Richard Gibbons' "Review" of the Administration of Justice in Nova Scotia, 1774

BARRY CAHILL*

In August 1774 lawyer Richard Gibbons wrote from Halifax to his patron, Lord William Campbell, the former governor, enclosing a "little Treatise" on the administration of justice in Nova Scotia.[1] "The following Sheets," wrote Gibbons:

> were the production of Many Years' Observation and Attendance upon the Courts of Justice in this Province, and were wrote as they Occurred in my Course of Practice at the Bar. Many are the Complaints which have been made to me from my Clients and others in the Country, of Injuries received in the County Courts and some have fallen within my Own Observation, Most of which were remediless from the Poverty of the Parties, or want of a proper and legal Mode of Redress, and many Similar Cases have happened even in the Courts at Halifax.[2]

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*Manuscripts Archivists at the Public Archives of Nova Scotia and Editor of the *Nova Scotia Historical Review*.

[1]Dartmouth Papers: MG 23 A 1 at 2740 ff., National Archives of Canada (NAC) [hereafter *Gibbons*, and parenthetically within text]. The treatise was transcribed for "Nova Scotia A" and is calendared in *Report on Canadian Archives* (1894) 320. The transcription was read by J.B. Brebner, who both quoted from and described the treatise as a remarkable memorandum: *Neutral Yankees of Nova Scotia: A Marginal Colony during the Revolutionary Years* (1937) (Toronto: Carleton Library Reprint, 1969) 76, 217. Brebner apparently did not know that the original was in the Dartmouth Papers. Gibbons' treatise was also quoted by S.E. Oxner, "The Evolution of the Lower Court of Nova Scotia," in J.A. Yogis *et al.*, eds., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984) 67-68 — not only inaccurately but also misleadingly, because the passage in question (2747) concerns justices of the Inferior Courts of Common Pleas, not justices of the peace *per se*. Gibbons' treatise was even known to Thomas Chandler Haliburton, whose account of the establishment of the courts of common law borrows liberally from it (2743 ff.): *An Historical and Statistical Account of Nova-Scotia* (1829) (Belleville: Mika Reprint, 1973) I at 163-65. Haliburton combined unacknowledged paraphrase and verbatim quotations.

The author gratefully acknowledges the assistance of Patricia Kennedy (Chief, Pre-Confederation Archives, NAC), who generously provided a photocopy of the complete text of Gibbons' treatise, without which parts would have been quite illegible.

[2]*Gibbons* at 2740: Gibbons conspicuously addresses Lord William Campbell as if he were still Governor of Nova Scotia.

Such was the origin and *raison d'être* of Gibbons' pioneering treatise on Nova Scotian jurisprudence, the earliest and also the most substantial work of its kind until Beamish Murdoch's celebrated *Epitome of the Laws of Nova-Scotia* nearly sixty years later.

At the end of 1774, the last full year of peace before the outbreak of the American Revolution, the members of the Halifax bar — there were no lawyers elsewhere in the province[3] — could be counted on the fingers of one hand. Dean as well as *ex officio* head of the bar was Attorney-General William Nesbitt, who had come out with Governor Edward Cornwallis as "Governor's clerk" and had been principal law officer of the Crown for twenty-one years. Closest in seniority to Nesbitt was Daniel Wood, the only "attorney" among the founders of Halifax. Next in order of precedence were the present and former Solicitors-General: James Monk and James Brenton. Monk, a former clerk of the Crown, had recently returned from three years' study of law at the Middle Temple of the Inns of Court with a mandamus as solicitor-general. Brenton, a Rhode Island "planter," had articled in Boston with James Otis Junior and succeeded Monk's father as King's solicitor in 1768, only to be displaced six years later by the son. Possessed of a few years' more seniority than Brenton — he was described as an attorney as early as September 1755 — was Richard Gibbons Junior.[4]

The Gibbonses were among the early settlers of Halifax, though they did not come out with Governor Edward Cornwallis in 1749. The younger Richard was born in London about 1734, and the family emigrated and settled at Annapolis sometime before 1748. From Annapolis they moved to Halifax, arriving by May 1750. Gibbons Senior, a carpenter by trade, somehow gained entry into the officialdom of the new capital; he became successively deputy provost-marshal, coroner, clerk of the licences and postmaster. In the spring of 1757 Richard Gibbons Junior succeeded the late John Ker as clerk of the Inferior Court of Common Pleas, a post he was to hold for sixteen years.[5] Even in the Supreme Court of the 1770s, litigants still occasionally acted as their

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[3]In 1766 the inhabitants of Kings County complained by petition to the legislature about the absence of lawyers except at Halifax: *Journal of the House of Assembly of Nova Scotia* (6 June 1766). Barristers' and attorneys' rolls of admission, 1768-1903, are transcribed in RG 39, ser. M, vol. 24A, Public Archives of Nova Scotia (PANS). The earliest extant barristers' and attorneys' roll (ca. 1770-1800) originated as a "Court Roll" or Oath of Allegiance for judges and justices; it was also subscribed by lawyers, however, and usually gave the dates of their admission to the Bar. A helpful source for identifying lawyers who began to practise before 1770 is the Supreme Court docket and record-books in RG 39, ser. J, vols 1-31, 98-105, 140, PANS. A useful guide to when a lawyer began to practise — i.e., when he was admitted as an attorney — is the date of his commission as a "notary and tabellion public." The commission-books, which date from the founding of Halifax, are available in RG 1, vols 163 ff., PANS.

[4]The only treatments of Gibbons' career are: J. Doull, "The First Chief Justice of Cape Breton, Richard Gibbons" in (1945) 23 *Can. Bar Rev.* 417-23; R.J. Morgan, "Richard Gibbons" in (1979) IV *Dict. Can. Biog.* 292-93. Both must be used with caution. They perpetuate two fundamental misconceptions about Gibbons: that his family came to Nova Scotia from South Carolina or Virginia, and that he studied law in England. These false claims derive from family tradition (cf. MG 1, box 268, no. 5, PANS), and from Gibbons' heavily autobiographical first will, dated 11 November 1781, in which he directed that his son Richard III should have "a Law Education at the Temple" (Halifax County Original Estate Papers, G 24). The will of Richard I, dated 31 March 1757, describes his son as "attorney at Law" (*Ibid.*, G 23); cf. RG 37, vol. "B" at 156, PANS.

[5]Although the earliest extant commission to him is dated 31 October 1765, it is clear from the original papers of causes pending in the Halifax Inferior Court (RG 37, box 3, PANS) that Gibbons took over from Ker on the latter's mortal illness and death, which occurred in March 1757. In the "Court Roll" which Gibbons signed in November 1766, he styled himself as advocate and proctor of the Vice-Admiralty Court; counsel, solicitor and attorney of the courts of Nova Scotia; and clerk of the common pleas and peace for Halifax County: *supra* at note 3. This, and the memorial abstracted in RG 1, vol. 189 at 21, demonstrate that Gibbons was officiating at the Court of Quarter Sessions of Halifax County, which explains his intimate knowledge of its judicial functions. Gibbons was serving as deputy clerk of the peace by December 1758, and he would therefore have succeeded lawyer David Lloyd, the previous and first holder of the office of clerk of the peace, on Lloyd's death in June 1763.

own attorneys, and though lawyers were no longer permitted to practise in any court where they also officiated as clerk, there was nothing to prevent a lawyer from practising in one court and clerking in another. Such was the situation of the younger Gibbons between 1757 and 1773, when he both practised as a barrister in the Supreme Court and served as clerk of the Common Pleas for Halifax County.

Although little is known of Gibbons' legal apprenticeship, there is evidence of a close personal relationship with Judge John Collier which suggests that he studied law in Collier's office.[6] In 1765 Gibbons was confirmed as clerk of the Common Pleas and became a counsellor and solicitor in the Court of Chancery.[7] In 1766 his eventual patron, Lord William Campbell, came out as governor. Gibbons rose so high in Campbell's esteem that he was able to use him as a conduit to the Earl of Dartmouth, who became Secretary of State for the Colonies in 1772. When Campbell left Nova Scotia for the last time in October 1773, Gibbons sailed with him to England in a vain quest for office. Remaining there over the winter of 1773-74, he prevailed on the outgoing governor to intercede for him at Whitehall. Campbell represented his *protégé* to Lord Dartmouth as a man worthy of patronage, and even recommended him for the vacant chief justiceship of St. John's Island (Prince Edward Island).[8] Returning to Halifax in the spring or summer of 1774, Gibbons must have finished his treatise and enclosed it to Campbell, who conveyed it to the Secretary of State. Gibbons' essay therefore ended up among the Dartmouth Papers at the National Archives of Canada.

The treatise is fifteen pages long, exclusive of detailed marginal annotations, and divides roughly into three sections: declamatory introduction, narrative history of the courts, and proposals for judicial reform. Gibbons' "anglicizing ideology" may be the product, at least in part, of personal observation of the three superior courts of common law at Westminster Hall. It was certainly influenced by a close reading of Sir William Blackstone's *Commentaries on the Laws of England*, which went into five editions between 1765 and 1773, and which Gibbons recalls though does not actually quote.[9] Gibbons' preoccupation with one aspect of the history of the courts — the Inferior Court of Common Pleas — reflects both his professional training and his long experience. No one would have been better placed to offer a critique of the Inferior Courts of Common Pleas than the lawyer who was clerk of the premier of those courts — Halifax — for sixteen years.

> Gibbons' argument is simple, and runs thus: justice had been maladministered in Nova Scotia because the judicial system at its institution deviated from English models and practice. The purpose of Gibbons' historical inquiry

[6]Gibbons was the first of the three subscribing witnesses to Collier's will in 1767; he named his only son "Richard *Collier* Gibbons" in 1779; and in 1781 he owned "a Tortoiseshell Case formerly Mr Colliers."

[7]RG 1, vol. 164 at 332; MG 100, box 145, no. 33, PANS.

[8]Letters of Campbell to Dartmouth (3 June 1774; 18 August 1774) in Dartmouth Papers at 2731, 2738, NAC.

[9]All five quotations of Judge Blackstone's writings are from the third (1758), fourth (1759) or fifth (1762) Oxford edition of *An analysis of the laws of England*, "to which is prefixed an introductory discourse on the study of the law." The discourse was subsequently incorporated into *Commentaries on the Laws of England* as Book 1, Introduction, Section 1: "On the Study of the Law." Though Gibbons may have bought — or at least perused — a copy of one of the available British editions of Blackstone's *magnum opus* during his London visit of 1773-74, it is clear from the pagination of his marginal notes that he was quoting not the later work but the earlier. Gibbons, incidentally, was a subscriber to the first American edition of the *Commentaries*, which was printed at Philadelphia by Robert Bell in 1771-72.

> was to chronicle the nature and extent of this deviation. As the inquiry shows the Inferior Court of Common Pleas to have been the point of greatest deviation, the greater part of the treatise highlights abuses at the level of the county courts, thereby justifying their entire abolition. The historical inquiry was aetiological in purpose: if the courts had been properly erected in the first place, the abuses now standing in need of correction would never have arisen. Gibbons assumes that the Royal Instructions to Governor Cornwallis in 1749 provided for a judicial system on the British model *per se*. While the Instructions were hardly explicit on this point, they nevertheless implied that the Lords of Trade intended for Nova Scotia a judicial system based on that of other "royal" (i.e., non-charter or non-proprietary) governments, such as Virginia.[10]

The establishment in 1749-50 of a lower or "County" court in Nova Scotia — the original jurisdiction of which was civil, while that of the Supreme or "General" court was criminal — had resulted from the comparative study by a Council committee of the judicial systems of the other American colonies, followed by a recommendation of Virginia as a suitable model for Nova Scotia.[11] The bench of the County Court and its successor, the Inferior Court of Common Pleas, was composed of justices of the peace; there were no professional men, except among the attorneys. The fact that none of them were lawyers may explain the absence of theoretical, if not also practical, knowledge of the law among most of the justices of the Common Pleas, or, at least, the allegation that this was so.

The problem of judicial ignorance was made worse by the happenstance that the four puisne judges appointed between 1764 and 1770 were all present or former chief justices of the Common Pleas. Despite the presence of lay judges in the Supreme Court, however, the court was presided over by a lawyer who had received his legal education at the Inns of Court and was a member of the English bar — Jonathan Belcher. Judges' qualifications thus turned on the basic question of legal education versus judicial, or other office-holding, experience. It was not until 1781 that a lawyer — James Brenton — gained promotion to the Supreme Court bench.

The anglophilia so prominent in Gibbons' treatise differed from that of Chief Justice Belcher, who was a pedant and a literalist. Implicitly criticizing Belcher's slavish adherence to the forms rather than the substance of English jurisprudence, Gibbons cautioned against the literal rendering of English judicial administration in the Nova Scotian context. His end was to rationalize the administration of justice by reconstituting the courts: professionalizing the judiciary even if it meant abolishing those lower courts wherein laymen presided, and transferring their jurisdiction to the superior court. Gibbons' anglophilia also differed from that of Solicitor-General James Monk. No less than Monk, Gibbons, with his high sense of judicial office, was deeply offended by the abuses of power and the irregularity of procedure in the Inferior Courts of

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[10]On this subject see T.G. Barnes, "'As Near as May Be Agreeable to the Laws of this Kingdom': Legal Birthright and Legal Baggage at Chebucto, 1749" in *Law in a Colonial Society*, *supra*, note 1 at 1 ff.

[11]The committee's report was inserted verbatim in Council Minutes for 13 December 1749: RG 1, vol. 186 at 33 ff., PANS.

Common Pleas, where he perceived the greatest deviation from English jurisprudence to have taken place. Nevertheless, Gibbons' critique of the Inferior Courts is less strident and better informed than the solicitor-general's — Monk had clerked for seven years in the Supreme Court, not for sixteen in the Inferior Court of Common Pleas.

The appearance of Monk's "Observations on the Courts of Law in Nova Scotia" a year or so after Gibbons' treatise naturally invites comparison between the two.[12] That the comparison reveals contrasts as well as similarities is due, in part, to an accident of chronology: the *Supreme Court Circuit Act* was passed in the interim,[13] and the situation to which Gibbons had addressed himself thereby underwent a fundamental change for the better. The Inferior Courts nevertheless remained in full operation, and both lawyers deplored the ignorance, incompetence and partiality, especially of the country justices of the Common Pleas. Both reformers recommended abolition of the Inferior Courts. Gibbons, however, proposed to transfer their jurisdiction to the Supreme Court; to resolve the powers of the Supreme Court into its three components — King's Bench, Common Pleas and Exchequer; and to replace the Inferior Court with two Supreme Courts, both of which would go on circuit around the province. Monk proposed to invest all the powers of the Inferior Court of Common Pleas in a unitary Supreme Court which would both sit at Halifax and go on circuit. Rather than divide the Supreme Court in two and double the number of judges, Monk would simply have added a third puisne — a lawyer by profession — to the bench.

Monk, himself an office-holder and MHA deeply involved in politics on the side of Governor Francis Legge's unpopular regime, and writing after the outbreak of the American Revolution, was conscious of the political role of the judiciary as agents of government. Gibbons, on the other hand, an office-seeker politically unskilled and inexperienced, writes as if politics had little or no bearing on the administration of justice. His own foray into electoral politics was unsuccessful.[14] Gibbons seemed not to appreciate that judges were appointed more for their political soundness than for their legal knowledge.

Although shorter than Gibbons', Monk's treatise is in some respects more comprehensive: he surveys all the courts, while concentrating on common law and equity. Gibbons confines his attention to the two common law courts; he has nothing whatever to say about the Court of Chancery, though Article 66 of Cornwallis' Instructions conferred equity jurisdiction on the General Court consisting of Governor and Council.[15] Gibbons' silence on the subject is explicable from the covering letter, in which he compliments Lord William Campbell's "constant Zeal for discovering Truth and dispensing Justice in those Causes which have come before you as Chancellor."

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[12]See Barry Cahill, "James Monk's 'Observations on the Courts of Law in Nova Scotia,' 1775" in (1987) 36 *UNB L J* 131-45.

[13]14 & 15 Geo. 3, c. 6 [1774]. The bill was assented to by Governor Legge on 12 November 1774.

[14]Gibbons stood for Barrington Township at the general election of 1770, and was the unanimous choice of the freeholders. No return on the writ was entered at the Secretary's office, however, and he was denied his seat: *Journal of the House of Assembly* (17, 18 & 19 June 1771).

[15]The Court of Chancery was reconstituted in 1764 with the governor or *ex officio* chancellor as presiding judge, and three "Masters in Chancery" as assistant judges: CO 218/3/31, Public Record Office (PRO).

Clearly, Gibbons would not have wished to imply that justice had ever been maladministered in the Court of Chancery — at least not after 1766, when Campbell became governor and Gibbons himself was a solicitor but recently admitted to practise in that court. The omission of Chancery is justified, in any case, if Gibbons believed that equity jurisprudence in Nova Scotia did not deviate from its English counterpart.

Gibbons was not, like Chief Justice Belcher, a member of the English Bar, nor had he, like Monk, read law at the Inns of Court. Yet he was a more discriminating anglophile than the former, and a more ardent one than the latter. Although his knowledge of the "Mode of Jurisprudence in England" was mediated exclusively through Blackstone, he brought it closely to bear on his wide experience of the courts of Nova Scotia. He was not a disinterested observer, of course, and his "Review" lacks perspective. It is monological; depth of interpretation has been sacrificed for breadth of description. It is, in short, an observant lawyer's critique — biased, yet well-informed — of the wholesale maladministration of justice by lay judges; of abuses which derived not from the common or the statute law, but from structural defects inherent in the courts since their institution.

Gibbons' perceptions suffer both from professional myopia and personal bias. One can make allowance for his animus against Chief Justice Belcher — a reflex, perhaps, of his devotion to the memory of the late Judge Collier — because they took different views of the role of the "English mode of jurisprudence" in the Nova Scotian context. More serious is Gibbons' naivety in failing to make allowance for personal and political rivalries between or among the justices and the attorneys; and for national tensions between European and New England settlers in early Halifax. His simplistic explanation for the maladministration of justice — apart from the general theme of "deviation" — is that the judges were not lawyers; he has no solution but to abolish those courts on which they sat. He perceives one basic problem, and proffers one basic solution: a retroactive reconstitution of the courts of Nova Scotia, in which the English mode of jurisprudence is strictly adhered to. If one accepts the premise that deviations from the English mode in the original establishment of the courts produced "bad Consequences," then the conclusion that adherence to it in the reformation of the judicial system would put an end to the maladministration of justice necessarily follows. Gibbons, however, merely takes for granted that the superior common law courts at Westminster were the intended model for colonial courts of justice.

Gibbons' treatise had no effect on government policy towards the judicial system in Nova Scotia — any plan which involved a substantial increase in the parliamentary grant was foredoomed — nor on his own prospects for office. Gibbons asked Lord Campbell to recommend the work to the consideration of the Colonial Department,[16] and the document would not have found its way into the Dartmouth Papers otherwise. By November 1774 Gibbons was hopeful enough that his patron had straightened the path to Whitehall that he himself wrote Lord Dartmouth asking for any legal office which might fall vacant in Nova Scotia. However, his efforts availed nothing until

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[16] *Gibbons* at 2740.

1777, when, under another governor and another secretary of state, he was appointed solicitor-general *vice* Monk.[17]

The Inferior Court of Common Pleas remained unreformed until 1824, when lawyers were appointed to head each of the three divisions into which the county and district courts on the mainland had been divided.[18] The Inferior Court remained in existence until 1841, when it was abolished by statute and its jurisdiction transferred to the Supreme Court.[19] Both developments, however long in coming, would surely have pleased Gibbons, inasmuch as they fulfilled his plan for judicial reform. In the fifty years which elapsed between his treatise and the Act of 1824, few if any lawyers are known to have sat on the bench of an Inferior Court of Common Pleas, let alone attained the position of first justice.[20] The inferior courts held out few prospects of professional advancement to lawyers, who were ambitious either for a Crown law office or a Supreme Court judgeship. Hence the tradition of an amateur lower court bench — chosen usually from among mercantile gentlemen and office-holding esquires — continued and perpetuated the abuses which Gibbons had observed in the courts of his day.

In editing Gibbons' treatise, I have retained as far as possible his orthography, grammar and capitalization, while modifying paragraph structure and punctuation for the sake of comprehensibility. Gibbons' own *marginalia*, indicated here by upper-case letters "A" to "E" when he is quoting Judge Blackstone, and by lower-case letters "*a*" to "*m*" when he is offering commentary of his own, are inserted into his text at the points where they occur.

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A Review of the past and present State of the Administration of Justice in Nova Scotia, Shewing the Deviations therein from the Mode of Jurisprudence in England, the present and future bad Consequences thereof to His Majesty's Government and Subjects in this Province, with a Plan humbly proposed for the Reformation of the same.

One of the most essential Principles of all good Government ever was and ever must be the due and impartial Administration of Justice among the People Subject to such Government. It will then necessarily follow that the Government wherein the Administration of Justice is lodged in the Hands of Persons of Learning, Judgement, Independence and Integrity will best answer the purpose of its Institution; and the People under its Influence and protection enjoy the Blessings of Peace, Happiness and Security, and Honor, Obey and respect public Authority in an incomparable greater

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[17]Gibbons was recommended for the office by Governor Legge. The mandamus was signed by Secretary of State Lord George Germain on 23 January 1777: RG 1, vol. 3-7, no. 38, PANS.

[18]4 & 5 Geo. 4, c. 38 [1824].

[19]4 Vic., c. 3 [1841].

[20]A notable exception was lawyer Daniel Wood II, appointed a judge of the Common Pleas of Halifax County in 1810: RG 1, vol. 173 at 30, PANS. He had been prothonotary and clerk of the Crown, and was admitted to the Bar in October 1787.

Degree than where that Power is lodged with Weak, Ignorant, Illiterate, Contemptible or Unjust Men. A Government and People thus circumstanced must be truly pitiable; the Consequences of such an Administration were and must be, weakness in the Hands of Government, and Oppression, Distress and Disorder among the People. Every Subordinate Officer will become an Arbitrary Tyrant to extort that Shew of Respect, which his want of Abilities prevents him from receiving, as due to the Honor of his Station. The People from an Hatred and Contempt of the Subordinate Magistrates and Ministers of Justice thus founded, will become distrustfull to the Government whose Delegates are thus become the objects of their Abhorrence and Scorn — every Measure of Government, however well projected and calculated for the public Good, will meet with opposition and difficulty and at best be but weakly and almost ineffectually carried into Execution for the want of the Confidence and Respect, which the Governed ought to place in, and observe towards, those in Authority over them:

> [NOTE A: "It is necessary that the Magistrate should understand his Business; and have not only the will but the power also (under which must be included the knowledge) of administering legal and effectual Justice. Else when he has mistaken his Authority, through Passion, through Ignorance or Absurdity he will be the object of contempt from his Inferiors, and of Censure from those to whom he is Answerable for his Conduct": Blackstone's first discourse on the Study of the Law, *xxiv*.]

— On the Other Hand, where the Honor and Justice of Government is reflected upon the People through the Abilities and Integrity of those to whom the different Branches of Its Power are delegated, the People will bear that Love and Respect for the Administration which will greatly strengthen the Hands of Government, give a Lustre to every Branch of Its Authority [2742] and Facility and Effect to all its Measures. Such a People will be flourishing, happy and quiet while Such a Government reverenced and chearfully obeyed. No human Form of Judicial Administration can be better adapted to obtain so desireable an End, in a young and growing Country, than One constructed upon the Principles of that of England, so justly and generally admired and envied. — It is not necessary in a New Country like this, that a close adherence should be observed to all the Prolixities of the English Practice, (which in England may perhaps be unavoidable). Neither is such a Multiplicity of Officers as in England are employed in and about the Courts of Justice (and probably not more than is there necessarily required to despatch the Business) by any means required in the Courts of Nova Scotia. — A Practice for this Country might easily be formed, wherein all the essential Principles of the English Administration of Justice should be preserved, and yet a Multitude of Forms in Use there, be omitted here, whereby great delay and Expence might be saved to the Suitors.[21]

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[21]Ten years later Gibbons had the opportunity to practise what he preached. In November 1785, when drafting Rules for the Supreme Court of Cape Breton, of which he had been appointed Chief Justice, he instructed "That on the plea side the forms of Process observed in the Court of Kings Bench at Westminster Hall shall be observed and followed until the Court shall further order and adapt them to the circumstances of this Island": quoted in Doull, "Richard Gibbons," *supra* , note 4 at 419.

Every Deviation from the Fundamental Principles of the Practice in England has ever been productive of Evils greater or less according to the Degree of Deviation. — This is Notoriously the Case in those parts of America where the Mode of Government and leading Principles of the People have Occasioned as great a departure from English Systems as was possible, and is seen, acknowledged and lamented by the Judicious and Unprejudiced part of the Inhabitants. But there the Evils have taken too deep Root and are become too diffusive to be easily remedied.

> [NOTE *a*: This was the opinion of Jeremy Gridley Esqr one of the most Eminent Professors of Law in New England[22] in a Conversation with the Writer in the Year 1761 at Boston relative to the Mode of Justice in Massachusetts Bay.]

It is one of His Majesty's Instructions to the Governors of his new Colonies to establish Courts of Justice as nearly Similar to those at Westminster as might be practicable,[23] and a Consequence thereof would have been that the Practice in those Courts must have accorded with that of England in every Point of Consequence. — How far this Instruction has been understood and followed in Nova Scotia, and the Reasons which have occasioned Deviation from it, I shall by a review of the past and present Constitution of the Courts of Justice and their Practice, endeavor to point out; and humbly recommend a Plan for removing the present defects, and shew the Advantages that will thence arise as well to the King's [2743] Government as His Subjects resident or interested in this Province.

Until the Settlement of Halifax under Governor Cornwallis in 1749 there had never been any Common Law Establishment made in the Province,[24] and among his Instructions was that directing the Appointment of Courts of Justice.[25] But unfortunately for that good Governor and the Province there was not among those Gentlemen who composed his Council and regulated the arrangement of Civil Affairs here, a Single Person who had Studied or could be supposed to understand the Principles of the English Common Law;[26] or was Acquainted with the Nature of the Several Courts of

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[22]For Jeremy [Jeremiah] Gridley (1701/02-1767), see (1931) VII *Dict. Amer. Biog.* 611; (1945) VII *Sibley's Harvard Graduates* 518-30. Gridley was, by common consent, "the greatest New England lawyer of his generation."

[23]See L.W. Labaree, *Royal Instructions to British Colonial Governors* 1670-1776 (New York: Appleton-Century, 1935) vol. I at 295: 422 for the creation of courts in new provinces; vol. I at 299-300: 429 for the creation of courts in Nova Scotia, 1749-1756. Any similarity which may have been intended was to the judicial systems of older established royal colonies such as Virginia. "Similar to those [courts] at Westminster" is an accretion by Gibbons and strictly *ex hypothesi* .

[24]This statement is demonstrably false: the "general court" of Governor and Council exercised plenary judicial powers at Annapolis from 1721 to 1749. See J.A. Chisholm, "Our First Common Law Court" in (1921) 1 *Dal. Rev.* 17-24. All previous work on the subject is now superseded by T.G. Barnes, "'The dayly cry...for Justice': The Juridical Failure of the Annapolis Royal Régime, 1713-1749" forthcoming in P. Girard & J. Phillips, eds., *Essays in the History of Canadian Law*, III [The Nova Scotian Experience] (Toronto: Osgoode Society, 1988).

[25]*Supra* at note 15. The General Court as [re]established by the Instructions in 1749 had plenary common law and equity jurisdiction. Article 66 introduced a series of fifteen articles dealing with the administration of justice. Article 67 provided for the establishment of inferior courts.

[26]Two of the original members, however, Paul Mascarene and Edward How, had had practical experience of the administration of justice: they sat for many years as *ex officio* judges of the General Court at Annapolis. The rest of Cornwallis's councillors were army officers, merchants and officials.

Justice in England, and their different Practices, Constitutions and Powers. — From hence it happened that the first formed Courts of Justice in this Province were very incongruous to those of Westminster and very defective.

The Courts which were first Commissioned and opened under Governor Cornwallis were — First The General Court or Superior Court of Judicature, Court of Assize and General Gaol Delivery in which the Governor or Commander in Chief, and Council for the time being sat as Judges. The Jurisdiction of this Court was to inquire of, hear and finally Determine all Criminal Matters whatever in like manner, and with the same Power and Authorities as are vested in the Court of King's Bench, Justices of Oyer and Terminer and Gaol Delivery in England; but could not hold any Plea in the first Instance of any Matter of Property, as the Court of King's Bench can (except in some few Cases, such as where a Councillor or Officer of the Court happened to be a Party &c). Here was one manifest and essential deviation from the King's Instruction; — but (seemingly in lieu of recovering Actions in the first Instance) a power was given to this Court to receive Appeals from the Judgements of the County Court, upon Actions relative to Property, when the Sum in dispute amounted to above five Pounds; — upon which Appeal the Supreme Court admitted the Parties to a New Trial of [2744] Facts before a Second Jury and Affirmed, reversed or altered, the Former Judgement, according to the Verdict of the Second Jury. — This was another great deviation from the King's Instruction and from the Course of the Common Law, — highly derogatory to the Credit of Jurors by admitting One Jury on Oath, to falsify the Verdict of a former, likewise on Oath, and where they could not be admitted to a Defence of their Character; besides being productive of much delay and increase of Expence to the Suitors. — This Court sat but twice in the Year in April and October.[27]

Secondly The County Court, (so called the whole Province being then but one County), the Judges of which were the same Gentlemen who were in the Commission of the Peace and resident in the Town of Halifax. — This Court sat Monthly and held heard and determined, in the first Instance all Pleas in Causes relative to Property (except in the few Instances where the General Court took Original Cognizance) without limitation as to sum or Nature of the Action, and was invested with the same Powers, Authorities and Jurisdictions, exercised in the King's Bench, Common Pleas and Exchequer on the Plea side in England (except in Matters Criminal); but either of the Parties might after Judgement, carry the Cause by Appeal into the Supreme Court, and there obtain a Trial de novo, as has been before mentioned. — The practice of this County Court was altogether peculiar to Itself and conformable to no one System adopted in any other Part of the British Dominions;[28] full of absurdity and Defect, although by an Ordinance of the Governor and Council all Writs and Process were to be conformable to those of England,[29] so little were the Judges, Attornies and officers

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[27]On the General Court see RG 1, vol. 186 at 33; RG 39, ser. J, vol. 117 at 140, PANS; C.J. Townshend, *Historical Account of the Courts of Judicature in Nova Scotia* (Toronto: Carswell, 1900) 19.

[28]On the County Court see RG 1, vol. 186 at 37 ff.; RG 37, box A, vols 1-2, PANS. Gibbons seems unaware that the regulations governing both the General Court and the County Court had been lifted out of the Virginia Statutes, an edition of which the Council committee had at their disposal.

[29]See RG 1, vol. 186 at 160, PANS. The ordinance was dated 6 December 1749.

of the Courts acquainted with the English Practice. As both the before mentioned Courts are long since laid aside,[30] it is unnecessary to do more than thus briefly to mention them by way of Introduction to the Changes which afterwards took place.

It is also needless to say more of the Quarter Sessions of the Peace, than that they are constituted nearly similar to the like Courts in England, although the practice and proceedings in them are far from being carried on with the Regularity and Propriety which ought to prevail, from the want of Knowledge in most of the Justices and Officers belonging thereto,[31] but when the Superior Courts are established upon a reformed Plan, the Inferior will soon by their Occasional Controul be brought into a Regular and legal Method of Proceeding.

[2745] In the Year 1752 near three years after the Institution of the Superior and County Courts, many Inconveniences and Difficulties having been discovered from the then Method of Practice, — The County Court was abolished, and in Its place a Court erected by the Stile of an Inferior Court of Common Pleas, and intended to have been upon the same plan of the Inferior Courts of Common Pleas in New England.[32] The Powers formerly vested in the County Court were now transferred to this, but instead of sitting Monthly, the new Court was to sit Quarterly,[33] and the New England Practice, at least as much of it as was then known in Halifax, was introduced, which as widely varied from the Practice in England, and consequently from the Tenor of the King's Instruction, as the former Mode had done. — Those Changes were made from the recommendation of the justices of the former County Court who were now become Judges of the Inferior Court of Common Pleas, some of the principal of whom had been bred and long resident in New England, though none to the Study and Practice of the Law,[34] and therefore could not be supposed so intimately acquainted with the proposed System, as to introduce it in a perfect State; wherefore confusion and inconsistency in the Judicial Administration of the Province continued. New Difficulties frequently occurred, and the Governor and Council by Ordinances then called Acts, endeavored as frequently to obviate and remove them, — and the Practice in the Courts for those Reasons remained in a fluctuating and variant State ever imperfect and irregular.

In the later end of the Year 1752 Governor Hopson being arrived and having taken the seat of Government,[35] a long Remonstrance signed by great Numbers of the

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[30]The County Court in 1752; the General Court in 1754. See *infra*.

[31]The General Court of Quarter Sessions of the Peace (usually abbreviated to "Court of Sessions") was the lower of the lower courts of common law, and had administrative as well as judicial functions. It consisted of all the justices of the peace sitting *in banco* and presided over by the senior among them as *custos rotulorum*. See J.M. Beck, *The Evolution of Municipal Government in Nova Scotia*, 1749-1973 (Halifax: Queen's Printer, 1973) 7-11.

[32]Although the change as such is not recorded, it clearly took place on or about 29 February 1752, when new commissions were ordered to be issued to the justices of the "Inferior Court of Common Pleas": RG 1, vol. 186 at 157, PANS. John Collier's successor as first justice, Charles Morris, was from Massachusetts, as were two of the four other justices: See Townshend, *supra*, note 27 at 34-35.

[33]I.e., in March, June, September and December — to coincide with meetings of the Court of Sessions.

[34]Gibbons is obviously referring to Charles Morris and James Monk Senior.

[35]Colonel Peregrine Thomas Hopson, formerly a councillor, replaced Cornwallis as Governor on 3 August 1752.

Inhabitants was exhibited to him and the Council,[36] containing many high and criminal Charges against the Judges of the Inferior Court and Justices of the Peace, relative to their Conduct in their Offices, and a public Examination was made into the Merits of the Complaints, which took up the daily Attention of the Governor and Council, Complainants and Defendants, for near six Weeks (Sundays excepted). Upon the conclusion of which the Judges & Justices were acquitted of [2746] the Charges, but the Commissions of the Inferior Court of Common Pleas and Peace were thereafter Superseded by new Ones, in which the former Justices were continued, and several of the principal Complainants were joined with them, but the same Mode of Practice continued.[37] — The dissatisfaction of the People which occasioned the above Complaint arose more from the want of a Competent knowledge of Law and Practice in the Judges and Justices, than from an intentional perversion of Justice; and also from the Defects in the Constitution of the Courts and Inconsistencies, Incertainties, and Absurdities of their Practice; and would have been prevented had the first erection of Courts in Nova Scotia, and Mode of Practice therein, been judiciously regulated agreeable to the King's Instructions upon a plan conformable to that of the Courts at Westminster, and each of the Branches headed by an Able and Upright Common Lawyer.

The Complaints of the People respecting the Administration of Justice, and Other Reasons of a Political Nature which arose afterwards, occasioned a Change in the General or Superior Court; And his late Majesty was pleased in the Year 1754 to appoint Mr Belcher from England, Chief Justice of Nova Scotia,[38] upon the publication of whose Commission the Court changed Its Stile to that of the Supreme Court, Court of Assize and General Gaol Delivery, and the Governor and Council no longer continued to Sit therein as Judges. But the New Court assumed no other Powers or Jurisdiction than what had 'till that time been exercised by the former General or Superior Court;[39] And the Practice in the Supreme and Inferior Court continued nearly the same to the time of the first Convention of an House of Assembly in this Province in the Year 1758, when the Practice of the Inferior Courts of Common Pleas (there now being two of these Courts established, One at Halifax and another at Lunenburg) was again changed by a temporary Act of Legislature and a new Mode prescribed, compounded partly from the Practice in England and partly from that of New England;[40] but yet essentially different from both. Upon the Expiration of this Act, and

[36]The "remonstrance," dated 30 December 1752, was signed by Joshua Mauger and forty-six other "Merchants, Traders and Principal Inhabitants of the Town of Halifax" — including two attorneys, Wood and Nesbitt: RG 1, vol. 186 at 291, PANS.

[37]The "justices affair" consumed the months of January and February 1753 and some sixty pages in the Council minute-book. Most of the relevant documents are either abstracted or copied verbatim in the minutes: RG 1, vol. 186 at 282 ff., PANS.

[38]Jonathan Belcher (1711-1776), a New England expatriate, was a member of both the English and the Irish Bar.

[39]Belcher's commission makes clear that the Supreme Court of Nova Scotia was invested with all the powers of the three superior common law courts of Westminster Hall, i.e., King's Bench, Common Pleas and Exchequer: RG 1, vol. 164 ["B" Section] at 36, PANS. Despite the fact that Belcher's commission conferred plenary jurisdiction both criminal and civil on the Supreme Court, it was supposed in Nova Scotian legal circles at the time that the new Supreme Court possessed only appellate jurisdiction in civil causes. Perhaps the Inferior Court was jealous of its unique original jurisdiction in civil matters, and its judges politically influential enough to prevent any transfer of powers to the Supreme Court. Equity jurisdiction of course remained with the Governor and Council sitting as a Court of Chancery.

[40]32 Geo. 2, c. 27 [1758]: "An Act for confirming the past Proceedings of the Courts of Judicature, and for regulating the further Proceedings of the same."

making several of the same Nature Subsequently, new Changes frequently took place and the Practice remained lame and mutable as before.

Upon the expulsion of the former French Inhabitants, and introduction of English Subjects as Settlers into the interior parts of the Province, new Counties were erected and Inferior Courts of Common Pleas became multiplied as Counties increased and the Judges [2747] were appointed from among those Persons resident upon the Spot, which Government were made to believe were the most Sensible and Consequential among the new Settlers, by which Means a Power which in England is never given but to the most Eminent and learned Professors of the Law, was here given to a great Number of Persons not any of whom but what were altogether Ignorant of the Duty and Office of a Judge and almost every Principle of Law; some of them so illiterate as Scarcely to be able to write their Names legibly. — Men so far from being Persons of competent Law Knowledge, and in some measure independent Circumstances are the very reverse; and several in great Indigence and depending upon their own Hands for a daily Support, without Books or leisure and ability to read and understand them if they had them.

> [NOTE B: Blackstone speaking of legislators says, "And how unbecoming must it appear in a Member of the legislature to vote for a new law, who is utterly ignorant of the old" (and what follows is equally applicable to Judges). "What kind of interpretation can he be enabled to give who is a stranger to the text upon which he comments": Blackstone's first discourse on the Study of the Law, *xxv*.]

Very few of which Judges untill their Names were put in those Commission were above the Rank of the generality of their Fellow Settlers either in Circumstances, Education or Capacity.

Thus the Number of Common Law Judges in this Young Colony is increased to near Thirty,[41] and as the Province increases in its Settlement, and new Counties will of Course be erected, these Kind of Judges (if the present System continues) must become more Numerous. — These have been and must inevitably be the Consequences of forming Courts of Justice upon this Plan, and some of the Evils thence arising both to the Government and Subject are, oftentimes The total obstruction of Justice, always Confusion and Irregularity in Trials of Causes, and pronouncing and entering up Judgements, given too often against Law and Reason, either through the inability of the Judges or proceeding from other Motives not so excusable. An Office of the highest Consequence and Honor rendered cheap and contemptible in the Estimation of the People, which ought to be an object of their Reverence and Respect; — The just Powers of Government weakened and often defeated; — The Laws seldom and by Chance duly carried into execution; — and The property and Reputation of the Subject always rendered precarious, often greatly injured, and too often without a possibility of

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[41] It was unusual for the bench of an Inferior Court of Common Pleas to consist of fewer than four, or more than five, judges. Their commissions are to be found in RG 1, vols 163 ff., PANS. A new commission had to be issued each time a change was effected on the bench, and the person named first — i.e., the judge with the most seniority — was considered to be chief justice of the common pleas of that county. For the number of county courts at the time when Gibbons was writing, see *infra* at note 61.

Redress, by reason of the inability of the Sufferer to Support the Charges of a Prosecution to obtain it. Besides it would [2748] require an Interest to get a Complaint of this Nature admitted to a hearing in the only Court possessing a Power of Redress, The Supreme Court, where Pursuits of this Nature have oftentimes met with an Absolute Refusal of Admission and always with great Opposition and Discountenance from the Bench.

> [NOTE C: "Should a Judge in the Most Subordinate Jurisdiction be deficient in the Knowledge of the Law it would reflect infinite contempt upon himself and disgrace upon those who employ him": Blackstone's first discourse on the Study of the Law, *xxix*. And again, "But how Serious and affecting in the Case of a Superior Judge if without any Skill in the Laws he will boldly venture to decide a question upon which the welfare and Subsistence of whole Families may depend! where the chance of his judging right or wrong is barely equal; and where if he chances to judge wrong he does an Injury of the most alarming Nature, an Injury without a possibility of Redress": *xxix-xxx*.
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> And again, "And what the Consequence may be, to have the interpretation and enforcement of Laws (which include the intire disposal of our properties, liberties and lives) fall into the Hands of Obscure or illiterate Men is matter of very public concern": *lxii*.]

— How widely different Such an Administration of Justice is from that established in England, and pointed out in the King's Instruction, is too obvious to need any Illustration. — It has too often been the Case, that those Judges of Inferior Courts, from their Residence among, and Equality with, the People under their Jurisdiction, and their necessary Intercourse and Connections in Business and Dealings with them, were interested and eventually Parties in Suits brought before them for Trial, or Strongly prejudiced in favor of one or the other of the Parties; which from want of a Competent Knowledge of the Law, and the Honor and Duties of their Station, have often Occasioned many of them to act as Counsellors and Solicitors between the Parties.

> [NOTE *b*: One Instance of this among Many others fell within the Writer's personal Observation — at Horton Court in the Year 1763 A Man having lost his Case, publicly addressed One of the Judges upon the Bench Complaining that he had brought and prosecuted the Action by his the Judge's advice and directions and thought it hard therefore to have Judgement pass against him.[42]]

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[42]Horton Town Plot (now Hortonville) was the venue for sittings of the Inferior Court of Common Pleas of Kings County. Only a very few papers of causes adjudicated in the year 1763 are extant (see RG 37 [KI], box 1, PANS), however, so it is impossible to try to identify the parties in the suit to which Gibbons refers, or to speculate on why Gibbons himself was present. The Inferior Court of Common Pleas of Kings County had been erected in August 1761 with Isaac Deschamps, Henry Denny Denson and Robert Denison as judges (RG 1, vol. 164 at 146 ["B" Section], PANS). Deschamps — about whom more *infra* — was a merchant-official based in Windsor; Denson and Denison were both ex-soldiers and recent immigrants to Nova Scotia. (The commissions to Inferior Court judges set forth the conditions under which an appeal to the Supreme Court might be allowed.)

Thus constituted, The Courts continued and practised untill the Year 1764 when a Seeming Change took place in the Supreme Court. The House of Assembly (considering from frequent Complaints of Suitors and other Inhabitants of the Province, that the People were aggrieved in the Supreme Court by having all Causes brought into that Court determined by the Opinion of a Single Judge, as Mr Belcher from his first appointment to that time had sat alone and sole Judge upon that Bench) —

> [NOTE *c*: This seems not to have been the Intention of the Crown in appointing Mr Belcher, who was Stiled Chief Justice of the Province, which implied that other Judges of the Same Court were to be appointed among which he was to be president. Or that the Councillors should still continue their Seats as Judges under him — but as no Mandamus was sent for that purpose Mr Belcher became Chief and Sole Judge.]

- – Addressed the then Governor [Montagu] Wilmot, that two other Judges might be joined with the Chief Justice in the Constitution of that Court.[43] And two of the Members of His Majesty's Council were accordingly Commissioned as Assistant Judges of the Supreme Court,[44] and had Salaries granted by the House of Assembly, tho' far from being Such as were Suitable to the Dignity of Judges, but were as large as the House apprehended, could be spared from the public Funds of the province.

> [NOTE *d*: One Hundred Pounds Currency per Annum Each.]

— The Powers granted to the Assistant Judges by their Commissions (which were said to be drafted by Mr Belcher) were so qualified and limitted, that the Intention of the House of Assembly was altogether frustrated, and those nominal Judges remained little more than Commissioners for taking Affidavits &c, —

> [NOTE *e*: This became Evident soon after their Appointment, when upon a Trial in the Supreme Court after the Evidence and Arguments were finished, in giving the Charge to the Jury Mr Belcher asked his two Assistants beginning with the Junior whether they would Speak to the Jury upon the Case. They both Spoke and Agreed in opinion in point of Law upon the Evidence and Arguments before them — after which the Chief Justice in Closing the Charge, recapitulated the Evidence, mentioned the Opinion of the two Assistant Judges and gave his own altogether different therefrom, in these or nearly these Memorable Words: "Mr Justice Collier and Mr Justice Morris have given you their opinion, that you ought to find a Verdict" (in Such a Manner) "but Gentlemen The Court is of opinion that you ought to find it" (in Such a Manner), which was against the Opinion of both the other Judges. Since which time he Seldom or never asks the Assistant Justices to give their Opinions or Charge to the Jury until he had finished the Charge and declared the Opinion of the Court to them, and then bowing to Each of his Assistants,

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[43] The address is printed verbatim in *Journal of the House of Assembly* (24 November 1763).

[44] They were John Collier and Charles Morris, respectively the former and the current Chief Justice of the Common Pleas of Halifax County.

> asks their Consent thereto, which they never fail to give by a Silent return of his Bow.
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> It is true in Some Notable Cases where the Parties have been Supposed of Such Consequence that their Representations and Complaints would be heard and Attended to in England and Endanger the Loss of Office — The Chief Justice has ever privately consulted his Assistants, influenced their Opinion by his own, and then taken Care that their Opinions Should be publicly known and pronounce the Judgement of the Court Seemingly thereupon — thereby to leave the Weight of Censure, if any Should follow, altogether upon them.]

— not having a Power to determine any Matter whatever, or hear a Trial but in conjunction with the Chief Justice and could not even open or adjourn the Court without his presence and Concurrence.[45] [2749] The Salaries of these Assistant Judges have for several Years past been reduced from £100 — Pr annum, which was at first allowed them, to only £50 — apiece Pr annum,[46] occasioned by a Decline in the Provincial Annual Revenue, and the inutility of their appointment with such limited Powers.

The Inferior Courts remained in the same State as before until the Year 1765 when the Act prescribing the form of Practice, having been repealed by His Majesty and no other enacted,[47] the Judges for the County of Halifax determined and Ordered "That hereafter the Practice of this Court shall be conformable to the Rules of the Common Law of England,"[48] and accordingly a practice prevailed (in the County of Halifax only) as nearly thereto as the Constitution of the Court, and some Provincial Act relative to Juries,[49] would admit, but very defective in many Material Points, which under such a Constitution were not to be remedied or removed. — The Courts in the other Counties, far from understanding this or any other Practice, were left to pursue as far as they knew the former, or any other Course as Chance might direct, equally incapable of forming any Regular System or understanding any that might be formed for them; and the Course of Judicial Proceedings in each County differed from that of all the Others except in being equally absurd, defective and Confused.

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[45] 27 June 1764: RG 1, vol. 164 ["B" Section] at 302, PANS.

[46] *Journal of the House of Assembly* (16,17,26 & 28 June; 31 October 1766). At the sessions of 1766 there was intense disagreement between Council and Assembly over judicial salaries.

[47] 3 Geo. 3, c. 2 [1763]: *An Act for regulating the Proceedings of the Courts of Judicature.* It was disallowed by Order in Council on a recommendation from the Lords of Trade, on a report from their legal adviser: CO 217/21/17; CO 218/6/217, 232, PRO. The text of the Act is in RG 5, ser. S, box 2, PANS. It originated in the Council, where it had been introduced by Charles Morris, Chief Justice of the Common Pleas, 24 August 1762 & 3 May 1763: RG 1, vol. 215, PANS. This early attempt to establish--statutorily--rational rules of civil procedure, undertaken at a time when the Chief Justice was Lieutenant-Governor and chief executive, and both the previous and the present Chief Justices of the Common Pleas were also members of the Council, had originally been resisted by the Assembly and was ultimately "repealed" by the King in Council.

[48] The source of this quotation is probably a book of rules and regulations no longer extant. In Michaelmas Term 1767, the Supreme Court ordered "that all original Actions and proceedings thereon...be as near as may be Conformable to the proceedings in the Courts of Westminster Hall in England": RG 39, ser. J, vol. 141 at 1, PANS.

[49] The source of this quotation is probably a book of rules and regulations no longer extant. In Michaelmas Term 1767 the Supreme Court ordered "that all original Actions and proceedings thereon...be as near as may be Conformable to the proceedings in the Courts of Westminster Hall in England": RG 39, ser. J, vol. 141 at 1, PANS.

The House of Assembly (many of the Members of which were Judges of the County Inferior Courts[50]) to remedy as they Supposed the above inconveniences, passed an Act in the Sixth Year of his present Majesty's Reign, prescribing the Forms of Writs, Times of their Return &c,[51] but for the same Reasons, which Occasioned the Inconveniences and Irregularities, this Measure instead of removing increased the Mischief, and the Supposed remedy of one absurdity produced a Multitude. — In the same Session the House passed another Act for establishing of Fees for the Courts of Justice,[52] and at the Instance of the Judges who were Members, allowed to the Judges of the Inferior Courts, certain Fees upon all Matters and Process issuing out of or brought before those Courts, by which their Fees upon every Cause tried before them the Merits of which amounted to above the Value of ten Pounds, would amount to twenty two Shillings and two pence; and upon every Cause [2750] for litigating Matters between the Value of Three Pounds and Ten Pounds — fifteen Shillings and two pence; and two Shillings and Six pence was [sic] allowed to the Judges upon Issuing every Writ. None of these kind of Judges were ever allowed any Salaries except in the County of Halifax, whose Judges had small Salaries given them by the Government for a few Years, but were discontinued because the House of Assembly refused to continue that Charge in the Public Accounts.[53] — The Judges of the County of Halifax ever did and Still continue to refuse receiving the above Fees. — The very dangerous Consequences to be feared from this Method of paying Judges, and especially when composed of Men of the Capacities and in the Circumstances before described must instantly Occur. For to Persons in low Circumstances, Mean Characters, and Ignorant of the Criminality of the Action, Such Casual allowances by Fees, must be a great Temptation to become Fomentors of Quarrels and Disputes, and Stirrers up and Promoters of Law Suits thereby to enhance the Profits of their Office.

Soon after the Repeal of the Act for regulating Courts of Justice and prescribing the Form of Practice, the Supreme Court upon a Motion from the Bar, took into Consideration the Powers contained in its Commission, and determined itself to be fully invested (within the Province) with the same Powers as the King's Bench, Common Pleas and Exchequer had in England;[54] and therefore possessed a Concurrent Jurisdiction with the Inferior Courts of Common Pleas in the first Instance in all Cause relative to property, which 'till then had been commenced in those Courts only. — It also determined that the Mode of removing Causes by Appeal and trying the Facts de novo by a Jury (as had been till then the Practice) was irregular and illegal, and therefore abolished that Method and adopted the Practice of removing Judgements from the Inferior Courts of Common Pleas to the Supreme Court by Writs of Error, and reversing or affirming such Judgements upon Matters of Record only. — These Changes in some Instances seemed to have introduced Remedies to the Evils of the former Practice, but

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[50] In 1774, between one-quarter and one-third of the members of the House of Assembly were judges of the Inferior Courts of Common Pleas.

[51] 6 Geo. 3, c. 8 [1766].

[52] 6 Geo. 3, c. 11 [1766].

[53] *Journal of the House of Assembly* (8 August 1759). An allowance to the chief justice of the common pleas and *custos rotulorum* of Halifax County was paid as late as 1770.

[54] *Supra* at note 39. Gibbons was obviously speaking from first-hand knowledge, though corroboration is wanting. The answer may lie in his characterizing the civil jurisdiction of the Supreme Court as "till then dormant Powers."

(from the Nature of the Constitution of the Courts and the discovery of those 'till then dormant Powers of the Supreme Court) were far from answering the desired Purpose, and served only to point out in a more obvious manner the necessity of a total Change, and thorough Reformation in the Constitution and Practice of all the Courts.

In England Writs of Error lay returnable in the King's Bench for the relief of parties injured by Errors in the Judgements given in the Common Pleas and Exchequer; and for reforming Errors in [2751] Judgements obtained in the King's Bench, a like Writ lays returnable in the Exchequer Chamber, before the Judges of the Common Pleas and Barons of the Exchequer: A Wise and just Institution where Suitors Supposing themselves aggrieved by the Judgements of either of the Courts, have the same Mode of Redress open to them. — The Case in Nova Scotia is far otherwise, and ever must remain so until the Courts are Constructed upon a different Plan from the Present, and reduced to a nearer Similitude in Constitution and Practice to the Courts at Westminster, for although the present Supreme Court doth receive Writs of Error and Adjudge thereon in all Cases determined before the Inferior Courts of Common Pleas, And the Governor and Council are by the King's Instructions a Court of Error for reforming Errors in Judgements given in the Supreme Court, in Matters of Property where the Sum in dispute between the Parties shall exceed three Hundred Pounds Sterling,[55] yet in all Causes Criminal or where the Matter in litigation is of an Inferior Value the Party injured is altogether without Remedy, however Erroneous the Proceedings and Judgement may have been, for the Court if it was so disposed, cannot correct its own Errors after the end of the Term in which they have happened and final Judgement given.

> [NOTE *f*: An Instance of this Injury happened in the Supreme Court in Trinity and Michaelmas Terms 1770 in a Cause Foster Sherlock and Wife against Catherine Obrien Administratrix and Heiress of Quin —
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> Debt upon a Bond given by the deceased was brought by the Plaintiffs against the Defendant as Administratrix and Heiress — Judgement past against the Defendant by Default and was entered Not de bonis Testatoris but de bonis propriis without any Suggestion or Return of Writ being made, and Execution in the Common Form prescribed by the Act of the province was taken out de bonis propriis and against her Body which was executed — And the Sum for which the Action was brought and Judgement obtained not being Sufficient to give the Governor and Council Cognizance of the Case and there being no Other Court which could receive a Writ of Error thereupon, A Motion was made in the Supreme Court Hillary Term 1771 for the Defendant by Messrs Brenton and Gibbons her Counsel to Set aside the Execution and amend the Record, but the Relief was denied because the Term was past in which Judgement was given — and the Party was thereby left without Remedy.[56]]

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[55]See Article 28 of the "Instructions to Governor Legge," 1 July 1773: CO 218/7/197, PRO.

[56]RG 39, ser. C[HA], box 8A; RG 39, ser. J, vol. 5 at 154, PANS; Halifax County Original Estate Papers, Q 1. Catherine O'Brien (*née* Quin) was next-of-kin and heir-at-law to James Quin, innkeeper, who had died intestate and apparently insolvent in May 1768. *De facto* redress, relief and remedy which was not available elsewhere could be had in the Court of Chancery, and in November 1770 Mrs. O'Brien filed a bill of complaint against both the Sherlocks and Quin's alleged wife, who had contested the administration of his estate. The complainant's solicitor originally was not Gibbons but Brenton; Lord William Campbell, as Chancellor, allowed an injunction to issue against the defendants: RG 36, box 4, no. 27, PANS.

— And since the Supreme Court hath taken up a Concurrent Jurisdiction with the Inferior Court in Actions relative to Property, the Suitors in that Court in all Causes whose amount is not sufficient to give the Governor and Council a Cognizance in Error are barred of that Remedy (in Case of Error) which they would have been intituled to if the same Actions had been prosecuted in the same Manner before any of the Inferior Courts of Common Pleas. — From this System of Practice arise two distinctions evidently unjust, the one is, that of allowing a Remedy and Relief against Errors to the Person whose dispute shall be relative to a Matter of one farthing's Value above three Hundred Pounds Sterling and denying them to another whose Action shall be of only that farthing's less Value, and both the Cases exactly under the same Circumstances; the other is, that a Remedy in Case of Error in the Judgements of the Inferior Courts of Common Pleas is allowed to be sought in the Supreme Court, provided the Cause of Suit is five pounds or upwards, but the like Cause and proceedings brought and had before the Supreme Court in the first instance (if not for a Sum exceeding three Hundred Pounds Sterling), however Erroneous, after the Term ended cannot be examined and set right in that or any other Court.

[NOTE D: See the Second part of the NOTE C from Blackstone's discourse &c, *xxix-xxx.*]

— Another great Mischief arising from the present Scheme of Jurisprudence in this Province is the want of the establishment of regular Circuits, which cannot with any Degree of Propriety be introduced until a total Change in the Courts shall take place.[57] Since the Supreme Court hath been opened to Suitors to commence their Actions there in the first Instance, Its Sittings or Terms have been increased from twice to four times in the Year.[58] It sits only in the Town of Halifax and all Trials of Issues joined in this Court must be tried there. — [2752] Its Writs and Process run throughout the Province, and Many Plaintiffs resident in the Most distant parts of the Province commence their Actions in this Court, to avoid the Danger apprehended from the Partiality, Prejudice and Ignorance of their own County Inferior Courts of Common Pleas. The Consequence of which is, that Parties and Witnesses are obliged to come from very great Distances at an heavy Expence and with considerable loss of time from their Families and Business to Attend the Trial of a Cause at Halifax, and oftentimes are obliged to repeat the Journey several times before the Action is brought to trial. And in some Cases, Such as in Civil Actions, a whole Jury may be obliged to come from the most remote Settlement of the Province, to try an Issue in the Supreme Court at Halifax. The Hardships, Losses and Expences, which are and may be by this means Sustained are incredible.

Nor is this Mischief much less in the Inferior Courts of Common Pleas, (except in Local Actions which must be tryed in the County Court where the Lands lay, if not brought in the Supreme Court), for their Writs and Process also run throughout the

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[57]The essential change had already taken place in December 1773, when Judges Charles Morris and Isaac Deschamps received new commissions enabling them to hold and adjourn the Supreme Court in the absence of the Chief Justice: RG 1, vol. 168 at 346, PANS.

[58]8 & 9 Geo. 3, c. 5 [1768]. The terms were Hilary (January), Easter (April), Trinity (July) and Michaelmas (October).

Province, and in all Transitory Actions it is sufficient to give the Court Jurisdiction, that one of the Parties is resident in the County where the Suit is brought, and the Defendant and his Witnesses must attend that Court, though from the most distant parts of the Province and at ever so great an Expence, whenever the Matter in Dispute is of the Value of five Pounds or above, for those Courts are limited by an Act to Sit at certain times, at one particular Town in the County for which they are appointed.[59] The Judges of these later Courts still remain composed of the same Kind of Men as when they were first Instituted, and must and do consequently continue in the Same State. These Common Pleas Judges are always likewise named in the Commission of the Peace with many others. The Justices of Peace by an Act of Legislature are impowered to try and determine in a Summary Manner all Controversies and Demands of the Value of three pounds and under, Subject to an Appeal to the Inferior Court of the County,[60] so that it may happen that those Judges may Sit and adjudge upon the Trial of an Appeal from the Judgements they may have before given as Justices of the Peace, or influence their Brethren upon the Bench to affirm their Judgement when it is brought before the Court by the Party thinking himself aggrieved.

There are at present seven of those Inferior Courts of Common Pleas Commissioned within the Province,[61] each of which hath at least three Judges, some of them more, besides a Clerk (who are all intituled to Fees upon the Business coming before them). — That for the County of Halifax Sits four times in the Year, and each of the other twice only.

Thus stands the present State of Judicial Administration of Common Law [2753] in this Province, far from being such as was directed in the King's Instruction, widely differing in Principles and Practice from the Courts at Westminster Hall, quite insufficient to enforce Obedience to the just Measures of Government, or dispense impartial Justice among the Subjects.

The Fees before mentioned allowed to the Judges of the Inferior Courts of Common Pleas are in fact a Tax laid upon all Proceedings at Law, and though they may have been (comparatively speaking) inconsiderable hitherto, will increase fast as the Province becomes Populous and Litigations of course multiplied, and at a Time perhaps not far distant amount to an enormous Sum, to be applied in the Support of a System of Judicial Proceedings productive of more Mischief both public and private than would be felt from a total want of Courts for the determination of Property.

To form a System adapted to the Circumstances of this Province, which will effectually remedy and remove the Evils of the past and present Course of Justice, is esteemed by Many so very difficult or absolutely impracticable, that it ought not to be attempted.

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[59] See, e.g., 1 Geo. 3, c. 13 [1761]. Similar acts were passed subsequently.

[60] 11 Geo. 3, c. 21 [1771].

[61] These courts were in the counties of Annapolis, Cumberland, Halifax, Kings, Lunenburg, Queens and Sunbury. The Inferior Court of Common Pleas of Sunbury County had been established in March 1773 by virtue of a commission from Governor Lord William Campbell. It was to meet four times — not twice — a year: RG 1, vol. 168 at 198, PANS.

[NOTE *g*: Some of the principal people in power in the province in conversing upon this Subject have acknowledged the Iniquity of the present System and propriety of a proposed Amendment, but Opposed all Attempts to attain it because to Use their own Words "We are not ripe for Regularity." The Inferior Court Judges and Sessions of the Peace at Halifax have Solemnly refused to Suffer Provincial Laws exactly Similar to English Acts of Parliament to be construed and applied in the Same Manner as Such Acts of Parliament in England were — and the Supreme Court has also refused to admit Certiorari's to remove Orders from the Sessions and Justices of the Peace or receive Complaints against their Irregularities, for the same Reasons among Others, That the Province is not yet ripe for Regularity and the impossibility of expecting it in Justices and Judges. —]

But this Conclusion is founded upon the same want of Knowledge of the English Constitution of Courts and the Practice that has there so long prevailed, which has produced the inconsistent, absurd and Mischievous Plan hitherto followed in Nova Scotia.

I would therefore humbly propose, That the present Commissions of the Supreme Court and Inferior Courts of Common Pleas, in this Province should be revoked, and that in their place be erected two Superior Courts of General Provincial Jurisdiction. The first of which to be constituted upon the Principles, and invested with all the Powers, of the Court of King's Bench in England, under the present Stile of the Supreme Court &c or such other as might be judged better adapted to an American Province. The other to be constituted upon the Principles, and invested with the Powers, of the two Courts of Common Pleas and Exchequer at Westminster, under the Stile of the Court of Common Pleas and Crown Revenue, or such other Stile as may be deemed more proper. — That one Chief Justice and two other Judges be appointed to each of the two Courts. That the present Salary of £500 — Pr annum, allowed to the Chief Justice of the Province, being a very Honorable and Sufficient Provision, would require no further addition, as the Chief Justice of the first Court would remain Chief Justice [2754] of the Province.[62] — That the Chief Justice of the Common Pleas or second Court, might be allowed three Hundred pounds Pr annum, and each of the Puisne Judges two Hundred pounds Pr annum.

[NOTE *h*: By this Estimate there would be wanting £1100 — per Annum only over the present Allowance from home of £500 — to the Chief Justice. And for effecting so good a purpose it is to be wished the Parliament would increase its Annual Bounty to the Province to the Amount of that Sum, untill the Inhabitants in Number and Wealth Should be in a State to Support the Charge, when the Parliamentary Provision might Cease. — And if the Assembly would not then Voluntarily make the necessary Provision for Supporting the Courts of Justice — The Crown by withdrawing Its powers from all Courts but those of Criminal Jurisdiction for preserving the Peace —

[62] Curiously, when in 1966 the Supreme Court of Nova Scotia was reorganized into a Trial and an Appeal Division, the Chief Justice of the province became *ex officio* Chief Justice of the Appeal Division.

> would compell them to do so or be the means of preventing themselves and their Constituents enjoying the necessary Protections and Benefits obtainable from the Courts in Matters of Private Trespass and property. — Or by procuring a Small Stamp Duty to be laid by a Provincial Act on all Law proceedings, Deeds, and Other Instruments under Seal, cause the Foundation of a Fund to be Made for Annually lessening the necessity of a Parliamentary Assistance, and in time intirely Supply its Place.]

— That of the Judges the two Chief Justices at least, should be Gentlemen of Abilities well acquainted with the Theory and Practice of the Law; the other four, if not before particularly conversant with Law, at least possessed of a liberal Education, Integrity, Honor and Sound Judgement, and be altogether unconnected with any private Business or Avocation whatever, except such as could not interfere with the Duty or Dishonor the Character of a Judge.[63]

That able and upright Persons be appointed Attorney and Solicitor General, and (after the present Attorney General's time[64]) the Salary allowed at present of two hundred pounds Pr Annum to that Office being divided will be a genteel and sufficient provision from Government for both the Attorney and Solicitor General, with what they would otherwise get by Practice.[65] That one Prothonotary or Chief Clerk for all the Civil Business be appointed to each of the Courts, who by himself or his Deputies would be Sufficient to dispatch all the Business, which in England requires so great a Number of Officers. No Salary would be necessary for this Office, which would be well Supported by a proper Establishment of Fees. — That One Chief Clerk be appointed for the Criminal Business in the former of the Courts, who by himself or his Deputy or Deputies should have the whole Management of that Department. This Office should be allowed Fees for such Business as could admit of a taxation and be leviable with propriety, and would besides require a Salary, as the greatest part of the Culprits would be too poor to pay any Fees that might accrue in their Conviction; and for Such Prisoners as may be by their County Acquitted, or discharged by Proclamation, it would be highly unjust to oblige them to pay Costs.

> [NOTE *i*: The present Clerk of the Crown in the Supreme Court[66] is allowed a Small Salary for Transacting the Criminal Business — which fluctuates according to the Annual Disposition of the House of Assembly — And receives Fees for all Civil Business. Now upon the proposed Plan his Salary might be fixed at a Reasonable permanent Annual Sum payable out of the

[63] It is noteworthy that Gibbons, so harsh a critic of the non-professional judiciary in the inferior courts, should have failed to insist that not only the chief justices but also the puisne judges of the superior courts lawyers. Under the circumstances, however, perhaps he could not have not done otherwise: both Judge Morris and Judge Deschamps were laymen, promoted from the bench of the Inferior Court of Common Pleas. And they stood in an ambiguous relation to each other, as well as to Gibbons: Morris had been Chief Justice of the Common Pleas during the "justices affair" of 1752-53, and Deschanps one of the signers of the remonstrance: *supra* at note 36.

[64] William Nesbitt was attorney-general from 1753 to 1779. He was succeeded by James Brentonin turn succeeded by Gibbons.

[65] Both the attorney and the solicitor-general were obliged to carry on a private law practice in addition to conducting Crown prosecutions. The office of solicitor-general, moreover, paid no salary at all.

[66] He was George Henry Monk, younger brother of James, for whom he deputized during the latter's absence in England. The office was subsequently confirmed to him: RG 1, vol. 168 at 400, PANS.

Revenue arising from the Stamp Duties, when levied by the Legislature, and till then from Such other Fund as may be thought proper.]

All those Chief Clerks ought to be Persons of Repute and well Acquainted with the Practical part of the Law. These would be all the Officers necessary to be appointed by Government in the Establishment of the proposed Courts. — That a concise Scheme of Practice be formed, in which should be retained all the Essential Parts of that of England, adapted to the Circumstances of this Province, which would be no difficult undertaking to a Person or Persons —

[NOTE E: The observation of Sir William Blackstone in Speaking of An Academical Study of the Law in some sort by its imitative applicability supports this mode of reformation in Nova Scotia — he says — "The leisure and abilities of the learned (in these retirements) might either suggest Expedients, or execute those dictated by wiser Heads for improving its Method, retranching [sic] its Superfluities, and reconciling the (little) contrarieties (which the practice of Many Centuries will necessarily create in any human System)": Blackstone's first discourse on the Study of the Law, *lviii*.]

— who were well acquainted with the Province and the Principles of Jurisprudence in England, in the formation of which the greater Part of the prolix Forms, delays, and Expence, attending a Suit in England, might very easily be avoided and rendered quite unnecessary in this Province.

[NOTE *k*: That the Scheme of Practice to be followed, together with a Complete and Reasonable Table of Fees for the Offices of the Clerks, Attornies, Provost Marshal, Bailiffs, Jurors and other Necessary Inferior Officers, be drawn up, carefully Considered and established by an Order from England. — And the Judges in their respective Courts fully impowered by Rules and Orders from time to time to Supply any Omission or Defect in Such Scheme and Table of Fees, which might be discovered in Course of Practice. So as their Rules and Orders should not Change or be repugnant to the Fundamental Principles of the Establishment and be likewise liable to Vacation by Orders from Home. — The Provost Marshal being one of the Principal and Necessary Crown officers in the Province, and requiring allways to be filled with an Able and Respectable Person, very much requires an additional Support from Government by Salary besides the Casual and Ordinary Allowance of Fees upon Law Proceedings in the Common Course of Justice, as much of his Duty is Crown Business from which Fees cannot be received, and the Respect of that Officer needs a fixed Honorable Provision.[67]]

That the Seat of the proposed Courts should be fixed at the Capital of the Province, and the Judges from thence go regular Circuits to the different Counties, twice in the

[67]The provost-marshal was John Fenton, commissioned 5 December 1772: RG 1, vol. 168 at 183, PANS. Though responsible, through his deputies, for the service of writs and execution of judgements across the province, he had no salary — either from Parliament or from the legislature.

Year during the temperate Seasons. The Roads at present, it is true, are but indifferent, but as the Province increases [2755] in population and Wealth, the Communication between the several parts will become more easy and commodious, and if Government should so far favor the Province as to Assist in opening New Roads and repairing the old, the present inconveniences in travelling would immediately vanish. Besides, the Roads already opened are such as to admit Persons on Horseback or on Foot to pass and repass between many parts of the Province from the beginning of May to the later end of October, Within which Term the Circuits might be gone without much Danger and with little Difficulty to persons in Health. — That the several Counties should by a County Rate defray the Reasonable Travelling Expences of the Judges upon the Circuit and their necessary Attendants, by a fixed allowance Per day, and a limitation be made of the Number of Days they should remain in each respective County.[68] This Charge would be very inconsiderable to individuals and be no more than a reasonable allowance to the Judges and Officers in the execution of this Duty.

> [NOTE *l*: This must be done by a Provincial Act, and the necessity of having the Judges travel the Circuits would procure the passing Such a Law as the Parties should otherwise be at the Expence of the Travel and Maintenance of themselves, Witnesses and Jurors to Halifax to obtain Trials at Bar, which would be an Expence and Loss falling upon Individuals far Exceeding the Change proposed to be born by a whole County.[69]]

Some of the principal and obvious Advantages which would flow from this Change in the Courts of Nova Scotia are: First, to Government. The King's Governor would by this means have about him a Set of Honorable and able Law Counsellors to advise in points of Law and Constitutional Measures, and to revise and correct any Proposed Acts of Legislature; point out which of them were Accordant with, and which repugnant to, the Laws of England; and thereby prevent any of the later kind from passing through the vain formalities of Public Acts, and disgracing the Code of Provincial Laws. — An attentive review of the precedent Acts of this Province their Amendments, Alterations, and Additions, will evince the want of such Correctors resident in the Province.[70] — Their Honor and Power would insure an effectual and just execution of the Revenue Laws, which at present are oftentimes obstructed and defeated by means of the Weakness and Ignorance of some of the Judges and Justices; and the public exertion of the Judicial Powers of Others, and their avowed Junction with Delinquents, in opposing the execution of those or any other Laws, which they, from Motives of fear of the Common People, Prejudice, Ignorance or Interest may disapprove.

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[68]Gibbons here anticipates the *Supreme Court Circuit Act*: 14 & 15 Geo. 3, c. 6 [1774]. The bill establishing the circuit was introduced during the sixth session of the Fifth Assembly (October-December 1774).

[69]Money to pay the travelling expences of the judges on circuit was voted by the House of Assembly, albeit grudgingly.

[70]At that time, review of colonial legislation took place in England; it was the responsibility of a senior barrister who was legal adviser to the Lords of Trade. In 1774, he was Richard Jackson, K.C., a bencher of the Inner Temple and Member of Parliament.

[NOTE *m*: Some Instances among others to Support this are 1.st The Complaint made in 1772 or beginning of 1773 by Mr Johnson, Collector of the Duties at Liverpool, of the Conduct of the Judges and Justices there and the obstruction he met with in his Office from them.[71] 2.dly The Conduct of the Judges in Cumberland in the case of Eagleson and Gannet.[72]]

Secondly, to the Public in General. The Province from the proposed [2756] Plan would reap all the Advantages from the Labor of the Parties, Witnesses, Jurors and Others, which it now loses by their tedious and distant unnecessary Attendance upon Courts, the amount of which is inconceivably great, and the Evil must increase as the People become Numerous, under the present Mode. Besides, the present unlimited burthen of the Fees allowed to Judges would cease.

Thirdly, to individuals. — The Loss and Expence in obtaining Justice would be greatly lessened, and their Properties better Secured. The proposed Judges being in Station high above the generality of the People, would in a great Measure be unconnected with, and unknowing of, them, and consequently indifferent between the Suitors. — By their Indifference, Superior Abilities, and Application, being enabled to hear Causes coolly, discuss them justly, and pronounce Judgement upon true Principles of Law and Reason touching all Matters brought before them, the People would be induced to acquiesce under their Determination, and thereby avoid many tedious and very expensive Litigations. — And the Reverence which would attend so Honorable and Usefull an Appointment, and that Confidence which would be placed in Such Judges, would tend to remove or prevent Many great Causes of Discontent, Murmur, Complaint and Confusion among the People; the Intent of the King's Instruction would be fully answered; and all the Benefits attained both by His Majesty's Government, and his Subjects in this Province which are to be expected from the best Scheme of Human Jurisprudence; and an excellent Model formed for introduction into any new Governments hereafter to be erected.

All which is humbly Submitted by

R. Gibbons junr.[73]

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[71]William Johnson (Johnston, Johnstone) was commissioned Collector of Impost and Excise for Queens County in September 1771, and a justice of the peace in June 1772: RG 1, vol. 168 at 134, 136, 163, PANS. Simeon Perkins was a justice of the common pleas at the time, but he kept no diary from July to December 1772.

[72]*Eagleson* v. *Gannett* concerned the attempt by the Church of England clergyman, John Eagleson, in 1770-1771 to take possession of the glebe lands in Cumberland Township which had been held by the Dissenting clergyman, Caleb Gannett. Originally there was litigation in the Inferior Court of Common Pleas at Fort Lawrence — at least two of the judges concerned (William Allen and Jotham Gay) were openly partial to the defendant — followed by a writ of error or certiorari issued out of the Supreme Court at Halifax. In Michaelmas Term 1773 Richard Gibbons, Eagleson's attorney, recovered for the plaintiff with costs: RG 39, ser. C[HA], box 12; RG 39, ser. J, vol. 5 at 249, 256, PANS. In September 1773, Jotham Gay had in fact been removed from the bench of the Inferior Court of Common Pleas of Cumberland County for acting as Gannett's attorney while his cause with Eagleson was *sub judice*: RG 1, Vol. 189 at 197, 227, PANS. (I am indebted to Ernest A. Clarke for sharing his vast knowledge of this subject with me.)

[73]Gibbons styled himself thus until the death of his father, on 24 November 1774.