Dr. D.C. Harvey, "Nova Scotia, like Tudor England, made the Justice of the Peace its man of all work".³⁷ At this time the English justice of the peace was at the zenith of his power, his origin as a police officer under the Plantagenets had been long overshadowed by ever increasing administrative and judicial duties. The office was an unpaid, though prestigious one. Few of the justices had legal training.³⁸

As in their English model, the Nova Scotia justices of the peace meeting together as the Court of General Sessions of the Peace exercised jurisdiction over many aspects of local government, — over licensed premises, vagrants, overseers of the poor, roads and bridges, the Watch and the constables. The court met quarterly in Halifax county and twice yearly throughout the rest of the Province.³⁹ It met at the same time as the Inferior Court of Common Pleas to spare the time of the justices and jurors, many of whom were required for both courts.⁴⁰ Theoretically all justices from the county were to attend Sessions Court to administer and judge their county affairs. In truth, the records indicate a meager attendance often times less than the legal minimum of two.

In addition to their administrative responsibilities the justices had

35. Stats. N.S. 1783, c. 9.

36. *Supra*, note 5, 136.

37. Harvey, D.C. "The Struggle for the New England Form of Township Government in Nova Scotia," *Canadian Historical Association Review* (Ottawa, 1933) 22.

38. Moir, Esther, *The Justice of the Peace*, (London, 1969).

39. *Supra*, note 27, V. 5, 166.

40. A Petition to the Governor in 1752 resulted in the Sessions Court and Inferior Court of Common Pleas meeting at the same times. See P.A.N.S., R.G. 1, V. 186.

the power in sessions, with a member of the Quorum being present, to hear and determine with a jury all crimes exclusive only of forgery, perjury or statutory limitation.⁴¹ However, according to First Justice Marshall⁴² of the Cape Breton Inferior Court of Common Pleas, the justices did not ordinarily use all this power, preferring to send the difficult cases to the Supreme Court as their commission suggested and authorized them to do. Again according to First Justice Marshall,⁴³ and the records of the Sessions Courts bear this out, they rarely determined offences “without benefit of clergy”, — felonies which prescribed the death penalty, “but this was only a point of discretion and convenience; not because they have not jurisdiction of the crime”.

The court in sessions also had the power to hear and determine small debt actions.⁴⁴ Out of sessions they had common law powers to issue process and search warrants, to admit to bail and to bind over to keep the peace.

They also had other powers which flowed from their commission or from statutes such as the powers of the ancient conservators at common law in the suppressing of riots and affrays and apprehending and committing persons accused of crime. A justice alone could determine and sentence minor statutory offences such as swearing and drunkenness.⁴⁵

The English justice of the peace was primarily drawn from the leisure class, the aristocracy and landed gentry. Traditionally the bench was a meeting place for the County’s most eminent citizens. There was no such leisure class in the pioneer colony of Nova Scotia and from the beginning there were complaints about the justices’ want of knowledge, their failure to attend court and to their court duties, their partiality and their corruption.

Richard Gibbons, Jr.,⁴⁶ in his memorandum on the dispensation of justice in Nova Scotia to the Earl of Dartmouth around 1774 gave his impression of the justices as follows:

. . . not any of whom but what was altogether Ignorant of the Duty or Office of a Judge and almost every Principle of Law. Some of them, to illustrate, are scarcely able to work their names legibly.

41. Marshall, J.G. *The Justice of the Peace*, (Halifax, 1837) 267.

42. *Ibid.*

43. *Ibid.*

44. E.g. *supra*, note 18, 19.

45. *Supra*, note 41. This work discusses fully the various jurisdictions of the Justice, in and out of Sessions. It must have been an invaluable aid for the Justices, many of whose acquaintance with the Statutes came only from having them read aloud the first day of Sessions Court after their enactment.

46. Gibbons, R., Jr. — Untitled memorandum on the Dispensation of Justice in Nova Scotia to the Earl of Dartmouth, C. 1775, P.A.N.S., Dartmouth Papers, Reel 2, 2740.

Men so far from being Persons of Competent Knowledge, and in some measure independent . . . are the very reverse, and several in great Indigence and Depending upon their own Hand for Daily Support, without Books or leisure and ability to read and understand them if they had them, very few of which Judges until their names were put in these Commissions were above the Rank of the generality of their Fellow Settlers either in Circumstances, Education or Capacity.

First Justice John Marshall spoke more softly, but to the same effect, in the foreword to his *Justice of the Peace*⁴⁷ (which was to become the main guide and assistance to Nova Scotian justices after 1835). He attributed the poor state of the administration of justice to the want of legal knowledge, education and time available to the local justices.

From the very beginning the justices begrudged the time required for their judicial function, naturally preferring their administrative responsibilities which brought them the power of patronage. No doubt they neglected their judicial duty partly because of their ignorance of it, but also they must have resented the cost of having to take the time from earning a living in "Nova Scarcity" where the living was not easy. Furthermore, many of the Nova Scotian justices were not of the *noblesse oblige* tradition of the volunteer English bench.

In 1764 there were six justices of the peace for Queen's County. According to More's *History of Queen's County*⁴⁸ "they were leading men of the community and therefore in every way qualified to fill the positions in which they were placed". Mr. More was less happy about the twenty members of the 1847 bench "some of whom were men of ability".⁴⁹

The Queen's County bench in 1800 was composed of twelve justices, — 5 merchants (or merchant ship owners), 3 farmers (farmer fishermen), 2 public officials, and 2 of unknown occupation.⁵⁰

The Halifax bench in 1800 was made up of 59 justices. Of the 37 whose occupations I could trace, 12 were merchants, 9 held government offices, 4 were physicians, 3 were military officers, 3 were lawyers and there was one school teacher, one farmer, one printer, one blockmaker, one auctioneer and one clergyman. In 1841, 13 out of 51 members of the Legislative Assembly were justices of the peace.⁵¹

A return of the Commission of the Peace for the county of Halifax in 1868 indicates there were 91 justices of the peace on the roll. Of these

47. *Supra*, note 41, iv.

48. More, J.F., *The History of Queen's County, Nova Scotia* (Halifax, 1873) 91.

49. *Ibid.*, 93.

50. Much of this biographical information was obtained from More, J.F., *supra*, note 48.

51. P.A.N.S. R.G. 34 — 312J, V. 3.

five had left the county or province and some occupations were not given. The occupations of the others were as follows:⁵²

21 farmers, 1 horticulturalist, 14 merchants, 10 fish merchants, 4 gentlemen, 3 auctioneers, 1 innkeeper, 1 cooper, 1 insurance broker, 1 stationer (the *Custos Rolatorum*), 1 tanner, 1 school master, 1 alderman, 1 clerk of the steam boat corporation, 1 ship builder, 1 surgeon, 1 tinsmith, 5 officials, 1 bootmaker, 1 butcher, 1 hatter, 1 watchmaker, and 1 printer.

Missing are the military officers, lawyers and clergyman present on the Halifax bench of 1800. It must be recollected, however, that the city of Halifax officials had performed since 1841 the functions of local government and the lower judiciary for the urban area.⁵³

Notices in the papers of the time indicate that there were considerable social aspects to membership in the Sessions Court. The justices went together to dignitaries' funerals and to greet distinguished guests to the province.

An interesting glimpse of the Halifax County Sessions Bench personality may be seen in the obvious animosity between some of its members and the Stipendiary Magistrate whose appointment had been urged upon them by the Attorney General and whose intrusion on their territory they seemed to resent. A letter dated December 27, 1861 from their Clerk of the Peace to the Lieutenant Governor concerning reallocation of rooms at the Court House asked that the Stipendiary be given the water closet for an office.⁵⁴

Thomas Chandler Haliburton's word picture of Mr. Justice Pettifog⁵⁵ circa 1830, showing him subordinating justice to his personal gain, despised by the community for his avarice, his partiality and his pomposity, is not unfounded, despite the possibility of bias on the part of the author who was a "professional" judge. Letters of complaint to the Governor and debates in the House of Assembly indicate a lack on the justices bench of the judicial qualities of courtesy, impartiality, dignity and common sense. Judge Haliburton's later allegation that Justice Pettifog owed his elevation to "his interest in an election" is supported by an account⁵⁶ of the justice systems in Queen's county written in 1873 which states "The Justices of the Peace of later years have been appointed principally from political considerations and become rather a source of annoyance to the people than otherwise, they

52. *Ibid.*

53. *Infra*, note 84.

54. P.A.N.S. R.G. 34 — 312 P, V. 20.

55. Haliburton, T.C., *Sam Slick, The Clock Maker*, (Halifax, 1836), 14.

56. *Supra*, note 48, 92.

being in many instances shopkeepers and others engaged in the trade of the country and many of them transient persons”.

But while there were complaints, there was also praise. Indicative of this is a letter written to Justice Joseph Avar⁵⁷ of Westmoreland by the Provincial Secretary dated July 10, 1838, expressing the appreciation of the Lieutenant Governor in Council for the “important services, which, at much personal risk, you rendered in pursuing, for upwards of 100 miles, and apprehending the prisoner charged with murdering a family. At the first Sessions of the Peace in Queen’s county after the death of Simeon Perkins, Esq., the following notice was given him in the Presentment of the Grand Jury:

This inscription is made in memory of Simeon Perkins, Esquire, the late first Magistrate of the County, who presided in the county with great integrity, uprightness and impartiality to the general satisfaction of this community . . .

This tribute was framed and set up over the Bench in the Liverpool Courthouse where it still hangs, exhorting the presiding judge to meet the challenge of the past, and, no doubt, at times causing invidious comparisons to arise in at least the minds of the unsuccessful litigants.

By 1815 the town of Halifax was plagued by petty criminality. The dubious moral character of many of the settlers, the human flotsam and jetsam attracted to the town by its port, naval base and military garrison, the animosity between segments of the population, the successive waves of often destitute settlers, the severe winter weather combined with a volatile and often depressed economy, the free-flowing rum, the lessening but still existing barter economy, the inefficient police work and the lack of interest of many of the justices of the peace in their judicial functions all contributed to this civil unrest.

The legislative committee established in 1814⁵⁹ to investigate the situation determined that its cause was the lack of enforcement of existing laws. While the reasons for this were not specifically stated, it is clear from contemporary material that it was attributed to insufficient and inefficient police work and want of knowledge and interest on the part of local justices of the peace. The Act⁶⁰ subsequent to the committee report established a public Police Office to be staffed by three justices of the peace. One of these, the Police Magistrate as he came to be called, was to be salaried and attend daily. The first Police Magistrate was John George Pyke,⁶¹ a member of the merchant oligarchy, who, as

57. Trueman, Howard, *The Chignecto Isthmus*, (Bellville, 1975) 181.

58. *Supra*, note 48, 150.

59. Journal of the Nova Scotia House of Assembly, 1815, 42.

60. Stats. N.S. 1815, c. 9.

61. Colonel Pyke had come to Halifax as a child with Lord Cornwallis. He was a

an experienced justice of the peace, a lawyer, and a long time member of the Legislative Assembly was very familiar with both provincial laws and criminal procedure.

The three justices were given the authority to hire and supervise three paid constables to police the town, one of whom was to attend daily at the Police Office. The justices' work at the Police Office covered many aspects of the administration of justice such as the taking of complaints on oath from victims of offences, the issuing of search warrants and warrants for the arrest of accused persons or witnesses and the hearing and final determination of many matters.

The immediate result to the community of the daily Police Court was the reassurance through the provision of accessible and visible machinery of justice that the State was protecting the lives and property of its citizens.

The greater likelihood of detection created by the greater efficiency of the new system would no doubt lessen the incidence of crime by acting as a deterrent to some. Furthermore, the more efficient removal from the streets to the jail of the nuisance offender, the noisy drunk, the cheat or the tavern pugalist would quiet the town and recommend the court to the citizen.

The long term results are more complex. Firstly, it foreshadowed the doom of the volunteer justices of the peace and laid the foundation for the uniquely highly professionalized modern Canadian justice system. Its success no doubt influenced the appointment of the legally trained First Justices of the Inferior Court of Common Pleas in 1823 and 1824 and the Halifax Stipendiary Magistrate in 1867, and the steady increase of matters that Courts could deal with summarily, without a jury.

Secondly, it was the beginning of a professional police force.

Thirdly, it closely identified the police with the lower criminal court which had the effect in later years of tarnishing the image of the court's impartiality.

The influence of the court was obviously due to its acceptance in the community. To what was this success due? As mentioned before it soothed a previously disturbed community by focusing attention on the working of the justice system through the visibility of a public police office open daily. It provided a focal point for criminal justice activities and an accessible, competent and available justice of the peace to citizens in search of one.

Important to the success of the court, however, must have been the fact that the appointees and their performance satisfied the influential justices of the peace as well as relieved them of much of their undesired

prominent member of Halifax society and served for a time as *Custos Rotulorum* or President of the Sessions Court.

judicial burden. The fact that the Police Magistrate was a well tested government supporter with many connections in high places would tend to make the court actions acceptable in official circles. No doubt also related to acceptability was the fact that the jurisdiction was exercised by well liked benevolent and knowledgeable judges in a manner consistent with the humanitarian and reform movements (including professionalization) which by 1815 had arrived in Halifax.

All this is not to say that the court was well received by all. Allegations of corruption in 1818 foreshadowed the famous Joseph Howe allegations of corruption in the police office "brick building". The 1818 allegation was:⁶²

This Police Office, to do it justice I must call it a scene and sink of inequity, infamy, corruption and pollution; and calls loudly for a reform in the most essential branches of it.

Joseph Howe's 1835 celebrated denunciation of the Halifax Magistracy⁶³ specifically mentioned

. . . the miserable but costly corruption of the Bridewell and poor house, the inefficiency of the police, the malpractice of the brick building . . . and the confusion in the accounts.

These allegations of corruption would seem to be substantiated to some extent by the fact that returns of fines for the Police Court were not made as required.⁶⁴ Certainly, if Colonel Pyke was not corrupt he was a very poor administrator.

The anger that gave rise to these charges was bound up in the old New England settlers demand for democratic local government and resentment against seemingly corrupt appointed officials. There was not now long to wait. The Halifax City Charter of 1841⁶⁵ gave Halifax Nova Scotia's first elected local government. As well as abolishing the administrative functions of the justices of the peace, the Halifax Charter also conferred the Police Court's judicial functions upon the new elected officials.⁶⁶

A need was still apparent for justice to be disposed of more expeditiously outside Halifax to prevent the hardships caused by the delays Nova Scotians were experiencing in court matters. One way was suggested by the judicial structure established when Cape Breton was re-

62. G.V. Nicholls, "The Forerunner of Joseph Howe". *The Canadian Historical Review*, Vol. 8, 1927, pp. 225-226.

63. Chisholm, J.A. *Speeches and Public Letters of Joseph Howe* (Halifax, 1905), at 59.

64. Presentation of the Grand Jury to Supreme Court January 26, 1818. P.A.N.S. R.G. 34-312, P. V. 8.

65. Stats. N.S. 1841, c. 55.

66. *Ibid.*, s. 52.

annexed,⁶⁷ — the appointment of an experienced lawyer as First Justice of the Inferior Court of Common Pleas who would also be President of the Court of Sessions and preside when sessions met. This proposal was strongly condemned by the “country” Assemblymen who regarded such proposals as a scheme to create offices for Assemblymen-lawyers.⁶⁸

After much debate and by a majority of one, an Act was passed dividing mainland Nova Scotia, (Halifax excepted) into three divisions.⁶⁹ In each division a lawyer of at least 10 years experience was to be appointed to preside over both the Inferior Court of Common Pleas and the Court of Sessions of the Peace.⁷⁰

The fears of the country Assembly were realized when well paid positions all went to Assemblymen-lawyers. The appointees were William Henry Otis Haliburton to the middle division, Gared Ingersoll Chipman to the eastern division and Thomas Ritchie to the western division.

The lawyer/historian Beamish Murdoch had nothing but praise for the new Act.⁷¹

Since the passing of these acts the Courts of Common Pleas throughout the province have assumed . . . a new character, by the introduction of lawyers of respectability in their profession, who each perform a circuit in their respective divisions. The court of each county and district is separate and unconnected as before, in all other respects, having its separate judges, records, etc., but the one chief justice acts in each court of his division . . . There can, however, be no doubt, that the gentlemen appointed to these new judgeships have put their courts on an improved footing, and given very general satisfaction to the country, in the performance of their judicial functions. It is also admitted universally, that as presidents of the general sessions, their services are most necessary and valuable to the Province. Much of the statute law is carried into effect through the intervention of the sessions in each county and an important and indispensable criminal court, which the sessions undoubtedly is, demands the aid of a professional president of legal education and experience.

The expense of the justice system was a matter of concern in 1830 to the members of the Legislative Assembly who were unanimous in their determination to reduce the dollar cost of justice. England, they were told, with a population of twelve million had twelve judges; Nova

67. Stats. N.S. 1823, c. 36.

68. *Supra*, note 5, 67.

69. Stats. N.S. 1824, c. 38.

70. *Ibid.*, S. 1, 2.

71. *Supra*, note 27, V. 3, 60.

Scotia, with a population of one hundred and twenty-four thousand had nine judges. Furthermore, it was reported to them that the Chief Justice of Nova Scotia was receiving a larger salary than the Chief Justice of the United States and the judicial establishment of Nova Scotia was more costly than that of New York state.⁷² They were not so unanimous on how to achieve their aim.

The increased road network and the stage coach lines now made it reasonable for the Supreme Court to serve the province outside of Halifax by regular circuit. The Inferior Court of Common Pleas, made up of judges resident in their four districts invested with civil jurisdiction almost concurrent to the Supreme Court and presiding over the criminal work of the courts of General Sessions was doing the majority of the judicial work. Should the number of judges in each court be reduced or should the Supreme Court take over the functions of the Inferior Court of Common Pleas? It was agreed by all that there was not enough work for them both. The four First Justices of Inferior Court of Common Pleas had in total heard thirty-eight civil cases and presided over the Courts of Sessions during forty-five criminal cases the previous year.⁷³ The power struggle continued until 1841.

In 1841 the Inferior Court of Common Pleas with its local judges was abolished.⁷⁴ The Supreme Court was enlarged to do the work of the Court of Inferior Common Pleas. The Act also swept away the jurisdiction of the General Sessions of the Peace to sit judicially (outside of Halifax county) with a grand or petit jury. From this time on (excluding Halifax county) grand and petit juries sat in Nova Scotia only with a Supreme Court judge.⁷⁵

The Prerogative Writ powers of the Supreme Court, which were not shared with the Inferior Court of Common Pleas, and the fear that a single court would lower the dignity of the Supreme Court were significant reasons for the Supreme Court victory.

Another factor contributing to the defeat of the Inferior Court of Common Pleas might well have been the animosity left over from the time of its establishment, when it passed the House of Assembly by only one vote. The arguments against it were many. It had been considered by some a scheme to make jobs for assemblymen-lawyers. There had also been unhappiness that the First Justices presiding at General Sessions would have the effect of diminishing the status of the *Custos*

72. Based on Beck, *supra*, note 5, 128.

73. *Ibid.*

74. Stats. N.S. 1841, c. 3.

75. *Ibid.* This relates to judicial sittings only and does not relate to Halifax County outside the city. Outside of Halifax city the Grand Jury continued to sit with Sessions to carry out their administrative functions. The Sessions court also sometimes sat judicially with a jury of three. *Infra*, note 83.

*Rotulorum*⁷⁶ and justices of the peace. Concern was expressed about judgment being rendered on technical legal grounds rather than on justice and common sense. Also, the First Justice had presided in counties in his district other than his own where he would be a stranger in the Sessions Chair and no doubt this intrusion had alienated many.

The abolition of the major jurisdiction of the Court of General Sessions seemed to be accomplished without great opposition. They had been drawn into battle by reason of their organizational entanglement with the Chief Justice of the Court of Common Pleas. The improvement of these courts under the influence of legally trained chairmen, while resented, had still been generally acknowledged. No doubt there was a hesitancy to return to the previous experience of a non-legally trained chairman.

But there must have been other reasons why even the justices themselves did not protest being divested of everything but minor jurisdiction. Firstly, contemporary records show that their interest was not great; it was difficult to get them out to sit on the Sessions Bench. A human reason may be that the justices still maintained their title and administrative functions (outside the city of Halifax). Another human reason may be that their administrative functions which they retained gave them the power of patronage, while they could bear seeing their judicial functions disappear as these often brought them only the criticism and displeasure of their neighbours and colleagues. A deeper reason may well have been the lack of tradition of a General Sessions Court in Nova Scotia. Nova Scotia's population was made up of Indians, Acadians, English, Germans, Irish, Scots and New Englanders, with the largest single group being the New Englanders. Many of the "Americans" had come from states where if the justices were not elected, they were appointed by elected bodies. With the exception of the English, the justices of the peace had no place in the cultural background of the others.

Nor was there in Nova Scotia a leisure class prepared to give to judicial duties the time and concern given by the English justices of the peace. Given that their bench was drawn from other than the leisure class and was rather similar in personality to Nova Scotia's the fact that many of the English urban Sessions Courts were being replaced at this time by single legally trained Stipendiary Magistrates supports the view that at that time a leisure class may have been a necessity for a strong sessions bench.

The reform legislation of 1841 centralized the administration of justice in Halifax. While two terms of the Supreme Court were to be held annually in every county but Halifax,⁷⁷ the only local courts remaining

76. The *Custos Rotulorum* was the President of the Court of Sessions.

77. Stats. N.S. 1841, c. 3, s. 3.

to serve Nova Scotians who resided outside of Halifax were the justices of the peace with their diminished jurisdiction. This situation was to remain until the county courts were established after Confederation.⁷⁸ Ironically, the jurisdiction of the Sessions of the Peace for the county of Halifax outside the city was untouched by the reform acts. The people of Halifax county with their close proximity to the Supreme Court also enjoyed the advantages of the traditional Sessions' jurisdiction.⁷⁹

Because of the hardship and inconvenience caused to the community by the loss of the local judges of the Inferior Court of Common Pleas, more extensive civil jurisdiction was conferred upon the justices until by 1864 they had the power to hear summarily claims up to \$20.00 sitting alone and up to \$80.00 sitting with one or more colleagues.⁸⁰ This increase in jurisdiction was opposed by some Assemblymen who regarded the justices as "a most ignorant and narrow-minded set of men" who would "feel less inclined for litigation if they were obliged to pay all fees into the County Treasurer".⁸¹ The *Morning Chronicle* concurred: "These jobbing Justices have surely field enough under the present law for the exercise of their peculiar talents".⁸²

Prohibiting the Sessions of the Peace from dealing with Bills of Indictment or sitting with a petit jury greatly reduced their criminal jurisdiction. What remained to them were such powers as flowed from their commissions, from statutes or from the common law. These related to relatively minor matters such as binding over to keep the peace or public intoxication. While the justices were mainly left with a summary jurisdiction, they were authorized by statute to sit with juries of three on certain civil and criminal matters.⁸³

The assumption in 1841 of the jurisdiction of the Halifax Police Court by the Mayor and Alderman of the newly incorporated city of Halifax finally realized the promises of elected judges made to the New England settlers in 1758.⁸⁴ This marks Nova Scotia's only experience with an elected judiciary to my knowledge. By this legislation⁸⁵ the

78. Stats. N.S. 1874, c. 18.

79. Stats. N.S. 1841, c. 3, s. 5.

80. R.S. N.S. 1864, c. 128. A jury of three could be requested by either party if the action was for more than \$20.00. By Sec. 37 of this Act, Stipendiary Magistrates have the power under the Act of two Justices of the Peace — to hear debt actions up to \$80.00, with or without a jury of three.

81. *Acadian Recorder*, March 8, 1862.

82. *Morning Chronicle*, April 10, 1862.

83. E.g. *Supra*, note 80 (civil); Stats. N.S. 1841, c. 3, s. 12 (criminal); R.S.N.S. 1859, c. 131 (civil); Stats. N.S. 1864, c. 15, s. 7 (criminal); but see Stats. N.S. 1866 c. 49, s. 2, for the protection of a jury being substituted for the protection of at least 5 justices in matters of assault and larcenies under \$80.00, C.f. Stats. N.S. 1858, c. 16.

84. Proclamation of Governor Lawrence and his Council, January 11, 1759 quoted in J.B. Bribner, *The Neutral Yankees of Nova Scotia* (Toronto, 1769) 22.

85. Stats. N.S. 1841, c. 55.

function of the Police Court was continued, even using the same premises, with its jurisdiction vesting in the Mayor and Aldermen. The Mayor, or, in his absence, an Alderman, was to daily attend at the police office. In addition to the jurisdiction of the Police Court they were given the authority to enforce ordinances and bylaws of the City Council. A city⁸⁶ official called the Recorder, a Barrister, had the responsibility of offering legal advice and assistance to the Police Court. The court's power of punishment⁸⁷ was limited to imprisonment for 30 days or to a fine of up to five pounds with power to imprison up to 30 days in default of payment.

The 1841 City Charter did away with the Commissioners Court for the summary trial of civil actions of limited amount and vested similar power in a court to be known as the "City or Mayor's Court".⁸⁸ The new court was to sit the first and third Tuesday of every month for no longer than two days. The court was composed of the Mayor and one Alderman or, in the absence of the Mayor, of two Aldermen. They had exclusive jurisdiction for debt actions in which the claim did not exceed ten pounds. Their jurisdiction extended also to all actions of trover, assault and battery, trespass on lands (where the title was not in question), and slander, where the claim did not exceed five pounds. Either party to the action could demand a jury of three. There was an appeal to the Supreme Court from all judgements exceeding 20 shillings.

In 1864 the Police Court and the Mayor's Court were merged into a City Court composed of the Mayor, an Alderman and the Recorder.⁸⁹ In the absence of the Mayor, an additional Alderman was to sit in his place. The right to a jury was abolished and the jurisdiction enlarged.⁹⁰

The new court could hear, in a summary way, all criminal offences committed within the city except treason, homicide, burglary, or arson.⁹¹ The court's power of punishment was limited to imprisonment for one year or a fine of \$100.00, unless the statute offended provided for the imposition of a greater sanction.⁹²

The civil jurisdiction of the City Court included causes of action in contract not exceeding \$80.00 and other civil actions in which the damages claimed did not exceed ten pounds.⁹³ The court was also given jurisdiction in actions relating to seamen's wages, forcible entry and detainer and overholding tenants.⁹⁴ The City Court was to hear the civil

86. *Ibid.*, s. 57.

87. *Ibid.*, s. 53.

88. *Ibid.*, s. 54.

89. Stats. N.S. 1864, c. 81, s. 114.

90. *Ibid.*, s. 115, 130.

91. *Ibid.*, s. 130.

92. *Ibid.*

93. *Ibid.*, s. 115.

94. *Ibid.*, s. 122, 123.

cases on the second and fourth Tuesdays of every month continuing until all matters had been heard.⁹⁵ Obviously, the press of business necessitated a longer term than the four days a month provided for in the 1841 statute.

The 1864 amendments were quickly followed by others in 1865.⁹⁶ This time it was enacted that either the Mayor or the Recorder was required to constitute a valid court and provided that in absence of the Mayor the Recorder would preside.

This statute spelled out that the presiding officer in the Police Court could hear, in a summary way, petty thefts, assaults, trespasses, breaches of the peace, and riot or disturbances at city elections.⁹⁷ His power of punishment was limited to under 90 days imprisonment or a fine of \$40.00 and costs.⁹⁸ The criminal jurisdiction of the City Court was extended to all criminal matters but punishment was limited to a fine of \$100.00 or imprisonment for a term of six months.⁹⁹ The court's power to punish for enticing soldiers or sailors to desert was greater than their general jurisdiction.¹⁰⁰ An interesting provision of the 1865 Act required a unanimous verdict from the court for a conviction to be entered.¹⁰¹

1867, the year of Confederation, found the judicial functions of the Mayor and Alderman transferred to Stipendiary Magistrate.¹⁰² This was hailed as the eradication of the "worst form of democratic nuisance, a judicial ulcer, a disgrace to our Constitution".¹⁰³ The court continued the Halifax 1815 pattern of the salaried, legally trained judge holding court daily and hearing and determining less serious criminal charges summarily. Pains were taken to strengthen the office by ensuring the independence of the Magistrate by giving him the same security of tenure as that given to the Supreme Court Judges.¹⁰⁴ It is interesting to note that like his 1815 predecessor, the first incumbent, Henry Pryor, Q.C., was a member of the Legislative Assembly at the time of his appointment.

The office of Stipendiary Magistrate was not new to Nova Scotia. The poet, blacksmith, and civic leader, Andrew Shiels, was appointed a Stipendiary for the county of Halifax in the late 1850's to deal with small claim actions.¹⁰⁵ An 1864 Act¹⁰⁶ established the office throughout the

95. *Ibid.*, s. 124.

96. Stats. N.S. 1865, c. 87.

97. *Ibid.*, s. 5.

98. *Ibid.*

99. *Ibid.*, s. 6.

100. *Ibid.*

101. *Ibid.*, s. 7.

102. Stats. N.S. 1867, c. 82.

103. *Acadian Recorder*, January 29, 1866.

104. *Supra*, note 102, s. 2.

105. Stats. N.S. 1860, c. 34, s. 1 increased this jurisdiction to that of two Justices of the

province by enabling Sessions of the Peace to select one or more of their number to be Stipendiaries for their area. The justices selected were given the power to act as a "Police Court" and to hear and determine in a summary way such matters as petty thefts, assaults, riots, and breaches of the peace. A special provision required two justices of the peace to preside with the Stipendiary on all theft charges and provided a jury of three at the option of the accused. The provincial Stipendiaries had the power to imprison for a period not exceeding 60 days or to levy a fine not exceeding \$20.00 and costs. The Stipendiaries enjoyed the civil jurisdiction of two justices of the peace. An appeal was allowed from any judgement for any sum of money.

The evolution of the lower courts in Nova Scotia may be traced to forces both within and without the justice system. The volunteer English and Virginian court models introduced into the Province were first changed by the powerful influence of the New England settlers. The rigors of pioneer life and their cultural heritage caused early Nova Scotians to avoid service in unpaid, time consuming judicial office thus preventing the transplants from flourishing. The difficulties thus caused the administration of justice led to experiments with salaried legally trained lower court judges who seemed to satisfy the community. This concept was embodied in the office of the Halifax Stipendiary Magistrate in 1867. Its success tolled the death knell for the volunteer lay magistracy, and formed the basis for the contemporary Provincial Court. Its rise, with the concurrent rise of an ever increasing summary jurisdiction nudged the Canadian judiciary to its present highly professionalized state.

Peace.

106. Stats. N.S. 1864, c. 15.

