

## HON. WILLIAM A. HENRY

FIRST JUDGE FROM NOVA SCOTIA ON THE BENCH OF THE  
SUPREME COURT OF CANADA \*

Among Nova Scotia's "Fathers of Confederation" after Hon. Dr. Tupper, none was more prominent or took a larger part in the deliberations leading up to Confederation than Hon. William A. Henry. He was present at the Charlottetown and Quebec Conferences and, after the latter, accompanied the delegates from the Maritime Provinces upon their junketing expedition to "sell"—to use the up to date expression—Confederation to Canada. He was one of "the sixteen scamps with the Treasuries of three Provinces in their hands", as Howe described them, who went to London in 1866 to assist in the drafting of the necessary legislation. Yet nothing has ever been written of him and no recognition was ever made of his services for Confederation. The other delegates had been rewarded.<sup>1</sup> McCully became a Senator and afterwards a Judge; so did Ritchie,<sup>2</sup> who was not a delegate either to Charlottetown or Quebec;<sup>3</sup> Archibald was a Senator and later Lieutenant-Governor successively of Manitoba and Nova Scotia; and Dickey<sup>4</sup> who was not in London was made a Senator. Henry, despite his greater claims, was overlooked. A sketch of his life and some appreciation of his services seems to be suggested. Save for an amusing, but not altogether unkind, reference to him in Sir Robert Borden's *"Memoirs"*,<sup>5</sup> I know nothing that has been written about him since his obituary notices.

William Alexander Henry was born at Halifax on the 30th of December, 1816. His father Robert Nesbit Henry, son of a

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<sup>1</sup> Hon. Jonathan McCully, Member, Legislative Council, 1848-67; Solicitor-General, 1860-62; Senator, 1867-70; Judge, Supreme Court of Nova Scotia 1870-77.

<sup>2</sup> Hon. John Wm. Ritchie, Solicitor-General and Member, Legislative Council 1864-67; Senator, 1867-70; Judge, Supreme Court, 1870; Judge in Equity 1873-82.

<sup>3</sup> Hon. Adams G. Archibald, Member House of Assembly for Colchester County 1857-67; Solicitor-General 1856; Attorney-General 1860; Secretary of State with seat in Senate 1867-70; Lieutenant-Governor of Manitoba 1870-73; Lieutenant-Governor of Nova Scotia 1873-83; Member House of Commons Colchester County 1888-91. President, Nova Scotia Historical Society 1885.

<sup>4</sup> Hon. Robt. B. Dickey, Barrister, Member Legislative Council 1858-67; Senator 1867-1903. The late Mr. Justice T. Sherman Rogers whose connection with the Dickey family extended over a long period and was of the most intimate character, is my authority for saying that Dickey would have been Lieut.-Gov. of N.S. if he would have contributed to the election funds.

<sup>5</sup> "MEMOIRS OF ROBERT LAIRD BORDEN" Vol. I, p. 25.

Presbyterian clergyman in the North of Ireland, came to Halifax some time about 1812 and set up in business there. He soon married a widow, Margaret Forrestral, owning much and valuable property in Antigonish to which place they very soon moved and there spent the rest of their lives. William was their first-born. There was then no such educational institutions as now make Antigonish famous; but there was a scholarly Presbyterian minister, the Rev. Thomas Trotter<sup>6</sup> who was glad to give instructions to "lads o' pairts". To him young Henry went and to him he owed his education. He spoke and wrote as an educated man. Latin maxims and Latin phrases were part of the stock in trade of his generation of lawyers but Henry used them more freely than most and as if he were the master of them, not the slave to them. He studied law in the office of Hon. Alexander MacDougall<sup>7</sup> and was admitted to the Bar on November 30th, 1841. A month before, he had been elected to the House of Assembly as one of the members for Sydney County—his half-brother Richard Forrestral being the other. It may have been with Mr. MacDougall's blessing and approval that Henry, not himself, was elected in 1841, but I am afraid it was not. I am afraid that Henry "stood beside the way of the gate and stole the hearts of the men". When elected he was the youngest member in the House, and in 1867 when he left it, was in point of length of service the oldest. Two years later when Hon. Mr. Johnston,<sup>8</sup> seeing an opportunity to defeat Howe<sup>9</sup> on the one college question, sprung an election, Henry was defeated—his only defeat in a quarter of a century. In the general election on August 15th, 1847, he was returned and at all elections thereafter till 1867. That is to say, in 1851, 1855, 1859 and 1863, he did not, in singular contrast to his later experiences, know what defeat was. In the election of 1847, the Tories were defeated and a Liberal Government lead by Hon. James B. Uniacke<sup>10</sup> succeeded. This Govern-

<sup>6</sup> Rev. Thomas Trotter, Presbyterian minister of Antigonish 1818-58. Mr. Trotter published three learned works: "A Lecture on Mineralogy"; "A Treatise on Geology" and "Letters on the meaning of *Baptizo* in reply to the views of the Rev. Charles Tupper"; but in later life was much more proud of the editorials he had written for the radical paper of those days, *The Colonial Patriot*, which had driven officialdom into impotent rage.

<sup>7</sup> Hon. Alexander MacDougall, Poet, Member for Sydney i.e.: the Counties of Guysboro and Antigonish 1837-41; afterwards in Legislative Council, some time Solicitor-General.

<sup>8</sup> Hon. James William Johnston, too well known to require notice.

<sup>9</sup> Hon. Joseph Howe, too well known to require notice.

<sup>10</sup> Hon. James B. Uniacke, son of Hon. R. J. Uniacke, Attorney-General 1797-1830. Member Legislative Assembly for County of Richmond. At first a high Tory but afterwards allied himself with Howe and the Reformers. Premier, 1847-54 or until his health failed. Howe's wonderful eulogy of him is well known:

ment was handsomely sustained at the election of 1851 and carried on until 1854 when, the leader's health having failed him, he retired. Young, afterwards Sir William Young, Chief Justice of Nova Scotia, took his place, re-organized the Government and selected Henry for his Solicitor-General and Hon. Lewis M. Wilkins<sup>11</sup> for Provincial Secretary. After the session of 1856, Wilkins was appointed to the Supreme Court Bench and Henry took his place as Provincial Secretary and A. G. Archibald became Solicitor-General.

Then came Howe's sordid and inglorious quarrel with the Catholics. Henry was one of the ten<sup>12</sup> who crossed the floor of the House and allied themselves with the opposition to defeat the Government on Johnston's non-confidence motion in the winter session of 1857. It is easy to assume that Henry transferred his allegiance from no good motive but because the electors of Antigonish County were about seven-eighths Catholic and he was afraid of losing their support. There can be no positive proof they would not still have supported him even had he voted with the Government on the non-confidence motion. He could at least have counted upon the support of *The Casket*, then as now the official organ of the Hierarchy of Antigonish, which had taken strong ground that no one should oppose the Government because of any action or words of Howe since he was not a member of the Government, and the Government was not in any way responsible for what he did or said. I cannot deny that Henry may have been influenced by considerations of political expediency but I believe he had another and better reason for his course. His mother was a Catholic; his only sister was a Catholic; he himself was baptized a Catholic, and he was not the man to hear or read Howe's furious attacks on the faith of his mother and sister without deep resentment. Then, too, himself a member of the Government, he knew that it only danced as Howe pulled the strings. Immediately after the non-confidence motion, Young resigned and Hon. James W. Johnston was called upon to form a Government. He did so with himself as Attorney-General

<sup>11</sup> Hon. Lewis M. Wilkins, Member Legislative Assembly 1834-37 and 1853-56. Member Legislative Council 1837-44. Judge Supreme Court 1856-78.

<sup>12</sup> These men were Thomas Fuller, Richmond County; John Tobin, Halifax City; Peter Smyth, Inverness County; Henry Martell, Arichat Township; Francis Bourneuf, Digby County; Maturin Robichaud, Clare Township; John McKinnon, Antigonish County; James McKeagney, Cape Breton County; John C. Wade, Digby County; and William A. Henry, Antigonish County. All but the last two named were Catholics. Wade and Henry were Protestants but a very large majority of their constituents were Catholics.

and the redoubtable Dr. Tupper<sup>13</sup> as Provincial Secretary. In the election of 1859, the Johnston Government was defeated and Henry for four years was in opposition. Young formed a new Government but soon abandoned politics to become Chief Justice and Howe, for the first time, was Premier. His majority was never more than three but he held on until by efflux of time he had to go to the country. In 1863, his Government was defeated at the polls and Johnston returned to power. As before, Johnston was his own Attorney-General; Henry became Solicitor-General. In the next year, Johnston was made Judge in Equity and Henry became Attorney-General. As such, he accompanied Tupper to England in 1865 on business connected with the construction of the Intercolonial Railway, or that part of it between Truro and New Brunswick. They succeeded in making a contract, afterwards cancelled because of the failure of the contracting party to carry out its terms. If not conspicuously successful in their business, they at least had a real good time; were presented to the Queen, lunched with Miss Burdett-Couts when another guest was the "quite pleasing and very pretty" Queen Emma of Honolulu.<sup>14</sup> In the same year, Henry took Tupper's place in a united delegation from all the Provinces to Washington to make an effort in favour of continuing the Reciprocity Treaty of 1854.

All through the negotiations leading up to Confederation, he played a prominent part—the most prominent part of any of the delegates from Nova Scotia excepting only Tupper. He was present at the Charlottetown and Quebec Conferences, and was one of the "four lawyers and a doctor" who went to London to secure the necessary legislation. There is a tradition held strongly in Nova Scotia at least that he and Ritchie drafted the British North America Act—the Confederation Act so called. It is easy to understand how the tradition, if it be nothing more than a tradition, arose. The Nova Scotia delegates were in London for four months—from July 28th until November 30th—before the delegates from Canada arrived. They had the Resolutions of the Quebec Conference and knew that these were to be regarded as an inviolate compact that the legislation to be obtained must strictly follow. McCully and Archibald were otherwise engaged. Each while in England wrote and published a pamphlet on the Confederation issue in reply to similar pamphlets published by Annand<sup>15</sup> and Mac-

<sup>13</sup> Hon. Dr. Tupper afterwards Sir Charles Tupper, too well known to require notice.

<sup>14</sup> SAUNDERS, *LIFE OF SIR CHARLES TUPPER*, Vol. I, p. 119.

<sup>15</sup> Hon. Wm. Annand, too well known to require notice.

Donald<sup>16</sup> of the "People's Delegates". What more natural and likely than that Henry and Ritchie should occupy their leisure in preparing and having ready the draft of an Act for the time when all the delegates had come and the deliberations begun?

For my own part, after some research, I am satisfied the tradition is true in substance and in fact; that Henry and Ritchie did draft the original Act and that that draft is in Henry's hand-writing. The first full meeting of the Delegates in London was held on the 4th day of December, 1866. To this meeting was presented a series of Resolutions<sup>17</sup> which were, through all following sessions, discussed and considered. They are the foundation for the Act and may very appropriately be considered as the preliminary draft of the Act. The original of these resolutions is on file with other papers of Sir John A. Macdonald in the Public Archives at Ottawa. Through the kindness of my good friend Mr. Alvin F. MacDonald, a member of this Society and of the Archives staff, I have had a photostat made of the opening paragraphs, and comparing it with letters of Henry to my father, now in my possession, I feel sure they were written by same hand. But even if I am mistaken on this point, there still remains sufficient proof, I think, that he was one of two who made the first draft. In the 1886 edition of Rose's "Representative Canadians, An Encyclopaedia of Canadian Biography", *sub nomine* William Alexander Henry, it is stated that at the London Conference 1866 "he was one of the two members who framed the original draft of the British North America Act". This is, of course, only secondary authority although it is notorious that the notices in Rose are autobiographical rather than biographical; in other words, were written by the persons themselves. The same or very similar statements were made at the time of Henry's death in at least three leading newspapers.<sup>18</sup> There were then living quite a number of the delegates to London, some of whom would have been

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<sup>16</sup> Hon. Hugh MacDonald, M.L.A. for Inverness County 1859-63; M.P. Antigonish County 1867-73. President Privy Council June 14th, 1873. Minister of Militia August 13th, 1873; Judge Supreme Court of Nova Scotia Nov. 5, 1873. Later on in this paper, further mention will be made of him. If Pope's "Life of Sir John A. Macdonald" is correct, Judge MacDonald was appointed the day *after* the Government of Sir John A. had resigned. See Pope Vol. II, pp. 193 & 195. Judge MacDonald proved himself to be a sound and capable judge, well grounded in the principles of law. When, after twenty years of good service, he resigned, it was Henry's son, Hugh MacDonald Henry, who was appointed in his place.

<sup>17</sup> These Resolutions will be found in Pope's CONFEDERATION DOCUMENTS, at p. 98.

<sup>18</sup> *Morning Chronicle*, Halifax; *Free Press*, Ottawa; *Empire*, Toronto.

certain to come forward to correct the statement if it were not true. That no one did so convinces me that what I have been calling a tradition should no longer be so regarded but accepted as an established fact.

The British North America Act, the outcome of the London deliberations, passed as we all know, on March 29th, 1867, despite the gallant, nay, herculean labours of the "Peoples Delegates" Howe, Annand and MacDonald, and Confederation was assured. Henry, with the other delegates from Nova Scotia, came home to face the "party of punishment". The result is well known. The defeat of the Confederates lacked little in its completeness. Henry fell with the rest. His opponent was Hugh MacDonald, a former law student of his who had represented Inverness County between 1854 and 1863 and had refused to become Solicitor-General under Howe in 1862. In 1863, he had run for Antigonish in a three-cornered fight in which there was no question of party, for all three candidates Henry, McKinnon and MacDonald, were opposed to the Howe Government. On nomination day, Henry complained of MacDonald entering the contest—said he should have stayed in Inverness to fight Blanchard and that he (Henry) would rather be trying to get votes for him in Inverness than trying to prevent him getting votes in Antigonish. I wonder if, when his old student opposed him, he recalled the time when he had ousted the man whose student he had been. Henry and Mackinnon were elected, Henry leading the poll. It was very different in the Confederation election. MacDonald polled 1,238 votes; Henry 390. It was in the days of open voting and the result being known early, the "Antis" made no effort to muster their full strength.

Henry's head may have been bloody but it was unbowed. A vacancy occurred in Richmond County by the death of William Joseph Croke, a young English barrister who, coming out here to do work more especially in the Admiralty Court, had joined up with the "Antis" and was elected in Richmond County. Henry became a candidate and was defeated by the Hon. Isaac Levisconte, a former colleague in the Government formed by Johnston in 1863. The vote was 555 for Levisconte and 345 for Henry. He did not run in the general election of 1872. At the bye-election that followed the appointment of Hon. Hugh MacDonald to the Bench, he made one more attempt to enter the Federal Parliament but was again defeated

—this time by another young lawyer Angus MacIsaac<sup>19</sup> who had the comfortable majority of 382—MacIsaac 960, Henry 578. This was his last election; one wonders why he ran for, by that time, he had been ten years out of the County and had lost touch with the electorate. Immediately after his appointment as Attorney-General, he had moved with his family to Halifax and was soon recognized as the leading lawyer in the Capital. But there was more than that. Except on the Confederation issue, Henry felt himself more at home with the Liberal or Reform Party than with the Government. Now that that issue was solved and out of the way, there was no difficulty in his returning to his former allegiance.<sup>20</sup> He had never come under the spell of Sir John A. Macdonald—did not indeed like him personally and failed to appreciate his great gifts and his many fine qualities; and when the Pacific Scandal came, that regard for integrity and honesty which he had maintained throughout his whole public career, caused him to revolt and withdraw from all support of those he deemed guilty of it.<sup>21</sup> He saw that such proceedings would damage or destroy Confederation. If the attempt to unite the Provinces were to succeed, if the opposition to it was to be soothed, a first requisite was common honesty on the part of men to whom were entrusted our public affairs. The last stroke necessary to complete the severance between him and his party was the appointment to the Bench of Hugh MacDonald. He had expected, nay, had counted upon that appointment for himself. Judge MacDonald, as already mentioned, had been a student of his and had nothing like Henry's standing or reputation as a lawyer. Henry had seen two of his fellow delegates to London appointed to the Bench, a third made a Lieutenant-Governor, and a fourth, a Senator, but nothing but defeat after defeat had been his portion; and now a man who had gone to London with Howe in opposition to Confederation, received a position which he coveted, for which by his qualifications he was

<sup>19</sup> Angus MacIsaac M.P. Antigonish County 1873-85: appointed Judge County Court for District No. 6 in 1885; died June 12th, 1902.

<sup>20</sup> Information from my father the Rev. George Patterson, D.D., LL.D., the historian of Pictou County. He and Henry were brothers-in-law, and though as unlike in character and endowment as two men could well be, were great friends.

<sup>21</sup> I am aware of the apparent inconsistency here. The Pacific Scandal was known to the people of Canada before November 1873 when the by-election was held and Henry seemingly was running in support of the Government guilty of it. But that was not really the position. The Pacific Scandal was not made an issue, but Confederation was. MacIsaac ran, not so much as being opposed to the Government, but as the natural and legitimate successor of Hugh MacDonald who had been elected as an Anti-Confederate and his support came from the Anti-Confederates.

entitled, and which by his services he had earned. It was too much. Human nature could not stand it, and from that time, he broke away from the Confederates or Conservatives and allied himself with the Antis or Liberals as the parties were coming to be called. The late Judge Russell<sup>22</sup> then an active young Liberal in Halifax once wrote me that "he could not remember the exact time when Henry came over but that the Liberals liked him very much and were glad to have him with them". In the federal general election on February 1874, Henry himself did not run but it was known where his sympathies lay.

By this time, the Local Government which had been from 1867 but more especially from 1874, a mere negation, was breaking up. Its leader was Hon. William Annand; he was old, tired and wanting to retire. Garvie<sup>23</sup> was dead. Wilkins<sup>24</sup> disappointed at not being made a Judge, had fallen upon the cushion of the Prothonotaryship at Halifax. Hon. Dan McDonald<sup>25</sup> was sulking in his tents at Antigonish. Vail<sup>26</sup> who had lead the House of Assembly during the sessions of '72, '73 and '74, had been taken to Ottawa. A strong man was required in his place and Annand thought to find him in Hon. P. C. Hill. A more amazing choice was never made in the political history of any country. Hill had been Provincial Secretary in the short-lived Blanchard Government that took over from Dr. Tupper on July 1st, 1867. He ran in Halifax as a Confederate in 1867 and 1871 and was beaten. In 1871 and for some years

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<sup>22</sup> Hon. Benjamin Russell, M.P., Halifax County, 1896-1900; M. P. Hants County 1900-04. Judge Supreme Court Nova Scotia 1904.

<sup>23</sup> Hon. Wm. Garvie, one of the Secretaries of the Anti-Confederation League. Scotsman. Came to Halifax in 1855. Started along with E. M. MacDonald *The Citizen* newspaper in Halifax. Edited it until 1866 when he went to London to study law. Returned to Halifax in 1869 and at once attained leading position at Bar; M.P.P. Halifax 1871. Commissioner of Works & Mines 1871-72. Died 1872.

<sup>24</sup> Hon. Martin I. Wilkins, son of Judge Lewis Morris Wilkins and brother of (11); M.P.P. Pictou Township 1851-59. Solicitor-General. In his early political life a Conservative. Strongly opposed to Confederation. M.P.P. Pictou County as an Anti Confederate 1867-71. Attorney-General 1867-71. Appointed Prothonotary at Halifax 1871. Now chiefly remembered by Howe's gibe "that as Prothonotary he would be swearing others to do what he never could do himself—tell the truth".

<sup>25</sup> Hon. Daniel MacDonald, M.P.P. Antigonish County 1867-78. Commissioner of Works & Mines 1872-75. Attorney-General January to November 1875. Many years after was for one session a member of the Legislative Council.

<sup>26</sup> Hon. W. B. Vail M.P.P. Digby County 1867-74. Provincial Secretary for same period. Leader of the House, Sessions of 1872, 73 and 74. Minister of Militia 1874-78. A very able man but like Napoleon and Byron not, or so it was alleged, a good speller. The opposition newspapers would playfully account for a bad spell of weather by the presence in the City of the Provincial Secretary.



before he was the general adviser of the Federal Government in the distribution of patronage in Halifax City and County; and on one occasion when a job was in contemplation, Tupper had wired a friend "Anything that Hill undertakes to do, I will undertake to carry out". I refer to this incident with no desire to revive a moth-eaten scandal that was threshed out in Parliament and on many platforms as well; but to show Hill's standing in the Conservative Party. At an election in Halifax in 1873 he was elected, and for part of one session or until he was unseated, he was the leading critic of the Annand administration. This was the man to whom Annand, for reasons never apparent, offered the position of Provincial Secretary. The offer was accepted and Hill was sworn into office on December 1st, 1874. The House was dissolved; a general Provincial election was held on the 17th of the same month and the Liberals returned but with a majority largely reduced. Annand retired in May, 1875. Hill became leader in his stead and carried on until the Liberal *débacle* of 1878.<sup>27</sup>

That is what I might call the official, rather I should say, the usual version of Hill's conversion and acceptance of office as a Liberal. Henry told my father a very different story of the transaction which Judge Russell in a letter to me has confirmed. According to Henry and Russell there was, by 1874, a general feeling among the Liberal rank and file that the Government was moribund and that a new leader should be chosen to infuse life into it. Henry was the man to whom their hearts turned. There was then no such organizations as we have now to make a choice of leaders and there was one man in the councils of the Liberal Party who had determined that Henry should not be the leader—A. G. Jones<sup>28</sup>, whose career was strikingly like that of Hill's. He had been a strong Conservative and one of Tupper's warmest and most intimate friends until they parted over the Confederation issue, and was for some reason, that if told me I have forgotten, bitterly opposed to Henry and found Annand willing to aid and abet him. After the Federal election in February 1874, there were in Nova Scotia at least five election petitions. These were not heard by the regular Judges as now; but by Judges specially appointed

<sup>27</sup> See article by late Judge Longley then Attorney-General on "*Premiers of Nova Scotia since 1867*" in Canadian Magazine for May, 1897.

<sup>28</sup> Alfred Gilpin Jones, M.P. Halifax County, 1867-72, 1874-78, 1887-91. Minister of Militia 1878. Lieutenant-Governor of Nova Scotia 1900-06.

to hear them—Judges *ad hoc* as they were called.<sup>29</sup> The Mackenzie Government then in power at Ottawa, appointed as *ad hoc* Judges: Henry, Alexander James,<sup>30</sup> and James William Johnston.<sup>31</sup> While Henry was engaged in Sydney hearing the petition in Cape Breton County, Jones, so Henry always insisted, induced Annand to effect a small *coup d'état*. Hill was sworn in as Provincial Secretary on December 1st, 1874, and an election held on Dec. 17th, nearly a year before there was any need. Henry was thus effectively shut out from recognition and leadership.

Time very soon brought revenge and Henry had not long to wait for an advancement much more to his liking. In 1875, appointments were being made to the Supreme Court of Canada then being constituted. A Judge was wanted from Nova Scotia. Jones was not yet a Cabinet Minister, but as representing the metropolitan County, he had great influence with the authorities. It was all cast against Henry. Jones' candidate was a highly respectable member of the Halifax Bar. Beyond the limits of Halifax, he was unknown and in Halifax, known only to a select few. It is said—the late Judge Russell is my authority—that Hon. Edward Blake, who was the Minister of Justice, was so worried between the claims of Henry and Jones' nominee that he sent an emissary to Halifax to make enquiries as to their respective merits. That emissary reported that Jones' man rarely went into Court; but that once he had defended a man accused of murder. His client was convicted, and it was found the lawyer had a mortgage on his place. Henry received the appointment. His Commission was dated October 8th, 1875.

I will not, I think, be accused of exaggeration when I say that at that time he was the outstanding lawyer in Nova Scotia; one of the best *nisi prius* men we have ever had. He had a very quick, alert and vigorous mind; a never failing tact and skill in dealing with witnesses; a great readiness in speech; a keen sense of humour that always appealed to juries and a

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<sup>29</sup> Though Henry acted as one of these Judges he later on in his judgment in *Valin v. Langlois*, 3 S.C.R. at p. 70 says "he was not insensible to the objections which might be raised to such a tribunal".

<sup>30</sup> Alexander James, Judge Supreme Court Nova Scotia, 1877. Judge in Equity 1882-89.

<sup>31</sup> James William Johnston, son of the great James William Johnston for so many years leader of the Conservative Party in Nova Scotia, Judge County Court Dist. No. 1, 1876. It is rather co-incidental that the two sons of the Hon. James William became stalwart Liberals. One of them, William A. ran in an election but was defeated. But for his untimely death, he would have gone far in law and politics.

knowledge of human nature that made him at home with them; and it must be remembered that in his time almost every suit was tried with a jury. He was never a great student, but with his immense and varied practice he had acquired a splendid working knowledge of law. Possibly he did not shine on appeals as on trials; nevertheless, the Judges recognized his ability and respected his argument even though not agreeing with it. His strong mind easily acquired an influence over the weaker minds of some of the members of the Bench and there are stories to the effect that this influence was at times improperly used. Of a different kind is a story told me by the late Lieutenant-Governor James D. MacGregor. When a young man, he became involved in serious litigation—perhaps “the first great cause least understood”. Henry was his lawyer. On the trial before Judge Dodd, his charge to the jury was so confused and unintelligible that the jury, having no proper direction, decided against MacGregor. On appeal the case was sent back for a new trial. This time Judge Ritchie was on the Bench. When it came to Henry to address the jury, he, to MacGregor’s horror, announced that he did not propose to address them but would leave the matter in his Lordship’s hands. MacGregor strongly remonstrated. “Don’t worry,” said Henry, “this fellow (Ritchie) knows his business; the other fellow (Dodd) didn’t.” Sure enough under Judge Ritchie’s direction the jury found in MacGregor’s favour and there was no appeal.

The law is notoriously a jealous mistress; and Henry gave her cause for jealousy. He was a great sport, never so happy as when on horseback and rarely did he walk without a dog following him. He was active in the militia. So early as 1834 he was Captain of the Ohio Company of the 2nd Battalion, Sydney County Regiment of Infantry, and rose to be the Lieutenant-Colonel of the First Antigonish Regiment and held the position until his removal to Halifax. He was the first President of the Antigonish Curling Club in 1857–58. In Halifax, he was for one year (1870) Mayor and for two years, 1873 and ’74, President of the Charitable Irish Society.

In personal appearance Henry was as Hamlet’s father :

A combination and a form indeed  
Where every god did seem to set a seal  
To give the world assurance of a man.

He stood over six feet in height and, never stout or gross, was exceedingly well built. I do not know his exact weight

but I remember seeing him sit on a fancy chair my mother had in her drawing room. He crashed through it as if it were paper and brought up with a joke on the floor. Whidden, the writer of that wholly admirable "*History of the Town of Antigonish*", who is one of the very few men left who can remember him before he removed to Halifax, writes:<sup>32</sup> "Those who remember W. A. Henry when he lived in Antigonish . . . can see him in their mind's eye with white riding gloves and riding crop and an Irish setter at heel or accompanied by a beautiful pair of hounds, a typical Irish gentleman."

Of his work as a judge I hesitate to write. Sir Robert Borden has written of him:<sup>33</sup> "Nova Scotia had sent (*i.e.*, to Supreme Court of Canada) William A. Henry, an able man but not a great student. He was of powerful physique, a thorough sport, an inveterate card player and a great lover of horses." Although not unkindly meant, I do not think the quotation does justice to Henry. Since reading it, I have gone carefully through two volumes of the Supreme Court of Canada Reports (and believe me, it is no old man's job to go through even one volume—the judges of that period wrote their decisions at such appalling length) and was astonished to find how persistently diligent Henry had been about his work. He had sat on the hearing of every single appeal. Very, very seldom does he do as the idle judge is prone to do, accept the decision of one of his brethren as his own. In practically every case, he writes his own decision, follows his own line of reasoning and, I am bound to say, that to me, most of them show signs of careful preparation. He frequently dissented; a number of cases in which he did so went to the Privy Council and it is remarkable how often his dissenting judgment was followed and adopted in that Court. I shall refer to only two. In the litigation arising out of the Dominion License Act of 1883, generally called the "McCarthy Act", he held contrary to the opinion of every one of his brethren, that the Act was *ultra vires* the Federal Parliament. The Privy Council held Henry to have been right—the rest of the Court wrong. Earlier in the *City of Fredericton v. The Queen*, 3 S.C.R. 505, the Supreme Court of Canada held the Canada Temperance Act or "Scott Act" was *intra vires* the Parliament of Canada. Henry strongly dissented. That case went no further but the same question arose in *Russell v. The Queen* (1882), 7 App. Cas. 829, and the Privy Council followed the decision of the Supreme Court in

<sup>32</sup> HISTORY OF TOWN OF ANTIGONISH, by D. G. WHIDDEN, p. 102.

<sup>33</sup> "MEMOIRS OF ROBERT LAIRD BORDEN", Vol. I, p. 25.

the *City of Fredericton Case*; that is to say, they held the "Scott Act" to be *intra vires* the Federal Parliament. Long after, the Privy Council in *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 had occasion to reconsider *Russell v. The Queen*. It was not for them to over-rule it; that is not done, but they point out in unmistakable terms that it was wrongly decided. Thus, after many years, Henry's dissenting judgment was held by the highest Court in the realm to have been right.

For thirteen years Henry sat on the Bench. For a large part of that time his work was highly creditable to himself and the Bar where he had been trained, but in the later years, although not an old man, he was showing the effects of the strenuous, not to say, careless life he had lead. Sometime in the mid eighties, he had diphtheria; there was no antitoxin then and he lay at death's door for weeks. His great strength enabled him to pull through, but he was never the same man again. The end came on May 3rd, 1888.

But it is not upon his work as a judge that Henry's chief claim to remembrance and recognition rests; it is upon the public services rendered before he became a judge. First elected to the House of Assembly in 1840, he immediately associated himself with the Liberal or Reform party and, with Howe, the Youngs, Doyle, Huntingdon and Annand, shared in establishing responsible government in Nova Scotia. In all the struggles of the years following, resulting in the change in our Provincial constitution and the sweeping away of old abuses, he bore an honourable part. It was his shaping hand that lead to measures for the protection of the fisheries at the Gut of Canso and other Nova Scotian waters from the inroads of American fishermen; and that secured for the Province as complete a system of telegraphs as existed in any part of the Continent. In the face sometimes of stubborn opposition, he effected important legal reforms. He carried through the House the resolutions under which the second and greatest revision of the Statutes was prepared. Later on, he had much to do with the passing of the Free School Act. It was well known that the Catholics feared the effect of the Act upon their right to the education of their children. A Protestant himself, Henry represented a constituency seven-eighths Catholic. A colleague, Hon. Isaac Levisconte, was in much the same position; that is to say, a Protestant representing the Catholic County of Richmond. He moved two amendments to the Act which caused Tupper to say he would rather burn his Bill than accept them. Henry made no such

demonstration. He quietly saw to it that the rights of the Catholics were preserved without the essential principle of the Act being destroyed. Later still, as we have seen, his work in the negotiations leading to Confederation was of the greatest importance. More than any other of the delegates to London, he was responsible for the form of the British North America Act. Whatever opinion we may have of that measure, none can deny the remarkable ability shown in its drafting or the amazing skill that took the hastily-drawn conclusions of the Quebec Conference and cast them into statutory form; and doing it so well that in spite of changing conditions and new experiences, it has remained to this day the instrument by which the people of Canada are governed.

GEORGE PATTERSON.

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