THE OFFICE OF ATTORNEY-GENERAL

"The law as Lord Westbury once observed genially, in a debate in the House of Lords, 'has in its infinite wisdom provided for the not improbable event of the imbecility of a bishop'. It has made the same provision for a judge."[1] It has not, however, envisaged the need of providing expressly against the assumption of the office of attorney-general by a man who is not a member of the legal profession.

Thus it has come to pass that since September 15, 1937, a layman, Hon. William Aberhart, has been the attorney-general of Alberta.[2] Mr. Aberhart is not a member of the Bar; he has never received any training in the law; nor, so far as the writer knows, has he ever given any special attention to legal problems. This situation, unique apparently in the history of Canada,[3] has given rise to questions never before, it seems, discussed in our law journals, although one of them has been the subject of a dictum in at least one reported decision.[4]

The questions are: Can a layman legally be an attorney-general? Is his holding of the office open to attack directly or collaterally in the courts? The other, and the more important question, because mere illegality can be remedied by legislation, is: Is it essential to the proper administration of the office of attorney-general that he be a member of the legal profession or, at least, a man who has been trained in the law? In other words, will the public welfare suffer in the long run if the present unique situation in Alberta be continued or repeated there or imitated by other provinces? That, it seems obvious, is the real question which the Alberta situation requires the profession throughout Canada to face. "The test of its (the law's) value is its applicability to, and its usefulness in our daily life."[5]

There can be little doubt that the answer given by any gathering of lawyers would be unanimous and emphatic; but an answer from that source, unsupported by adequate reasons or by a mere reference to tradition and general custom, will not,

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[1] BUCHAN (LORD TWEEDSMUIR), HOMILIES AND REFLECTIONS, 210.

[2] And also Premier, and Minister of Education.

[3] The brief attorney-generalship of Mr. Pattullo of British Columbia in 1935 was not a real exception to the rule, because it was, and was intended to be, a temporary one pending the result of a general election. The history of the office in Canada might furnish a suitable subject for a thesis by a student in an historical-legal course in one of our universities.

[4] *R. v. Nyczyk*, [1919] 2 W.W.R. 661, 30 M.R. 17, 31 C.C.C. 240 (Man.); holding that an acting attorney-general had authority to prefer a bill of indictment before the grand jury, even though he was not a barrister.

[5] BUCHAN (LORD TWEEDSMUIR), HOMILIES AND REFLECTIONS, 218.

it is likely, be deemed sufficient by the public to-day, at least in the Western provinces. The public is, at first blush at least, notoriously indifferent to, and sometimes hostile to, arguments which to the mind of the profession are of substantial and preponderating weight. Evidence of the fact is that this unique situation has existed in Alberta for nearly two years without producing any noticeable expression of disaffection. The attitude of the Alberta legislature may be attributed to party politics; but it cannot be entirely discounted on that ground, for, had the situation appeared as shocking to the legislators and the public as it does to the profession, it is likely that the opposition members, few though they are, would have protested with real vigour, as they have done in respect to other matters; and that one or more of the government supporters would have "bolted". Mr. John W. Hugill, K.C., who was Mr. Aberhart's predecessor as attorney-general in the Aberhart government, sought leave, in the second session of 1938, to introduce a bill to add to The Attorney-General's Act a section providing that the attorney-general must be a member of the Bar of Alberta of at least ten years standing. That leave was refused overwhelmingly.[6] In the next session he moved a resolution that such a bill should be introduced by the government. That resolution was defeated by a vote of 42-14.[7]

It does not seem probable that the attitude of the public with respect to the question will be overcome, in this province at least, until that surest of teachers, experience, has supplied its inevitable lesson. Meanwhile it behooves the profession to be prepared to enforce that lesson by all those arguments which the law, history, and logical reasoning supply so abundantly. The problem is, it seems, open to approach from three aspects, viz., (a) The legal; (b) The traditional and customary; (c) The aspect of expediency, i.e., of the public good and welfare.

The Legal Aspect

> *"To be effective, law must not only have executive force behind it, but also the principle of judicial authority the sense in every community that individual authority has its limits, and be exerted only within the sphere allotted to it, Liberty is the child of law."*[8]

[6] See Votes and Proceedings of the Legislative Assembly, 7th sess., 8th Legislature, No. 2. See also *Constitutional Principle*, a print in pamphlet form of the speech delivered by Mr. Hugill in support of his motion.

[7] See Votes and Proceedings of the Legislative Assembly, 8th sess., 8th Legislature, No. 13.

[8] Bryce, *Influence of National Character and Historical Environment on the Development of the Common Law*, 24 L.Q.R. 9 at p. 11.

In the absence of statutory requirements, a layman attorney-general is, it seems, on indefeasible ground. The question of the right of the Crown to appoint a layman to the office does not appear to have arisen at common law; and there does not appear to be anything in our constitutional procedure to restrict the Crown, in making the appointment, to members of the legal profession. The question has been the subject of a dictum in at least one reported decision. Therein it was said: "There is nothing in the statutes that I can find requiring the attorney-general to be a barrister or a solicitor, although the holder of that office usually is a barrister."[9]

Statutory restrictions, it has been contended, are to be found in the implications of the Attorney-General's Act, R.S.A. 1922, c. 10, and in sec. 47 of the Legal Profession Act, R.S.A. 1922, c. 236. The former Act provides:

> 2. There shall be a department of the Public Service of the Province to be called the Department of the Attorney General, over which the member of the Executive Council appointed by the Lieutenant Governor under the seal of the Province to discharge the functions of the Attorney General for the time being shall preside; and the said Attorney General shall ex officio be His Majesty's Attorney General in and for the Province.
>
> 3. The duties of the Attorney General shall be as follows:
>
> (a) He shall be the official legal adviser of the Lieutenant Governor;
>
> (b) He shall see that the administration of public affairs is in accordance with law;
>
> (c) He shall have the superintendence of all matters connected with the administration of justice in the Province within the powers or jurisdiction of the Legislative Assembly or Government of the Province;
>
> (d) He shall advise upon the legislative acts and proceedings of the Legislative Assembly of the Province and generally advise the Crown upon all matters of law referred to him by the Crown;
>
> (e) He shall be entrusted with the powers and charged with the duties which belong to the Attorney General and Solicitor General of England by law or usage so far as the same powers and duties are applicable to the Province; and also with the powers and duties which belong to the office of the Attorney General and Solicitor General in respect of the laws of Canada and of the Province to be administered and carried into effect by the Government of the Province;
>
> (f) He shall advise the heads of the several departments of the Government upon all matters of law connected with them respectively;

[9] *R. v. Nyczk, supra.*

(g) He shall be charged with the settlement of all instruments issued under the Seal of the Province;

(h) He shall have regulation and conduct of all litigation for or against the Crown or any public department in respect of any subjects within the authority or jurisdiction of the Legislative Assembly;

(i) He shall be charged generally with such duties as may be at any time assigned by law or by the Lieutenant Governor in Council to the Attorney General of the Province;

(j) He shall be charged with the conduct of the matters hereinafter set forth, the enumeration of which, however, shall not be taken to restrict the general nature of any provision in this Act contained. . .

It is contended that the "true intent, meaning and spirit" of this Act is that only a member of the Bar shall occupy the office. Stress is laid on clause (a) of section 3, which says that he shall be the "legal adviser of the Lieutenant-Governor", and on clause (d), and especially on the reference in clause (e) to the powers and duties which belong "by law or usage" to the Attorney General and Solicitor General of England, it being notorious that they have always been men eminent in the profession and that that tradition has been followed without exception in all the provinces of Canada and at Ottawa.[10]

"Everybody knows that he is the head of the English Bar. We know that he has from the earliest times to perform high judicial functions which are left to his discretion to decide."[11]

"From one out of many King's counsel, the Attorney-General became the first and only King's counsel, and so head of the English Bar."[12]

The reader's receptivity to this argument will depend, of course, on his view as to the proper approach to and methods of determining questions of statutory interpretation. Much support can, no doubt, be found in established canons with respect to the construing of statutes for the view that an Act on such a subject, and so worded, should be interpreted in the light of history and custom and, therefore, that it should be held to mean in effect that the occupation of the office of attorney-general by a layman is, not merely unconstitutional in the broader of the two senses

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[10] A judicial reference to a similar Act, which has not, however, any bearing on the present enquiry, is *Cosgrain* v. *Atlantic and N.W. Ry. Co.*, [1895] A.C., 64 L.J. P.C. 88 at 95, referring to R.S.Q. 1888, which provided that the attorney-general "has functions and powers which belong to the office of attorney-general and solicitor-general of England respectively *by law or usage* in so far as the same are applicable to this province."

[11] *R. v. Comptroller-General of Patents, Ex. p. Tomlinson*, [1899] 1 Q.B. 909, 68 L.J.Q.B. 568

[12] Bellot, *The Origin of the Attorney-General*, 25 L.Q.R. 400 at p. 411.

of that term as British peoples use it, but that it is strictly speaking illegal.[13]

It is to be noted, moreover, that the statute does not expressly limit the Crown's right of appointment and the argument that it does so depends on the strength of its necessary implications. The Interpretation Act, R.S.A. 1922, c. 1, does not provide, as the corresponding Act in Ontario does, that no Act shall affect the Crown unless it is expressly stated therein that the Crown shall be bound thereby. Therefore, it is argued that the common law rule as to necessary implication applies.[14]

The argument based on the Attorney-General's Act is supported by reference to sec. 47 of the Legal Profession Act, R.S.A. 1922, c. 206, which provides:

> No member of the society shall wilfully and knowingly act as the professional agent of any person not a member of the society, or suffer his name to be used in any such agency on account of or for the profits of any person not a member of the society or do any act to enable such person to practise in any respect as a member of the society.

If, it is said, no counsel can appear in Court as agent of a person who is not a member of the Bar of Alberta, then a counsel who appears as agent for a layman attorney-general is violating the statute and his appearance should not be recognized by the Court; and, since one of the primary duties of the Attorney-General is to appear in Court personally or through his agent on behalf of the Crown, *i.e.*, in the public interest,[15] a layman attorney-general cannot fulfill his functions in conformity with said statutory provision and, therefore, his tenure of office must be held to be contrary to law.[16]

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[13] See as to "constitutional" and "unconstitutional", 2 C.E.D., (Ont.) p. 715 (n), quoting Riddell J (now J.A.).

[14] See 10 C.E.D. (Ont.) p. 263.

[15] "The attorney-general of this province is the officer of the Crown, who must be considered to be present in the Courts of the province to assert the rights of the Crown and those who are under its protection."—*Attorney General* v. *Niagara Falls Bridge Co.* (1873), 20 Gr. Ch. 34 at p. 37.

"Criminal prosecutions. . . so far as the State intervenes, are under the normal control of the Attorney-General, whose subordinate the the Director of Public Prosecutions is. *It is clearly desirable that these officers should proceed regularly with full personal responsibility.*" [Italics ours.] KEITH, THE BRITISH CABINET SYSTEM, *1830-1938*, p. 117.

Attorney-General as a party, see 3 C.E.D. (Ont.), pp. 400-402; 10 C.E.D. (Ont.) p. 247; 2 C.E.D. (Western), p. 696-7; 6 C.E.D. (Western) pp. 454-458. See also *The Attorney-General as Interpreter*, by E. E. Williams, 34 Law Quarterly Review, p. 282, discussing *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410, 81 L.J. K.B. 217, [1912] 1 Ch. 158.

[16] An interesting paradox is that while sec. 8 of The Legal Profession Act makes the attorney-general of the province an *ex officio* bencher of The Law Society of Alberta it does not seem to require him to be a member of the society. The wording of the section is: "The Attorney General of Canada for the time being and every person who has held that office and

The consequences, however, of holding that Alberta has had no attorney-general in the eyes of the law for nearly two years would be so serious and far-reaching that they would no doubt be speedily removed by remedial and retroactive legislation. The legal aspect of the situation is, therefore, in the long view an academic one, especially in those provinces where there is no legislation in the terms of or similar to the Attorney-General's Act of Alberta.

A stronger argument is that based on sections 46 and 47 of the Act. The former provides that no person who is not enrolled as a barrister and solicitor in the books of the Law Society of Alberta shall "commence, prosecute, carry on or defend any suit or other proceeding for or on behalf of any person in any Court of civil or criminal jurisdiction established by the Legislature of Alberta, except before any justice of the peace." Section 47 reads: "No member of the society shall wilfully and knowingly act as the professional agent of any person not a member of the society, or suffer his name to be used in any such agency on account of or for the profits of any person not a member of the society or do any act to enable such person to practice in any respect as a member of the society." These sections, it is contended, do in effect limit the Crown in the appointment of attorney-generals to members of the Law Society.[17] The fact that the attorney-general is a Minister of the Crown and a member of the Executive Council does not, it is argued, remove the restriction, for, whether he is or not, he is always "the King's Attorney", and it is his right and duty to function as such, and under said statutory provisions he cannot legally do so, nor be represented in the courts by an agent, unless he is a member of the Law Society. The distinction between him and other members of the cabinet, when he is a cabinet member, is that he personally acts in a professional capacity and because of his professional status. As a leader of the Alberta Bar said to the writer: "It is true that a Minister of Health may or may not be a physician, but when he is his office as minister does not call upon him to engage in the personal practice of his profession.

is a member of the society, the Attorney General of the Province of Alberta for the time being, and every person who had held that office and is a member of the society, and every person who has held the office of Attorney General of the North-West Territories, and is a member of the society, shall be *ex officio* benchers of the society; but it shall not be necessary that notice of any meeting or other proceeding be given to any *ex officio* bencher."

[17] As to the duty of the Crown and every branch of the executive to obey the law, see 2 C.E.D. (Ont.), p. 719, and 2 C.E.D. (Western) p. 34, citing *Eastern Trust Co.* v. *Mackenzie, Mann & Co.*, [1915] A.C. 750, 84 L.J. P.C. 152 31 W.L.R. 248, 22 D.L.R. 410.

It is a fallacy to confuse the position of an attorney-general as 'the King's attorney' with his administrative duties as the head of a government department. It is a fallacy, to look upon the attorney-general merely as a cabinet-minister." He may or may not be included in the cabinet.[18]

This argument, of course, leaves it open to contend that, even apart from any statutory restrictions express or implied, the Lieutenant-Governor is not free to call upon a layman to serve as attorney-general; but that contention brings us again into that very nebulous realm of the scope of the royal prerogative, a realm in which many modern Canadian lawyers are coming to feel the need for more clearly defined boundaries and bearings.[19]

TRADITION AND CUSTOM

The appeal to tradition and custom requires but little elucidation or emphasis in a law review. The public should not however, overlook the fact, as the writer will endeavor to demonstrate more fully later on, that that argument has a vital bearing on the public welfare aspect of the problem. On the other hand the lawyer needs always keep in mind that there may be said of custom and tradition what was said of rules of law by one of their greatest modern masters, whose profound and accurate legal learning, and respect for legal learning, was united with, and perhaps the basis of, his liberal philosophy in the social-political realm and his realistic theory of law:[20]

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[18] "It is not usual that either [law officer of the Crown] should be in the Cabinet, though Sir R. Isaacs and Sir D. Hogg are instances to the contrary for the office of attorney-general. . . There are advantages, it is clear, in excluding from the Cabinet officers charged with the *impartial and non-political* administration of the law." [Italics ours]. KEITH *op. cit.*, p. 244.

"The changes involved in the growth of Cabinet government have made them members of the ministry. . . and, in these last days, changes in the character of legislation, resulting from changed ideas as to the objects which the state should seek to attain, have made it necessary that the attorney-general should be a member of the cabinet." HOLDSWORTH, *op. cit.*, pp. 465-6.

In 1907, Anson wrote: "The law officers of the Crown. . . are members of the Ministry, though never of the Cabinet." THE LAW AND CUSTOM OF THE CONSTITUTION, (3rd ed.), vol. 2, p. 207.

As to the position of the attorney-general in the first quarter of the 19th century see HALEVY, *HISTORY OF THE ENGLISH PEOPLE IN 1915*, p. 54 (Pelican edition).

It is an interesting anomaly that the designation of "attorney" should now be given to the head of the Bar, since the ordinary attorneys were originally inferior professionally and socially to the barristers, see HOLDSWORTH, *op. cit.*, pp. 432-4. "Looking back we see that the attorney-general had no connection with attorneyship in its narrower sense." See Bellot in 25 L.Q.R. 410 for one explanation.

[19] As to the exercise of the prerogative by Lieutenant-Governors, see 2 C.E.D. (Ont.), and 2 C.E.D. (Western), *Constitutional Law*, pp. 721-2, and 35-6, respectively.

[20] For a criticism of the realist movement, see *Some Rationalism About Realism*, by Kantorowicz, 43 Yale Law Journal p. 1240, which, referring to

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. . . Everyone instinctively recognizes that in these days the justification of a law for us cannot be found in the fact that our fathers have always followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants. History is the means by which we measure the power which the past has had to govern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end. History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old.[21]

The words "no better reason" must be given their full weight; for it was the same liberal-realist who also said that he was "slow to consent to overruling a precedent".[22] The final word on the origin and development of the office of attorney-general is, perhaps, that which is to be found in Holdsworth's monumental work.[23] It was not, he says, till the end of the seventeenth century that the offices of attorney and solicitor general attained in substance their present shape.

> By that date they had become the legal advisers of the Crown. Either by themselves or their deputies they appeared on behalf of the Crown in the courts. As the legal advisers and deputies of the Crown they gave legal advice to all the departments of state, and appeared for them if they wished to take action in the courts. From the very earliest period in our history the king has appeared by his counsel in his courts. . . The King's attorney has become, in the sixteenth century, the most important person in the legal department of the state, and the chief representative of the Crown in the courts. . . We can see, for instance, that the work done by Coke and Bacon, in the courts and out of the courts, is in substance the same as that of a modern attorney-general.[24]

Nowhere, it is to be noted, does Holdsworth refer to an instance where the King's attorney was not a member of one or other branch of the legal profession. The reason given for the superiority attained by the King's attorney over the King's sergeants who were originally superior to him is significant.

the adherents of the movement, says: "Their senior is the 'great dissenter' Oliver Wendell Holmes."

[21] HOLMES, COLLECTED LEGAL PAPERS, p. 225.

[22] HOLMES, *op. cit.*, p. 23.

[23] "Mr. Holdsworth is telling us a profoundly interesting story. It is one of the most important chapters in the greatest human document—the tale of what men have most believed and most wanted. It is told with learning and scientific instinct and the book is to be recommended equally to philosophers who can understand it and to practical students of the law." Oliver Wendell Holmes in 25 Law Quarterly Review, pp. 412-415.

[24] HOLDSWORTH, A HISTORY OF ENGLISH LAW, vol. 6, pp. 457-462.

THE PUBLIC WELFARE ASPECT

"The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. It is true, I think, to-day in every department of the law that the social value of a rule has become a test of growing power and importance."[25] Nevertheless in considering this aspect of our enquiry the layman should not minimize the importance of tradition and custom. The presumption is that a principle which has been unquestioned over long periods of time both in British countries and in other lands in which the source of law is the English common law, must have been of real service to the public.[26] It was one of the most distinguished of the sociological school of priests who said: "We can only cling for the most part to the accumulated experience of the past, and to maxims and principles and rules and standards in which that experience is embodied."[27]

Nevertheless the fact that the attorney-general has never been other than a member of the legal profession may not seem to the layman a conclusive answer to the question: Why should not a modern attorney-general be a layman? Are not his most important duties administrative? May he not rely on his qualified technical assistants for such professional knowledge as he requires? If the First Lord of the Admiralty can be a man who because as an office boy in an attorney's firm he polished up the handle of the big front door "so carefully" that he became "the ruler of the Queen's navy," why should not a successful modern mariner (some of whom have been knighted) or a competent high-school principal hold the office of attorney-general? These we presume are the arguments that appeal to Mr. Aberhart and his supporters. Possibly they will be relied on by other provincial premiers, should the occasion to do so arise. The fact that they are really fallacious, and that they ignore not only history and general custom, but also present-day tendencies, does not make them easily answerable in a few words.

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[25] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (Yale University Press, Oxford University Press) pp. 66, 73.

[26] "The high position of the attorney-general is common in nearly all the Dominions, and is one point of contact with the practice in the United Kingdom."—KEITH, RESPONSIBLE GOVERNMENT IN THE DOMINIONS (1912 ed.), vol. 1, p. 311.

"In the United States his opinions are published by the government periodically for the use of its officials and they are frequently cited by the courts," ENCYC. BRITT., vol. 2, p. 886.

[27] CARDOZO, THE GROWTH OF THE LAW (Yale University Press, Oxford University Press) p. 141.

Probably the proper attitude for the profession to take when confronted with them to-day is to emphasize the truth that the public welfare cannot be best served if they are accepted and applied; that it is not true that the duties and responsibilities of the attorney-generalship, especially under a federal system of government, can be discharged as well by a layman as by one who is learned and experienced in the law. Party leaders now recognize that the public more and more prefers to have the highest administrative offices and cabinet portfolios held by men of training and experience in the technical subjects with which their departments have primarily to deal. Ministers of health are recruited from the medical profession, ministers of agriculture are successful farmers, ministers of defence are men of military training, the present Minister of Transport is a graduate of a famous institute of technology. Why then should the public be led to think that this tendency should be reversed in respect to the attorney-generalship?

Under a federal system of government there is even more need for professional qualification and experience in the attorney-generalship than there is in England. One of his most important duties is to advise on the validity of proposed legislation, especially in these days when the provinces are seeking to enlarge their legislative jurisdiction and the tension between Dominion and Provincial claims to legislative power is more acute than ever before in the history of the Dominion. It has long been the opinion of the writer that it is more difficult to be a really competent practitioner of the law in Canada than in any other country, whose jurisprudence is based on the English common law. He must consider not only the common law, but also Imperial and Dominion and Provincial statutes, and the decisions of eleven judicial systems (those of the nine provinces, the Dominion and England). In weighing those decisions he must consider with care the differences in the wording of the statutes on which they are based. The English counsel or solicitor has no such difficult task. There are no external statutes which affect his case, except in those comparatively rare instances where a problem of private international law arises; and only the decisions of his own Courts are binding upon him or need to be, as a rule, referred to.

If such are the difficulties of the ordinary legal practitioner in this country, those of an attorney-general in Canada are equally more onerous than the duties of the corresponding minister in England. And nobody there has ever suggested, so far as the writer knows, that a layman is competent to hold the office. The

Labour Government of Ramsay Government certainly did not do so, but appointed one of the most eminent English counsel, Sir W. A. Jowitt. Nor did the United Farmers of Alberta think they could govern the province without the assistance of a professional attorney-general; in fact, in order to obtain that assistance, they went outside the ranks of their elected members, there being no lawyers among them, and opened a seat for a member of the bar who had not been a candidate in the general election.[28] In the government of the United Farmers of Ontario it was a lawyer, afterwards a Judge, who was attorney-general.[29] It is significant too that it was because he could not conscientiously advise the Lieutenant-Governor, as his colleagues wished him to do,[30] that certain bills (afterwards disallowed)[31] would be intra vires that Mr. Hugill resigned his portfolio.

Cannot a layman attorney-general, some one will ask, obtain an opinion from his professional assistants and convey that to the Lieutenant-Governor? The answer is that, while of course he could do so, the Lieutenant-Governor has the right to the attorney-general's own conclusion. The attorney-general should not be a mere conduit of the opinions of others, and it is not possible for him to be anything but that if he is not learned in the law. In order to come to any conclusion really worth while he must have that instinct for the spirit of the law which can be acquired only from professional learning and experience, and, in order to weigh the opinions of his assistants and be qualified to discuss them and to convey the result which to his own mind follows from them he must be able to think in legal terms and to formulate his conclusions in accordance with those terms. One of the most eminent of modern legal scholars has said:

> Legal precepts have demonstrated their significance through experience of administration of justice by means of them in all lands

[28] John E. Brownlee, K.C., who was afterwards premier, 1925-1935.

[29] The late Mr. Justice Raney.

[30] The "formula" handed to Mr. Hugill by the legislative caucus of the members of his party read: "So that we may be certain of our Bills receiving the assent of the Lieutenant Governor, we suggest that the Attorney General assures us that he feels in a position on every count to recommend that the Lieutenant Governor gives his assent to every Social Credit measure or appertaining to, it has been decided to submit of which he knows." (See print of Mr. Hugill's speech). This is a correct copy of this extraordinary "formula"; its wording is not, as the reader might reasonably presume, due to any oversight on the part of the present writer, editor, printer or proof reader.

[31] The Credit of Alberta Regulation Act, 1937 (2nd sess.), c. 1. The Bank Employees Civil Rights Act, 1937 (2nd sess.), c. 2. The Judicature Act Amendment Act, 1937 (2nd sess.), c. 5. These three Acts were disallowed on August 17, 1937. See 71 *Canada Gazette*, September 11, 1937, p. 686. No reference to their disallowance is to be found in the volumes containing the Alberta statutes.

> and in all ages. Yet one need not, because he concedes their significance, confine the province of jurisprudence to systematizing and harmonizing them. The legal order is no less significant, and its historical continuity has been vindicated over and over again against attempts at *creative law making out of whole cloth.* A body of received ideals of the legal order, and of the ends of social control and of what legal precepts and their application should be, is one of the decisive factors not only in law making and in juristic thinking, but in the process of judicial decision and *administrativedetermination.* (The italics are ours.)[32]

The history of the office, its duties and responsibilities, and especially the successful operation of our federal system, afford weighty support for the view that the relationship of the attorney-general to the Lieutenant-Governor is in the nature of a personal one. The name "King's attorney" crystallizes that idea. The Lieutenant-Governor has, therefore, at least as much right to receive the personal, not the inversely delegated, opinion of his attorney as any private client has to expect the personal opinion of his solicitor rather than the transmitted opinion of one or more of the solicitor's partners or employees, even though that opinion may be the result or the amalgam of their research and points of view. Moreover it is the right and, in many instances, the duty of the attorney-general to appear in Court on behalf of the Crown. No layman can fulfill that duty with competence. "An axe is, generally speaking, a more valuable implement to man than a razor, but it is no good trying to shave with it."[33]

Another point of importance with respect to our enquiry so far as the Western provinces are concerned is the absence of a grand jury. The formal charge, which is substituted there, and now in Quebec, for an indictment, is preferred by the attorney-general or his agent.[34] A professional, as well as a lay attorney-

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[32] Roscoe Pound, *Law and the Science of Law*, 43 Yale L.J. 524 at p. 529.

[33] BUCHAN (LORD TWEEDSMUIR), HOMILIES AND REFLECTIONS, p. 218.

[34] "This power is much wider than that of a grand jury. It may be exercised without the holding of a preliminary inquiry and without any notice to the person to be charged. See *In re Criminal Code* (1910) 43 S.C.R. 434, 16 C.C.C. 459." *Maloney* v. *Fildes*, [1933] 1 W.W.R. 33, 60 C.C.C. 7, [1933] 3 D.L.R. 752 (Ford J.) (now J.A.).

It is worthy of note that in the *Unwin* and *Powell Cases* [1938] 1 W.W.R. 339, 347; 69 C.C.C. 197, 205; [1938] 1 D.L.R. 529, 535; the attorney-general declined to prefer a charge. Harvey C.J.A. said: "Defamatory libel has always appeared to partake so much of a civil character that it has been the common practice for the Crown to take no part in the prosecution other than that which is formally necessary to get the case before the Court. In this case the attorney-general *declined to take even that initial step* [italics ours] but intimated that he would not stand in the way of the private prosecutor." It is perhaps, even more worthy of note, that there was an unprecedented delay in committing the accused to jail after their convictions had been affirmed.

general, may it is true abuse this tremendous power, but is it not equally true that no man is likely to escape entirely the influence of a professional training and atmosphere. A course of conduct which might seem justifiable or excusable to the unprofessionally untrained and inexperienced mind will often seem too shocking or unprecedented for a member of the Bar to authorize or countenance, no matter how arbitrarily inclined he may be temperamentally.

The enforced resignation of many competent and conscientious police magistrates in Alberta during the past four years is an illuminating illustration, and a warning which should be heeded in other provinces. No official explanation, other than that it was "in the public interest" has been given, for instance, of the resignation required of the able magistrate who in the proper and conscientious performance of his duty committed Messrs. Powell and Irwin for trial on charges of criminal libel. The facts that they were both found guilty on jury trials, and that their convictions were affirmed on appeal are conclusive proof that their committal for trial was not merely justifiable, but unquestionably proper. Yet the layman attorney-general demanded that magistrate's resignation. Possibly a lawyer attorney-general of the same political views and temperament might have done so too, but his membership in the profession and his resulting respect for (or wish to appear respectful of) its standards and the opinion of his professional brethren would likely have caused him to feel that he should furnish an explanation more adequate than the one which was given in this instance. "The greatest dangers to liberty," Mr. Justice Brandeis has said, "are the insidious encroachments of men of zeal, but without understanding." Few men trained in the rule of law can entirely escape its beneficent influence.

Stress has been laid in this article on the importance under our federal system of the attorney-general's function as the

The fact that the executive arm of the criminal law is almost wholly under the control of the provincial government is, the writer has frequently thought, a fact which may afford some day a serious impediment to the administration of justice in this country. It is possible, in the light of occurrences during the past few years, to conceive a situation when judgments of the courts in the enforcement of the criminal Code will not be carried out, despite the penalties provided by the Code, because the officials whose duty it is to do so owe their positions to a hostile provincial administration.

"I also notice that the magistrate reserved his decision for the purpose of obtaining the opinion of the attorney-general upon the construction of the statute. Now, while the attorney-general may properly advise executive officers of the government, he cannot be appealed to for advice by judicial officers": *R.* v. *Dobie*, [1921] 1 W.W.R. 723, 29 B.C.R. 188, 35 C.C.C. 10, 57 D.L.R. 290 (per Macdonald, C.J.A.).

legal adviser of the Lieutenant-Governor.[35] His right and duty to advise the Legislature is also of very great importance. Hastily drafted Acts, unhappily worded and uncoordinated with the body of statute law, are the bane of the Courts and a detriment to the public welfare and respect for the administration of justice. The legislative draughtsmen are not to blame; they are but civil servants and are not in a position to oppose the sudden and often imperative demands of the legislators. A competent attorney-general can be of great service here. As a member of the cabinet his objections and suggestions should carry much more weight with his colleagues than those put forward by one of his staff, no matter how capable and conscientious the latter may be. "The courts, it has been wisely said, cannot do for the legislature what the legislature has failed to do for itself. . . a great deal of statute law sound in principle and bad in practice. . . being only a trap for honest men, is the worst of all forms of legislation. . . Some institution is needed in the state which will act as a buckle or a link of sympathy between the legislature and the judiciary in the way in which the cabinet, for example, acts as a buckle or link between the legislature and the executive under the British system of parliamentary government."[36]

May we not suggest that the attorney-general, provided he have the necessary training, ability and the will to serve, can and should be that link. No layman, however, is able to give that service to the state. No layman can supervise properly the work of his department in this respect or be able to guard against or remedy haste and inefficiency. Even the learned attorney-general can do so only partially, but he, at least, can do what the layman cannot do, envisage the ideal at which he should aim, and, "without ideals what is life worth? They furnish us our perspectives and open glimpses of the infinite. It often is a merit in an ideal to be unattainable. Its being so keeps forever before us something more to be done, and saves us from the ennui of a monotonous perfection."[37]

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[35] "A distinction is to be made between the department of the attorney-general and the attorney-general. . . (and) a distinction should be made between those functions which the attorney-general is called upon to exercise as such, as defined specifically in *The Attorney-General's Act*, R.S.M. 1913, c. 14, and those functions which he is called upon to exercise before the courts where a case arises to enforce the rights or prerogatives of the Crown." —*Rex* v. *Hammatt* [1926] 3 W.W.R. 350 (Lacerte, P. Mag.).

[36] Address by Ira A. MacKay, LL.B., Ph.D., delivered to the Law Society of Alberta, at Calgary, December 18, 1913.

[37] HOLMES, *op. cit.*, p. 243.