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## The Treason of the Merchants: Dissent and Repression in Halifax in the Era of the American Revolution

“The various events of the American revolution — the attempt on fort Cumberland — the design against Halifax, only set aside by the fear of the epidemic small pox [July 1775], and many other obvious causes, created a reign of terror in this province which continued to the close of the war in 1783.”

— *Beamish Murdoch, 1866*

“There is an impression that in Nova Scotia only New Englanders were suspected of disloyalty and sympathy with the Revolutionists.”

— *Walter C. Murray, 1903*

“My son, a great rebel hunt is in progress. Every man of New England birth is suspect, and when he happens to be a merchant with many in his debt, there are sure to be certain ones eager to denounce him, truly or falsely, to bring about his ruin. Halifax is ringing with accusations and denunciations’.”

— *Thomas H. Raddall, His Majesty’s Yankees, 1942*

IN APRIL 1754 MALACHY SALTER, a 38-year-old *émigré* Boston merchant, sat on the grand jury which discharged a ‘foreign Protestant’ immigrant lying under an indictment of high treason. This was the first attempted prosecution for treason in what is now Canada.<sup>1</sup> Twenty-four years to the month later, Malachy Salter, ex-justice of the peace, himself stood indicted for sedition. It was the second occasion on which the Halifax grand jury — their heads turned by rebellion and civil war in America and insurrection in the Chignecto hinterland — had returned ‘true bill’ on an indictment against Salter for ancillary crime against the state. “During the American Revolt...” wrote Thomas Beamish Akins in 1895, “Mr. Salter, with several other gentlemen of the town, became suspected of treasonable correspondence. He was twice under prosecution, but on a full investigation nothing appeared to have been said or written by him of sufficient moment to warrant the charges”.<sup>2</sup> Writing almost three decades earlier, the lawyer-chronicler Beamish Murdoch — a paternal great-grandson of Salter — adopted a somewhat different

1 *R. v. Hoffman* (N.S. Gen. Ct., 1754). See Barry Cahill, “The ‘Hoffman Rebellion’ (1753) and ‘Hoffman’s Trial’ (1754): Constructive High Treason and Seditious Conspiracy in Nova Scotia under the Stratocracy”, in F. Murray Greenwood and Barry Wright, eds., *Canadian State Trials [Volume One]: Law, Politics and Security Measures, 1608-1837* (Toronto, 1996), pp. 72-97.

The author is grateful to Jim Phillips, Barry Wright and the three anonymous reviewers at *Acadiensis* for their critiques of earlier drafts of this article.

2 T.B. Akins, “History of Halifax City”, *Collections of the Nova Scotia Historical Society*, 8 (1895), p. 235.

Barry Cahill, “The Treason of the Merchants: Dissent and Repression in Halifax in the Era of the American Revolution”, *Acadiensis*, XXVI, 1 (Autumn 1996), pp. 52-70.

perspective: the Council, in November 1777, had ordered the arrest, detention and prosecution of his ancestor for corresponding with the enemy. Murdoch went on to assert, however inaccurately, that Salter was tried and acquitted at the next supreme court.<sup>3</sup> In fact, the accused, who had already been tried and convicted earlier the same year for uttering seditious words, was neither tried nor acquitted of the more serious misdemeanour of treasonable correspondence. Trial was indefinitely postponed and the lingering threat of prosecution was removed only by Salter's death three years later. Murdoch's brief account bears contrasting with the slightly later and more expansive one provided by Salter's great-great-granddaughter, Susan Stairs:

On October 10th, 1777, was passed an order-in-council for the arrest of Malachy Salter on a charge of corresponding with parties in Boston of a dangerous tendency, and a prosecution was ordered. The original indictment of the grand jury was found a few years ago in the court house, and is now in the possession of the [Nova Scotia] Historical Society. In this paper is stated that Malachy Salter is reported to have said, 'He did not think the rebels were so far wrong'; but upon this the grand jury indicted him for high treason, but Mr. Salter was allowed to give security himself in £500, and two others each £250 for his good behaviour. He was tried in the supreme court and acquitted....

I have seen the indictment and am sorry that I did not copy the names of the grand jury.<sup>4</sup>

Taking the *Salter* case as its point of departure, this article provides an account of the sedition proceedings arising from the inability or unwillingness of the old New England mercantile elite of Halifax to navigate between the shoals of neutrality and disloyalty, and thus respond successfully to the challenge posed by the government's reaction to the emergency in the New England colonies. The Nova Scotia government attempted to suppress sedition in Halifax and elsewhere in the colony through a variety of measures, executive and judicial, which involved both

- 3 Beamish Murdoch, *A History of Nova-Scotia, or Acadie* (Halifax, 1866), vol. 2, pp. 587-8. Murdoch failed to mention that Salter had been tried and convicted of uttering seditious words in February 1777. The bias of the historiography — and it persists — is to paint Salter as a 'good' American; a loyal Yankee rather than a disloyal, or even 'neutral' one. See, for example, C. Bruce Fergusson, comp., *A Directory of the Members of the Legislative Assembly of Nova Scotia 1758-1958* (Halifax, 1958), p. 307; and Arthur Wentworth Hamilton Eaton, "Chapters in the History of Halifax, Nova Scotia, No. X: Halifax and the American Revolution", *Americana* 12, 2 (April 1918), p. 200.
- 4 [Anon., comp.], *Family History: Stairs Morrow: Including Letters, Diaries, Essays, Poems, Etc.* (Halifax, 1906), pp. 252-3. Susannah Duffus Morrow [Mrs William James Stairs], 1822-1906, began to compose "The Morrow Family" history in 1879. The court document to which she refers is no longer to be found in the Royal Nova Scotia Historical Society fonds, now held at the Public Archives of Nova Scotia [PANS], nor are other records extant of the Halifax grand jury of the time. It is nevertheless clear from Mrs Stairs' description of the proceeding that her ancestor Salter was charged not with high treason (rebellion) but with sedition (incitement to rebellion).

prosecution and persecution, legal repression and legal harassment. The use of the formal law in sedition trials was an essential aspect of the official response to the American Revolution. For a variety of reasons repression and not leniency marked the legal process. Official repression through the criminal justice system was distinguished by various methods of harassing suspected rebel sympathizers: arrest, imprisonment or detention without trial, oppressive recognizances, delay of trial through repeated continuances, pseudo-treason indictments disguised as high misdemeanour (serious sedition), and vexatious or malicious reindictment.

The causes and nature of the official response to sedition in Nova Scotia in the era of the American Revolution must be evaluated in the context of the aftermath of the patriot siege of Fort Cumberland in 1776.<sup>5</sup> In responding to the insurrection, the government, soon also facing legal constraints which prohibited trials for high treason, turned to the lesser charge of sedition as a means of suppressing dissent. Any account of rebellion and repression in the Revolutionary era would be incomplete, therefore, if trials for sedition such as Salter's were not placed in the broader context of the official reaction to political protest and dissent on the part of Nova Scotia's New Englanders. The government's reaction to Salter's articulation of his pro-patriot political views was characterized more by repression than by leniency, and, in particular, the heavy hand of the law of sedition was imposed. Yet Salter was one of only two patriot sympathizers actually tried for sedition, and, while both were found guilty, neither received a harsh sentence.<sup>6</sup>

Except for two of the patriot besiegers of Fort Cumberland, no one in Nova Scotia was tried for high treason during the period which encompassed the American Revolution.<sup>7</sup> This article attempts to show why Malachy Salter, an 'economic republican' who, nevertheless, did not favour American independence and who was not himself a rebel, was subjected to such an extreme degree of harassment and continuing legal repression. It also suggests that the only reason why Salter was not charged with high treason was that the imperial *Habeas Corpus Suspension Act* of 1777 effectively prevented treason trials. This is the reason why only two of the 40-odd insurrectionists indicted for high treason following the siege of Fort Cumberland were actually tried, and why no treason

5 See generally Ernest Clarke, *The Siege of Fort Cumberland, 1776* (Kingston & Montreal, 1995).

6 This and the paragraph following depends upon the introduction to Ernest A. Clarke and Jim Phillips, "Rebellion and Repression in Nova Scotia in the Era of the American Revolution", in Greenwood and Wright, eds., *Law, Politics, and Security Measures*, pp. 172-3.

7 The only other comparable proceedings were *R. v. Patten* (Hilary Term 1779) "For Treasonable Practices" and "for Encouraging Desertion from his Majesty's Troops". The Halifax grand jury initially declined to consider the former for want of crown witnesses, while returning true bill on the latter: N.S. Supreme Court, Pleas of the Crown, Easter Term 1765 to Michaelmas 1783: RG 39, series J (HX), vol. 1, pp. 333-4, 338, PANS. Patten was never tried, and all proceedings against him were finally ordered terminated by the lieutenant-governor in May 1780: Secretary [Bulkeley] to Attorney-General [Brenton], 9 May 1780, Secretary's letter-book, p. 279, RG 1, vol. 136, PANS. Joseph Patten JP (1710-1787), a New England Planter from Massachusetts, was the senior patriot leader in Granville Township, Annapolis County — a 'Yankee' by no means 'neutral'; see generally A.W. Savary, *Supplement to [W.A. Calnek] History of the County of Annapolis* (Toronto, 1913), pp. 35-6.

indictments were preferred after local proclamation of the act in August 1777.<sup>8</sup> The language of the second indictment preferred against Salter in April 1778<sup>9</sup> makes clear that the government thought they had good grounds for charging him with high treason and that they fully intended doing so should the inconvenient statutory bar be removed. Though the *Habeas Corpus Suspension Act* did not forbid charging a suspect with high treason — arrest, detention and indictment were allowed, while recognizance, bail and trial were prohibited — there was no point in doing so while the act was in force. Better, then, to confine formal charges to triable indictments than for the government to prefer a charge which could not proceed to trial without special permission from Whitehall.

The loyalty of the members of the pre-Planter New England mercantile elite<sup>10</sup> of Halifax, according to Lewis Fischer, was secured by their anticipation of sustained economic growth based on sharply rising pre-war levels of trade and commerce — in other words, the prospect of wresting control of the lucrative West Indies trade from their New England competitors.<sup>11</sup> It is ironic that Salter, who exemplified the entrepreneurial stratum within Halifax's New England mercantile elite,<sup>12</sup> ultimately became the victim of his own determination to compete with and remain independent of the old Anglo-European mercantile elite, personified by Joshua Mauger. Salter's biographer makes the telling point that he "was the only leading Haligonian prosecuted during the American revolution who was not defended by Mauger's associates"<sup>13</sup> — the reason being that Salter was indebted to Mauger's

8 These insights derive from Clarke and Phillips, "Rebellion and Repression".

*An Act to empower his Majesty to secure and detain Persons charged with, or suspected of, the Crime of High Treason, committed in any of his Majesty's Colonies or Plantations in America...*, (1777) 17 Geo. 3, c. 9. The emergency measures *Habeas Corpus Suspension Act* was subject to annual renewal, and was renewed five times before being allowed to expire in January 1783. It is arguable that the proliferation of prosecutions for 'high misdemeanor' or 'treasonable practices', rather than high treason *per se*, can be attributed to the authorities' desire to circumvent the *Habeas Corpus Suspension Act*, which prevented them from either bailing or trying an accused for treason, and effectively suspended the legal right "to be tried within a reasonable time".

9 Depositions and Other Papers Connected with Crown Prosecutions between 1749 and 1780, RG 1, vol. 342, doc. 80, PANS.

10 It is necessary to distinguish between New England Planters of the period 1759-1764 and New England settlers of the decade preceding the Planter immigration. Pre-1759 emigrants from urban New England, such as Salter, were not 'Planters' in the same sense as post-1759 New England and Ulster immigrant farmers and fishermen who both colonized the vacant Acadian lands and founded new townships on the south and southwestern shores of Nova Scotia.

11 Lewis R. Fischer, "Revolution without Independence: The Canadian Colonies, 1749-1775", in Ronald Hoffman et al., eds., *The Economy of Early America: The Revolutionary Period, 1763-1790* (Charlottesville VA, 1988), pp. 94-5ff.

12 Lewis R. Fischer, "'Revolution without Independence': The Halifax Merchants and The American Revolution, 1749-1775", paper presented to the Annual Meeting of the Canadian Historical Association, June 1978, p. 12 [ms.]. Elsewhere, Fischer points out that "after 1764 New Englanders never comprised less than 85 per cent of all [Halifax] merchants": "Canadian Colonies", p. 107.

13 S. Buggey, "Salter, Malachy (Malachi)", in *Dictionary of Canadian Biography*, vol. IV, p. 696. The reason for Salter's isolation and vulnerability was that John Butler, Mauger's principal agent and the army paymaster, was not only Salter's most pressing creditor but also a member of Council. Some merchants being more equal than others, Butler was exonerated of the charge of

associates, who were not about to leap to the defence of a hard-pressed competitor, much less incriminate themselves by opposing government action against an exemplary seditious. "Although Salter", writes Fischer,

like so many successful merchants, managed to gain his share of place holdings, his principal interests were always in trade and commerce. His connections, both mercantile and familial, were chiefly with New England, but his network of commercial correspondents stretched at least as far down the coast as Philadelphia. To serve his expanding trading interests, Salter invested heavily in shipping, becoming the most important shipowner in the town [of Halifax] following Mauger's departure [in 1760].<sup>14</sup>

Salter, writes Brebner, "was notable in that he chose to maintain his commercial contacts with New England, which had been his home".<sup>15</sup> He was even more remarkable in that he chose to persevere following the outbreak of rebellion and civil war in New England, refusing to sacrifice his investment despite the trade embargo. Yet there also were pressing financial reasons for Salter's determination to take advantage of the new economic opportunities presented by what soon became a revolutionary war. Importuned by creditors, he had taken over as master of his newest and largest trading vessel, the brigantine *Rising Sun*. As early as 1774, his creditors, pursuing him down the south shore from Halifax to Liverpool, attempted, unsuccessfully, to have the vessel impounded.<sup>16</sup>

Though the ordeal of Malachy Salter was atypical of the experience of the old New England mercantile elite of Halifax, his very failure to capitalize on the war shows why Fischer's "revolution without independence" model, which draws heavily upon the evidence of Salter's career, forms the basis for a new economic interpretation of the failure of the American Revolution in Nova Scotia. Other scholars have also recognized the importance of mercantile issues and have identified Salter as one of those merchants who had "waxed fat from war contracts" during the previous war.<sup>17</sup> Fischer himself, however, neglects to consider the impact

corresponding with the enemy in February 1776; he was too powerful to be subjected to the indignity of a seditious indictment: Minutes of Council, 8 February 1776, RG 1, vol. 189, PANS.

14 Fischer, "Revolution without Independence", p. 103.

15 John Bartlet Brebner, *The Neutral Yankees of Nova Scotia: A Marginal Colony during the Revolutionary Years* ([1937] New York, 1970), p. 21.

16 Harold A. Innis, ed., *The Diary of Simeon Perkins, 1766-1780* (Toronto, 1948), pp. 72-3 (April-May 1774), 79 (Aug 1774), 157 (July 1777).

17 Wilfred Brenton Kerr, *The Maritime Provinces of British North America and the American Revolution* (Sackville NB, [1942]), p. 12; cf. Brebner, *Neutral Yankees*, pp. 19-20. The original proponent of the theory of an homogeneous merchant-loyalism was Viola F. Barnes, "Francis Legge, Governor of Loyalist Nova Scotia, 1773-1776", *New England Quarterly*, 4 (July 1931), pp. 425ff. In his article, "The Merchants of Nova Scotia and the American Revolution", *Canadian Historical Review*, 13, 1 (March 1932), pp. 20-36, W.B. Kerr offered a critique of the Barnes thesis "that the influential Halifax merchants were directly responsible for keeping Nova Scotia loyal to the Crown"; see George A. Rawlyk's important historiographical essay, "The American Revolution and Nova Scotia Reconsidered", *Dalhousie Review*, 43, 3 (Autumn 1963), pp. 379-80 and 391 n. 5. See also Reginald C. Stuart, *United States Expansionism and British North America, 1775-1871* (Chapel Hill NC & London, 1988), p. 18, and "A Revolution Repeatedly Rejected, 1774-1871", in

which Salter's indebtedness, not to mention his years-long persecution as a suspected state criminal, had on his commercial activities. Also left out of consideration are the kinship ties which bound the old New England mercantile elite, of which Salter was the most prominent and prestigious member, to the old New England official elite.<sup>18</sup>

The death of Chief Justice Jonathan Belcher, at the end of March 1776, seems to have removed the last restraint on legal repression of "the more radical New England element at Halifax" and elsewhere. Belcher was not replaced for two years and, during the hiatus, the government evinced no reluctance to suppress political dissent on the part of "the extreme New England republican wing of the local opposition".<sup>19</sup> As early as July 1776 Attorney-General William Nesbitt illegally laid an *ex officio* criminal information for high treason against one Thomas Falconer [Faulkner], a New England Planter of Londonderry Township.<sup>20</sup> Though prosecutions by way of information for anything other than high misdemeanours were *ultra vires* under the criminal procedure of England as in force in Nova Scotia, the offence was non-bailable and the accused was detained without trial until the next term, when the indictment (for "treasonable practices") which had afterwards been preferred against him was quashed by the grand jury.<sup>21</sup> It is inconceivable that Chief Justice Belcher would have tolerated this flagrant abuse of process — unless

John Herd Thompson and Stephen J. Randall, *Canada and the United States: Ambivalent Allies* (Montreal & Kingston, 1994), pp. 9-14. Yet neither Kerr's critique of Barnes nor Rawlyk's critique of Kerr really undermines the basis of the Barnes thesis, of which Fischer's economic reinterpretation is both a recapitulation and a revision. On the other hand, an inherent weakness of this whole approach may be that it confines the scope of the economic interpretation to the leverage exercised by the metropolitan mercantile elite.

18 Salter himself had been briefly an ally of Nova Scotia's Bostonian first chief justice, Jonathan Belcher. His son and namesake, Dr Malachy Salter Jr, would later marry a daughter of Justice Charles Morris of the Supreme Court of Nova Scotia. Councillor Morris, originally from Massachusetts, served as acting chief justice of the province from March 1776 to April 1778 and in that capacity presided not only at the treason trials of the patriot besiegers of Fort Cumberland, but also at Salter's trial, in February 1777, for uttering seditious words.

19 The phrase is Winthrop Bell's, used in reference to the administration of Charles Lawrence, 1754-60: W.P. Bell, *The "Foreign Protestants" and the Settlement of Nova Scotia: The History of a Piece of Arrested British Colonial Policy in the Eighteenth Century* ([1961] Fredericton and Sackville NB, 1990), p. 465.

20 Pleas of the Crown, 15 July and 11 October 1776, RG 39, series J (HX), vol. 1, pp. 257, 262; petition of Thomas Faulkner, 10 February 1777 (endorsement), RG 1, vol. 342 doc. 59, PANS. The original charge against Faulkner was changed from statutory high treason to the high misdemeanour of 'treasonable practices' because no grand jury could be persuaded to return true bill on an indictment for high treason unless the accused were shown to have taken up arms against the king. Faulkner, who afterwards led a contingent from the Cobequid townships at the siege of Fort Cumberland, was to be one of only two indicted rebels tried for high treason in April 1777.

21 The high prerogative expedient of *ex officio* criminal informations was available only for prosecuting misdemeanours; ergo, the Faulkner prosecution was illegal and unconstitutional.

The "quasi-independent township of Londonderry", as Brebner (*Neutral Yankees*, p. 39) calls it, though colonized 14 years earlier, was not formally erected until March 1775 — scarcely a month before the outbreak of rebellion in New England. Londonderry subsequently showed itself to be the least rebellious of the three Cobequid Bay townships, having been settled mainly by Ulstermen rather than by New England Planters. See generally Mary Ellen Wright, "'...of a Licentious and Rebellious disposition' — the Cobequid Townships and the American Revolution", *Collections of the Royal Nova Scotia Historical Society*, 42 (1986), pp. 27-40.

as an unavoidable side effect of the government's proclamation of martial law on 5 December 1775, in which the moribund chief justice, as *ex officio* president of the Council, had no choice but to acquiesce. Attorney-General Nesbitt probably took advantage of the fact that neither of the assistant judges of the Supreme Court — the senior of whom (Isaac Deschamps) replaced Belcher as acting chief justice — was a lawyer. Whether their ignorance of criminal procedure (not to mention the 1695/6 *Treason Trials Regulation Act*) excused the judges' failure to counter the abuse of process by the chief crown attorney begs the question of judicial complicity in official repression. The *Habeas Corpus Suspension Act*, which permitted arrest and detention without bail or trial — on mere suspicion, not to mention accusation or misprison of treason — cannot be pleaded in extenuation of the judges' action, because it was not passed and did not become law until 1777.

The late chief justice, concerning whom "the tradition is emphatic that he was distinctly in sympathy with the Revolution",<sup>22</sup> had had close links with Halifax's Protestant Dissenters' Meeting-House [Mather's Congregational], and with its interim supply, Parson Seccombe of Chester, afterwards accused of seditious preaching. Thanks to the proliferation of independently-minded New England merchants such as Salter among its lay leaders, Mather's Church came to be viewed by government as the seed-bed of whig-patriotism in the capital. "So much concern did the political sympathies of this congregation give the Governor", writes the church historian, "that extraordinary means were taken to thwart them".<sup>23</sup> In broader ideological terms, moreover, the significance of the ordeal of Malachy Salter was not lost on those of his New England compatriots whose Congregationalism accommodated both religious and political dissent. If "the Revolution made Congregationalism...unpleasantly synonymous with rebellious sympathies", then Salter was "naturally suspected" not only "because of his New England connections", but also because of "his leading position at Mather's".<sup>24</sup> Salter was thus trapped in a vicious circle: the fact that they had selected him as moderator drew suspicion upon the congregation, while the congregation's uncompromising New Englishness cast the veil of suspicion over its paramount leader. The government's continuing prosecution-cum-persecution of Malachy Salter cries out for detailed analysis as a case study of ambiguous or divided loyalty, combining elements of politics, trade and religion. As a conscientious patriot, as a seagoing merchant suspected of trading with the enemy and as a pillar of the New England Congregational 'mother church', Salter made altogether too conspicuous a

22 Eaton, "Halifax and the American Revolution", p. 198.

23 Walter C. Murray, "History of St. Matthew's Church, Halifax, N.S.", *Collections of the Nova Scotia Historical Society*, 16 (1912), p. 164. One of the foundational myths of Mather's church is that the 65-acre glebe was 'confiscated' as a result of the 'treason trials' of Parson Seccombe of Chester and Salter: *ibid.*, p. 152; Ian F. MacKinnon, *Settlements and Churches in Nova Scotia 1749-1776* [Montreal, 1930], pp. 72 n. 3, 97 n. 4; [R.M. Hattie], *Looking Backward over Two Centuries: A Short History of St. Matthew's United Church...* (Halifax, 1949), p. 12. Of course, no such trials ever took place, and escheat and forfeiture could only follow a conviction for high treason or judgment of outlawry against the accused.

24 Brebner, *Neutral Yankees*, pp. 192, 340.

target.

The “ardent republican”, who studied the biography of the regicide and observed the anniversary of King Charles I’s execution as a private holiday,<sup>25</sup> was not about to renege on his political principles because those of like mind had taken up arms against King George in defence of the very principles to which Salter himself adhered. His reputation appears even to have preceded him to England, whither he had gone on a trading voyage, for, in July 1776, the secretary at the Treasury wrote to the permanent under-secretary at the American Department informing him that a vessel lying in the Thames, the owner-master of which was Malachy Salter, was suspected of being bound for Massachusetts — in direct violation of the *Boston Port Act*. The secretary of state himself was concerned enough to write on the same subject a few days later to the new lieutenant-governor of Nova Scotia, advising him that a vessel owned and commanded by Salter was believed to be carrying goods from London to Nova Scotia in transit to Boston, and instructing him to prevent all contraband trade with the colonies in rebellion.<sup>26</sup> Commodore Marriot Arbuthnot RN, commissioner of the naval dockyard, who had taken over the government in May, replied that he would do his “utmost to prevent any intercourse or Correspondence between the Colonies in Rebellion, and any Persons in this Province”.<sup>27</sup> This blanket prohibition against written communication, which derived from Governor Legge’s proclamation of 5 July 1775 forbidding aid to the rebels,<sup>28</sup> laid the groundwork for the government’s four-year-long vendetta against Malachy Salter.

Salter returned from England in the autumn of 1776. His ordeal, which began in earnest in the aftermath of the raising of the patriot siege of Fort Cumberland, coincided with a period of accelerated legal repression. The government’s

25 “My great-great-grandfather,” wrote Susannah Duffus Morrow, “was an ardent republican; beside him in his portrait is painted the ‘Life of Cromwell’, the name distinctly marked on the back of the book; while on the anniversary of the death of King Charles, Mr. Salter always had a sheep’s head for dinner. I do not just see the connection, unless he meant to imply a resemblance between the two heads”: [Anon.], *Family History*, p. 252. The unsigned and undated painting to which Mrs Stairs referred (probably an early Copley) now hangs in the Legislative Library at Province House in Halifax.

26 J. Robinson to W. Knox, 12 July 1776, Colonial Office Series [CO] 5 (America and the West Indies — Original Correspondence, etc.)/ vol. 147/ folios 320-1, Public Record Office [PRO]; G. Germain to M. Arbuthnot, 20 July 1776, CO 217 (Nova Scotia — Original Correspondence)/ vol. 52/ folio 162 (draft), PRO (mfm at PANS). See Judith Norton, comp., *New England Planters in the Maritime Provinces of Canada, 1759-1800: Bibliography of Primary Sources* (Toronto, 1993), p. 21, §156.

27 Arbuthnot to Germain, 3 October 1776, CO 217/52/226r, PRO.

28 “Proclamation forbidding persons to Aid or Correspond with any persons in Rebellion”, 5 July 1775, CO 217/51/282r-283v, PRO. Murdoch states, “the governor issued a proclamation, forbidding all persons in this province from corresponding with or assisting the ‘rebels’ in New England, and directed the justices of the peace to publish it, and cause it to be read several times in all places of public worship”: *Nova-Scotia*, p. 548. Eaton (“Halifax and the American Revolution”, p. 201) considers this to be an economic warfare measure in response to the Nonexportation Resolution of Congress (17 May 1775), which placed an embargo on trade with the other American colonies not yet in rebellion.



post-insurrection strategy aimed particularly at suppressing sedition through comprehensive use of the criminal law.<sup>29</sup> Indeed the two sedition trials — of Houghton first, then Salter — were held expeditiously in the winter of 1777, while the two treason trials were deferred until the spring. Salter was tried and convicted of uttering seditious words in February 1777. Indicted again, scarcely a year later, for corresponding with the enemy, he saw the indictment quashed on a technicality. His reindictment on a more substantive and serious charge,<sup>30</sup> was not proceeded with because it appeared to charge high treason in the guise of high misdemeanour. Treason trials were banned by the imperial *Habeas Corpus Suspension Act*, which was passed the very month of Salter's trial, and came into force six months later. Salter nevertheless lay under the third indictment for nearly three years, until his death in January 1781. The prosecutorial compromise struck between the law officers was indefinite continuance, only aggravating the tension which must have been felt by the victim of the prosecution. Like the New England Planter magistrate Timothy Houghton of Chester — tried and convicted for high misdemeanour a mere two days earlier than Salter<sup>31</sup> — the latter, whose “misfortunes seem to have broken him”,<sup>32</sup> did not live to see the end of the war.

The proliferation of indictments for “treasonable practices” (constructive treason) rather than high treason *tout court*, as well as the tendency for indictments to be indefinitely continued and never to come to trial, can both be attributed to the overarching impact of the five-year-long *Habeas Corpus Suspension Act* on the government's tactical planning for the prosecution of crimes against the state. The misdemeanour classification was therefore little more than a convenient legal fiction. Salter eventually fled to England because he feared that all that stood between him and a treason trial was the renewal of the temporary *Habeas Corpus Suspension Act*. If it were not renewed, then the way was clear for him to be indicted and tried for high treason. Though Salter could have been indicted for outlawry (high treason *in absentia*), he could not have been tried while the *Habeas Corpus Suspension Act* was in force. Had the act not been renewed, however, there would have been more indictees on high treason than those three dozen arising from the patriot siege of Fort Cumberland, and Malachy Salter would surely have been one of them.

After his first return from England in October 1776, Salter had begun to interest himself in the welfare of American prisoners of war incarcerated at Halifax. His charitable ministrations to the sick or wounded Americans subsisting on board a

29 In contrast, Clarke and Phillips, “Rebellion and Repression”, p. 200, argue that the 1777-80 *Salter* prosecution exemplified “a reluctance” on the part of government “to invoke the heavy hand of the law”.

30 “Treason imputed to a person by law from his conduct or course of actions, though his deeds taken severally do not amount to actual [high] treason”: *Black's Law Dictionary*, 6th ed. (St Paul MN, 1990), p. 1501.

31 See Barry Cahill, “The Sedition Trial of Timothy Houghton: Repression in a Marginal New England Planter Township during the Revolutionary Years”, *Acadiensis*, XXIV, 1 (Autumn 1994), pp. 35-58.

32 Brebner, *Neutral Yankees*, p. 341 n. 137.

hospital ship in Halifax Harbour while awaiting the prisoner exchange cartel, brought him into contact with one Dr John Jeffries, a Boston Tory emigrant refugee who had arrived in Halifax in April 1776. Jeffries, whose patriot father was the long-time treasurer of the town of Boston, was surgeon to the General Hospital in Halifax from 1776 to 1779. In November 1776 Dr Jeffries had a casual conversation with Salter, with whom he was barely acquainted, in which the latter declared that “he was always of the Side of the Americans In their Conduct, untill they declared their Indypendence and then he quit or Left them”.<sup>33</sup> Salter, who had carelessly assumed that Dr Jeffries, a scion of Boston gentry, was no less ardent a republican than his father — and Salter himself — was denounced to the authorities by his scandalized interlocutor.<sup>34</sup> Salter, who declared himself to be against American *independence*, was not opposed in principle to the American *rebellion*, which he saw as the continuation of political protest by other means. As a patriotic American, Salter could conceive of no lesser response to tyranny and oppression. It would be going too far to say that the old New England mercantile elite filled the role of a fifth column in Halifax during the war: “Merchants appear to have been equivocal, supporting resistance but taking a conservative stance about rebellion”.<sup>35</sup> But Salter was atypical. He appears to have been unequivocal, supporting rebellion but taking a conservative stance about independence.

The government took a serious view of what they evidently construed as a deliberate attempt by a prominent local patriot to seduce a prominent Loyalist refugee from his allegiance. Salter was charged with speaking seditious words, indicted and tried for misdemeanour in the Supreme Court in February 1777. The only witness against him was the deponent, Dr Jeffries, who testified that the accused said, “he thought the Americans were Much in the Right of it to make the Stand they did”. Though he was convicted, the verdict against Salter was qualified; the jury declined to return a general verdict of guilty as charged because the crown failed to prove seditious intention. As the court did not order a trial *de novo*, and the accused could not be granted an absolute discharge, Salter was bound over,

33 The Deposition of John Jeffries..., 16 November 1776, RG 1, vol. 342, doc. 77, PANS. The deposition was drafted by Attorney-General Nesbitt and sworn before Secretary Bulkeley. Concerning Dr Jeffries see Allan Everett Marble, *Surgeons, Smallpox and the Poor: A History of Medicine and Social Conditions in Nova Scotia, 1749-1799* (Montreal & Kingston, 1993), p. 343.

34 “He is the Tory refugee”, wrote Thomas H. Raddall of Dr Jeffries, “who betrayed Malachi Salter to the courts”: *His Majesty’s Yankees* (New York, 1943), pp. 322, 324. The ordeal of Malachy Salter is a well-developed subtheme in Raddall’s first historical novel, set in Nova Scotia during the revolutionary years, 1774-8. See generally Barry Moody, “The Novelist as Historian: The Nova Scotia Identity in the Novels of Thomas H. Raddall”, in Alan R. Young, ed., *Time & Place: The Life and Works of Thomas H. Raddall* (Fredericton, 1991), pp. 140-53.

Elsewhere Raddall characterizes the ‘Yankee merchants’ (namely, Salter and Simeon Perkins) as typical of Nova Scotia’s New Englanders: “cautious, measuring their American sympathies against the British strength by sea, and hoping that somehow the Nova Scotians could stay neutral in what seemed to them a ruinous brawl”: Thomas H. Raddall, *The Path of Destiny: Canada from the British Conquest to Home Rule: 1763-1850* (Toronto, 1957), p. 79

35 Stuart, *United States Expansionism*, p. 18.

securities worth £1000 being ordered produced to ensure his good behaviour.<sup>36</sup> The case attracted attention in Boston, where John Gill's radical patriot *Continental Journal and Weekly Advertiser* described how Salter had been prosecuted "on account of some expressions in favour of America".<sup>37</sup> An immediate result of Salter's conviction was that when the next general commission of the peace was issued his name was omitted, though he had been a justice of the peace continuously for over 16 years.<sup>38</sup>

Despite Salter's notorious rebel sympathies, his 160-ton brigantine was at no less risk from American privateers than any other Nova Scotian merchantman. In July 1777 the inevitable happened: the *Rising Sun* was taken outside Liverpool *en route* to Halifax from Bermuda and was conveyed to Salem, Massachusetts.<sup>39</sup> From July to September Salter was in Boston, where he petitioned the council of state to be allowed to resettle, on the grounds that, "having Suffer'd severely, both in person & property on account of his political principles, and for the favor and assistance he afforded to the American Seamen & Others in Captivity there [Halifax], his residence in that Province must render him very unhappy".<sup>40</sup> Whether Salter was serious about returning to Halifax to collect his family and settle his affairs before removing permanently to his hometown of Boston, or the petition was merely a ruse calculated to procure his escape from Massachusetts, the council granted him safe conduct. By October Salter was back home in Halifax; he never set foot in Boston again. Before the end of the month the storm broke over his head. The government called in Solicitor-General Gibbons to advise "in the Case of Mr Salter lately from Boston Suspected of Treasonable & Criminal Practices &c."<sup>41</sup> Suspecting that he was at best a middleman, at worst a double agent who intended to convert Nova Scotian treasury bills and provincial warrants for the purpose of financing the rebel war effort, the government took decisive measures. Treasurer Benjamin Green (another former Bostonian) was ordered to stop payment on all warrants presumed to have originated in New England.<sup>42</sup>

Within days of his return, Salter was writing to his former business partner in Boston, the merchant Bartholomew Kneeland,

36 Crown Prosecutions, RG 1, vol. 342, docs. 77, 78; Pleas of the Crown, RG 39, series J (HX), vol. 1, p. 280 (Hilary Term 1777), PANS.

37 19 June 1777, cited in Clifford K. Shipton, comp., *Sibley's Harvard Graduates, Volume XV: 1761-1763* (Boston, 1970), pp. 421-2 n. 11.

38 Commission Book, 5 May 1777, RG 1, vol. 168, pp. 500-2, PANS.

39 Innis, *Simeon Perkins*, p. 157 (7 July 1777).

40 Edmund Duvar Poole, comp., *Annals of Yarmouth and Barrington (Nova Scotia) in the Revolutionary War* (Yarmouth, 1899), pp. 31-2, quoting Massachusetts Archives (manuscript documents series), vols. 159, p. 168; 183, p. 136.

41 The tortuous progress of *R. v. Salter* (2nd) can easily be followed through Solicitor-General Gibbons' cumulative statement of account, 1777-9 (2 April 1779): "Manuscript Documents of Nova Scotia", RG 1, vol. 248, doc. 13, PANS.

42 Brebner, *Neutral Yankees*, p. 341.

The times are Such I am almost afraid to put pen to paper...there is an order to the Treasurer to Stop paym.<sup>t</sup> for my Treas.<sup>ts</sup> notes. I am forbid to speak to the prisoners [of war], and I apprehend my life to be in danger as I have been much threat'ned, for being suppos'd a friend to the Rebels. ...I am forbid sending Money or any thing Else in the Cartel [prisoner exchange vessel]. I beg you will be cautious in what you write me, I stand on very ticklish ground, & must be very Circumspect...I could say many things but must forbear, you'll hear further from me soon. I am indeed very full of trouble.<sup>43</sup>

The letter, in which Salter indiscreetly mentioned that he hoped to sail for England "in about a month", was confiscated from the cartel before it sailed. A mere two days after the letter was written, the Council ordered Salter's arrest and detention on suspicion of "Crimes and Misdemeanours against Government"; Solicitor-General Gibbons was afterwards directed to draw up and transmit "an Opinion upon Mr Salters intercepted Letter".<sup>44</sup> Though he had not been charged, and so was not eligible for bail, Salter was ordered to post a £1000 bond to secure his release from custody and appearance at the next sitting of the Supreme Court, to answer any charges which might be found against him. Otherwise he would have remained one of "the Persons now confin'd in the Jail of Halifax for promoting Rebellion and such treasonable practices...".<sup>45</sup>

The moratorium on the redemption of treasury notes was repealed one week after its imposition, whether because the government already had the exhibit evidence they needed — the intercepted letter to Kneeland — in order to charge Salter with sedition; because Salter's creditors in Halifax, such as Councillor John Butler, wanted his debts repaid; or because the government thought the better of painting with the broad brush of sedition everyone holding redeemable treasury notes of possible New England provenance. To be sure, corresponding on any business matter, however innocuous, with anyone in New England (especially Boston) — the more so in that Salter's letter must have been smuggled on board the cartel, without the captain's knowledge — was *prima facie* evidence of sedition because it violated Governor Legge's proclamation of July 1775 prohibiting correspondence with the rebels. Crimes and misdemeanours against government were the only common law offences for which someone could be arrested on suspicion and held, thanks to the *Habeas Corpus Suspension Act*, which provided the legal pretext for detention without trial. Though appearances may have been deceptive in Salter's case, the government was legitimately concerned with both appearance and reality. Overburdened with 500 prisoners (both military and civilian) in custody, hopelessly inadequate penal facilities and an acting sheriff, Thomas Bridge, who just

43 M. Salter to B. Kneeland, 8 Nov 1777, Crown Prosecutions, RG 1, vol. 342, doc. 82, PANS (emphasis added).

44 For this and what follows see minutes of Council, 10, 15 and 22 November 1777, RG 1, vol. 189, pp. 433ff.; Solicitor-General's Statement of Account, RG 1, vol. 248, doc. 13, PANS.

45 Minutes of Council, 30 December 1777, RG 1, vol. 189, p. 436, PANS.

happened to be Salter's son-in-law as well as one of his sureties, the government had every reason to be deeply apprehensive of the continuing security risk posed by Salter.

It is probably no coincidence that Salter fled Nova Scotia for the relative safety of England the very month — January 1778 — when the *Habeas Corpus Suspension Act* was due to expire; he could not have learned of its renewal before his arrival overseas. Though Salter applied for and received from the lieutenant-governor a leave of absence to go to England on business, and was gone before any indictment could be preferred against him, he was in direct violation of his parole. Having broken a solemn undertaking that he would present himself to answer any charges which might be laid against him at the next sitting of the Supreme Court, Salter was rendering himself vulnerable to a process for outlawry.<sup>46</sup> In January 1778, after he had left the province, Salter was indicted for misdemeanour for secretly corresponding with the enemy; the only substantive evidence against him was his letter to the Boston merchant, Kneeland. Though a simple majority of the grand jury was prepared to accept Attorney-General Nesbitt's rather limited indictment, the panel was sharply divided over the merits of the crown's case. True bill was returned, but the indictment was null and void because an absolute majority (12) was required for the accused to be tried, and only 10 of the grand jurors were in favour. Nevertheless, the crown — now represented not by Nesbitt but by his deputy, Solicitor-General Gibbons — was granted a continuance; a *nolle prosequi* should have been entered or, more properly, a stay of proceedings ordered by the court.

In Easter Term 1778 *R. v. Salter* resumed. Solicitor-General Gibbons, taking no chances, drafted a new, longer and much more expansive indictment which charged constructive high treason. The grand jury voted 16 in favour of finding a true bill, whereupon counsel for the crown, in the absence of the accused, had no alternative but to move either for judgment of outlawry or that the recognizance be forfeited for non-appearance. Solicitor-General Gibbons chose the latter course, arguing that the recognizance was forfeitable because it had been made for personal, not legal, appearance. Counsel for the accused, former solicitor-general James Brenton, argued against the motion, which, if granted, would have led to forfeiture of the recognizance and made Salter, as well as his sureties, Thomas Bridge and John Fillis,<sup>47</sup> debtors to the crown for a substantial sum. Defence counsel then moved for leave to traverse (contradict) the indictment, which motion was denied by the court.<sup>48</sup> Unable to try the accused on the true bill found against him and unwilling

46 Clarke and Phillips, "Rebellion and Repression", pp. 192-5. For this and what follows, unless otherwise indicated, see Crown Prosecutions, RG 1, vol. 342, docs. 79-80, 82-5 [1777-9]; Pleas of the Crown, RG 39, series J (HX), vol. 1, pp. 311, 321, 340, 376 [1778-80], PANS.

47 John Fillis JP and MHA was Halifax's leading distiller and rum merchant; his daughter was married to Salter's son. See generally James F. Smith, "John Fillis, MLA", in *Nova Scotia Historical Quarterly*, 1, 4 (December 1971), pp. 307-23.

48 Justice Isaac Deschamps bench-book, under date 14 April 1778, Royal Nova Scotia Historical Society fonds, MG 20, vol. 221, file 91.5, PANS.

to order a stay of proceedings,<sup>49</sup> the court decided to continue both the recognizance and the indictment to the next term. This was but the first of 11 continuances, which were granted until Michaelmas Term 1780, eight months after Salter had returned to the province, having been absent for more than two years. Despite his return, he was neither tried nor granted a conditional discharge. Only his death, on 13 January 1781, a few weeks short of his 65th birthday, put an end to the interminable series of continuances and removed the oppressive indictment.

The crux of *R. v. Salter* is why proceedings continued after Trinity Term (July) 1778, when the lieutenant-governor — taking, as it were, the law into his own hands — ordered it stayed.<sup>50</sup> There are a number of possible explanations: a new lieutenant-governor had been appointed, and was to take office within the month; the new chief justice (Bryan Finucane) had only begun to preside; or, by far the likeliest explanation, Attorney-General Nesbitt took exception to a nonconsultative motion on the part of his junior by coming into court within days of the government's stay of proceedings order and moving successfully for another continuance. Given that the indictment was already subject to a continuance, the motion for a stay of proceedings had to be made in open court by senior crown counsel by right of preaudience. Precedence at the bar, therefore — no trifling matter among colonial British North American lawyers — may well have been the issue that ultimately frustrated Solicitor-General Gibbons' attempt to carry out the lieutenant-governor's executive order. In such a charged atmosphere, even the exercise of prosecutorial discretion would have been strictly circumscribed.

Ironically, it was this lawyers' imbroglio which enabled Malachy Salter to prolong his absence from Nova Scotia without suffering any adverse consequences to his property. He left Halifax under a recognizance and returned home two years later to find himself lying under indictment for constructive high treason. He might have met a far worse fate had the *Habeas Corpus Suspension Act*, which was subject to annual expiration, not been renewed regularly by special act of Parliament. Towards the end of the first year of the act's operation, the government of Nova Scotia was forced to consider the implications of non-renewal of the act for its strategy of legal repression. There was concern enough in official circles that the law officers were asked to develop a contingency plan which would provide for

49 The court was apparently also unwilling to issue process of outlawry against Salter; see generally Clarke and Phillips, "Rebellion and Repression", notes 122-6 and accompanying text. This would have permitted the immediate confiscation of his very considerable holdings of real estate. Salter owned all the property now occupied by Maritime Centre, St Matthew's Church and Government House, in the heart of the south suburbs of the old town of Halifax — not to mention large landholdings elsewhere on the peninsula and outside Halifax Township and County: Estate of Malachy Salter, Halifax County Court of Probate, file S 6 (mfms at PANS).

50 R. Bulkeley to R. Gibbons, 22 July 1778, Secretary's letter-book, RG 1, vol. 136, p. 266, PANS. The stay of proceedings ordered by the lieutenant-governor against the advice of Attorney-General Nesbitt was ignored by Solicitor-General Gibbons, who acted as chief crown prosecuting attorney until Salter's counsel, Brenton, replaced Nesbitt as attorney-general in October 1779. The solicitor-general's ability to act more or less independently of the attorney-general suggests that Salter may have been spared a trial on the second indictment because of a debilitating stasis between the law officers of the crown.

suspects to continue to be detained without trial, or prosecuted for some statutory or common law offence (e.g., sedition).<sup>51</sup> In England Salter was immune from a trial for high treason regardless of whether the *Habeas Corpus Suspension Act* was renewed or not. In Nova Scotia he was not, as the contents of the second indictment — constructive high treason disguised as sedition — showed clearly.

Salter's authorized and certainly well-publicized departure<sup>52</sup> for England in January 1778 coincided with the second proceeding against him. Once safely there, he remained for two years, perhaps not so much in order to attend to his tangled business affairs as to protect himself against the potentially fatal consequences of non-renewal of the disabling *Habeas Corpus Suspension Act*. After Attorney-General Nesbitt finally retired, in March 1779, and was duly succeeded by his protégé, Brenton (hitherto Salter's counsel), the prosecution was postponed for the duration of Salter's life.<sup>53</sup> Continued for more than two years, or eight terms, the indictment never came to trial. Despite Solicitor-General Gibbons' determination to charge Salter with high treason in April 1778, no useful purpose would have been served by indicting a suspected traitor for a crime for which he could not have been tried. Though Attorney-General Nesbitt certainly did not advise the lieutenant-governor to order a stay of proceedings, and interposed his authority in order to secure yet another continuance, it was Nesbitt's successor, Brenton, who saw to it that the ageing, worn-out and ill Salter was not subjected to the ignominy of a second sedition trial.

If, as Brebner argues, the affair of Governor Legge committed the oligarchy of Halifax officialdom to loyalism,<sup>54</sup> then the "dramatic increases in trade and shifts in its pattern"<sup>55</sup> on the eve of the American Revolution also committed the old New England mercantile elite of Halifax to a strategy of economic brinkmanship and politically untenable bipartisanship. Like the neutral Americans during the Napoleonic Wars, the "neutral Yankees of Nova Scotia" during the Revolutionary years wished to trade with both belligerents — in defiance of imperial and colonial government policy. In business as well as personal terms, therefore, Malachy Salter, the most prominent but least typical member of the elite, lost the war and did not survive long enough to contest the peace. The old, pre-planter New England mercantile elite died with him.

51 "As the Act of Parliament for Securing and detaining persons charg'd with or Suspected of the Crime of High Treason [*Habeas Corpus Suspension Act*] will expire at the end of this year; The Lieutenant Governor desires that you will consider the Consequence thereof in respect of such person[s] as may be now Confin'd in Jail in this Province under the Authority of said Act and how far such persons may be detained or prosecuted under any other Law": R. Bulkeley to W. Nesbitt, 16 December 1777 [copy], Secretary's letter-book, RG 1, vol. 136, p. 258, PANS. In response to the letter from the provincial secretary, Solicitor-General Gibbons submitted "a long Opinion respecting the State Prisoners in Gaol on the first of Jan. y 1778", Statement of Account, RG 1, vol. 248, doc. 13, PANS; the former document, regrettably, is not extant.

52 See, for example, Innis, *Simeon Perkins*, p. 175 (18 December 1777).

53 Buggy, "Salter", p. 696.

54 Brebner, *Neutral Yankees*, p. xiv.

55 Fischer, "Revolution without Independence", p. 101.

Nor was Salter the only Halifax merchant prosecuted in such a public and repressive manner: the New England Planter merchant, John Avery, was indicted in the summer of 1779 for carrying on trade, commerce and correspondence with the rebels. Having been arrested, imprisoned and then released after entering into a recognizance for £2,000, Avery was never subsequently tried on or discharged from the indictment which was found against him; his ordeal lasted for nearly five years. Despite the intervening passage of the omnibus amnesty act, the prosecution was continued from term to term, until April 1784, after Avery's premature death.<sup>56</sup> As a brother of one of the leading Cumberland insurrectionists, James Avery, John Avery was placed in a hopelessly compromising position.<sup>57</sup>

Yet John Avery did not form part of the New England quadrilateral on which Brebner based his "stifling of treasons" argument.<sup>58</sup> It will not do as an effective reinterpretation of the Nova Scotia government's strategy for suppressing sedition to place on an equal footing Judge Foster Hutchinson, the Boston Tory refugee lawyer and mandamus councillor;<sup>59</sup> the "seditious preacher", John Seccombe; the "ardent republican", Malachy Salter; and the oath-breaking conscientious objector, Timothy Houghton. The only thing these four New Englanders had in common was that they were all natives of Massachusetts and that they were suspected of disloyalty chiefly on account of their New England connections. Of the four, only Salter and Houghton were indicted and tried, and only against Houghton was an unconditional verdict of guilty of high misdemeanour recorded. That the government's overreaction to the crisis was reflected in the political use of the criminal law against New Englanders of *any* stripe, whether old settlers or recent refugee immigrants, suggests that, while the nature and degree of official repression could vary widely, its most characteristic form was legal. Moreover, by effectively banning treason trials, the *Habeas Corpus Suspension Act* narrowed the range of prosecutorial options available to colonial governments for suppressing rebellion and apprehending insurrection. A renewable war measures act designed to legalize

56 Pleas of the Crown, RG 39, series J (HX), vol. 1, pp. 348, 405; Crown Prosecutions, RG 1, vol. 342, docs. 51-7, PANS. See Norton, *New England Planters*, p. 33, §267.

57 A Connecticut Yankee whose family included prominent and active patriots such as his younger brother James, John Avery struggled unsuccessfully for the rest of his life to remove the stigma of the presumption of guilt by association which had attached itself to him. The literature on Avery is considerable: Ernest A. Clarke, "Cumberland Planters and the Aftermath of the Attack on Fort Cumberland", in Margaret Conrad, ed., *They Planted Well: New England Planters in Maritime Canada* (Fredericton, 1988), p. 44; Jean Stephenson, "The Connecticut Settlement of Nova Scotia Prior to the Revolution", *National Genealogical Society Quarterly*, 42, 2 (June 1954), p. 59; Julian Gwyn, "Capitalists, Merchants and Manufacturers in Early Nova Scotia, 1769-1791: The Tangled Affairs of John Avery, James Creighton, John Albro and Joseph Fairbanks", in Margaret Conrad, ed., *Intimate Relations: Family and Community in Planter Nova Scotia, 1759-1800* (Fredericton, 1995), pp. 190-212. See also *Nova Scotia Gazette & Weekly Chronicle* (Halifax), 25 November 1783, p. 1.

58 Brebner, *Neutral Yankees*, p. xiv.

59 Judge Hutchinson (younger brother of the last royal governor of Massachusetts Bay) arrived in Halifax in April 1776, and promptly arranged for inflammatory Congressional documents to be printed in the *Gazette*: *ibid.*, p. 340.



detention without trial on suspicion of high treason, it had the unanticipated side effect of limiting the scope of prosecutable crimes against the state to sedition. The latter was a utilitarian common-law misdemeanour comprehending a wide range of indictable offences from defamation to constructive high treason. Prosecutions for ancillary or collateral crimes against the state also served the limited monitory and exemplary purpose of legal repression better than statutory high treason, which posed serious political risks for the legitimacy, impartiality and credibility of the administration of criminal justice by colonial governments. Grand juries were less likely to find ‘true bill’ on high treason indictments, and petit juries less likely to convict for a crime for which the death penalty was mandatory and royal pardons unheard-of. Sedition, on the other hand, was a first-division misdemeanour, which might comprehend “treasonable and seditious words, libels or correspondence” — to quote the language of Nova Scotia’s “Act of Grace”, the omnibus *State Crimes Pardon Act* of 1783.<sup>60</sup> Unlike high treason, these crimes and misdemeanours against government were — in theory, at least — prosecutable by means of the *ex officio* criminal information as well as by regular indictment.

Even from indictments, however, if the prosecution was ordered by government during wartime, the only release was by death — as both Salter and John Avery discovered. It is therefore necessary to view the sedition proceedings — the most obvious method of dealing with rebel sympathizers — as but another of several aspects of the government’s broad strategy of legal repression. A willingness to invoke the heavy hand of state security law also marked the Nova Scotia government’s reaction to several other instances of real or imagined sedition during this period. Though none of these involved armed rebellion, the government’s persecution of the expatriate New England merchants, Salter and Avery, shows that the official response to crimes against the state — less high treason, where the government’s freedom of action was severely curtailed by imperial legislation, than sedition, where the limitless resources of the common law might be exploited fully — was heavy-handed legal repression. Parson Seccombe was not merely warned and asked to renounce republicanism; “he was ordered to find security in £500 for his good behaviour, and to be debarred from preaching until he had signed a recantation”.<sup>61</sup> Timothy Houghton was tried and convicted of high misdemeanour for slandering the king and sentenced to fine and imprisonment. The charge against Malachy Salter was *not* dropped, despite the lieutenant-governor’s stay-of-proceedings order, and he remained under indictment until finally discharged by death three years later.

The behaviour of the Nova Scotia government with regard to suppressing

60 *Statutes of Nova Scotia* (1783) 23 Geo. 3, c. 3: “An ACT for granting the King’s Most Gracious Free Pardon, to all His Subjects in this Province, for all Treasons, Misprison of Treasons, or Treasonable Correspondence committed or done by them, or any of them, in adhering to, aiding or assisting, countenancing or abetting, His Majesty’s late Subjects in the Thirteen Colonies, during their Rebellion”. The second section enacted that all depending prosecutions, whether private or public, should cease. Such an act could not have been passed unless and until the overriding *Habeas Corpus Suspension Act* expired for good, which it did in January 1783.

61 Murdoch, *Nova-Scotia*, p. 584.

rebellion and sedition during the Revolutionary years was not consistent, thanks to the interposition of the imperial *Habeas Corpus Suspension Act*. Deprived of high treason as a triable crime against the state, the government focused maximum attention on sedition. In doing so, it consistently tended to exaggerate and to overreact to the apparent danger to state security posed by the New England 'underground'. The government, moreover, was prepared to use this temporary act as a cloak for subverting due process of law in the attempt to counter incitement to rebellion. Inevitably, political protest was criminalized. The authorities dealt vigorously with the Cumberland insurrection in late 1776, but though the siege of the fort had been lifted and the rebels dispersed or captured, the following and succeeding years were marked by an expanded strategy of legal repression, which from late 1776 onwards included prosecutions for sedition. The significance of *Salter* and the other sedition proceedings is precisely that dissent was "depicted as treason".<sup>62</sup> The policy of indiscriminate repression directed towards New Englanders, Planter and non-Planter alike, though perhaps a policy dictated to some extent by post-insurrection paranoia, was nonetheless one which treated true sedition — breach of allegiance — as constructive high treason. The aftermath of the Cumberland insurrection suggests that the government dealt leniently with treason and repressively with sedition in order not to have occasion to suppress rebellion again. The renewable, and five times renewed *Habeas Corpus Suspension Act* was flexible enough to permit the government either to inflict wholesale legal repression or to alternate repression and leniency.

If the ordeal of Malachy Salter provides a contribution to the historiography of political crime in 18th-century Nova Scotia, it also suggests the need for some modification of the Clarke-Phillips thesis, which extrapolates official restraint from a loyalty paradigm for the popular response to the American Revolution in Nova Scotia. Explanations of why Nova Scotia did not rebel, or was not invaded like Quebec — the *real* 'fourteenth colony'<sup>63</sup> — have stressed ideological over material factors and religious attitudes over practical economic, military and even epidemiological considerations (smallpox). Historians of the political economy of the American Revolution, such as Joseph Ernst, make the instructive point that Nova Scotia did not have the infrastructure to rebel even if it had wanted to: "What Nova Scotia missed...was not any dialogue over liberty, or the rise of nationalist sentiment, but a half-century or more of economic and political development, and of population growth, that created the pre-conditions for Revolution".<sup>64</sup> Economics and demographics aside, the New England Planter

62 Clarke and Phillips, "Rebellion and Repression", p. 201.

63 See, for example, S.D. Clark, *Movements of Political Protest in Canada, 1640-1840* ([1959] Toronto, 1978), pp. 75ff., 'The Struggle for the Fourteenth Colony', 1775; cf. "The fact that Nova Scotia was only one of fourteen colonies suggests that our line of approach ought to be by way of a comparison between conditions in Nova Scotia and those in the other colonies, especially in those which were more backward in accepting the revolutionary point of view [e.g., Georgia]": Kerr, "Merchants of Nova Scotia", p. 21.

64 Joseph A. Ernst, "English Canada and the American Revolution", *La Révolution américaine et l'Europe* (Paris, 1979), p. 518; see also Marc Egnal and Joseph A. Ernst, "An Economic

experience in “a marginal colony during the Revolutionary years” argues that historians should pay more attention to the varying degrees of *nonloyalty* which the New England majority in general exhibited, not only in the “critical years”, 1775 and 1776, but, indeed, throughout the war.<sup>65</sup> The planter majority — 75 per cent of Nova Scotia’s approximately 20,000 population in 1775 was of New England origin<sup>66</sup> — was neither neutral nor loyal; neither was it disloyal. The New Englanders, like the nonjuring Acadians before them, simply wanted to be left alone in undisturbed possession of the status quo, anomalous and unsustainable though it was in the face of rebellion, civil war and revolution. The neutral Yankees’ third way was not sincere or straightforward but time-serving and dissimulative — and the hard-pressed Nova Scotia government called their bluff. This article suggests that, in formulating its response to sedition, the oligarchy came to view the elite leadership of the New England church and community as constructive traitors.

Finally, if there is one main conclusion which may be drawn from this investigation of the ordeal of Malachy Salter, it is that historians who ignore or undervalue the role of the old New England mercantile elite in any study of Nova Scotia and the American Revolution do so at their peril. Halifax, as a minor metropolis, was by no means unique in its dependence upon trade.<sup>67</sup> The English or English-connected merchants who survived and even flourished during the war were the competitors-creditors of those New England merchants victimized as political criminals. The only way to understand the ‘treason of the merchants’ is to return once again to studying political dissent and protest and the impact of wartime conditions (e.g., privateering) on commercial competition. The fate of established American merchants as chosen victims of state crimes prosecution in Halifax during the Revolutionary years cannot be satisfactorily explained by the ‘leniency’ thesis. It is time to acknowledge the centrality of government repression, and of an official attitude of repressiveness, to an understanding of Nova Scotia in 1775-6 — when revolution was not so much “rejected” as prevented.

Interpretation of the American Revolution”, *William and Mary Quarterly*, [3rd ser.], 29, 1 (January 1972), pp. 3-32; and Joseph Ernst, “‘Ideology’ and an Economic Interpretation of the Revolution”, in Alfred F. Young, ed., *The American Revolution: Explorations in the History of American Radicalism* (DeKalb IL, 1976), pp. 159-85. (Ernst goes on to state, “In sum, the insistence by some historians of the Maritimes upon viewing the American Revolution as essentially an ideological and nationalist movement has tended to trivialize the study of Nova Scotia’s history during the Revolutionary period”: “English Canada”, pp. 518-9.)

- 65 “Mr. Eaton declares positively that there was no reluctance on the part of the people ‘to throw in their lot with their friends of the New England colonies’ and ascribes their failure in so doing to their rural situation, paucity in numbers, dispersion in settlement, and lack of arms”: Kerr, “Merchants of Nova Scotia”, pp. 20-1, quoting Arthur Wentworth Hamilton Eaton, whose description (*History of King’s County*, pp. 430-2), deriving from oral tradition, of the circumstances which resulted in provincial troops being dispatched to the New England Planter township of Cornwallis in the autumn of 1778 — to quench the “seditious spirit in King’s” — gives one pause.
- 66 James E. Candow, “The New England Planters in Nova Scotia”, *Planter Notes*, 6, 2 (April 1995), p. 5. Candow points out that the “American Revolution was perhaps the central phenomenon in the history of the New England Planters”.
- 67 Fischer, “Halifax Merchants”, p. 32.