# *HABEAS CORPUS* AND SLAVERY IN NOVA SCOTIA: *R.* v. *HECHT EX PARTE RACHEL*, 1798

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"Few or no Negro slaves are given up. My chief errand to town [New York] was to look up one of mine, and I saw the rogue, but found he had formed such connections with a certain great personage that I could no longer look upon him as my own. He told me he was going to Novy Koshee."
– *Anon., August 1783*

"Be so good to attend to the poor Blacks let them be considered as the human species (which by the by is not done every where)."
– *Governor John Parr, 1785*

"they [the free Blacks] are in short in a state of Slavery."
– *Lieutenant John Clarkson RN, 1791*

"This ["practical civil liberty'] was fully recognized by the decision given many years ago at Annapolis, when the doctrine was acted upon that slaves brought into this country became free ipso facto on landing."
– *Beamish Murdoch, 1832*

"A detailed list of the slave owners in New Brunswick cannot be attempted, but it included leading individuals in nearly all parts of the Province."
– *W.O. Raymond, 1903*

"It can be accepted as a general rule that the ancestors of the present coloured population in Annapolis County [Nova Scotia] were slaves."
– *Elizabeth Ruggles Coward, 1955*

"Not that the Loyalists quarre[l]ed with the institution of slavery; many were able to carry their slaves away with them to St. Augustine [East Florida] or the West Indies, and others put slaves on board privateers in order to collect prize money."
– *Wallace Brown, 1965*

"The outcry against slavery was buried in the files."
– *Ellen Gibson Wilson, 1976*

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"Slavery was probably never a major economic or historical force in Nova Scotia. The reasons for its establishment and growth in the United States (primarily agricultural) did not exist in this rocky forested land."

– *Joseph A. Mensah, 1982*

"The notion of a Negro who was not a slave was a novelty in North America in the 1780s."

– *D.G. Bell, 1983*

"Not very long ago the very existence of slavery in Canada was denied or obscured in Canadian historical writing, and the black 10 per cent of the Loyalist migration was simply ignored."

– *James W.St.G. Walker, 1992*

"Who owned slaves is an area for inquiry."

– *Sylvia Hamilton, 1994*

In January 1800 Sampson Salter Blowers, chief justice of Nova Scotia, commented on the first slave case he had adjudicated in a letter to his long-time friend, Solicitor-General Ward Chipman of New Brunswick. Chipman had initiated the correspondence in anticipation of a *habeas corpus* test case brought by the English anti-slavery attorney, Samuel Denny Street. Chipman, who had volunteered his services as junior associate counsel for the Black, expected – naively, as it turned out – that the broad question of whether slavery was a justiciable controversy would be decided.[1] "Since I have been chief justice," wrote Blowers,

> a black woman was brought before me on Habeas Corpus from the gaol at Annapolis. The return was defective and she was discharged, but as she was claimed as a slave I intimated that an action should be brought to try the right, and one was brought against a person who had received and hired the wench. At the trial, the Plaintiff proved a purchase of the negro in New York as a slave, but

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[1] This was the infamous, deadlocked *R.* v. *Jones, ex parte Ann, alias Nancy* (S.C.N.B., 1800), which has been brilliantly analysed by D.G. Bell: "Slavery and the Judges of Loyalist New Brunswick" (1982) 31 U.N.B.L.J. 9 at 19 et seqq. The Chipman-Blowers slavery correspondence, Dec. 1799-Mar. 1800, has been twice published: I.A. Jack, "The Loyalists and Slavery in New Brunswick" in *Proceedings and Transactions of the Royal Society of Canada*, 2nd ser., vol. 4 (1898), sect. ii, 137, at 148-51; and J.W. Lawrence, *The Judges of New Brunswick and Their Times* (Fredericton, 1985 [repr. of 1905-07 ed.]), at 71-75. As neither of these editions is satisfactory, one is best advised to consult the originals in the Ward Chipman family fonds at the National Archives of Canada [hereinafter NA]: MG 23 D 1 vols. 4 & 6 (mfm at Public Archives of Nova Scotia [hereinafter PANS]). On slavery in Nova Scotia see further A.B. Robertson, " 'But calls herself Betty': Afro-Nova Scotians in Print during the Eighteenth Century," in *Callaloo: A Journal of Afro-American and African Arts and Letters*, forthcoming, 1995, from the University of Virginia; idem, "Bondage and Freedom: Apprentices, Servants and Slaves in Colonial Nova Scotia" (paper presented to the Royal Nova Scotia Historical Society, 16 Jan. 1992) [unpublished]

> as he could not prove that the seller had a legal right so to dispose of her, I directed the jury to find for the Defendant which they did.[2]

chief justice Blowers referred to *R.* v. *Hecht, ex parte Rachel, alias Bross alias Fair.* The "black woman" who was brought before the chief justice in chambers in Halifax on a writ of *habeas corpus* was Rachel Bross [Mrs Charles Fair]; her putative master was Frederick William Hecht JP, a New York Loyalist settled at Digby, who was commissary of musters to the British Army in Nova Scotia; the action which Blowers indicated should be brought to test the right to hold a Black person in slavery was *Hecht* v. *Moody,* in the Supreme Court at Halifax, for trespass; and "the person who had received and hired the wench" was the Halifax "sole trader", the widow Phebe Moody. The two Hecht cases epitomize the phenomenon of the Loyalists and slavery.

To paraphrase Jack P. Greene's articulation of slavery as the Anglo-American socio-cultural norm, "the powerful presence, wide diffusion" and, especially in greater Nova Scotia (including New Brunswick), expanding use of slavery in the 1780s throughout Loyalist "British America provide a vivid reminder of just how fundamentally exploitive that society was." Since Lord Chief Justice Mansfield's decision in *Somersett* (1772),[3] an application to the chief justice in chambers for habeas corpus had been the generally accepted method of delivering alleged slaves

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[2] Letter, S.S. Blowers to W. Chipman, 7 Jan. 1800, *supra*, note 1 at 141-143.

[3] See generally C.P. Bauer, *Law, Slavery, and Sommersett's Case in Eighteenth-Century England: A Study of the Legal Status of Freedom* (Ph.D. thesis, New York University, 1973). chief justice Blowers and Solicitor-General Chipman sharply disagreed over the respective merits of the broad versus the narrow construction of England's famous "Negro Case" – better to call it England's "Great Evasion" – which had no legal significance beyond confirming the common-law generality of the prerogative mandatory writ of *habeas corpus*. The extent to which the legal effects of this decision have been misunderstood by earlier scholars of American Loyalism is clear from Wallace Brown: "There was never any question of the British freeing the Loyalists' slaves except that after Somersett's case any exile's slave who reached the British Isles was automatically free": W. Brown, *The King's Friends: The Composition and Motives of the American Loyalist Claimants* (Providence RI, 1965) at 276; that was no more true than it would have been of refugees' slaves reaching Nova Scotia. The most which can be said is that the freedom of a free Black in England was legally protected, as was the slavery of a enslaved Black. David Bell has rightly drawn attention to the salient fact that even the Lord Chief Justice of England, who handed down the decision, "himself died a slave owner twenty-one years later" *supra*, note 1 at 13. The import of *R.* v. *Knowles, ex parte Somersett* was to discourage transatlantic slave-trading, not slavery *per se* either in England or in the colonies. The "Negro Case" was therefore more a reference model than a precedent in the modern sense of the word. It was probably one of the "British precedents" to which J.M. Bumsted refers: "No colony in the [Atlantic] region abolished slavery through legislation, and it was gradually eliminated only through court extension of British precedents in the nineteenth century": "Resettlement and Rebellion" in P. Buckner and J.G. Reid, eds., *The Atlantic Region to Confederation: A History* (Toronto & Fredericton, 1994) 182. There is nothing to object to in this generalization, except that the case-law was indigenous; *Somersett*, the usefulness of which both radical abolitionists such as Benjamin Franklin, and excellent practical lawyers such as Sampson Salter Blowers, took a decidedly dim view, played no part.

from false imprisonment, and also of bringing a "slavery reference" into court. Indeed, if one examines the proliferation of habeas corpus applications in the first decade of the Blowers Court, 1797-1806, it appears that those which did not involve illegal imprisonment for debt involved Black people – alleged fugitive slaves who had been kidnapped by their masters and wrongfully imprisoned. Such was the character of the judicial war of attrition against slavery in Nova Scotia, which commenced under Blowers's predecessor, chief justice Thomas A.L. Strange, and culminated with the legal destruction of slavery in the first decade of the nineteenth century. Before the end of the decade, the failure of civil litigation by slaveholders to negate the salutary effects of *habeas corpus* meant that Black slaves had better access to the courts to secure their liberty than free Blacks had to assert theirs. The right to hold a Black person in slavery gradually ceased to be maintainable by either statute law, of which there was none in Nova Scotia, or case-law, of which there was a miniscule *corpus*. After the government-sponsored emigration of free Blacks to Sierra Leone in 1792, which was the true *terminus post quem* of the attack on slavery, Loyalists' slaves increasingly had recourse to law to obtain judicial emancipation. Such was the "Nova Scotia Compromise", so to speak, inspired by chief justice Strange's jurisprudence, according to which

> a summary decision of the question of slavery here has always been resisted, and the party claiming the slave has been put to his action; and several trials have been had in which the jury has decided against the master, which has so discouraged them that a limited service by Indenture has been generally substituted by mutual consent.

There was never any question of a declaratory judgment, however, because chief justice Strange "dexterously avoided an adjudication of the principal point"[4], the property right, and also because the legal position had yet to be established or clarified, either through the application of locally "adjudged cases" or by the extension of exemplary English case-law. Before the 1792 emigration of the free Blacks from Nova Scotia to Sierra Leone, slavery jurisprudence was embryonic – more shadow than substance. Black slaves were a far more visible minority after the Exodus than they had been before, and accordingly left an even more "powerful impression upon colonial whites" who were apprehensive of the economic consequences of the Exodus. The removal of the free Blacks meant that Loyalist slaveholders were more determined to exploit the labour potential of Black slaves. The paradox was that, as a direct result of slaveholders attempting to use the law to assert their property rights, civil liberties associated with emancipation or free-birth were conveyed to slave "black people, identified by

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[4]Letter, Blowers to Chipman, 7 Jan. 1800 see *supra*, note 1. This is the only sense in which "Black servant" – during the latter, emancipationist phase of colonial slavery – meant precisely that. Three decades later the Epitomist, Beamish Murdoch, was to echo the judicial status quo ante statutory abolition by arguing that unlimited servantship "would virtually be a contract of slavery": 2 Epitome 1. This was the view taken by Scottish law: "The law of Scotland annuls the contract to serve for life": Jack, *supra*, note 1 at 164, *per* Chipman, marginalium.

their colour."[5] According to James Walker, in 1790s Nova Scotia it is possible to witness the transfer of status from a sociobiological characteristic to a legal condition, from Black to slave. The articulation of negritude as a legal disqualification, explicit in slavery, became implicit in post-Exodus Nova Scotia, reinforced by the white slaveholders' assertion of their residual property rights. The legal effect of the war on slavery incited by slaveholders tested whether the master had clear title to his human "property". As slavery did not exist as a statutory right, and did not exist at all at common law, the principal point – whether there might be property in human beings – was not deemed adjudicable and so was not adjudicated.

The Loyalist township of Digby was among the major points of debarkation for the free Black emigrants. The town had the largest community of free Blacks in Annapolis County, Brinley Town, as well as a substantial population of slave Blacks. While the Exodus to Sierra Leone in 1792 "resulted in the physical shattering of the [free] black settlements", depriving Brinley Town of seventy-five per cent of its population,[6] Black slaves imported by white Loyalists perforce

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[5] J. W.St.G. Walker, *The Black Loyalists: The Search for a Promised Land in Nova Scotia and Sierra Leone 1783-1870* (Toronto, 1992 [repr. of 1976 ed.]), pp. 23; cf. *idem*, "The Establishment of a Free Black Community in Nova Scotia, 1783-1840" in M.L. Kilson & R.I. Rotberg, eds., *The African Diaspora: Interpretive Essays* (Cambridge MA, 1976); and *idem*, "Blacks as American Loyalists: The Slave War for Independence" in *Historical Reflections*, 2 (1975) at 51-67.

[6] Walker, *ibid.*, at 388; see also E.G. Wilson, *The Loyal Blacks* (New York & Toronto, 1976), at 109-10. Brindley Town ("Negro Town"), named by the disbanded Black Pioneers who founded it in honour of the Commissary and Storekeeper-General to the British Army in Nova Scotia, George Brindley, was situated on the western shore of Little Joggins Cove, south of the town of Digby. The post-Exodus remnant afterwards removed to Jordantown, which remains a viable Black community.

During the Loyalist bicentenary of a decade ago, Peter MacLellan got through a sixteen-page article on the early history of "what ... seems to be Nova Scotia's forgotten Loyalist settlement" without pausing to remember the Black population of Digby Township, whether slave or free: D.P. MacLellan, "A Loyalist Crucible: Digby, Nova Scotia, 1783-1792" in (1983) 3 *Nova Scotia Historical Review* at 23-38; contrast T.J. Padley, "The Church of England's Role in Settling the Loyalists in the Town of Digby, 1783-1810" (M.A. thesis, Acadia University, 1991), at 26-29. The entire omission of Blacks from MacLellan's article obviated the need to discuss the difficult and still sensitive subject of which Blacks were slaves and which Loyalists slaveholders. Indeed, the whole issue of slavery and slave descent is comparable to changing sociohistorical perceptions of convict ancestry in Australia: "Convict ancestry is now a status symbol in certain quarters, whereas in the early part of this century records were destroyed, hidden and falsified to hide such stains from family names": B. Reed, "Appraisal and Disposal" in J. Ellis, ed., *Keeping Archives*, 2nd ed. (Port Melbourne, 1993) 157 at 188.

An understandable desire to think positively about Afro-Nova Scotian history has led not only to falsification of the historical record; it has led also to the obsessive glorification of militarism, colonial or imperial, be it in the shape of the Black Pioneers of the War of the American Revolution, the "Fighting Maroons of Jamaica", the exploits of William Hall, VC during the Indian Mutiny, or the Number 2 Construction Battalion of the Canadian Expeditionary Force in World War I. Most regrettable of all is the caricature-cum-stereotype of Stephen Blucke (fl. 1783-1796), the paramount leader of the pre-exodus free Black community of Shelburne County, who was not so much as even a soldier, let alone the commanding officer of the Black Pioneers – there were no Black commissioned

remained behind. The Black slave – white Loyalist slaveholder dynamic has tended to disappear beneath the wave of Walker's influential characterization of the Black refugees as "Black Loyalists" – the vast majority of them were not free-born free agents, but fugitive slaves emancipated by proclamation of the British military authorities – while the Black slave presence in Digby and other Loyalist settlements has attracted far less scholarly attention.[7] The existence, in the pre-Exodus period (1783-91), of a free Black community adjacent to a Loyalist town such as Digby, has tended to distract scholarly attention away from both Black slavery and white Loyalist slaveholding, which continued with full vigour during and long after the Exodus. If all, or indeed any of the Blacks brought to Nova Scotia after the Revolution had been "Loyalists" in Walker's artificially broad sense of the term, then criminal proceedings against slaveholding Loyalists asserting their right to property in human beings would not have been necessary.

The status of "official" Black slavery was so intrusive, however, that the three slaves of "Captain Young" were described as such on the Digby muster roll of May 1784, at a time when the predominant bureaucratic practice was to describe slaves as "servants".[8] Digby mustered some 152 "servants" – 11.7 per cent of the

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officers – and who (unlike all the Blacks who served in the Black Pioneer regiment) was not an emancipated slave but a free-born Barbadian mulatto. It is no less unfortunate that free-born Blacks, who risked being perceived as Uncle Toms, should be classed as "former slaves", than that Black slaves should be written out of Afro-Nova Scotian history by Afro-Nova Scotians themselves. If MacLellan's article on Digby amply proves Walker's contention that "the black 10 per cent of the Loyalist migration was simply ignored," then the fully one-quarter of that Black ten per cent who were slaves, have been far worse served by historians.

[7] In fairness to Walker, however, it must be pointed out that this imbalance is remedied in the new Preface to the 1992 edition of his 1976 monograph (*supra*, note 5), which was reprinted to commemorate the bicentenary of the exodus. Here Dr Walker explicitly addresses the social paradox of the free Black suburban poor, caught as they were between white Loyalist slaveholders who begrudged the free Blacks their civil rights and white Loyalists' Black slaves, to whom the wartime British military "emancipation proclamation" did not apply. Slaves could only run away from their masters; they could not voluntarily participate in a government-sponsored repatriation scheme.

[8] The difference here was that these Black men were considered to be slave heads of household, rather than slave members within a Loyalist household. Young himself, who was probably a regular Army officer, does not appear on the muster roll. The only other Black household was that of John Williams ("Free Negro"), who was to be one of the seventy-six grantees of one-acre lots within "Negro Town Plot" (Brinley Town) in 1785: PANS RG 20 Series A, John Jingo et al. [land grant file]. Not only were the free Blacks mustered separately from the Loyalists – evidence of systemic racial discrimination – but the slave Blacks were not mustered at all except within the Loyalist households to which they belonged: evidence that their civil disability rendered them legal non-persons. It is instructive to observe on the muster roll of free Blacks that the routine headings, "Servants above 10" and "Servants under 10", were bureaucratically scored out almost as an afterthought: "Return of [free] Negroes and their Families mustered in Annapolis County, betwixt the 28.th day of May and the 30.th day of June 1784." : Ward Chipman family fonds: NA MG 23 D 1, Series I vol. 24, at 69-72 (mfm at PANS). Free Blacks did not have "servants" – many had formerly been such – while Black 'servants' were mustered only in the white Loyalist households of which they formed part.

local population, 42.1 per cent of the pre-Exodus settled Black population of Annapolis County, and 12.3 per cent of the estimated total of 1,232 Black "servants" imported by Loyalists – "to nearly all of whom must have belonged the appellation of 'slave'."[9] Of the 503 households in Digby, 15.9 per cent held slaves ranging in number from one to six per unit. Digby, which poet-scholar George Elliott Clarke christened "the Birimingham of Nova Scotia", was a slave society because the Loyalists who founded it included numerous slaveholders.[10] Indeed, the Connecticut Loyalist generally recognized as the founder of Digby, lawyer Amos Botsford, was himself a slaveholder.

The presence of large numbers of slave Blacks in close proximity to the free Black communities, not to mention the constant threat of re-enslavement, undoubtedly contributed to the Exodus at the end of the first Loyalist decade. It is not surprising that free Blacks could obtain neither trial by jury nor proper access to the courts while their fellow Blacks elsewhere in Digby Township were held in slavery. The chief promoter of the Exodus among the free Blacks was Sergeant Thomas Peters, a senior NCO in the disbanded Black Pioneer regiment and a resident of Brinley Town; he blamed racial prejudice against the free Blacks

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The free Black population of Annapolis County in 1784 (211 individuals), about 73 per cent of which was in Digby Township, was just 28 per cent more than the slave Black population at Digby (152 individuals). This suggests that "the relative insignificance of slavery in the province" was offset by its relative importance in Black population centres, such as Digby (Brindley Town): Walker, *supra*, note 5 at 39, 41. By March 1787 the free Black population had risen by only twenty individuals, or 9.5 per cent: Proceedings of the Board of Agents for the Loyalists : Township of Digby [alias Edward Brudenell letter-book], at 263: William Inglis Morse Collection, Harvard College Library, Cambridge MA (mfm at PANS).

[9] T.W. Smith, "The Slave in Canada" in Collections of the Nova Scotia Historical Society, 10 (1899), 1 at 32, 23; "Report on Nova Scotia by Col. Robert Morse, R.E. [sic: C.E.], 1784" being Note C of D. Brymner, comp., *Report on Canadian Archives* 1884 (Ottawa, 1885), xxvii, at xli; A.W. Savary, History of the County of Annapolis : Supplement (Belleville ON, 1973 [repr. of 1913 ed.]) at 117-27; M. Ells, "Settling the Loyalists in Nova Scotia" in *Canadian Historical Association Report* (1934), 105 at 108.

[10] Clarke's powerful literary evocation of the Afro-Nova Scotian experience during the Loyalist period can lead to the misunderstanding of an important aspect of it: "They [the free Blacks] entered a society where the slave trade was illegal, but human property remained enforceable; ... However limited, Nova Scotia offered them legal emancipation and a spiritual vision of freedom and social justice": D. Samson, "George Elliott Clarke's Songs of Love and Pain from Africadia: An Introduction to 'The Apocrypha of Whylah Falls' " in (1994) 2 *Left History*, 67 at 68. The slave-trade was no more illegal in Nova Scotia than it was elsewhere in the British Empire, and though parliamentary attempts at statutory abolition began in England as early as 1791, they did not succeed until 1807. Attempts to legislate against the slave-trade in Nova Scotia in 1787 and again in 1789 failed because the law officers feared that any legislation would lead to the implicit recognition of Black slavery as a statutory right. Nor did Nova Scotia offer the free Blacks "legal emancipation", which status had already been conferred on them as a war measures act by the Commander-in-Chief of the British Army in America – or the liberty of the subject, which they claimed as their constitutional right.

on the "public and avowed Toleration of Slavery".[11] Like the *ante-bellum* United States, Loyalist Nova Scotia could not endure half-slave and half-free. Either the slaves would have to be emancipated, or the free Blacks would have to emigrate; the alternative was social chaos and catastrophe. As the wholesale emancipation of slaves was scarcely more inconceivable in the post-bellum 1780s than the statutory abolition of slavery, the majority of free Blacks chose emigration.

The proposed emigration was generally resisted by slaveholders and white Loyalists, who preferred to maintain the domestic economy of semi-slavery and pseudo-freedom rather than let a chosen people go off in search of a promised homeland. So intense was the opposition that "in Digby [Peters] was physically attacked by an outraged white citizen."[12] For many Loyalists, not only slaveholders, the only good Black was an enslaved one; they were no less aware than was Peters, himself a refugee slave, that most of the free Blacks were not free-born but fugitive slaves emancipated by the British military authorities for strategic not humanitarian reasons. The free Blacks were no more "Loyalists" in

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[11] Quoted in Wilson, *supra*, note 6 at 179-81; see Appendix 1. Wilson makes the interesting point that Granville Sharp, who was not only a director of the Sierra Leone Company but also chair of the Society for the Abolition of Slavery, assisted Peters with drafting his Memorials, which "fit neatly into the anti-slave-trade campaign"; that was the chief focus of the British anti-slavery movement in the 1790s. "Certainly the references to English law and the tone of moral outrage at the existence of slavery in the Maritime Provinces are typical of Sharp ...": loc. cit. See also J. W. St.G. Walker, "Peters (Petters) Thomas" 4 DCB 626-28.

"The outcry against slavery was buried in the files," writes Wilson (ibid., 181), because the protesters were Black ex-slaves confronted with the very real threat of re-enslavement. Rather than state, as does Walker (*supra*, note 5 at xxii), that the "Black Loyalists provide a unique insight into the consequences of slavery for the black slaves," it would be more to the point to have stated that the pre-exodus experience provided a unique insight into the consequences of slavery for free Blacks. The principal thrust of one of Peters's two petitions was to mitigate the impact of circumambient Black slavery on free Blacks determined not only to avoid re-enslavement, but also to assert and exercise their constitutional liberty as British subjects. Unfortunately for the free Blacks, however, slavery left a far more powerful impression upon colonial whites, especially those American Loyalist refugees who were hereditary or proprietary slaveholders, than did Black freedom. "[T]he Black Loyalists' demand for equality" (Walker, loc. cit.) provoked from the white Loyalists - disinclined, as they were, to distinguish not only between Black and slave, but also between free-born Blacks and emancipated slaves - the demand for reinforcement of the status quo. What Walker characterizes as a "transfer of status ... from 'slave' to 'black' " in the postwar period was in fact an attempt at restoration of the status quo ante-bellum, when most Blacks were slaves and many whites were masters. Loyalist attitudes, among which Black slavery was an idée fixé, anticipated a return to the pre-war, pre-emancipation state of Black slavery; the Loyalists sought to re-create the world they had lost, even in its most negative and inhumane aspects. What Walker sees as change was in fact more of the same. Black slavery did indeed make a powerful impression upon the social attitudes of white Loyalists, by confirming them in their extreme reactionary, anti-modern tendencies. But as lawyers – even Loyalist lawyers – were among the first to recognize, slavery was an idea whose time was past. If colonies *en masse* could break the bond of allegiance, then Blacks *en masse* could likewise break the bonds of slavery.

[12] Walker, *supra* note 5 at 119. The name of Peters's attacker, a belligerent drunk, was not recorded.

the contemporaneous acceptation of that historically abused term than were the Black slaves, whose white Loyalist masters supposed that emancipated slaves – certificated freedmen – entering Nova Scotia reverted to their former status *ipso facto* on landing. The free Blacks had less to fear from predatory American slaveholders, from whom they were adequately protected by the same military high command responsible for their emancipation, than from avaricious Loyalist slaveholders, from whom they had no more protection than a piece of paper.

The prospect of reducing the impoverished free Blacks to the state of slavery was too great a temptation for many Loyalists, who believed that they had not been compensated adequately for the property losses they had sustained. The Loyalists took the view that emancipation was a strictly ad hoc "war measures act"; the ending of military rule and the lifting of martial law meant reversion to the status quo *ante-bellum* of civil disability, or "slavery on demand". Article VII of the Provisional Peace Agreement between the British and American plenipotentiaries expressly forbade the evacuation of "any Negroes or other Property of the American Inhabitants".[13] This undertaking sounded the death-knell of the emancipation period. It would henceforth be a matter of free-born Blacks and emancipated slave Blacks alike preserving their freedom against slavemongers on one hand, and indifferent British military authorities on the other. In order to link Loyalist opposition to slave Black emancipation during wartime to Loyalist opposition to free Black emigration during peacetime, one must look to the economic consequences. "To some extent at least," writes Joseph Mensah,

> the potential advantages of slave labour were nullified by the presence of free Blacks whose services could be hired at little more than the cost of housing and feeding a slave. In consequence, the abolition of slavery through-out [sic] the British Empire in 1833 had little effect in Nova Scotia.[14]

This argument, which relates only to the decade 1783-92, ignores the fact that the removal of fully one-third of the free Black population to Sierra Leone made such a powerful impression on white Loyalist slaveholders that they determined to retrench. They had lost the free Blacks as a result of imperial high policy; they would use the courts to make certain they kept their slaves.

If the imperial statutory abolition of slavery had been made redundant by circumstances in 1830s Nova Scotia, it was because a programme of judicial emancipation had resulted in the progressive legal destruction of slavery some twenty-five years earlier. The anti-slavery movement among Nova Scotia's legal

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[13] I refer to enlightened, humanitarian jurists such as Sampson Salter Blowers and Richard John Uniacke, successive attorneys-general (1784, 1797) and to the English barrister Thomas A.L. Strange and Blowers, successive chief justices (1790, 1797).

[14] J.A. Mensah, "Situation Report on the State of Race Relations in Halifax and Digby" (31 March 1982) at 3-4: typescript at PANS.

elite[15] arose in response to attempts by, *inter alia,* "Southern white loyalists" to abuse due process of law in order to try to re-enslave free Blacks.[16] Originally, therefore, the focus was not on abolishing slavery or emancipating slaves, but on protecting ex-slaves against re-enslavement. The slaveholders' offensive did not begin in earnest until after the Exodus had taken place and slaves had begun to assert unilaterally the same "mobility rights" which enabled the free Blacks to emigrate. The post-Exodus slave "war of independence" was the legal counter-attack on the slaveholders' property rights, and involved active resistance by the courts to assertion and enforcement of these alleged rights.

The Exodus had the effect not only of depleting the free Black population, but also of transforming the legal defence of the freedom of the remaining free Blacks into an attack on the slavery of unfree Blacks. Before 1792, free Blacks possessed in theory, though hardly in practice, "the right to the equal protection and equal benefit of the law without discrimination". Afterwards, even slave Blacks were eligible for statutory protection of personal liberty under *habeas corpus*. The first decade of the Loyalist Ascendancy, which commenced in 1792 with the long reign of the "Loyalist Governor" Wentworth, saw the legal position undergo a sea of change, as the white man's burden became the burden of proof. Even registered bills of sale were not necessarily admissible as evidence of title to human property, whether slaves were classed as mere chattels or otherwise. Slaveholders had as little success in the courts as the free Blacks had formerly had access to them. The slaveholding die-hards among the first generation of Annapolis County Loyalists, who figured most prominently in court proceedings involving slaves, began to appear as socially dangerous reactionaries, immobile in the face of changing times.[17]

Among those die-hards must be counted Frederick William Hecht JP (1738-1804), who played a significant role in the history of early Loyalist Saint John.[18] Hecht's involvement in the affairs of the refugees began in November 1783, when he was appointed Senior Assistant Commissary in Nova Scotia, chiefly

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[15] Wilson, *supra*, note 6 at 11; Walker, *supra*, note 5 at 51.

[16] Quoted by Walker, *supra*, note 5 at 10.

[17] As late as 1807, the petitioning slaveholders of Annapolis County, led by John Taylor and James Moody of Sissiboo [Weymouth], were determinedly styling themselves "proprietors" or "owners" of Negro Servants, as if the word "slaves" were so much more offensive than the fact of slavery that they could not even detect the solecism (see Appendix 2).

[18] D.G. Bell, *Early Loyalist Saint John: The Origin of New Brunswick Politics 1783-1786* (Fredericton, 1983) at 32, 51, 53, 101; see also E.C. Wright, *The Loyalists of New Brunswick* (Yarmouth NS, 1985 [repr. of 1955 ed.]) at 97, 102. It was Professor Bell who discovered the hitherto unknown book of proceedings of the Board of Agents at Digby (*supra*, note 8), and quoted the passage which appears at the beginning of this article (ibid., 57) as evidence of the conventional white Loyalist attitude towards Blacks, be they slave, ex-slave or free-born.

responsible for provisioning the refugees. A "Foreign Protestant" immigrant himself, Hecht eventually settled in New York, where he became a substantial landowner, accumulating some 13 000 acres.[19]

In October 1786 the Loyalist Claims Commissioners arrived in Saint John to take evidence from claimants, and in November ex-Commissary Hecht testified on his own behalf before Commissioner Jeremy Pemberton. Then in December, perhaps in anticipation of moving to Nova Scotia, Hecht formally manumitted one of the slaves whom he had brought with him from New York.[20] While instruments of manumission were less commonplace in pre-Exodus New Brunswick than slave bills of sale, the registration of such instruments was exceptional and, in this instance, a direct legal effect of civic incorporation. The City of Saint John, which received its Charter in 1785, excluded all but "American

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[19] For this and much of what follows see Hecht's Loyalist Claim records: Public Record Office [hereinafter PRO] AO 13/13/fols. 199-202, AO 12/23/fols. 205r-210r (mfm at PANS); W.B. Antliff, comp., *Loyalist Settlements 1783-1789: New Evidence of Canadian Loyalist Claims* (Toronto, 1985) at 173-74; G. Palmer, comp., *Biographical Sketches of Loyalists of the American Revolution* (Westport & London, 1984) at 375. If Hecht, who claimed losses totalling £2,460 sterling, had been unable to bring his slaves with him to Nova Scotia, then he could also have claimed compensation for losses in that species of movable property to which he held marketable title. Not only were "the slaves belonging to Loyalists ... never offered their freedom" (Walker, *supra*, note 5 at 2); the Treasury also issued "Standing Interrogatories" for the use of the Commissioners hearing evidence from Loyalists claiming losses in "Negroes" (i.e., Black and mulatto slaves), who were regarded as personal chattels: Palmer, ibid., xvii. (The intent was to evidence not only ownership, but also fair market value; the former to establish the loss, the latter to support the claim.)

Concerning Hecht, see further W.O. Raymond, ed., *Winslow Papers A. D. 1776-1826* (Boston, 1972 [repr. of 1901 ed.]) at 203 n. [*], 223, 235, 306, 311, 318, 320. Hecht, who stated in oral testimony before Commissioner Pemberton at Saint John that he "came into *this Country* [italics added] in 1750," is almost certainly to be identified with the Friedrich Hecht, aged about 12, who came with his father, a Lutheran pastor, to Nova Scotia on board the emigrant transport, Ann, in September 1750: E.C. Wright, comp., *Planters and Pioneers: Nova Scotia, 1749 to 1775* rev. ed. (Hantsport NS, 1982), at 155, s.v.; Bell's Register of Lunenburg County Families, in Winthrop Pickard Bell fonds: PANS MG 1, vol. 109, at 183 (mfm), s.v. "Hecht, Joachim Christian & Friedrich". There is no further record of young Frederick, who seems to have left Lunenburg sometime before 1760.

[20] Hecht to Moore, 19 Dec. 1786: New Brunswick Geographic Information Corporation. Saint John County Registry Office. Book A 2, page 145, 98. The text of this registered deed is given by Smith, *supra*, note 9, at 60-61; W.O. Raymond, "The Negro in New Brunswick," in *Neith*, 1, 1 (Feb. 1903), 28, at 32; and W.A. Spray, *The Blacks in New Brunswick* (Fredericton, 1972), at 22-23. "To St. [sic] John, New Brunswick," wrote Archdeacon Raymond proudly, "appertains the honor of one of the earliest recorded manumissions of a slave." The manumittee, Joshua Moore, was a mulatto who had been slave-born in New York in 1766. It is worth noting that one of the two witnesses to the instrument was the nineteen-year-old Thomas Wetmore, then a law student of Solicitor-General Ward Chipman and afterwards himself a prominent lawyer and attorney-general of the province. In 1800 Wetmore was retained as associate counsel for the master in *R.* v. *Jones*, in which his former principal Chipman was of volunteer counsel for the Black: *supra*, note 1. For a later (1794), unregistered, conditional manumission see D.G. Bell & E.C. Rosevear, comps., *Guide to the Legal Manuscripts in the New Brunswick Museum* (Saint John, 1990) at 93: 835.

and European White inhabitants" from "the status of municipal freemen."[21] Of greater historical significance than the mere fact of manumission or registration, therefore, was the appended certificate by Mayor Gabriel George Ludlow, who had to satisfy himself that there was no collusion between master and man to cover the escape of a fugitive slave – in other words, that the quit-claim deed executed by the master in favour of the slave was not fraudulent; the master had clear title and therefore the right to renounce his slave-property. Hecht, who was not a freeman, would have raised suspicions among the slaveholding city fathers by granting an absolute discharge to a slave-born mulatto.[22]

Though it is not known exactly when Hecht crossed the Bay to Annapolis County, of which Digby Township was then part, he held the appointment of Commissary of Musters (inspector-general) from 1785 onwards and was posted to the garrison at Annapolis Royal. By 1788 Hecht had settled permanently in the town of Digby, where in 1792 he petitioned the crown for a grant of ninety-two acres, having never received any land from government.[23] Two years later, Hecht was appointed a Justice of the Peace.[24] In December 1792 Hecht's Black slave, Rachel Bross (or "Brass"), who appears to have been his quondam mistress, was wed to a fellow Black of Digby, one Charles Fair (or "Fare", "Phair") by the Church of England resident clergyman, Roger Viets.[25] The marriage presumably took place without Hecht's knowledge or permission, which was contrary to the customary law of slavery, though nearly five years elapsed before the master took unilateral action against his slave for "eloping".

As a rule, Black people had no formal access to civil justice; the only way Black slaves could test the lawfulness of their condition, with a view to obtaining judicial emancipation, was to compel the master to test the lawfulness of his claim in the Supreme Court. Proceedings, either by the Crown against the slaveholder, or by the slaveholder against the harbourer of the alleged fugitive, almost invariably resulted when the master decided to take unilateral action to repossess

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[21] Bell, *supra*, note 18 at 57; Spray, *supra*, note 20 at 34 – quoting the relevant section of the Charter.

[22] Mayor Ludlow himself, incidentally, was "the possessor of property in slaves": Smith, *supra*, note 9 at 29. Few, if any New York Loyalists, such as Hecht and Ludlow – not to mention the latter's older brother, chief justice George Duncan Ludlow, the leading judicial partisan of slavery in New Brunswick – were non-slaveholders.

[23] PANS RG 20 Series A (1792). Memorial of Frederick William Hecht; see also Digby County Registry of Deeds, Book 1B, at 166: T. Kerin to F.W. Hecht (mfm at PANS).

[24] PANS RG 1, vol. 171 at 117 (2 July 1794).

[25] Trinity Anglican Church (Digby), Register of Marriages, 27 Dec. 1792 (mfm at PANS). For this and what follows, unless otherwise specified, see the two Supeme Court of Nova Scotia case files, *R. v. Hecht, ex parte Rachel alias Bross alias Fair* and *Hecht v. Moody*: PANS RG 39 "C" (HX), boxes 77 & 81; Original Entries, 26 Oct. 1797; 24 May 1798: PANS RG 39 "J" vol. 101, at 396c and 427d; Judgments, Easter Term 1799: RG 39 "J" vol. 11, 329.

his inalienable "property". Though Digby could boast at least one resident lawyer, Loyalist Peleg Wiswall, it is doutful whether any responsible lawyer, however violent a pro-slavery partisan he may have been, would have advised a justice of the peace to take the law into his own hands.[26] Knowing full well that the *custos rotulorum*, Major Thomas Millidge MHA, in his capacity as deputy surveyor had befriended the free Blacks, Commissary Hecht dared not approach him for a bench warrant to make the arrest legal. Thus circumventing not only the chief magistrate of the county, but also Sheriff Robert Dickson, Hecht considerably exceeded the powers of his position as a JP by ordering a constable to arrest Mrs Fair, whom he described as "my Negro Woman Slave, named Rachel (alias Bross)." She was taken from her home in Digby and imprisoned in the County gaol at Annapolis Royal on the grounds that, as an eloper and absconding slave, she was a fugitive and outlaw. Hecht, then perhaps short of money, decided to realize what he considered to be a liquid capital asset – despite the fact that Rachel was a feme covert – by having her taken into secure custody and then disposing of her at public auction.

The advertised sale never took place. Though Hecht had refrained from making his move until after the autumn sitting of the biannual circuit court, which brought both Justice James Brenton of the Supreme Court and newly-appointed Attorney-General Richard John Uniacke, a radical anti-slavery jurist and legislator, from Halifax to Annapolis, news of Hecht's illegal detention of his "slave" reached Halifax towards the end of October and elicited a rapid response from the Crown. As Attorney-General Uniacke did not enjoy the confidence of chief justice Blowers, it was the Loyalist Solicitor-General Jonathan Sterns who filed the writ of *habeas corpus* in favour of Mrs. Fair. The writ was issued by Justice Brenton on 26 October, and was returnable in Hilary Term (January) 1798. By 1 November, Sheriff Dickson – who, according to the detainee's husband, made the arrest in person – had sent Mrs. Fair to Halifax under escort in order to appear before the chief justice.

Arguments for and against the sufficiency of the return on the writ were not heard until Trinity Term (July) 1798; the return itself does not survive as part of the case file, though it must have borne a close resemblance to its counterpart in the earlier of New Brunswick's two leading cases on *habeas corpus* for slaves, *R.* v. *Jones, ex parte Ann, alias Nancy* (1800).[27] Considering that Solicitor-General Sterns died in May 1798, it is probable that his successor, Loyalist James Stewart, acted as Crown counsel; whether the defendant Hecht was represented by counsel, as he was during the subsequent civil litigation, is uncertain. It is known that chief justice Blowers ruled the return on the writ defective and ordered the

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[26] Peleg Wiswall (1762-1836) was a son of the slaveholding Loyalist Church of England rector at Wilmot, the Reverend John Wiswall.

[27] See *supra*, note 1.

prisoner discharged. In view of the documentary evidence, the decision could hardly have been otherwise. Exhibited was not only Hecht's letter to the keeper of the County jail, announcing that he had authorized a constable to arrest the alleged fugitive slave, but also a sworn deposition from Charles Fair that his wife of nearly five years had been taken into custody under false pretences. Though Hecht did not recognize the validity of the marriage, the fact that he waited five years before asserting his claim to his "Negro Woman Slave" rendered it suspicious.

In his gargantuan anti-slavery brief, Solicitor-General Chipman, junior associate counsel for the Black in *R.* v. *Jones*, cited *R.* v. *Hecht* (or rather Blowers's synopsis of it) in support of the proposition that slavery in Nova Scotia was mere social custom, without any basis in law. While the question whether Black people might be the property of white people had never been judicially determined, the Nova Scotian adjudged cases did not favour "Negro servitude". Neither legal nor illegal, the tenure was only sustainable until challenged in court. Both Hecht's "Rachel (alias Bross)" and Jones's "Ann otherwise Nancy" had been purchased in the middle Atlantic colonies and brought to New Brunswick after the war. The bench of the Supreme Court of Nova Scotia consisted of three judges, one of whom had issued the writ while another heard arguments on the sufficiency of the return to it. However, the Supreme Court of New Brunswick consisted of four judges, all of whom sat and who disagreed among themselves as to the sufficiency of the return; "[t]he Court being evenly divided, no judgment was entered and 'Ann otherwise Nancy' was returned to captivity."[28] How different from the outcome in *R.* v. *Hecht*. Rachel, her emancipation procured judicially, became a wage labourer, prompting chief justice Blowers to suggest "that an action should be brought to try the right" to hold a Black person in slavery – a right which did not exist at common or statute law. Since Hecht had claimed the prisoner as a slave, he may have been able to recover damages in tort against the person who, so to speak, had wrongfully interfered with his goods. The chief justice's subsequent intimation as to the prima facie existence of a cause of action which might pierce the "cloud on title"[29] raised by the success of *R.* v. *Hecht*, suggests that he was sceptical that *habeas corpus* alone could be a judicial test of the right to hold a Black person in slavery. Chipman, on the other hand, at least before the judicial deadlock in *R.* v. *Jones*, had been more sanguine. Blowers's stratified anti-slavery strategy was more sophisticated, just as his attitudes towards slavery were more consistent than Chipman's: immediate emancipation of slaves through criminal *habeas corpus*, concurrently with gradual abolition of slavery through exemplary civil action.

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[28] Bell, *supra*, note 1 at 21.

[29] The locution is Professor Bell's: ibid., 21 n. 43.

Within four months of his letter to Chipman, which described the present state of slavery adjudication in Nova Scotia Blowers was faced with yet another *habeas corpus* from Annapolis, which was viewed as a potential determination of the legality of slavery in the province.[30] It is uncertain how the case was disposed, but it is probable that the chief justice maintained the right to emancipate the slaves of yet another New York Loyalist, on the precedential authority of *R.* v. *Hecht*. Rising doubts as to the legality of slavery – that is to say, security of tenure – accelerated the transformation of adjudged criminal cases into case-law. The right itself, however, could only be tested through litigation. The case of Rachel Fair upon *habeas corpus* against the master, confirmed that the criminal law could be brought to bear against the illegal detention of a Black person. Blowers held out to insecure slaveholders the prospect of trying the right from which their claim derived, under the cloak of tort liabilty. Blowers's chief concern, however, was to free the slave once and for all. Indigent slaveholders, such as Hecht, soon discovered that damages were not recoverable against the harbourer of a fugitive slave, and that the fugitive herself was not reclaimable. To chief justice Blowers, slavery litigation was vexatious, except in the sense that the right could not be tried in any other way. Neither the slaveholders nor their lawyers, appreciated that civil litigation was the Venus fly-trap in which Blowers hoped to ensnare avaricious slaveholders. Having first deprived them of their slaves, he then divested them of their legal right to hold Black people in slavery.

David Brion Davis's model of slavery jurisprudence in late-eighteenth-century England can be brought to bear on the evidence of Loyalist Nova Scotia as a colonial slave society.

> The earlier judicial cases concerning Negroes had little to do with the law of nations, maritime law, or even the legality of slavery ... Rather, they involved civil disputes over the ownership of individual slaves, some of whom had obtained de facto freedom ... and had been employed for wages. In legal terms, the plaintiff commonly instituted an action for trespass or trover... The specific issue raised by such actions was whether English laws protecting personal property could be extended to protect the owners of errant slaves."[31]

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[30] *R.* v. *Ditmars, ex parte Van Embenow et al.* (S.C.N.S., 1800); for an analysis, see Cahill, *supra*, note [*], at 96 et seqq. See also PANS RG 39 "J" vol. 101, at 564b (Supreme Court of Nova Scotia. Original Entries, 1791-1804); it is possible that the habeas corpus proceeding did not go forward. (NB This was the case which was regrettably confused with *R.* v. *Hecht*, which occurred the previous year). In order to help pay the defendant's legal costs, twenty-five Annapolis County slaveholders – Hecht was not among them – bound themselves to one another in a solemn league and covenant: "Agreement with D: Ditmars to bear an equal proportion of the expence attending him about the slaves" [May 1800]: NA MG 23 C 29 (photocopy at PANS).

[31] D.B. Davis, *The Problem of Slavery in the Age of Revolution 1770-1823* (Ithaca NY & London, 1975) at 477.

*Hecht* v. *Moody*, for trespass, in the Supreme Court of Nova Scotia at Halifax in Easter Term 1799, realized Davis's model, though the freedom which Rachel Fair had "obtained" as the petitioner under *habeas corpus* was de jure. Having presumably been released on her own recognizance pending the hearing on the return to the writ, Mrs. Fair entered the employ of one Phebe Moody – a feme sole trader – "Grocery & General Store keeper, Hollis Street". On 24 May 1798, Hecht's lawyer, Loyalist James Stewart, filed suit against Phebe Moody for £200 exemplary damages. The same day, chief justice Blowers wrote to the Under-Secretary of State at the Home Department in Whitehall recommending Stewart – a former law student of his who had been at the bar for eleven years, to replace Sterns as Solicitor-General.[32] There were three reasons why Blowers moved with unseemly haste to ensure that the vacancy was filled by one of his proteges. First, the combined efforts of Wentworth, outgoing chief justice Strange and incoming chief justice Blowers, had not been sufficient to prevent Uniacke from succeeding Blowers as Attorney-General in 1797. Further, unless he could place another creature of his own in the only available crown law office, Blowers would not be in a position to divert as much crown legal business as possible from the Attorney-General, with whom he had very nearly fought a duel over a Black manservant seven years previously.[33] Finally, despite the untimely death of Solicitor-General Sterns,[34] who had been acting as crown attorney in the habeas corpus proceeding against Hecht, Blowers now had a manipulable substitute, which eliminated the risk of the matter falling into the expectant hands of the Attorney-General. As *R.* v. *Hecht* was pending from Michaelmas 1797 to Trinity 1798 – arguments on the return to prerogative writs were usually not heard during vacation – questions arose as to the reason for the double continuance, and also as to whether the machiavellian chief justice pre-approved the arrangement whereby the new Solicitor-General represented the slaveholder defendant in a crown proceeding and

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[32] Letter, S.S. Blowers to J. King, 24 May 1798: PRO CO 217/69/fol. 302r-303v (mfm at PANS). In a letter of his own twelve days earlier, Stewart had referred to his influential patron, the chief justice, as "my particular friend": J. Stewart to T. Coutts, 12 May 1798: PRO CO 217/69/fol. 296r, at 297v (mfm at PANS). On 25 May Stewart received from Lieutenant-Governor Sir John Wentworth, acting on Blowers's recommendation, a provincial commission as Solicitor-General of Nova Scotia: PANS RG 1, vol. 172 at 77.

[33] "The dispute was about a Negro Man whom Uniacke had dismissed and Blowers took into his Service. On this occasion Uniacke said some rude things – Blowers challenged – the chief justice [Strange] interfered and bound them both over in £1500, notwithstanding which Blowers wrote Uniacke he was ready to break his Bonds and meet him, – that Satisfaction he would have sooner or Later. This determined Conduct so frightened Uniacke that he begged pardon." Letter, T. Barclay to R. Chandler, 6 Nov. 1791: G.L. Rives, ed., *Selections from the Correspondence of Thomas Barclay* ... (New York, 1894) at 35-36. Both the writer and the addressee were American Loyalist lawyers, the former from New York, the latter from Massachusetts.

[34] For which the Loyalist legal fraternity, presided over by the chief justice, held Uniacke to be at least indirectly responsible: B. Cuthbertson, *The Old Attorney General: A Biography of Richard John Uniacke* (Halifax, 1980) at 36 and nn. 24, 25.

the same slaveholder as plaintiff in a concurrent and related civil action. It was chief justice Blowers, after all, who recommended to the defendant Hecht to put his money where his mouth was by "intimating" that Rachel Fair's employer might be the subject of tort liability. Ironically, like his New Brunswick opposite number, Ward Chipman, Stewart had no compunction about accepting briefs from slaveholders, whereas Attorney-General Uniacke, and increasingly chief justice Blowers himself, were radical anti-slavery ideologues.

It is unclear whether the commencement of civil proceedings by Hecht against Moody, or the new arrangement in the crown law offices, retarded the hearing of arguments on the return to the writ. Nor is it clear that the action did not proceed in the first instance because the *habeas corpus* application was *sub judice*. It is a striking coincidence that the *habeas corpus* writ was returned the same day the summons from Hecht to Moody was executed – 10 July 1798. Apparently the private action could not have gone forward until the criminal proceeding, on the outcome of which it depended, had been concluded. If *habeas corpus* was the stick to the frustrated slaveholder, then the prospect of tort liability was the carrot enticing him into costly and ultimately self-defeating litigation with the slave's receiver and hirer.

Excluded from the crown proceedings by the chief justice, Attorney-General Uniacke returned to the attack as counsel for the defendant in *Hecht* v. *Moody*. This was likely the first case in which compensatory damages in trespass were sought by a slaveholder against someone who allegedly by fraud and deception had procured the personal services of a fugitive slave as a wage labourer. Chief justice Blowers openly favoured such an action *in personam* as yet another in a continuing series of judicial "tests" designed to demonstrate to slaves and slaveholders alike the declasse legal status of slave-property. Attorney-General Uniacke, less than two years later, was to act for the defendant in a trover action in the Supreme Court at Annapolis Royal.[35]

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[35] This was *DeLancey* v. *Woodin* (1801), which effectively made chattel slavery illegal in Nova Scotia; see Anon., comp., *Opinions of Several Gentlemen of the Law, on the Subject of Negro Servitude, in the Province of Nova-Scotia* (Saint John, 1802) at 3-5; and Cahill, *supra*, note [*] at 97 et seq. Uniacke lost the case to a young Annapolis Royal lawyer, Thomas Ritchie. An Annapolis County jury disregarded instruction from the trial judge, who countered by granting defence counsel's motion in arrest of judgment. The subsquent quashing of the verdict induced the plaintiff's attorney to file suit in trespass, but (as Professor Girard has pointed out), the most likely reason why the action did not proceed to trial was that *res judicata* was pleadable by the defendant. It was the Halifax jury's verdict against Hecht in his action for trespass (1799) which had the cautionary legal effect that the next Annapolis County Loyalist slaveholder's suit (1801) against a Halifax merchant for harbouring a slave would be explicitly *in personam* (i.e., trover) and tried not in Halifax but by the circuit court at Annapolis Royal. The Hecht case, which was the prototype of slavery litigation in Nova Scotia, also explains why plaintiff James DeLancey, a former member of Council, did not run the high legal risk of kidnapping his fugitive slave, thus provoking yet another successful habeas corpus proceeding by the Crown. DeLancey, who learned a valuable lesson from Hecht's two consecutive failures to assert

The plaintiff's original declaration, filed in Trinity Term (July) 1798, asserted that Phebe Moody, about the beginning of the previous March, had knowingly taken into her employ a Black woman who was not a free agent. As the *habeas corpus* was pending, nothing further was done until Easter Term 1799, several months after the petitioner Fair had been discharged. The defendant Moody entered a plea of Not Guilty, and the trial was set down for 5 April 1799. The plaintiff attempted to set up good title to the property claimed by giving in evidence proof of purchase, doubtless in the form of a bill of sale. However, the chief justice ruled that mere proof of purchase did not vest marketable title in the conveyor and directed the jury to nonsuit the plaintiff. The jury further awarded costs against Hecht – they were taxed at £7.17.06 – which enabled Moody to retain the services of Uniacke, whose "opposition to slavery was life-long."[36] Whatever quiet enjoyment, not to mention pleasure, Hecht may have taken in his "Negro Woman Slave" was now forever at an end. The chief justice had beguiled the slaveholder into bringing a nugatory action for damages. If Hecht, as a Loyalist claimant in 1783-86, had not sought compensation for any "Negroes" because he had not lost any, then his estate inventory (1804) did not enumerate slaves because he no longer owned any.[37]

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Black slavery as legal tenure, nearly succeeded in court at least once, whereas Hecht conspicuously failed twice.

[36] Cuthbertson, *supra*, note 33 at 4.

[37] Annapolis County probate records, estate file H 24 [Frederick William Hecht, 1804] (mfm at PANS). The closest one gets to slaves in Hecht's estate file is his "dear friend", Jane Totten of Annapolis Royal, co-executor and residuary legatee – the redoubtable "Miss Totten", slaveholder and philanthropist, metaphorically described as one of the Annapolis Royal "400": F.W. Harris, "The Black Population of the County of Annapolis," in C.I. Perkins, *The Romance of Old Annapolis Royal*, 6th ed. rev. (Annapolis Royal, 1988), 60 at 64; W.A. Calnek, *History of the County of Annapolis* (Belleville ON, 1980 [repr. of 1897 ed.]), at 250-51. The aptness of the metaphor gives one pause; the New York Loyalist slaveholders who settled at Annapolis and Digby in the 1780s saw themselves no differently from the New York Vanderbilts a century later. It is abundantly clear that for bourgeois Loyalists, who constituted the majority, slaveholding was a status symbol. "In fact 'to keep slavery' was looked upon as a distinct mark of respectability": C.W. Vernon, "The Deed of a Sale of a Slave Sold at Windsor, N. S., in 1779" in (1903) 3 *Acadiensis*, 253 at 254. The advanced thinkers among the Loyalists were not their merchants and clergymen – many if not most of whom were slaveholders – but lawyers such as Blowers, who were consistent and progressively activist ideological opponents of slavery.

Among the aspects of "the question of slavery ... much agitated at the Bar"[38] were the relative procedural merits of trespass and trover as forms of action against the receivers-cum-hirers of fugitive slaves. The former was broader in scope than the latter, which applied only to chattels; trespass enabled the plaintiff to ground his action in the legal fiction that slaves were realty or real chattels, so that he might prove clear title.[39] The chief benefit of trespass was that it did not prejudice the question of property. Though the right of possession had to be proved – the American judge-made doctrine of constructive possession was not introduced into Nova Scotia until 1851 – the class of property, whether real or personal, affected only the form of the action, not the cause. While trover applied only to chattels, the ambiguity between chattels real and chattels personal, which derived from the feudal distinction between villeins regardant and villeins in gross – the latter only being conveyable – was a potential source of exploitation by slaveholders for the purpose of broadening the scope of the action. The court, on the other hand, chose to take the very narrow view, reminiscent of Scottish law, that the validity of the master's claim could not be proven regardless of either the form or the cause of action.

"The personal slavery has long since vanished," wrote Beamish Murdoch in his 1832 valedictory on the early modern English tenure of villeinage, "but the title to the land has continued to carry along with it many of the rules and usages that existed in the time of slavery."[40] The early legal historian of slavery in New Brunswick, Professor Isaac Allen Jack, observed that the registration of slave bills of sale accorded "with the idea that slaves savour of the realty", as indeed they did under statute from 1732 to 1797.[41] Taking the view that slaveholders did not

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[38] Letter, Blowers to Chipman: *supra*, note 1. "There was much debate on the advantages and disadvantages of the two actions," comments Davis on the English situation, "and it appears that some of the judicial cases concerning slaves were decided by procedural technicalities": *supra*, note 30 at 477 n. 14. Of Nova Scotia it could truly be said that *all* the judicial cases concerning slaves were decided by procedural technicalities (i.e., forms rather than causes of action) until the first decade of the nineteenth century, when the conceptualization informing the legal debate changed decisively from "property in human beings" to "legality of slavery".

[39] Davis (*supra*, note 30 at 477 n. 14) takes the somewhat singular view that "trover provided plaintiffs with a wider remedy than trespass" which ignores the truism that, relative to real property, trespass was a possessory action, and that slaves were properly litigable only as realty or real chattels, not as chattels *tout court*. Trespass by no means ruled out a challenge "to the plaintiff's right of possession", while the tort action of trover challenged a great deal more than mere reception or custody.

[40] 2 Epitome 74. Chief justice Blowers, in his letter to Chipman, expounded the view that the gradualist character of anti-slavery adjudication in Nova Scotia under his predecessor Strange was grounded in "the practice which formerly obtained in case of Villeinage in England": *supra*, note 1.

[41] Jack, *supra* note 1 at 141-42; section iv of *An Act for the more easy Recovery of Debts in his Majesty's Plantations in America*, (1732) 5 Geo. 2, c. 7, which "makes Negroes Chattels *[sic]* for the Payment of Debts" was repealed in 1797. The reference is to the title-deeds, or muniments of title, in English land law, under which real estate was liable to be seized in execution of a judgment. The act therefore

come to court with clean hands, the Blowers Court apriorized that no slaveholder could demonstrate clear title to the property claimed. The mere fact that slaveholder-plaintiff Hecht was unable to produce evidence of registration of his bill of sale prejudiced his case against the person who had expropriated his property.

The anti-slavery strategy which Blowers implemented as chief justice had evolved during the latter half of his tenure as Attorney-General, especially during the period 1790-96, when chief justice Strange was teaching his heir precedent by example. If (as was often the case) the Black claimed as a slave had not been born to the property of the claimant, the onus was on the latter, as putative purchaser, to prove that the vendor had good title to the property conveyed, in order to satisfy the court that there had been no breach of title warranty. To this requirement the mere production of a bill of sale of the slave as "real chattel" – an interest in a chattel construed as freehold – spoke nothing. The claimant-purchaser had to adduce documentary evidence in the form of a registered bill, or a certified copy thereof, or otherwise prove that the Black purchased as a slave had been, like Hecht's manumitted mulatto, Joshua Moore, born in a state of slavery to the vendor. However, slave sales were not as a rule recorded, and the only documentary evidence sufficient to maintain "[t]he right to hold a negro by this tenure" could not be adduced. The plaintiff-vendee's action failed for want of evidence that the vendor's title was not defective and the bill of sale not, therefore, void. Mere proof of purchase did not sustain marketable title because the bill of sale of a chattel slave had to be registered (and given in evidence) in order to relieve the plaintiff of the burden of proof. Under the circumstances, however, the chain of title did not need to be broken because, given the legally fictitious character of the property in litigation, it had never been forged. The struggle to evade breach of title warranty consigned the vendee-slaveholder-plaintiff to legal limbo, or rather a state of infinite regress, from which he could not extricate himself. The legal inference from the cause and form of action – trespass on the case – was that any bill of sale purporting to transfer ownership of a human being amounted to a fraudulent conveyance, which brought the matter within the scope of the provincial registry acts. Yet Hecht would have had no reason to register his bill of sale; his attempt to negotiate a third-party transaction through disposing of the slave Rachel at public auction had been forestalled by Justice Brenton's issuing *habeas corpus* in her favour. Regardless of how Blacks claimed as slaves were classed – as realty, personalty or "real chattels" –

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signified the statutory extension to the America colonies of an aspect of English law which would not necessarily have been received through the customary method of reception at common law.

The bill of sale to which Jack refers was executed at New York in 1778 and registered at Saint John in 1791; see also Cahill, *supra* note [*] at 134 n. 197. The subsequent vendee was thus secure against breach of title warranty.

substantive property law was applied in both the criminal and the civil contexts in order to defeat such claims on evidentiary grounds.

Just as there was no act of the provincial legislature recognizing slavery as a statutory right, so there was to be no decision of the Supreme Court recognizing it as a legal right. Neither by way of return on the writ of *habeas corpus*, nor by jury verdict in a civil action, was the master able to succeed against the slave; he could neither repossess the property, nor recover damages against the trespasser who had ejected him from the quiet enjoyment of it. It is more accurate to state that slaves were emancipated judicially, an evolutionary process which culminated in the legal destruction of slavery, rather than that slavery was judicially abolished. The character of the attack on slavery in Nova Scotia – as in Lower Canada – was fundamentally judicial, and the gradual abolition of slavery was due less to the passive reception of English case-law, and more to the inauguration of native slavery adjudication by the precocious young English barrister who became chief justice of the province in 1790. The "frequent conversations" which Attorney-General Blowers had with chief justice Strange on the question of slavery determined the direction which anti-slavery adjudication would take during its final phase after Blowers had succeeded Strange.

It is perhaps not well known that the term "negres blancs", used so memorably by Pierre Vallieres in 1969 to evoke the historical paradox and predicament of Quebecois in North America, was not coined by him.[42] About 175 years earlier, William Pitt the Younger, then Prime Minister of Great Britain, had described those leading British anti-slavery activists, who may well have assisted Thomas Peters with drafting his eloquent anti-slavery petition (see Appendix 2), as "white negroes."[43] Though a term of abuse, it could have been applied with equal if not greater justice to Nova Scotia's anti-slavery lawyers, pre-eminently Sampson Salter Blowers, who, in his capacity as both Attorney-General and member of the committee of the Council struck to superintend the embarkation of the free Blacks, facilitated Lieutenant John Clarkson's "mission to America".[44] While it would be speculative to argue that Blowers's direct

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[42] See now "Valliere's *[sic]* Negres blancs d'Amerique," in G.E. Clarke, *Lush Dreams, Blue Exile* (Lawrencetown Beach NS, 1994) at 26.

[43] Quoted by Wilson, *supra*, note 6 at 181.

[44] Lieutenant John Clarkson's arrival in Halifax in October 1791 preceded by a matter of days, or a few weeks at most, the departure of chief justice Strange, president of the Council, who was returning to England on furlough. Had Strange remained in Halifax longer, he would undoubtedly have played a prominent role in Clarkson's mission. See C.B. Fergusson, ed., *Clarkson's Mission to America 1791-1792* (Halifax, 1971), *passim*. "Clarkson came to know chief justice Thomas Strange, the first in that office to administer justice evenhandedly to the blacks, so Clarkson was told": E.G. Wilson, *John Clarkson and the African Adventure* (London, 1980) at 63. (Clarkson also had a "touching interview with Blowers's manservant (*supra*, note 32), who longed to join the migration to Sierra Leone but did not believe he could, 'consistent with honour', leave his master just now": ibid.)

involvement in the work of the Sierra Leone Company converted him to anti-slavery jurisprudence, it seems probable that having helped the free Blacks to re-emigrate, he then consciously turned his attention to helping slave Blacks achieve emancipation. Yet the West Africa resettlement scheme originally formed neither of the two proposals – land for the free Blacks and freedom for the slaves – which Thomas Peters took with him to England. The anti-slavery initiative, though far less well known, is in some respects historically more important. Officially discountenanced – the government was not prepared to allow the introduction into Parliament of a bill for abolishing the slave-trade, much less to address the question of abolishing British colonial slavery – the anti-slavery protest elicited no response at all. Ignored in its own time and demode in the aftermath of the recent, much-hyped bicentenary of the Exodus, Peters's anti-slavery petition has by and large been robbed of its historical value. The Black Loyalist mythogenesis occurred in direct reaction to the apprehension that those ex-slaves who acquired freedom as a reward for escape or in exchange for military service were not legally free in the same sense as manumitted or free-born Blacks, and later, judicially-emancipated slaves.[45]

What were the practical benefits of emancipation if free Blacks suffered similar disabilities to slave Blacks? One means of testing the constitutionality of their emancipation was for the free Blacks to protest the slavery of slave Blacks; "Thomas Peters' mission to London bears no other reasonable interpretation."[46] Peters' anti-slavery petition thus provides "a unique insight into the consequences of slavery"[47], more for Black freedmen than for Black slaves – the former being

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[45] In this connection it is worth observing that the Canadian historian of the "Black Loyalists" (Walker) has next to nothing to say about Peters's second petition – it was definitely not part of the "Sierra Leone inheritance", except to the extent that both slaveholding and slave-trading were prohibited by the Company – while the American historian of the "Loyal Blacks" (Wilson) both quotes and analyses it. Even in his article on Peters in the *Dictionary of Canadian Biography* (*supra* note 12, loc. cit), where Walker alludes to the petition, he carefully avoids mentioning the anti-slavery motif. Wilson grasped better than Walker the legal and social-psychological implications of the fact that the vast majority of the free Blacks were not free-born, and that the freedom which they asserted had the nature of a moral imperative rather than a legal sanction. It must also be borne in mind that neither the Preliminary nor the Definitive Treaty of Peace between the imperium and the united colonies spoke to confirming the liberty of emancipated slaves. Indeed it implicitly provided for the reclamation of fugitive slaves by their American owners. No one quarrelled with the right of Loyalists to remove their Black slaves, while Article VII of the Provisional Peace Agreement forbade the removal of Black slaves belonging to Americans. Had it not been for the humane conscience of the British commander-in-chief, General Sir Guy Carleton, therefore, it is entirely possible that most if not all of those slaves emancipated under martial law, who afterwards comprised the so-called Black Loyalists, would have been handed back to their American masters. On this subject generally see R.J. Lowry, "The Black Question in Article Seven of the 1783 Peace Treaty," in (1975) 38 *Negro History Bulletin* at 415-18.

[46] Walker, *supra*, note 5 at xxiii; the context is altered.

[47] *Ibid.*

understandably concerned that the entrenchment of slavery would lead to their retrogression to slaves. Wartime emancipation of fugitive slaves had not led to the postwar abolition of slavery. Peters' petition suggests that the emancipated slaves who comprised the overwhelming majority of the free Blacks hoped forlornly that the temporary wartime emergency measure would lead to the systematic emancipation of slaves in Loyalist British North America. As a matter of policy, however, the postwar imperial authorities were no more prepared to proclaim the emancipation of slaves than they were to countenance the statutory abolition of the slave-trade. Nevertheless, the Peters petition provides grounds for arguing that the legal destruction of slavery in Nova Scotia in the first decade of the nineteenth century began in 1790 with a formal protest against the social consequences of slavery by an emancipated African-American slave, who travelled to England to lay the grievances of Blacks slave and free alike, at the foot of the lion's throne.

## *APPENDIX 1*

### Petition of Thomas Peters, a Negro [1790][48]

To the R.t hon.ble Lord Grenville one of His Majesty's principal Secretaries of State.

The humble Petition of Thomas Peters, a Negro, late Serjeant in the Regiment of Guides & Pioneers serving in North America in the late War under the Command of Gen.l Sir Henry Clinton, and now deputed by his Fellow Soldiers and by other Free Negroes and People of Colour Refugees, settled at Annapolis, Digby and S.t John's (New Brunswick) in Nova Scotia.

Humbly sheweth

That the Situation of your Memorialist and of the other free Negroes and People of Colour above mentioned is rendered extremely irksome and disadvantageous not only by the Want of the promised Allotments of Land which they cannot yet obtain (as represented in another Memorial[49]) though seven Years are elapsed since their Arrival in the Province appoint'd for their Settlement, but more especially they are injured also by a public and avowed Toleration of Slavery in Nova Scotia as if the happy Influence of his Majesty's free Government was incapable of being extended so far as America to "maintain Justice and Right" in affording the Protection of the Laws & Constitution of England.

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[48] PRO FO 4/1/fols. 419-20; the transcription is exact, save for modernized punctuation. For an analysis of Peters's second, anti-slavery petition see Wilson, *supra*, note 6 at 179-81.

[49] *Ca.* Aug. 1791: contemporary copy in PRO CO 217/63/fols. 58-59 (mfm at PANS); transcription in Fergusson, *supra*, note 43 at 31-32

That even the King's Courts in Nova Scotia have publicly decided in Favour of Slavery, and refused the Protection of the Laws to the poor Negroes in [2] that unhappy State which has occasioned such a degrading and unjust Prejudice against People of Colour in general that even those that are acknowledged to be free Inhabitants and Settlers in the Province are refused the common Rights and Privileges of the other Inhabitants, not being permitted to vote at any Election nor to serve on Juries whereby it is become very difficult for them to obtain ordinary Justice in the Recovery of Debts due to them for Labor performed or even to obtain common Protection from Violence and personal Ill Usage, insomuch that several of them thro' this notorious Partiality or "Respect of Persons" (which is absolutely forbid and even deemed odious in the Laws of England) have already been reduced to Slavery without being able to obtain any Redress from the King's Courts, And that one of them thus reduced to Slavery did actually lose his Life by the Beating and Ill Treatment of his Master and another who fled from the like Cruelty was inhumanly shot and maimed by a stranger allured thereto by the public Advertisement of a Reward for such unnatural Violence who "delivered him up to his Master" in that deplorable wounded State. altho' the Laws of God (and of Course also the Common Law of England) have absolutely prohibited "the deliver[ing] up to his Master the Servant" (or Slave) "that has escaped from his Master" (Deut. 23.15) And as the poor friendless Slaves have no more Protection by the Laws of the Colony (as they are at present misunderstood) than the mere Cattel or brute Beasts, their Treatment of [...?] is also similar or even worse than the Treatment of [3] Cattle, as the Caprice & Passions of wicked Men are more liable to be excited against human Beings than against dumb Animals; and that the oppressive Cruelty and Brutality of their Bondage is in General shocking to human Nature but more particularly shocking – irritating and obnoxious to their Brethren of the same Kindred the free People of Colour who cannot conceive that it is really the Intention of the British Government to favour Injustice, or tolerate Slavery in Nova Scotia where the Nature of the Climate does not afford even the false Pretence of Necessity for Evil (so frequently alledged for the Evil of Slavery in the West Indies) as it is less congenial to Blacks than Whites, and therefore they humbly and earnestly implore Protection and Redress.

The Mark ° of Thomas Peters

*APPENDIX 2*

Petition of John Taylor [Weymouth] and others Negro proprietors to The General Assembly Dec.r 1807[50]

To the Honorable the Representatives for His Majesty's Province of Nova Scotia in General Assembly convened

The Petition of the Subscribers, proprietors of Negro Servants, brought from His Majesty's late Colonies now called the United States of America.

Most humbly sheweth,

That, prior to the late American Revolution, your petitioners were inhabitants of His Majesty's late revolted Colonies;

That, when His Majesty's authority began to be opposed in those Colonies, your petitioners adhered to their allegiance, and received the Royal assurance of full protection to their persons and security to their properties;

That, at that period, throughout all His Majestys Colonies (without any exception) a property in Negroes was maintained and acknowledged if not encouraged; And your petitioners know not of any public act since that time, whereby such sort of property has been declared untenable. On the contrary, the Royal Proclamations and the Acts of Parliament admitting and encouraging persons of your petitioners' political principles to remove out of The United States into this Province, expressly authorise them to bring their Negro Slaves, –[51]

Your petitioners are far from pretending [2] to advocate Slavery as a System. With the creation of that System they had nothing to do. The introduction of Negro Slaves into His Majesty's Colonies was at a time long before your petitioners were born. It was authorised by the controuling authority of Parliament, in which authority the Colonists had not by representation any share.

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[50] PANS RG 5, series "A", box 14, doc. 49 (mfm). The transcription is exact, save for modernized punctuation; cf. M. Ells, comp., *A Calendar of Official Correspondence and Legislative Papers : Nova Scotia, 1802-15* (Halifax, 1936) at 134-35, under date 1808 (9 Jan). For an analysis of the petition see Cahill, *supra*, note [*] at 118 et seq. John Taylor – "Loyalist, Captain, and afterwards Colonel Taylor, ancestor of the Taylors of Weymouth [Sissiboo], Digby County"– was the first of twenty-seven signatories, who owned numbers of Black slaves, ranging from one to ten per slaveholder: 29 men, 24 women and 37 children, for a grand total of ninety. The twenty-seven signatories, not all of whom were American Loyalists, included four women; also among them were New England Planters and Acadians. Concerning John Taylor see Calnek, *supra*, note 36 at 284. The signatures of F.W. Hecht and James DeLancey – the leading Loyalist slavery litigants, if not the most substantial slaveholders – could not have appeared because they had died in 1804, the former in January, the latter in May. Hecht's future son-in-law, Isaac Hatfield, however, did sign.

What Brindley Town had been to Digby, Weymouth Falls was to become to Weymouth: "Founded in 1783 by African-American Loyalists seeking Liberty, Justice and Beauty," writes George Elliott Clarke, "Whylah [Weymouth] Falls is a village in Jarvis [Digby] County, Nova Scotia. Wrecked by country blues and warped by constant tears, it is a snowy, northern Mississippi, with blood spattered, not on magnolias, but on pines, lilacs, and wild roses": G.E. Clarke, *Whylah Falls* (Winlaw BC, 1990) at [7].

[51] See, for example, Eng. Stat. (1790) 30 Geo. 3, c. 27: *An Act for Encouraging New Settlers in his Majesty's Colonies and Plantations in America*, which provided that citizens of the United States settling anywhere in British North America might import their Black slaves duty-free.

But, when your petitioners came to the age of discretion, they found that His Majesty's Colonial Subjects possessed the right of holding a property in Negroes upon the same ground that they possessed the right of holding any other species of property, and concieved *[sic]* that right to be as strongly guarded by law as any other of their rights or privileges whatsoever.

But, unfortunately for your petitioners, owing to certain doubts now entertained by The King's Courts of Law in this Province, such property is rendered wholly untenable by your petitioners, whose Negro Servants are daily leaving their service and setting your petitioners at defiance.

For, if it be no longer incumbent upon the Negro who claims his liberty within a Colony, to produce the Certificate of his emancipation; or to shew that he was born of free parents – or, at the least, to prove that at some former period of his life he exercised the rights of a free person, it is in vain that his possessor attempts to litigate with him. [3] Negroes, universally thro the Colonies, passed like other chattels; sometimes by Bills of Sale, at other times by mere tradition. As in the case of other chattels, possession was a proof of property till the contrary was shewn. And your petitioners are prepared to prove their property in the Negroes they possess against all adverse claimants. But, as Negroes are transitory, Your petitioners are not (nor from the nature of the thing is it possible they should be) prepared with a legal course of testimony, for deducing such Negros Pedigree from an African Slave ancestor, – Much less (as Colonists) are they prepared, or (as they humbly concieve *[sic]*) in reason called upon, to maintain the legality of a System which the Parliament of Great Britain has authorised, and the Parliament of The United Kingdoms doth still allow.[52]

Leaving all subtle reasonings to better heads, Your petitioners rely, and must rely, in this, as in many other cases, upon the long established usage in His Majesty's Colonies, and must humbly hope for the same rule and measure of justice here, as might, in their case, be hoped for by His Majesty's free colonial subjects of any other of his transmarine dominions.

Perhaps however, the peculiar circumstances of this Province, or perhaps the true interests of Humanity, may require, in this Colony, the [4] abolition of that particular species of property claimed by your petitioners, (these however are problems that your petitioners presume not to solve). But if so, it seems but reasonable and just, that your petitioners, and others under like circumstances with them, should bear only their proportional parts of the loss or expence attending such abolition.

Upon the whole therefore,

your petitioners confiding in the chaste manly and deliberate wisdom of this House; and fully relying upon the justice integrity and honor of this Assembly

Most humbly pray,

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[52] The year 1807 saw the statutory abolition of the slave-trade, not of British colonial slavery. The distinction between Great Britain and the United Kingdom refers to the intervening *Act of Union* (1801), which abolished the Parliament of Ireland.

That their Case may be taken under your Consideration, and that either such regulations may be made as in your wisdom shall be deemed expedient for securing your petitioners' property in their Negro Servants; – or, that, if such property is to be sacraficed *[sic]* to the public good, Your petitioners may, from that public, recieve *[sic]* their equitable compensation.

And your petitioners as in duty bound will ever pray.

Decem.r 3:d AD. 1807
County of Annapolis

## *APPENDIX 3*
## Historiographic Bibliography[53]

It is debatable whether Black slavery constitutes a major theme in Black history in the Maritimes, though the historiography of slavery, race and the Nova Scotia legal system in the colonial period is extensive enough to warrant a separate treatment. One cannot help wondering why a highly influential revisionist article such as D.G. Bell's "Slavery and the Judges of Loyalist New Brunswick" (1982) should have been omitted from a recently published comprehensive bibliography; see M.B. Taylor, ed., *Canadian History: A Reader's Guide. 1: Beginnings to Confederation* (Toronto, 1994), at 491 and 504, s.v. "Blacks", "Slavery". The standard "Bibliographical discussion" remains J. W.St.G. Walker, *A History of Blacks in Canada: A Study Guide for Teachers and Students* (Ottawa, 1980), at 26, which is preceded by a valuable historical summary. See also J.D. Smith, comp., *Black Slavery in the Americas: An Interdisciplinary Bibliography, 1865-1980* (Westport CT & London, 1982), I at 760-67. ("Slavery in Canada"). For legal history generally see P.C. Hogg, comp., *The African Slave Trade and its Suppression: A Classified and Annotated Bibliography of Books, Pamphlets and Periodical Articles* (London & Portland OR, 1973), at 308-13 – the scope of which ("Abolition and Suppression") is much wider than the slave-trade *per se*. Perhaps the best critical "Literature Review" is to be found in P.H. Fleming, *Class Configurations of the Racial Subordination of Blacks in Nova Scotia* (M.A. thesis, Carleton University, 1982), 13 at 33 et seqq.

Best known as the historian of Methodism in eastern Canada – within which there existed a tradition of "abolitionist advocacy", as Bell calls it – Rev. Dr. Thomas Watson Smith attempted nearly a century ago "to supply a missing chapter in Canadian history": "The Slave in Canada" in *Collections of the Nova Scotia Historical Society*, 10 (1899), 161 p. (The original title of Smith's lecture was "Half a Century of African Slavery in the Maritime Provinces.") Smith gave some twenty pages to the courts and slavery as part of his discussion of the causes of the decline of slavery in Canada. Comparable with Smith's essay – both of

[53] A preliminary draft of this essay appeared as dispersed footnotes to the author's "Slavery and the Judges of Loyalist Nova Scotia" *supra*, note [*] *passim*.

them were intended to commemorate the diamond jubilee of the official final extinction of British colonial slavery in 1838 – was Isaac Allen Jack, "The Loyalists and Slavery in New Brunswick," in *Proceedings and Transactions of the Royal Society of Canada*, 2nd ser., vol. 4 (1898), sect. ii, at 137-85. "Jack's most notable historical imprint," writes Professor Bell, "was based on an ironic misunderstanding. Joseph Wilson Lawrence [compiler of *The Judges of New Brunswick* (1907)] had presented Jack with Ward Chipman Sr's lengthy brief in an 1800 test case [*R.* v. *Jones, ex parte Ann, alias Nancy*], arguing the unlawfulness of slavery. The document became the centre-piece of Jack's 1898 article ... Though later research [i.e., Professor Bell's own] has shown that the test case was initiated by Samuel Denny Street and that Chipman argued the side of the slave owner in subsequent litigation, Jack's celebratory portrait of Chipman still dominates the historiography."[54]Chipman's pro-slavery brief (1805) – arising out of another *habeas corpus* proceeding – which Professor Bell discovered and analysed, but which was either unknown to or suppressed by Chipman's admirer, Jack – has never been printed and is accordingly much less well known than the earlier, "politically correct", anti-slavery brief.

The legal scholar and antiquarian polymath, Judge William Renwick Riddell of the Supreme Court of Ontario, who according to Walker (loc. cit.) wrote over thirty articles on slavery and abolition, drew almost exclusively on Smith's essay for the penultimate "Maritime Provinces" chapter of his own monographic treatise, also entitled "The Slave in Canada": *Journal of Negro History*, 5 (1920), at 261-377. This work remains useful to the legal historian, all the more so because of its author's relentlessly juristic if not legalistic approach to the subject. Most of Riddell's work is narrative rather than analytical, though it was he who invented the "judicial legislation" theory of the legal destruction of slavery subscribed to, among others, by Robin Winks (*infra*); see "Method of Abolition of Slavery in England, Scotland and Upper Canada Compared" in *Ontario Historical Society, Papers and Records*, 27 (1931), at 511-13; equally short, though no less thought-provoking, is *idem*, "When Human Beings Were Real Estate" in *Canadian Magazine*, 57 (1921) at 147-49.

For the legality of slavery in Lower Canada, a valuable sourcebook is the documentary history compiled by M.J. Viger and completed by L.H. LaFontaine, "De l'esclavage en Canada" in *Memoires et documents relatifs a l'histoire du Canada publies par La societe historique de Montreal* (Montreal, 1859), at [1]-63; Lafontaine was at the time chief justice of Quebec [Canada East]. The definitive study is M. Trudel, *L'esclavage au Canada francais. Histoire et conditions de l'esclavage* (Quebec, 1960), wherein the former work is described as "demonstration de l'existence legale ['fondements juridiques'] de l'esclavage. Ce travail ...est le premier travail historique sur la question de l'esclavage" (p. xxii). Trudel's book is disfigured by a sharp anti-Nova Scotian bias, which prompts the author to dismiss chief justice James Monk of the Court of King's Bench at

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[54] D.G. Bell, "Jack, Isaac Allen," in 13 DCB 500 at 501-02.

Montreal, a Nova Scotian lawyer who abolished slavery in Lower Canada in 1798, with one judicial decision, as nothing more than another "slavemonger" ["esclavagiste"], and to equate the expulsion of the Acadians from Nova Scotia in 1755 with the "deportation" – as it was called by Sir Adams George Archibald in 1885 – of the free Blacks to Sierra Leone in 1792.

Academically, the most influential general treatment of the subject is the chapter entitled, "The Attack on Slavery in British North America, 1793-1833" in R.W. Winks, *The Blacks in Canada* (New Haven & Montreal, 1971) at 96-113; Winks's treatment, like Bell's – despite the purportedly narrower focus of the latter – has the merit of placing the legal debate on slavery within its wider sociocultural and intellectual context. Additional to the numerous articles cited by Bell (*infra*, note 1, at 10 n. 2) are the following: F.W. Harris, "The Black Population of the County of Annapolis" [1920], in C.I. Perkins, *The Romance of Old Annapolis Royal* (Annapolis Royal, 1988 [repr.]) at 60-68; I.C. Greaves, *The Negro in Canada* (Orillia ON, 1931) at 9-20; C.B. Fergusson, comp., *A Documentary Study of the Establishment of the Negroes in Nova Scotia ...* (Halifax, 1948) at 4-9; J.F. Krauter, "Civil Liberties and the Canadian Minorities" (Ph.D. thesis, University of Illinois, 1968) at 84-91; R.W. Winks, "Negroes in the Maritimes: An Introductory Survey," in *Dalhousie Review*, 48 (1968-69), [453] at 457 et seqq.; E.G. Wilson, *The Loyal Blacks* (New York, 1976) at 94-95, 180-81, 210-12; P.E. McKerrow, *A Brief History of the Coloured Baptists of Nova Scotia* [1895], F.S. Boyd, Jr., ed. (Halifax, 1976) at xxi-xxii; D. Clairmont & F. Wien, "Blacks and Whites: The Nova Scotia Race Relations Experience," in D.F. Campbell, ed., *Banked Fires: The Ethnics of Nova Scotia* (Port Credit ON, 1978) at 146-52; D.G. Hill, *The Freedom-Seekers: Blacks in Early Canada* (Toronto, 1992 [repr. of 1981 ed.]) at 3 et seqq.; [D.G. Bell], *Manners, Morals and Mayhem: A Look at the First 200 Years of Law and Society in New Brunswick* (Fredericton, 1985) at 12-17; J. W.St.G. Walker, *Racial Discrimination in Canada: The Black Experience* (Ottawa, 1985) at 8-9; B. Pachai, *Beneath the Clouds of the Promised Land: the Survival of Nova Scotia's Blacks, Volume I: 1600-1800* (Halifax, 1987) at 19-35; and Volume II: 1800-1989 (Halifax, 1991) at 16, 34-35, 55, 61, 83, 146; J.N. Grant, *Immigration and Settlement of the Black Refugees of the War of 1812 in Nova Scotia and New Brunswick* (Westphal, N.S., 1990) at 13 et seqq.; G. Hartlen, "Bound for Nova Scotia: Slaves in the Planter Migration, 1759-1800" in M. Conrad, ed., *Making Adjustments: Change and Continuity in Planter Nova Scotia, 1759-1800* (Fredericton, 1991) at 123-28; A.P. Stouffer, *The Light of Nature and the Law of God: Antislavery in Ontario, 1833-1877* (Montreal, Kingston & London, 1992), at 7-18; G.E. Clarke, "White Niggers, Blacks Slaves: Slavery, Race and Class in T.C. Haliburton's *The Clockmaker*" in *Nova Scotia Historical Review*, 14, 1 (1994) at 13-40; S. Hamilton, "Naming Names, Naming Ourselves: A Survey of Early Black Women in Nova Scotia" in P. Bristow et al., *'We're Rooted Here and They Can't Pull Us Up': Essays in African Canadian Women's History* (Toronto, 1994), 13 at 14-32; B. Cahill, "The Antislavery Polemic of the Reverend James MacGregor (1759-1830): Canada's Proto-Abolitionist as 'Radical Evagelical' ";

paper presented at the Conference on the Contribution of Presbyterianism to Atlantic Canada [COPAC], Mount Allison University (Sackville, New Brunswick), November 1994.

It is ironic that Joy Mannette's otherwise valuable study of the pre-Exodus 1780s makes the assumption not only that "a small minority of the Blacks who came to Nova Scotia between 1783 and 1785 were actually slaves" – a conservative estimate would place the ratio of slaves to free Blacks as one to four – but also that "this period [the 1780s] is one of transition in ethnic relations in Nova Scotia since slave relations were on the demise for a variety of reasons": " 'Stark Remnants of Blackpast': Thinking on Gender, Ethnicity and Class in 1780s Nova Scotia," in Alternate Routes, 7 (1984) at 111, 128 n. 8. A more historically credible treatment – though from the same Marxist perspective – is to be found in Chapter 3 of Fleming (*supra*) who styles the period 1775-1833 as "The Early Settlement or Slave Period"; this work, though too heavily dependent on secondary sources and careless of the archival record, is the most generally satisfactory treatment of the subject and a necessary corrective to the still influential Winks magisterium.

Neil MacKinnon (*This Unfriendly Soil: The Loyalist Experience in Nova Scotia, 1783-1791* [Montreal & Kingston, 1986]), on the other hand, confines his attention exclusively to the free Blacks, as if there were no Black slaves, or too few of them to matter, while Margaret Ells ("The Development of Nova Scotia, 1782-1812," Ph.D. thesis [draft], King's College London, 1948, 450 p.) explains away Black slavery in a single inaccurate sentence: "Although by English law slavery was legal in the colonies..." (at 292). In Ells's descending hierarchy of working-class structuration, slaves are the lowest of the five tiers, preceded by freeholders, salaried labourers, indentured servants and apprentices (*ibid.*). This inverse pyramid model of slavery as economically, rather than racially determined may be compared with A.B. Robertson, "Tenant Farmers, Black Labourers, Indentured Servants: Estate Management in Falmouth Township, Nova Scotia," in M. Conrad, ed., *Intimate Relations: Family and Community in Planter Nova Scotia* (Fredericton, 1995) [forthcoming].

No less defective than labour-supply interpretations of domestic slavery is antiquarian legal history. See for example the important compilation edited by H.T. Catterall, *Judicial Cases concerning American Slavery and the Negro* (Washington, 1937), 340-48 – the section of which, under the subheading "Canadian Cases," contains nothing about the leading Lower Canada, New Brunswick or Nova Scotia slave cases – because none of them were reported. "There are but few slave cases in the Canadian reports," writes Catterall; those Vice-Admiralty cases reported from Nova Scotia arose from the imperial *Slave Trade Abolition Act* of 1807 and are irrelevant to the question of the legality of Black slavery in the colonies: ibid., 344-45. See also B. Hollander, comp., *Slavery in America: Its Legal History* (London, 1962), 212 p. for a compendium of Anglo-American legal source materials; especially Chapter 1, "Chattel Slavery under the Common Law of England" at 1-15.

The classic statement of the legal question, though a work commissioned by the London Society for mitigating and gradually abolishing Slavery in the British Dominions, is J. Stephen, *The Slavery of the British West India Colonies Delineated, as it exists Both in Law and Practice* (London, 1824 & 1830), 2 vols. Book I ("being a delineation of the state in point of law") consists of a 400-page essay on colonial slavery "considered as a legal institution". James Stephen (1758-1832), a Master in Chancery, had practised as a barrister in St. Christopher's [St. Kitts] and developed an unconquerable aversion to slavery. His second wife was a sister of the abolitionist MP, William Wilberforce.

The historically most sophisticated treatment of the legal question is Chapter Ten, "Antislavery and the Conflict of Laws", in D.B. Davis, *The Problem of Slavery in the Age of Revolution*, 1770-1823 (Ithaca and London, 1975) at 469-522; see especially the section entitled "Property versus Legal Personality" at 471-78. The most penetrating brief summary of the legal question is to be found in M. Craton et al., *Slavery, Abolition and Emancipation: Black Slaves and the British Empire. A Thematic Documentary* (London, 1976) at 157-58 – although the focus is chiefly on the West Indies, where plantation slavery flourished. See also J. Walvin, *Slaves and Slavery: The British Colonial Experience* (Manchester & New York, 1992) at 32-37; R.B. Shaw, *A Legal History of Slavery in the United States* (Potsdam NY, 1991) at 273-75 ("Canada"); and A. Watson, *Slave Law in the Americas* (Athens GA and London, 1989) at 63-82 ("England and Slave Law in America"). For an *omnium gatherum* of the best American legal history, see K.L. Hall, ed., *The Law of American Slavery: Major Historical Interpretations* (New York & London, 1987), 475 p., which reprints no less than twenty-seven major articles. For printed primary sources, see *Slavery, Race and the American Legal System 1700-1872* (New York, 1988), 16 v.; the series reproduces 180 pamphlets describing trials involving slavery or African-Americans. (I am grateful to Professor Philip Girard of Dalhousie Law School for drawing this series to my attention.)