SLAVERY AND THE JUDGES OF LOYALIST NOVA SCOTIA

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"A *Magna Charta* confirming and enforcing slavery, would be, indeed, a solecism in English jurisprudence."
– *Henry James Pye, MP, 1789*

"[T]he Black people being considered in this Province [Nova Scotia], in no better light than beasts ... ."
- *Lieutenant John Clarkson, 1792*

"Since my appointment to this Government [in 1792], I have taken care that they [Black people] are equally protected and encouraged as other [of] His Majesty's Subjects: and Slavery being almost exterminated here, distinctions naturally painful to these people are gradually dying away."
– *Lieutenant-Governor Sir John Wentworth, 1796*

"How terrible is that situation which renders slavery hereditary, and makes it impossible for humanity ever to recover its rights!"
– *Attorney-General Jonathan Bliss, 1800*

"They [Black people] are all free, as our provincial Laws, in this respect, follow those of England and Slavery is not known."
– *The Reverend Dr. Robert Stanser, 1811*

" ... the masters hold them [Black slaves] when they can – but dare not bring the Case to Trial."
– *anon., Halifax, 1812*

"Although this question [Black slavery] never received a judicial decision the slaves were all emancipated."
– *Thomas Chandler Haliburton, 1829*

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"The People of the British Empire at large, regarded as one great Community, had partaken of the guilt of the Slave Trade and of the Slavery to which it gave birth."
– *Lord Aberdeen, 1835*

"I have heerd tell, said he, that you British have 'mancipated your niggers. Yes, said I, thank God! slavery exists not in the British empire. Well, I take some credit to myself for that, said the Clockmaker; it was me that sot that agoin' any way."
– *Samuel Slick of Slickville [T.C. Haliburton], 1838*

"In fact, slavery near the close of the last century, had a certain legal recognition in this province."
– *The Reverend T. Watson Smith, 1888*

"In Nova Scotia, there was no decision that slavery did not exist. Indeed the course of procedure presupposed that it did exist, but the courts were astute to find means of making it all but impossible for the alleged master to succeed; and slavery disappeared accordingly."
– *Mr. Justice William Renwick Riddell, 1920*

"In the courts counsel had a field day trying to determine whether or not slavery had any legal status in the province."
– *Dr. Ronald S. Longley, 1957*

"There never was any statute recognizing slavery in Nova Scotia."
– *Joseph Francis Krauter, 1968*

"The heroes of abolition in British North America were its judges."
– *Robin W. Winks, 1971*

"It is ... difficult to maintain that Nova Scotia was a slave society, as some have done."
– *Frank Stanley Boyd Jr., 1976*

"As society in general accepted slavery, so too did the legal apparatus of the state."
– *James W. St.G. Walker, 1980*

"Canadians conveniently forget that, even in the early 19th century, slavery was as solidly institutionalized in Canada as it was in the United States."
– *Cecil Foster, 1991*

Though the existence of Negro slavery during the five decades after the founding of Halifax is well known and documented thoroughly,[1] perhaps no aspect of Nova Scotia's legal history has attracted less attention.[2] As in New Brunswick, "[t]he question has ... generally been treated either as a sort of historical curiosity or as an unfortunate episode in the development of the province's Black community."[3] This paper undertakes to attempt for the legal historiography of Loyalist Nova Scotia what Professor Bell's article[4] has achieved for New Brunswick. It will present a new and broader reconstruction of the legal debate on slavery in the old province of which planter New Brunswick formed a part. It will attempt to set the controversy in its proper comparative context of historical jurisprudence and suggest why, when they might have chosen abolition, the Nova Scotia judges instead undermined gradually the established socio-economic order of which slavery was a recognized part; and to address the question of judicial strategy and tactics, as well as legislative history, in the context of the general legal debate on slavery in Loyalist Nova Scotia.

A controversy was renewed in 1992 between B.C. Cuthbertson, biographer of the "Loyalist Governor" Sir John Wentworth, and J.W. St.G. Walker, the leading authority on the "Black Loyalists", over whether nineteen Black slaves whom Wentworth shipped to his mercenary cousin in Surinam in 1784, ostensibly for their own good, had been purchased in Halifax or brought to Nova Scotia from the former Wentworth estate in New Hampshire. Writing in a new preface to his definitive monograph on the Blacks in Loyalist Nova Scotia, Walker concedes Cuthbertson's objection that he had misrepresented the origin of these slaves, but argues nevertheless that the message conveyed in his original argument that 'uneconomic slaves', rather than being manumitted or employed gainfully, might be exported from Nova Scotia against their will, remained valid.[5] Lieutenant-Governor Wentworth's belated conversion to emancipationist probity perhaps came as a result of trying to accommodate the Jamaican Maroons, one of whom Wentworth acquired as a mistress and the chatelaine of his Preston manor-house. However ambiguous and exploitative may have been the personal attitudes and behaviour of the Loyalist Governor, whose long, sixteen year reign witnessed the

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[1]As long ago as 1898, nevertheless, T.W. Smith, in "The Slave in Canada" *Collections of the Nova Scotia Historical Society*, vol. 10 (Halifax, 1899) [hereinafter T.W. Smith], was deploring (in the Preface to this "missing chapter in Canadian history"), "the scepticism of many of the best informed Provincials as to the presence at any time of Negro slaves on the soil of Canada."

[2]A conspicuous exception to the general rule is A.B. Sprague, "Some American Influences on the Law and Lawcourts of Nova Scotia, 1749-1853" (1992) 12:2 *Nova Scotia Historical Review* [1] at 14-15.

[3]Bell, *supra*,, note * at 10.

[4]Bell, *supra*,, note *.

[5]J.W. St.G. Walker, *The Black Loyalists: The Search for a Promised Land in Nova Scotia and Sierra Leone, 1783-1870* (New York: Africana Publishing, 1976 [reprint: Toronto: University of Toronto Press, 1992]) at xix-xx [hereinafter Walker].

virtual extinction of slavery in Nova Scotia, Walker observed correctly that, "[t]hough many Nova Scotians, most prominent among them Chief Justice Thomas A. Strange [1790-97] and Attorney-General S.S. Blowers [1785-97], sought to make perpetual bondage illegal, slavery remained a fact throughout the 1780s and 1790s."[6] In this essay I shall argue, as Blowers himself was to do, that Strange and Blowers, as consecutive chief justices, sought to debilitate slavery without declaring it illegal, at virtually the same time as unsuccessful attempts were being made to affirm it by legislation. Although Walker goes rather too far in describing Attorney-General Blowers as "a pioneer in the attempt to abolish slavery in the province",[7] Blowers was undoubtedly opposed to trafficking in slaves, a striking example of which was Wentworth's slave consignment, described above.[8] On at least one occasion during his nearly thirteen years as Attorney-General, moreover, Blowers had resolved to prosecute some unidentified slavemaster for sending a Black man "out of the province against his will, who had found means to get back again, but the master being willing to acknowledge his right to freedom nothing further was done."[9]

Though unsuccessful attempts had been made in 1787 and again in 1794 to emulate New Brunswick's example by creating a third assistant justiceship and appointing a Loyalist thereto, Blowers, who succeeded Strange as Chief Justice in 1797, was not only the first but also, until 1810, the only Loyalist judge on the bench of the Supreme Court of Nova Scotia. The judges of Loyalist Nova Scotia, therefore, unlike New Brunswick, which did not have a non-Loyalist judge until 1834, were by no means all Loyalists or their sons. Nor was the legality of slavery in Loyalist Nova Scotia merely a question of Loyalist legal attitudes despite the preponderance of Loyalist attorneys at the bar after 1783. The issue was one which not only divided the Loyalist lawyers among themselves, but also one on which the abolitionist part thereof could make common cause with like-minded members of the pre-Loyalist bar, a rare, perhaps unique, instance of ideological convergence and professional cooperation between oldcomers and newcomers, who most of the time anathematized each other personally.

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[6]*Ibid.* at 41.

[7]*Ibid.* at 121.

[8]B.C. Cuthbertson, *The Loyalist Governor: Biography of Sir John Wentworth* (Halifax: Nimbus, 1983) at 78.

[9]Ward Chipman papers, MG 23 D 1, vol. 4 at 141-43: letter, S.S. Blowers to W. Chipman, 7 Jan. 1800, National Archives of Canada [hereinafter NA]; mfm. at PANS [hereinafter Chipman]. The basis of the intended prosecution must have been the legal "restriction" against disposing of a slave outside the province: T.W. Smith, "The Loyalists at Shelburne" *Collections of the Nova Scotia Historical Society*, vol. 6 (Halifax, 1888) [53] at 75. The origin of this restriction, certainly not provincial statute law, has yet to be determined. Its existence may have been inferred from a misconstruction of an early Shelburne slave case, *R.* v. *Gray*; see *infra* note 49.

Slavery, which had been a continuous feature of peninsular Nova Scotia life at least from the English founding of Halifax onwards, achieved both its zenith and its nadir during the Loyalist period.[10] The Black slaves of white Loyalists are estimated to have numbered over 1200, about thirty-four per cent of the number of "Free Blacks or Black Loyalists"[11] removing to greater Nova Scotia after the American Revolution. Writing as late as 1812 a Halifax observer commented, "... there are a few [Blacks] in Annapolis County, brought in by the Settlers from New York at the peace, and held as Slaves under a very doubtful Order from Government, which certainly does not, or ought not to extend to their posterity ... ."[12]

Between the mass exodus of free Blacks to Sierra Leone in 1792, which depopulated the Black communities in Shelburne and Halifax Counties, and the

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[10]The standard "bibliographical discussion" remains J.W. St.G. Walker, *A History of Blacks in Canada: A Study Guide for Teachers and Students* (Toronto, University of Toronto Press, 1992 [reprint]) at 26; it is preceded by an excellent historical summary. See also J.D. Smith, comp., *Black Slavery in the Americas: An Interdisciplinary Bibliography, 1865-1980*, vol. I (Westport, Conn.: Greenwood Press, 1982) at 760-67 ("Slavery in Canada"). 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*. For the legality of slavery in Lower Canada, a uniquely valuable sourcebook is the documentary history compiled by M.J. Viger and completed by L.H. LaFontaine, «De l'esclavage en Canada» dans *Mémoires et documents relatifs à l'histoire du Canada* Montréal, La société historique de Montréal, 1859 aux pp. [1]-63 [hereinafter Viger & LaFontaine]; Lafontaine was at the time Chief Justice of Québec [Canada East]. The definitive study is M. Trudel, *L'esclavage au Canada français: Histoire et conditions de l'esclavage*, Québec, Les Presses de L'Université Laval, 1960, wherein the former work is described as "démonstration de l'existence légale ["fondements juridiques"] de l'esclavage. Ce travail ... est le premier travail historique sur la question de l'esclavage" (p. xxii). 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: Longman, 1976) at 157-58, though the focus is chiefly on the West Indies, which accounted for most of the indigenous legislation and was the principal concern both of the English leading cases and of the imperial regulatory Acts. See now also J. Walvin, *Slaves and Slavery: The British Colonial Experience* (Manchester: Manchester University Press, 1992). For a comprehensive historical bibliography of primary sources, which includes legal decisions and briefs relating to legal questions created by slavery, see H. Barnard, ed., *Slavery: A Bibliographic Guide to the Microfilm Collection* ["Slavery: Catalyst for Conflict"] (Ann Arbor, MI [198-]).

[11]Thus W.A. Spray, *The Blacks in New Brunswick* (Fredericton: Brunswick Press, 1972) at 29 [hereinafter Spray]. (See also Walker, *supra*, note 1 at 41, 42). According to Margaret Ells' tabular computation, "Dispersion of American Loyalists in Nova Scotia, 1783-1800", moreover, the number of Black settlers remaining in Nova Scotia after the exodus of 1791-92 would have been 31.3 per cent less than the number of Black slaves introduced into Nova Scotia by the Loyalists: M. Ells, "Settling the Loyalists in Nova Scotia" *Canadian Historical Association Historical Papers* (Toronto: University of Toronto Press, 1935) 105 at 108.

[12]Letter, [W. Sabatier] to N. Atcheson, Halifax, 20 Aug. 1812: CO 217/97/fol. 37r *et seqq*., PRO (mfm. at PANS). The precise nature and origin of this "doubtful Order from Government" are unclear; it probably dealt with the removal by Loyalists of their property in slaves, to whom, of course, General Clinton's "emancipation proclamation" did not apply. William Sabatier would in any case have known whereof he spoke, for he had been a Loyalist in New York during the Revolution.

mass immigration of 1814-16, Nova Scotia's residual Black population was largely unfree and was concentrated in Annapolis County. Of course, only the free Blacks emigrated to Sierra Leone; the slave Blacks perforce had no choice but to remain behind. In the first decade of the 19th century, that part of greater Annapolis County[13] comprising especially the new Loyalist townships of Digby and Clements, held the largest portion of the Black population of the province; *ergo*, also the highest percentage of slaves and of frustrated slavemasters determined to maintain and, if possible, reinforce the *status quo*.[14] That the fear of reduction to slavery had been present continuously among the free Blacks, and gave impetus to the West African colonization scheme, is clear from the second of the two petitions (1791) from Thomas Peters, formerly a sergeant in the Black Pioneers, who effectively laid the groundwork for abolitionist John Clarkson's "mission to America", which resulted in the exodus to Sierra Leone. Peters, who was the chief spokesman of the Annapolis County Blacks, complained of the "public and avowed Toleration of Slavery":

> Several of them [free Blacks] thro' this notorious Partiality ... have already been reduced to Slavery without being able to obtain any Redress from the Kings Courts, and ... one ... thus reduced ... 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 ... who 'delivered him up to his Master' in that deplorable wounded State ... . [A]s 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 ... and ... the oppressive Cruelty and Brutality of their Bondage is particularly shocking and obnoxious to ... 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.[15]

Though the condition of Blacks in Annapolis County, where there had been an unbroken tradition of slavery originating at least as early as the New England Planter period, attracted the most attention, it was pre-exodus Shelburne, the Loyalist metropolis, which had the largest population of Blacks (both slave and free), anywhere in the province. As late as the year 1806, a refugee slave from Shelburne would precipitate an important Supreme Court case involving the

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[13]It then consisted of all the territory between Kings to the east and Shelburne to the southwest.

[14]In his review of *The Black Loyalists*, Winks candidly admitted that neither he "nor Dr. Walker have provided sufficient information on the nature of the Black community in the Annapolis Valley, and what we do provide tends to be set against each other.": "Book Reviews" (1977) 57 *Dalhousie Review* [149] at 151.

[15]Petition of Thomas Peters to Secretary of State, 1791: FO 4/1/fols. 419-20, PRO; as quoted in E.G. Wilson, *The Loyal Blacks* (New York: Capricorn Books, 1976) at 180-81.

prominent West Indies merchant George Ross, who years before had acted as local agent for Bahamian slavemasters.[16]

To paraphrase Walker's reply to a critical review of his book,[17] the term "slave mentality", which he originally used to refer to the free Blacks, might be more accurately assigned to white Loyalist society, whose refusal to regard the Blacks as anything but slaves was the primary psychological-cum-ideological barrier to the abolition of slavery, either by legislative enactment or judicial decision. Viewing Black domestic slavery not as a "legal condition", but as an entrenched socio-economic institution with a paralegal character, leads to an accurate formulation of the late 18th century position: Black slavery was presumed implicitly to be lawful until adjudged or legislated to be explicitly illegal. Legislation had not been required to establish slavery, but would be required in order to regulate or abolish it. The system, as it were, was innocent until proven guilty. Walker's opinion that the experience of the "Black Loyalists provide[s] a unique insight into the consequences of slavery for the black slaves"[18] is undoubtedly correct, for no sooner had the exodus taken place than Black slaves began to assert their right to freedom and to test it in the courts. In this they had both the sympathy and the assistance of the Supreme Court bench and most of the bar; few if any refugee slaves who tested their condition in the high court were ever reconsigned to slavery as a result of a judicial decision or jury verdict. Despite the anachronistic imposition of societal attitudes prevalent after the exodus of free Blacks to Sierra Leone onto the pre-exodus society, moreover, Walker takes the view that,

> black enslavement did leave a powerful impression upon colonial whites ... . In Nova Scotia in the 1780s it is possible to witness the transfer of status from a legal condition to a biological characteristic, from 'slave' to'black'. The articulation of 'race' as a social qualification, implicit in slavery, became explicit in Loyalist Nova Scotia, evoked by the Black Loyalists' demand for equality.[19]

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[16]See *infra*. It is claimed by eyewitnesses that the Ross-Thomson house in Shelburne, since 1971 a branch of the Nova Scotia Museum, formerly had manacles in the cellar. Needless to say, such artifactual relics of Shelburne's slave-owning heritage were not touristy and did not remain *in situ*. Cf. Spray, *supra*,, note 11 at 21: "A number of slave-owners' homes had rooms in the basement equipped with chains, which were used to confine slaves who had attempted to run away". A 1949 pamphlet written by a former occupant of the house is quite candid about the material culture of slavery: D. Webster, *The Charlotte Lane House which is The old Ross-Thomson House in Shelburne Nova Scotia* (Milton, MA: Turtle Press, 1949) at 11.

[17]Walker, *supra*,, note 5 at xviii-xix.

[18]*Ibid.* at xxii.

[19]*Ibid.* at xxiii. Walker elsewhere takes the view that the "justification" for slavery in colonial society was not racial but legal: *idem*, *Racial Discrimination in Canada: The Black Experience* (Ottawa: Canadian Historical Society, 1985) at 8. The argument is circular, however, unless slavery be not an extreme form of racial discrimination, and begs the question by attributing the subjection of Blacks to white authority to "their legal position as slaves": *loc. cit.*

The free Blacks' demand for equality in the 1780s was to resound in the slave Blacks' demand for liberty in the 1800s. Between these termini lay the watershed exodus of 1791-92. One can dissent from Walker's conclusion only inasmuch as the implication that Black slavery was a "legal condition" begs the question which this article attempts to answer. Slavery as a social institution was accepted in Nova Scotia as a fact of domestic, though not of the mercantile economy; plantation slavery was unknown, as there were no plantations and only a few manorial estates, which in any case were neither productive nor sophisticated enough to introduce slavery in the guise of old English villeinage.[20]

Slaves nevertheless figured not only in estate inventories as liquid assets, but also as attachable property in routine actions for debt recovery.[21] Free Blacks might also be civil litigants, as in *Watson, alias Phillis* v. *Proud* (N.S.S.C. 1779).[22] The plaintiff, a free-born Black woman from Boston who had been sold into slavery in Nova Scotia, was suing the defendant, a Halifax butcher, for £100 damages for illegal confinement. The case must have been something of a *cause célèbre* in its time; appearing for the defendant, William Proud, was Solicitor-General Richard Gibbons, who had applied for *certiorari*; appearing for the plaintiff was George Thomson, the most junior attorney at the bar. The plaintiff sued out the writ *de homine replegiando*, a medieval process which had been largely superseded in England by *habeas corpus*.[23] Counsel for the defendant

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[20]On this subject generally see now A.B. Robertson, "Tenant Farmers, Black Labourers, Indentured Servants: Estate Management in Falmouth Township, Nova Scotia" (paper presented at the third triennial New England Planter Conference, Acadia University, October 1993) [hereinafter Robertson]; *Idem.*, "Bondage and Freedom: Apprentices, Servants and slaves in Colonial Nova Scotia" (paper presented at the Royal Nova Scotia Historical Society, 16 Jan. 1992).

[21]See, for example, *Ormsby* v. *Wheelwright* [absconding debtor] (N.S.S.C. 1769): RG 39 "C" (HX), box 8, file 43, PANS.

[22]RG 39 "C" (HX), box 21, file 33; RG 37 (HX), box 22, file 45; RG 39 "J" vol. 98, at 421 [original entry]; vol. 6, at 103 [judgment], PANS. (I am grateful to Dr. Julian Gwyn of the University of Ottawa for drawing this important early case to my attention.) The superior court writ of *certiorari*, together with the record of the court below, ended up among case files of the Inferior Court of Common Pleas, for no apparent reason other than clerical error, or that cases in the Common Pleas, the lower civil court, might be removed, or its judgments appealed, to the Supreme Court. The justices were also more or less the same individuals, the *custos rotulorum* acting in a dual capacity as *ex officio* first justice of the Common Pleas.

[23]"The writ *de homine replegiando* lies to replevy a man out of prison, or out of the custody of any private person, (in the same manner that chattels taken in distress may be replevied ...)": W. Blackstone, *Commentaries on the Laws of England* (Philadelphia: Robert Bell, 1772) at III.8.iii.129; see also Francis Hargrave's argument in *R.* v. *Knowles, ex parte Somersett*, (1771-72) 20 St. Tr. 1 (K.B.) at 38-39 note, and W.S. Holdsworth, *History of English Law*, IX (Boston, 1926) at 105-07. What *habeas corpus* was to slavery, *de homine replegiando* had been to villeinage. The question of liberty, fact versus law, could not go to a jury for trial. Whereas *habeas corpus* might be used to procure liberty to the slave, moreover, *de homine replegiando* might be used to try the right of the free-born Black to her freedom. The remedy was different, though the result might well be the same, given the

erected his defence on the basis of a detailed inquiry into the "employment history" of the plaintiff, who allegedly had been sold and resold as a slave. Perhaps the most astonishing feature of the case is the fact that the lay magistrates of the Court of Quarter Sessions concluded from the testimony of witnesses that Watson had indeed been born free. The Supreme Court jury, however, which was asked to decide whether or not the plaintiff Watson was the "property and Slave" of the defendant Proud (a clear indication that the peremptory defence offered against the plea was favoured by Chief Justice Finucane, presiding), found that the plaintiff was indeed the defendant's "property and Slave" and that he should recover accordingly. Of similar import was *Ball* v. *Simpson, ex parte McMonagle* (N.S.S.C. 1780),[24] in which a deputy provost-marshal refused to discharge a free Black woman whom he had attached in execution of a judgment, the sworn appraisers wrongly inventorying her as a domestic slave.[25] The sheriff somehow managed to avoid prosecution for contempt for having defied the writ *de homine replegiando*, which lawyer Thomson again sued out on behalf of the husband of the imprisoned Black, to whom the court was unwilling to risk denying the benefit of common law.

It is, of course, essential to distinguish between cases testing the legality of slavery (these were unknown in planter, pre-American Revolution Nova Scotia where slavery was presumed lawful), and those, such as *Watson*, in which free-born Blacks could exercise their undisputed right to retain counsel for the purpose of initiating actions at law, and in which the cause of action was illegal confinement or false imprisonment rather than enslavement *per se*. The very fact that free-born or freed Blacks in Nova Scotia could seek judicial redress against the presumption of slavery during the American Revolution is significant for the legal history of slavery during the post-bellum, Loyalist period, when it became a question more of perpetuating the status of Black slaves who had been introduced into Nova Scotia by the Loyalists, than of pressing free-born Blacks into slavery.

The legality of slavery, which tended to be reinforced indirectly on the infrequent occasions when it was challenged during the pre-exodus 1780s, moreover, began to be challenged successfully on the grounds of defect of title

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connivance of petit juries. Writing some fifty years later, the anti-slavery jurisprudent Beamish Murdoch eloquently summarized the whole issue thus: "Judge Blackstone considers the ancient remedies still in force, in case the singular obstinacy of any person should render them necessary. As they form a part of the ancient common law, it may be concluded, that although not used, they might be resorted to here, in case of necessity for so doing, especially as the arm of justice would be weakened ... ." in *Epitome of the Laws of Nova-Scotia*, III (Halifax: 1832) iii.2 at 90 [hereinafter Murdoch].

[24]RG 39 "C" (HX), box 21, file 58, PANS. I am grateful to Julian Gwyn for also drawing this equally important case to my attention.

[25]*McMonagle* v. *Haines* (N.S.S.C. 1780): RG 39 "C" (HX), box 22, file 40, PANS.

warranty in the post-exodus 1790s. Yet this development took place only after two attempts at legislative regulation of Blacks in the late 1780s had failed. Why did the judges of Nova Scotia's Supreme Court during the Loyalist period consistently undermine the lawfulness of Black slavery when they might conveniently have abolished it? Why did the lawyers in Nova Scotia's legislature further undermine the lawfulness of slavery by declining to enact the regulatory bills, and yet fail to introduce an abolition bill until as late as 1808, when the virtual necessity of such a measure was conceded even by petitioning slavemasters?[26]

On numerous occasions in the late 1790s and early 1800s, the mainly non-Loyalist judges of Nova Scotia's Supreme Court were confronted with the vexed question of "whether slavery was to be held lawful in the absence of express statutory establishment."[27] Only among the advocates of its legalization, however, did the view prevail that slavery had been introduced by acts of Parliament extending either *proprio vigore* or at common law to the colonies. While it was no less entirely open to the Nova Scotia Supreme Court than to the New Brunswick Supreme Court to "mak[e] the law for the occasion",[28] the judges of the former strove to prevent law being made, for fear that legislating by judicial decision might impute even the presumption of legality to institutional slavery. In choosing gradually to subvert slavery, "when they might without inconvenience have chosen abolition",[29] the judges calculatedly rejected the option of declaring slavery illegal. The gradualist judicial policy developed and implemented by Chief Justices Strange and Blowers, the former an inexperienced English barrister, the latter an accomplished American Loyalist attorney from Massachusetts, whose tenures jointly covered the entire period of the Loyalist Ascendency, may be judged to have succeeded, in that slavery eventually disappeared without having to be abolished through judicial fiat, much less legislative enactment. The rationale for this approach to the impasse was that slavery, though arguably a violation of human rights, was both customarily legal and seen to be so, and that prudent judges had therefore to proceed with extreme caution lest they find themselves in the invidious position of determining what the law should be rather than deciding what it was, and thus provoke the legislature into overruling their decisions. Despite there being neither judge-made nor statute law, both Chief Justice Strange

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[26]See *infra*.

[27]Bell, *supra*,, note * at 9.

[28]*Ibid.* at 10 and n. 1, quoting Ward Chipman. Bell modifies the context of Chipman's remark by asserting that the Supreme Court of New Brunswick might have judicially abolished slavery, when instead, through their indecision, the judges accomplished its perpetuation by default. Chipman was actually criticizing Chief Justice Ludlow for not basing his argument on sound judicial authority, because his *ratio decidendi* in favour of the legality of slavery was "predicated altogether on the hypothesis that no law was ever made in any of the Colonies directly establishing slavery" in Chipman, *supra*, note 9 at vol. 6, 487 [letterbook copy]: letter, W. Chipman to S.S. Blowers, 27 Feb. 1800.

[29]*Ibid.*

and Attorney-General Blowers well knew that slavery existed in fact, if not in law.[30] It existed unchallengeably in default of either judicial decisions or legislative acts positively declaring it to be illegal.

In attempting to set the controversy surrounding the legal debate of slavery in its proper context, the primary obstacle is terminological: in the bureaucratic officialese of the late 18th century, "servant" was either a euphemism for "slave" or the two descriptors were often convertible and interchangeable. T. Watson Smith suggests that the lists of Loyalist companies bound for Shelburne were probably made up "under the direction of British officers whose dislike to the word 'slave' would lead them to use the alternative legal term"[31] servant. This late 18th century administrative catch-all category has been appropriated by some late 20th century historians, whom it has led either to reproduce the linguistic bias inherent in the sources or to retroject by two centuries presuppositions or misconceptions altogether alien to the subject of the inquiry. The implication is that the difference between slavery, perpetual bondage or servitude on one hand, and servantship on the other, was semantic or incidental rather than essential. It is undoubtedly true that in an economically depressed and declining slave society such as Loyalist Shelburne, in which "Black pauperism", as Walker calls it, was perceived to be a major, continuing social problem, free Blacks became indentured servants merely in order to subsist. Still, it is dangerously misleading to run together "slaves" and "servants" as if to suggest that these conditions were optional or alternative lifestyles, the difference between which was one of degree rather than kind. As servants were formally recognized and regulated by provincial statute law, whereas slaves were not, this hypothesis could be correct only in the respect that, depending always on the inclination of the master, Black labourers or indentured servants were treated no better than slaves.

Though "[t]he institution of slavery was systematically undermined during the administrations of Lieutenants-Governor Parr [1782-1791] and Wentworth [1792-1808]",[32] anti-slavery agitation was neither commenced by, nor confined to, lawyer-legislators. If indeed, as Winks and Bell argue, it was Nova Scotia's judges, and especially its law officers, who played a leading role in administering the *coup de grâce* to institutional slavery, then legislators took the active part in trying to perpetuate it through express statutory regulation. The third (1787) session of Nova Scotia's Sixth Assembly, the first to which numbers of Loyalists belonged and

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[30]R.W. Winks, *The Blacks in Canada* (Montréal: McGill-Queen's University Press, 1971) 96 at 102 [hereinafter Winks]. Blowers, while Attorney-General, worked assiduously, as both MHA and Member, and from 1797 *ex officio* president, of Council, to prevent any statute law relating to Blacks from being made.

[31]T.W. Smith, *supra*,, note 1 at 23.

[32]M. Ells, The Development of Nova Scotia, 1782-1812 (Ph.D Thesis [draft], King's College London, 1948) at 292 [hereinafter Ells].

in which the new Loyalist townships of Shelburne and Digby, having between them the bulk of the Black population, were represented, saw the first reading of *An Act for Regulating bound and free Negroes and Mulattoes, and for more effectually Punishing such Persons of that Description as shall in future be guilty of Offences*. Prominent among the five lawyer MHAs were Attorney-General Blowers and Solicitor-General Richard John Uniacke. Blowers, as Speaker, held an office analogous in power and influence to that of the Speaker of the House of Representatives in the United States Congress, while Uniacke, scarcely more than a year later, would succeed Blowers as Speaker. Professional rivals as well as bitter personal enemies, whose enmity would endure a lifetime, Blowers and Uniacke were nevertheless united in their belief "that slavery in Nova Scotia had no basis in law."[33] A lifelong, committed ideological opponent of slavery, Uniacke had emigrated in early manhood from a country where Black slavery was virtually unknown, even within the Anglo-Irish Ascendancy to which his family belonged. If Attorney-General Blowers and Solicitor-General Uniacke agreed on one thing only, it was that the perceived para- or quasi-legal status of slavery must not be enhanced by the passage of affirmatory acts of any kind whatsoever.

The 1787 *Negro Bill*[34] passed through first and second reading, and had reached the committee stage, when Solicitor-General Uniacke successfully moved that it be deferred until the next session. Uniacke was thus almost single-handedly responsible for quashing the Bill on the floor of the House of Assembly. Recalling the events of 1787 thirteen years later (after he had become Chief Justice and *ex officio* president of the Council, and was therefore still able to play a significant legislative role), Blowers wrote, "[w]hen the Law made in 1787 for the regulating of Servants[35] was brought into the house of Assembly, there was a clause inserted for the government of Negro Slaves which was rejected by a great Majority on

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[33]B.C. Cuthbertson, *The Old Attorney General: A Biography of Richard John Uniacke* (Halifax: Nimbus, 1980) at 4 and n. 6 [hereinafter Cuthbertson]. The case to which the author refers, *DeLancey* v. *Woodin* (see *infra*, note 81), was tried at Annapolis Royal, not Halifax. In October 1791 Blowers and Uniacke came close to fighting a duel over a Black servant-man whom the latter had dismissed and the former taken into his service: 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. In order to deprive the gawkish townspeople of the spectacle of a duel between the Attorney-General and the Solicitor-General, Chief Justice Strange compelled each of them to enter a peace bond: *R.* v. *Blowers*; *R.* v. *Uniacke*, RG 39 "C" (HX) box 79, 1798 [*sic*: 1791], PANS.

[34]The 1787 bill is not extant, but its text can be substantially reconstructed from the 1789 bill, the text of which is extant in two versions, draft and engrossed, the latter reproduced in Appendix I, *infra*. The author and/or introducer of the original bill, however, are alike unknown.

[35]It is possible, however, that Blowers was referring to *An Act in addition to, and amendment of, an Act, made in the Fifth year of His present Majesty's reign, entitled, an Act for regulating Servants*: (1787), 28 Geo. 3, c. 6, which would later figure in Uniacke's defence of Woodin (see *infra* note 81).

the ground that Slavery did not exist in the province and ought not to be mentioned ... ."[36] Though one fails to perceive the need for regulating a condition which did not exist, it is clear that Blowers meant simply that the existence of slavery had no legal sanction of any kind whatsoever, and that statutory recognition (not to mention regulation), might have the undesirable side-effect of granting it existence in law as well as in fact, thereby rendering eventual statutory abolition necessary, yet ultimately precluding the very possibility of judicial abolition, however gradual. On the other hand, it is no less clear that not all the MHAs, Loyalist or non-Loyalist, deferred to the view of the law officers; if so, the *Negro Bill* would not have been substantially reintroduced in the House of Assembly at its next session in 1789.

By that time Attorney-General Blowers had been promoted to the Council, where he joined the senior puisne justice of the Supreme Court, layman Isaac Deschamps, and Solicitor-General Uniacke had replaced Blowers as Speaker of the House. The new *Negro Bill* was drafted and presented by Charles Hill, an Ulster Protestant immigrant who ran an auction house in Halifax while representing the country constituency of Amherst, and who was also a close friend and business associate of Uniacke's. *An Act for the Regulation & Relief of the free Negroes within the Province of Nova Scotia*[37] progressed through the Assembly (Uniacke seems not to have interfered), and was sent up to the Council; it was returned by the Council "not agreed to", however, presumably at the instigation of Blowers, who feared that language such as, "no person or persons whatsoever can by authority of Law enslave them [free Negroes] unless they are proved by Birth or otherwise to be bound to Servitude for Life" and "[n]egroes ... who are not Slaves by Birth or otherwise", implicated the existence of slavery as a statute right. Despite the apprehensions of the senior law officer, and perhaps also former Acting Chief Justice Deschamps, the 1789 *Negro Bill* was conceived by its framers in the lower House partly as a vagrancy act, a social welfare-cum-civil rights bill. Walker[38] cites it as an honest attempt to address the worsening problem of the illegal seizure and export of free Blacks for sale in the United States or the West Indies. This *ad hoc* compromise, however, born of expediency, was no more than an attempt to prevent the illegal re-enslavement of free Blacks; it did nothing to ameliorate the condition of slave Blacks, and indeed held out to indigent free Blacks the prospect of nothing better than involuntary indentured servancy. The Bill's failure to be enacted was nevertheless to provide both the inspiration and the occasion for later judicial attempts at debilitating slavery by converting perpetual bondage (or servitude), into indentured servantship. The paradox of the Bill was that the servitude of slaves was presumed legal, whereas

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[36]Winks calls this "a pious declaration": *supra*, note 30 at 102.

[37]RG 5 "U" [Unpassed Bills] box 1 (1762-1792), PANS; the full text is reproduced in Appendix 1.

[38]Walker, *supra*, note 5 at 51.

the enslavement of free Blacks was explicitly declared illegal. Such a distinction was perhaps too nice to be drawn; the lawyer-legislators could not have it both ways. If there was to be tangent legislation, then the question of the legality of slavery would have to be addressed; for if slavery did not exist as a statute right, then by what legal right did it exist?

It must have appeared to Attorney-General Blowers that socially dangerous "positive law", such as the proposed *Negro Bill*, would be far worse than no legislation at all. Though Blowers' recollection of legislative affairs in which he had been directly involved as Speaker of the House and then as Member of Council, may have been coloured by the passage of time as well as by his own translation from the perspective of law officer to that of chief judge, he remained throughout a cautious and conservative jurist. His unflagging opposition to any species of statutory enactment "relating to Negroes" is explained thus by Bell:[39] "Such legislative recognition might have been viewed as precluding a challenge to the lawfulness of slavery as a principle."[40] The legality or otherwise of slavery was far too serious and delicate a matter to be left to Assemblymen, some of whom were slaveholders, while the majority did not in any case consist of lawyers; it was a matter instead for the Supreme Court, where, in Winks' memorable phrase, a "judicial war of attrition" would be waged upon slave-owners.[41]

The Negro Bills, had either of them been enacted, would not necessarily have legalized slavery; they would merely have recognized that its existence was presumed to be lawful until such time as it was statutorily or judicially abolished. Nova Scotia's legal history was to follow the second alternative course, through a series of judicial decisions tending to the gradual abolition of slavery.

Understandably of greater interest to Blowers, after he had become Chief Justice in 1797, was statutory interpretation. Given the failure of the 1789 regulatory bill to obtain passage through the Council, the only statute in which the words "Negro" and "slave" were conjoined was the 1762 *Innholders Act*, which prohibited retailing alcoholic beverages on credit to soldiers, sailors, servants, apprentices, indentured servants and Negro slaves.[42] Replying in 1800 to an enquiry from Solicitor-General Ward Chipman of New Brunswick, "[w]hether the

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[39]Though wrongly, given the context; see *infra*.

[40]Bell, *supra*,, note * at 16.

[41]Winks, *supra*,, note 30, *loc. cit.*

[42]Stats. N.S. (1762) 2 Geo. 3, c. 1. This Act was still in force in 1804 ("Uniacke's Laws"), and remained "on the books" while Beamish Murdoch, whose pre-1805 statutory citations ("P.L.") refer to the Uniacke edition, was composing his *Epitome of the Laws of Nova-Scotia*, *supra*,, note 23; see I, viii ["Laws for the Preservation and Improvement of Religion and Morals"] at 189. The Act was not repealed specifically until proclamation of the first of the modern series of Revised Statutes: R.S.N.S. 1851, c. 170, s. 9 at 500 ("Of the Repeal of Statutes, Revised and Consolidated").

question [of the legality of slavery] has ever been judicially determined, whether there was ever any act of Assembly in your province upon the subject, and upon what ground the right of the master is supported, if slavery is recognized at all among you", Blowers had stated, "[w]e have no Act of the Province recognizing the slavery of negroes as a statute right."[43] Chipman, however, in searching through the then current second edition (1784) of the old series of revised statutes of Nova Scotia, had discovered the *Innholders Act*; he supposed it would be construed by counsel for the master as securing their argument in defence of the legality of slavery: "Had the counsel for the master stumbled upon your [Nova Scotia's] Act passed in 1762, as revised in 1783, in the second section of which negro slaves are mentioned, the conclusiveness of their reasoning on their principles would have been considered as demonstrated."[44] Blowers, however, took the view that the "expression ... Negro Slaves in our province's *Law for regulating In[n]holders &c* has been considered here as merely a description of a Class of people existing in the province, and not as a recognition of the Law of Slavery."[45] In other words, the construction of a provincial statute in which "negro slave" was incidentally mentioned as part of an enumeration of social subclasses was immaterial to the legality or otherwise of Black slavery. The unpassed regulatory bills of 1787 and 1789 were another matter, however, for their legal character was such that they would have had the effect of legalizing slavery by according it *de jure* statutory recognition. If slavery could exist in default of legislation, regulatory or otherwise, then there was a serious lacuna in the statute law of the province. Thus, the incidental purpose of Nova Scotia's Negro Bills, which were not in the strict sense declaratory, was not so much to regulate Black persons as to regularize Black slavery. Yet it would never be argued in court that the very failure of the Negro Bills to be enacted amounted to negative proof of the

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[43]Letters, W. Chipman to S.S. Blowers, 15 Dec. 1799; Blowers to Chipman, 7 Jan. 1800: transcribed in D.A. Jack, "The Loyalists and Slavery in New Brunswick" *Proceedings and Transactions of the Royal Society of Canada*, 2nd ser., vol. IV, (1898) sect. ii, 137 at 148 and 149 [hereinafter Jack].

[44]*Ibid.* at 151: letter, W. Chipman to S.S. Blowers, 27 Feb. 1800. Counsel's reasoning could hardly have been based on principles of statutory interpretation or reception at common law, however, as the Act concerned was not in force in the neighbouring province: New Brunswick's *Statute Law Declaration Act*, (1791), 31 Geo. 3, c. 2, provided "[t]hat no Law, passed in the General Assembly, of the Province of Nova Scotia, before the erection, of the Province of New Brunswick [1784], shall be of any force or validity whatever, in this Province; or so deemed, or taken, in any Court of Law, or Equity, within the same." Indisputably, therefore, the Nova Scotia Act of 1762 did not extend to New Brunswick in 1800, though it might have done ten years earlier, as this New Brunswick declaratory act had "no retrospective force or operation."

[45]Chipman, *supra*,, note 9 at 147: letter, S.S. Blowers to W. Chipman, [?] Apr. 1800. If the *Innholders Act* was not material to the legality of slavery in Nova Scotia, then how much less so in New Brunswick, where it was not even potentially in force. The Act, then, which is altogether extraneous to the legality of slavery, merely documents the fact that Black slaves were sufficiently numerous in wartime Halifax in the early 1760s to attract hostile legislative attention. No statute even recognized, much less regulated, the existence or continuance of slavery in Nova Scotia before (or after) the province of New Brunswick was erected in 1784.

illegality of slavery, nor would its *de facto* legality ever be challenged on those grounds.

Slavery adjudication in Loyalist Nova Scotia meanwhile began not in the Supreme Court, to which it was afterwards confined exclusively, but on the judicial side of the Court of General Sessions of the Peace, and may have been a legal after-effect of the unsuccessful attempts in the late 1780s to enact a regulatory bill protective of the liberty of free Blacks. The judicial bench of the Court of Sessions, like the Inferior (civil) Court of Common Pleas, consisted of laymen, some of whom were themselves slavemasters and therefore interested personally in upholding the master's property right.[46] The burden of proof had not yet shifted from the freedman to the putative master; that development would not occur until slavery adjudication was translated (sometimes through *certiorari*), from the Court of Sessions to the Supreme Court. The judicial records of the Shelburne County Sessions, which survive almost complete from the late 18th century, contain numerous examples of freedmen attempting to escape re-enslavement at the hands of slavers or former masters, who were attempting to use due process of law not only as a means of reclaiming refugee slaves, but also as a cloak for trafficking or slave-market profiteering.[47] "If a master could prove a prior claim, of however long standing," writes Walker,[48] "the black was liable to be returned to slavery." Typical of those cases in which "the threat of being [re]claimed, in the courts and with the full sanction of the law, as a legal slave" was realized, was *R.* v. *Gray, ex parte Postell*,[49] in which the former master was tried and acquitted of a "misdemeanour" for having resold into slavery an emancipated slave.

With respect to its concern for the property rights of slavemasters, the Court of Sessions, especially in early Loyalist Shelburne, resembled more closely the Supreme Court of New Brunswick, which consisted entirely of Loyalists, than the Supreme Court of Nova Scotia. During the same period (1785-1808) in which the

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[46]New York Loyalist Isaac Wilkins, for example, the *custos rotulorum*, "is said to have brought a number of slaves" with him to Shelburne: T.W. Smith, *supra*,, note 1 at 24.

[47]Walker, *supra*, note 5 at 51 (*R.* v. *McNeill, ex parte Reed et al.*, 1786 [Ct. Sess. P.]); M. Robertson, *King's Bounty: A History of Early Shelbourne, Nova Scotia* (Halifax: Nova Scotia Museum, 1983) at 94-96. See also "Extracts from the Special Sessions of Shelburne, N.S." [typewritten transcript] at 11 *et seqq.*: MG 4, vol. 141, PANS. This case, which was *habeas corpus* in everything but name, occurred when four free Blacks were spirited from Halifax to Shelburne, in irons, for the purpose of being consigned to the Bahamian slave market for sale. The magistrates' court divided five to two in favour of discharging the Blacks, Wilkins voting with the majority.

[48]*Loc. cit.*

[49]RG 60 (SH), folder 49/file 4 (1791); MG 15, vol. 19, file 40 [photocopy of case file]; "Extracts from the General Sessions" [typewritten transcript] at 47 *et seqq*: MG 4, vol. 141, PANS. The defendant, one Jesse Gray, a southern Loyalist, brought four "servants" with him to Argyle township (now Yarmouth County) in 1786.

Supreme Court of New Brunswick was presided over by George Duncan Ludlow, a Chief Justice who was partial to the legality of slavery, moreover, the Supreme Court of Nova Scotia was presided over by two consecutive Chief Justices who opposed slavery. While the Strange Court (1790-1796) and the Blowers Court (1797-1833) were anti-slavery, however, they were emancipationist rather than abolitionist. Strange's policy, with which Blowers concurred and collaborated while Attorney-General, and which he continued to implement after he had become Chief Justice, was to exploit to the full the resources of law and procedure in order to secure the emancipation of individual slaves rather than abolish slavery *per se* by judicial fiat. If *habeas corpus* did not succeed in favour of the slave as against the putative master, then the alternative was slow strangulation of the master's "property rights" through risky, prolonged and expensive litigation. Though it would be difficult to attempt to estimate the number of slave cases tried in the Supreme Court of Nova Scotia in the 1790s, most if not all of them were crown proceedings for *habeas corpus* brought against masters on behalf of fugitive slaves, in order to determine whether slavery was a form of unjust and illegal detention from which liberation might be obtained. The criteria according to which such cases would have been decided (their very subject-matter made them precedential), were stated thus by Chief Justice Blowers: "The right to hold a negro by this tenure [i.e., slavery] is supposed by us to be maintainable, either by the Common Law of England, the Statute Law of England and the Colony, or upon adjudged cases ... ."[50] If "the genius and spirit of the common law is so hostile to slavery that whenever it is introduced or prevails it operates *ipso facto* to abolish slavery",[51] and as there was no provincial statute establishing, regulating or even recognizing slavery, the principal point was adjudicable on the grounds of English law and colonial custom or usage having the force of law; Blowers rejected the latter as a mere pretext for adducing the false principle of "colonial" common law, as distinct from English.[52]

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[50]Jack, *supra,* note 43 at 149: letter, S.S. Blowers to W. Chipman, 22 Dec. 1799 [*sic*: 7 Jan. 1800].

[51]*Charlotte* v. *Chouteau*, (1857) 25 Mo. 465, per Richardson, J. The respondent successfully reasserted her free-born status on the ground that slavery did not exist in Canada (i.e., Québec) at the time of her mother's birth in Montréal about 1768, which fell midway within the period between the restoration of civil government in 1764 and the passage of the *Québec Act* in 1774: "From the fact that there were laws and documents in which reference was made to slaves, or which contemplated a state of slavery, it was to be inferred that slavery lawfully existed in Canada. That inference was one of fact, to be made by the jury": "Slavery in Lower Canada" (1869) 3 L.C. Jurist 257 at 268. The entire argument, of course, derives from the civil law tradition and the *jus gentium*, which was exploited by Chipman for the opposite purpose in *R.* v. *Agnew, ex parte Hopefield* in 1805: Bell, *supra,* note * at 39.

[52]W.R. Riddell supposed it to have been admitted in *Somersett* that consuetudinary law made slavery legal in the American colonies: "The Slave in Canada" (1920) 5 Journal of Negro History 261 at 372, n. 20 [hereinafter Riddell]. The reference is to Francis Hargrave, who opened the pleading on behalf of the Black ex-slave, James Somersett: "The question ... is not whether slavery is lawful in the colonies, (where a concurrence of unhappy circumstances has caused it to be established as necessary ... .)": (1772), 98 E.R. 499.

In lieu of even informal reports or a systematic survey of court records documenting slavery adjudication in the Supreme Court of Nova Scotia during the 1790s,[53] one has to rely almost entirely on Chief Justice Blowers' retrospective on the Strange Court,[54] given a few years after Chief Justice Strange's resignation, in confidential correspondence with Solicitor-General Ward Chipman of New Brunswick.[55] "The question respecting the slavery of negroes has often been agitated here in different ways," wrote Blowers in reply to Chipman's original request for information, "but has not received a direct decision":

> My immediate predecessor [Strange] dexterously avoided an adjudication of the principal point, yet as he required the fullest proof of the master's claim in point of fact, it was found generally very easy to succeed in favour of the negro, by taking some exceptions collateral to the general question, and therefore that course was taken ... . [A] summary decision of the question of slavery between master and negro 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. Mr. Strange always aimed to effect this, and generally succeeded ... . I had frequent conversations with Mr. Strange upon the question, and always found that he wished to wear out the claim gradually, than to throw so much property as it is called into the air at once.[56]

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[53]An exception is *Douglass* v. *McNeill* (N.S.S.C. 1791), suit for damages "for falsely affirming a Negro Wench named Phebe to be a Slave & his property and selling her as such." (N.B. "Phebe" was probably the same Phebe Martin whom the defendant had brought from Halifax to Shelburne in irons in 1786, only to see her discharged by the magistrates: *supra,* note 47.) Attorney-General Blowers represented the plaintiff in this case of actionable fraud ("breach of title warranty"): D.G. Bell & E.C. Rosevear, comps., *Guide to the Legal Manuscripts in the New Brunswick Museum* (Saint John: New Brunswick Museum, 1990) at 17 § 86 [hereinafter Bell & Rosevear]: Blowers' private writ register (docket of causes); the original record is at RG 39 "C" (HX), box 62, file 62, PANS.

[54]Though Strange left Nova Scotia in the summer of 1796, and did not resign until the summer of 1797, his translation to Upper Canada in succession to Osgoode had been anticipated early in 1794.

[55]The correspondence, running from Dec. 1799 to Apr. 1800, was twice incompletely published: Jack, *supra,* note 43 at 148-51; J.W. Lawrence, *The Judges of New Brunswick and their Times* (Saint John, 1907 [reprint: 1985]) at 71-75. The originals, Blowers' holographs and Chipman's letterbook copies, are in the Chipman family fonds at NA: *supra,* note 9, vols. 4 and 6. (N.B. Unless otherwise indicated, quotations are from the Jack edition, except where the text has been elided or mistranscribed and I have therefore consulted the original directly. Chipman's holograph letters do not survive because Blowers destroyed his papers towards the end of his century-long life.)

[56]It was towards the end of the Strange incumbency that the principle was established in England, on the authority of Lord Chief Justice Eyre of the Common Pleas, that "[p]rocuring a slave to enter into a contract to serve as a servant for a term of years is equivalent to manumission": (1977), 18 *Halsbury's Laws of England* (4th) 887 at § 1708 n. 6. The case was *Keane* v. *Boycott,* (1795), 126 E.R. 676 (C.P.). The extremely controversial nature of this too broad a ruling, not only in its own time but also among early 19th century commentators, is clearly shown by the following marginal note by the reporter: "[I]t is to be observed that it ['this ingenious conjecture'] is inconsistent both with the general policy, and local institutions of the British Islands in the West Indies, to suppose that a slave

It is tolerably clear, therefore, that Strange may have been a clandestine emancipationist, but he was not in any degree an abolitionist. As the protégé, probably also the illegitimate offspring, of the Earl of Mansfield, who had retired as Lord Chief Justice of England the previous year, Thomas Andrew Lumisden Strange was nepotistically appointed Chief Justice of Nova Scotia in October 1789, at the embarrassingly premature age of thirty-three, after scarcely four years at the Bar and next to no practice in Westminster Hall.[57] Strange, who followed directly in Mansfield's footsteps to Westminster school, Christ Church Oxford and Lincoln's Inn, matriculated at Oxford in 1774, two years after his influential patron had handed down very reluctantly his ambiguous decision in *R.* v. *Knowles, ex parte Somersett*, soon to be mythologized as "The Negro Case".[58] Strange was destined to become Nova Scotia's Mansfield, and *Somersett* would be his model for adjudicating those slave cases which came before him. Emulating his mentor, Strange appears consistently to have evaded a direct adjudication on the legality of slavery during his half-dozen years in Nova Scotia; there were not to be any test cases, such as were tried after Blowers became Chief Justice. A clean cut from the Mansfield mould, Strange "sought, with all of his high tactical powers, to avoid any slavery issue: he was a property-minded man of commerce."[59] Strange's *dictum*, as related by Blowers, " ... he [the Chief Justice] wished to wear out the claim gradually, [rather] than to throw so much property as it is called into the air at once",[60] is resonant of Mansfield's *obiter*, "[t]he setting 14,000 or 15,000 men

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can be manumitted by implication": *ibid.* at 677, note (a)2. It was nevertheless the basis on which the trial judgment was sustained in an action which, though for trespass, might equally well have lain for trover (see *infra*). The question was already moot in England, of course, "because as soon as a slave arrives here, the yoke of slavery is dissolved by operation of law": *ibid.* at 678, *loc. cit.* (The reporter, incidentally, was Henry Blackstone, nephew of Judge Blackstone of the Common Pleas, the fourth and best edition of whose Reports, covering the years 1788 to 1796, appeared in 1827.)

[57]Strange's very accomplished mother, the "ardent Jacobite" Isabella Lumisden (Lady Strange), had almost certainly been Mansfield's mistress; Mansfield himself, though married, was childless. Strange, who was named for his maternal uncle, Andrew Lumisden, Secretary to both the Old Pretender and his son "Bonnie Prince Charlie", was born (probably in London) in 1756, in which year Mansfield (Attorney-General William Murray, as he then was) became Lord Chief Justice of England.

[58]*Somersett, supra*, (1771-72) 20 St. Tr. 1 (K.B.). Howell's collection was published too late to be used either by Chipman, who instead consulted *Lofft's Report* (1776), 98 E.R. 499, or by Blowers, who had the "folio edition of Hargrave", 11 St. Tr. 340, which was referred to in later editions of Blackstone's *Commentaries* and afterwards republished by Howell.

[59]"Mansfield, William Murray" *Encyclopædia Britannica* (1965 ed.) 14 at 806.

[60]Jack, *supra*, note 43 at 150: letter, Blowers to Chipman, 22 Dec. 1799 [*sic*: 7 Jan. 1800]. It is possible that Strange's determination not to violate the property rights of slavemasters influenced his close friend Chief Justice William Osgoode, though Osgoode was not responsible for drafting Upper Canada's 1793 *Act to prevent the further introduction of Slaves, and to limit the term of contracts for servitude within this Province*. The preamble read, "it is highly expedient to abolish Slavery in this Province so far as the same may gradually be done without violating private property": 33 Geo. 3, c. 7.

at once ... loose by a solemn opinion is much disagreeable in the effects it threatens."[61]

There would have been plenty of opportunities for Strange, had he been so inclined, to decide the "broad question", by permitting, or rather risking, an adjudication on the principal point in order to make a direct decision as to the legality of slavery. Strange was the first (and probably the only) Chief Justice of Nova Scotia to preside on the Supreme Court circuit, which at the time included Amherst, Annapolis Royal, Horton [Wolfville] and Windsor, and it seems probable that many if not most of the slave cases, excepting hearings on applications for *habeas corpus,* would have been tried on circuit. It was thanks to Strange, moreover, on whom Blowers conferred the distinctly backhanded compliment that he was a "most excellent theoretical lawyer",[62] that the bench and bar of Nova Scotia, unlike New Brunswick, were not riven into pro- and anti-slavery factions.[63] Strange, even more so than the practically experienced Blowers, was an instinctively conservative jurist who no more abolished slavery in Nova Scotia by judicial decision than did Mansfield in England. His strategy for adjudicating those slave cases which he could not otherwise avoid was to direct juries to find against any master who could not prove title to his so-called "property", or to grant writs of *habeas corpus* in favour of slaves whenever they should be applied for.

The prerogative writ of *habeas corpus* enabled the Court of King's Bench to declare that English law did not recognize slavery. Construction being everything in case law, however, *Somersett* was not necessarily viewed with the same breadth by all colonial chief justices. "Viewed in strictly legal terms," writes Bell, "Somersett's case is the most notable of a long series of highly contradictory English decisions which, although they contained many *dicta* useful to both sides in the broad slavery controversy, did little to weaken the master's legal claim to his Black."[64] Indeed, *Somersett* may be viewed as having had potentially the opposite effect: "Contract for sale of a slave is good here", Lord Mansfield

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[61]*Somersett* v. *Stewart* [*sic: R.* v. *Knowles, ex parte Somersett*] (1772), 98 E.R. 499 at 509 (K.B.), *per* Lord Mansfield, CJ. [hereinafter *Somersett*].

[62]Quoted in D.F. Chard, "Strange, Sir Thomas Andrew Lumisden" 7 DCB (1988) at 832.

[63]Strange, who was really nothing more than a *locum tenens* for Blowers, acquiesced in the inevitability of Blowers succeeding him, if for no other reason than that the highly regarded Attorney-General was intended to have preceded him. Lieutenant-Governor Parr's well-laid plans had been undone accidentally by newly-appointed Home Secretary W.W. Grenville, who was embarrassed enough to apologize to an old soldier thirty years his senior: Letter, Grenville to Parr, 20 Oct. 1789, CO 217/61/fol. 173-74, PRO (mfm. at PANS).

[64]Bell, *supra,* note * at 13. Though the case has been much written about in recent decades, the best study remains that of E. Fiddes, "Lord Mansfield and the *Somersett* Case" (1934) 50 L.Q. Rev. 499-511 [hereinafter Fiddes].

observed after hearing arguments by counsel for and against the return on the *habeas corpus* writ.[65] In terms of influencing the development of 18th century colonial jurisprudence, moreover, *Somersett* may arguably be considered to have been the least notable of the English decisions. Its contemporary importance in England, no less than the colonies was slight and its effect "in legal circles throughout the empire"[66] was incidental at best. The principle on which the case was decided, that a Black slave was eligible for *habeas corpus* and not only when facing deportation, had been settled ten years earlier in *Shanley* v. *Harvey*,[67] so perhaps there was really no question of binding precedent or new law; the judgment was merely declaratory or confirmatory of the earlier and more authoritative one. Lord Mansfield had been extremely reluctant to hand down any judgment at all, perhaps because he realized that he could scarcely go beyond what the Lord Chancellor had earlier decided in *Shanley* v. *Harvey* (concerning which Lord Chief Justice Mansfield maintained a deafening silence, as if to suggest that there was no law on the subject in the shape of an authoritative decision by the Lord Chancellor). Mansfield, in any event, aimed to decide exclusively the narrow point at issue rather than addressing the broad question: the sufficiency or otherwise of the return on the writ, rather than the legality of colonial slavery in England. Colonial lawyers of a practical rather than theoretical disposition, such as Chief Justice Blowers, had no illusions about the evasiveness and inconclusiveness of *Somersett*; they adopted a neo-conservative interpretation of a perfectly static decision. Blowers wrote in 1800:

> That case does not decide that Slavery is maintenable [*sic*] in England, but only that a Negro who was a Slave by Law in Jamaica and had been brought to England by his Master and afterwards put on board Ship to be carried back again, ought not to be taken out of the Master's hand on the complaint of the Negro, by a summary decision of the Court of B.R. [King's Bench] against the Master's claim returned on the Hab Cs.[68]

To this rather strained, even bizarre, construction Ward Chipman objected, "[b]ut the decision in that case was not as you seem to suppose", and proceeded to quote *verbatim* the famous last lines of Mansfield's judgment, as reported by Lofft, in which the ratio for the insufficiency of the return on the *habeas corpus*

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[65]*Somersett*, *supra*, note 61.

[66]T.W. Smith, *supra*, note 1 at 95.

[67]*Shanley* v. *Harvey* (1762), 28 E.R. 844 (Ch.) as *per* Henley, C, which was a probate appeal. "It must be observed, that this is the first time, probably, that this doctrine was so broadly stated in an English Court, and perhaps, a little prematurely": *R.* v. *Allen [alias, The Slave Grace]* (1827), 166 E.R. 179 at 187 (Adm.), per Lord Stowell, JA [hereinafter *R.* v. *Allen*]. All the doctrines of equity are judge-made law, of course, but *habeas corpus*, as a high prerogative writ, could issue out of any of the four superior courts of law and equity.

[68]Chipman, *supra*, note 9 at 143: letter, S.S. Blowers to W. Chipman, 7 Jan. 1800.

is set forth:

> [T]he only question before us is, whether the cause on the return is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is [*sic*] erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.[69]

Blowers countered:

> I knew *Somersett* was discharged for the insufficiency of the return, but my note was merely to remind me to answer a position advanced by my opponents that it was admitted in the argument of the Cause, that the Master by carrying his Negro back to the West Indies would of course recover his right to hold him there as a Slave.[70]

The basic question to be decided was the legality of the introduction of domestic slavery from the American colonies into England; the legality of slavery *per se* in England was not material. It is possible to speak of an American colonial neo-*Somersett* approach in reference to conservative jurists such as Blowers, because, far from thinking that the "Negro Case" had abolished slavery, Blowers contended that it had not made slavery illegal. Blowers' narrow construction of *Somersett*, as articulated in his reply (quoted above) to Chipman, who took a much more liberal, "humanitarian" view of the case, demonstrates that the neo-*Somersett*

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[69]Chipman, *supra*, note 9, vol. 6 at 485-88 [letterbook copy]: letter, W. Chipman to S.S. Blowers, 27 Feb. 1800.

[70]*Ibid.* at 145: letter, S.S. Blowers to W. Chipman, [?] Apr. 1800. Lord Stowell's decision in *R.* v. *Allen*, on appeal from the Vice-Admiralty Court of Antigua, which was the last important English slave case to be decided before statutory abolition of slavery in the colonies (*supra*, note 67 at 179-93), furnishes the most important legal-historical evidence for the broadening construction of *Somersett* during the sixty years elapsing between the decision itself and the statutory abolition of slavery in the colonies. The question posed by Blowers was answered in the affirmative: "[O]n her return to her place of birth and servitude, the right to exercise such dominion revives" (headnote). While Bell (*supra*, note * at 39 n. 98), correctly points out that Lord Stowell "assumed, rather than argued, that the basis of colonial slavery was colonial custom", it is no less clear that he also assumed consuetudinary law to be alterable only by legislative act [Lord Mansfield's "positive law"] (imperial, as it were, by default), "if the colonists themselves should neglect to interfere" (*R.* v. *Allen*, *supra*, note 67 at 192). The abolitionist, or rather emancipationist, construction of *Somersett* began with Lord Stowell, who observed that "the emancipation of slaves in England [had been] pronounced at the end of the last century" (*ibid.* at 184.).

approach was not necessarily, or perhaps not at all, an emancipationist interpretation.

Blowers saw clearly enough that the judgment in the Scottish leading case, *Knight* v. *Wedderburn*, which Fiddes considered to have declared "negro slavery ... illegal unconditionally",[71] was more significant as judge-made law than *Somersett*, though counsel for the master conceded in argument that "the municipal law of this country [Scotland] does not now admit of this state of slavery", while counsel for the Negro submitted that *Somsersett* was precedential "at least upon this question, Whether the negro could be sent out of England?" The case had been removed from the sheriff court to the Court of Session, the supreme civil court, where it was ruled that the complainant came under the protection of the *Act for preventing wrongous imprisonment*, Scottish *habeas corpus*, only stronger.[72] "The case of *Knight* v. *Wedderburne* stands on Better reason," wrote Blowers twenty-odd years after it had been decided, "and I doubt whether the determination in the Scotch Case would not be preferred by the Court of Kings Bench in England at this day."[73] The "better reason" was that "[t]he law of Scotland annuls the contract to serve for life," which Chipman in his anti-slavery brief quoted from Lofft's report of Hargrave's argument.[74] Summing up the judgment in *Knight* v. *Wedderburn*, Chipman wrote, " ... it was declared that the dominion assumed over the Negro under the law of Jamaica, being unjust, could not be supported in Scotland to any extent; that, therefore, the master had no right to the Negro's service for any space of time, nor to send him out of the country against his consent."[75]

It will become clear from the Nova Scotia cases decided by Blowers or his assistants, during his tenure as Chief Justice, that the role of English *habeas corpus* in the course of the judicial war of attrition against slavery in the province owed more to *Knight* v. *Wedderburn* than to *Somersett*. As in England, in Nova Scotia the key to liberating slaves without resorting to judicial abolition of slavery was *habeas corpus*, the remedial value of which both Strange and Blowers exploited to the full extent in the interest of fugitive or refugee slaves. Granting applications for *habeas corpus* was the preferred judicial tactic for setting slaves legally free, thereby asserting their basic civil right to personal liberty no less than any other of the King's subjects. The Nova Scotia cases would establish a neo-*Somersett* precedent, which demonstrated not only that proof of purchase and constructive

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[71]Fiddes, *supra*, note 64 at 507 n. 24. The Scottish case, as reported originally, was reprinted as an introductory note to *Somersett*, *supra*, note 23.

[72]*Knight* v. *Wedderburne* (1701), 8 & 9 Wm. 3, c. 6 (Sc.); 20 St. Tr. 1 at 19 note.

[73]Chipman, *supra*, note 9: letter, S.S. Blowers to W. Chipman, 7 Jan. 1800, *loc. cit.*

[74]Jack, *supra*, note 43 at 164; c.f. Murdoch, *supra*, note 23 at II, 1.

[75]*Ibid.* at 172. The quotation derives, through Hargrave and "Millar on Ranks", from the original report of the case in 33 Dict. Dec. 14,545 *et seqq.*

possession did not amount to sufficiency on a return to *habeas corpus* in favour of Black slaves, but also that English (and Scottish) case law extended *proprio vigore* to colonies lacking regulatory acts, no less than those 18th century acts of Parliament which assumed the legal existence of slavery in the colonies.

Blowers wrote to Chipman in January 1800:

> Since I have been Chief Justice, 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 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.[76]

The action to which Blowers referred was probably *R.* v. *Ditmars, ex parte Van Embenow* [*sic: Emburgh*] *et al.*, concerning which the defendant's attorney, neophyte lawyer Thomas Ritchie,[77] boldly asserted that "the legality of Slavery in the Province ... will be determined on the return to the aforesaid writ of *Habeas Corpora*."[78]

A consortium of twenty-five Annapolis County slavemasters, headed by Loyalist Assemblyman James Moody, and including Loyalist Councillor James DeLancey, executed a bond in favour of second-generation Loyalist Douwe Ditmars Jr. of Clements township, in which they undertook to share with him the burden of his legal costs: indirect evidence for a late 18th century prototype of the class action suit. The efforts of the bondsmen, all but two or three of whom were

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[76]Jack, *supra*, note 50 at 150: letter, S.S. Blowers to W. Chipman, 7 Jan. 1800.

[77]See A.C. Dunlop, "Ritchie, Thomas" 8 DCB (1985) at 751-53. Having but recently been admitted to the bar, Thomas Ritchie inherited the extensive practice of Loyalist Thomas Henry Barclay, with whom he had articled.

[78]"Agreement with D. Ditmars to bear an equal proportion of the expense attending him about the slaves", n.d.: MG 15, vol. 20, doc. 86, PANS (photocopy of Thomas Ritchie holograph at NA) [hereinafter Ditmars]. It is just possible that this was also the case to which Murdoch referred in his discussion of *habeas corpus* in the Introduction to the *Epitome*, *supra*, note 23 at viii.43: "This ['enjoyment of all the rights and liberties of British subjects'] 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." The resonance of Lord Chief Justice Holt's famous *obiter* in the much-cited *Smith* v. *Brown et al*, [n.d.] 91 E.R. 566 (K.B) [hereinafter *Smith* v. *Brown*], (" ... as soon as a negro comes into England, he becomes free") is unmistakable in this citation of an intramural leading case, which Murdoch viewed not only as having helped to establish the right of personal liberty as a fundamental principle of civil government, but also as having encouraged the evolution of *stare decisis* as a principle of jurisprudence: the "doctrine acted upon" was Holt's *ratio decidendi* in *Smith* v. *Brown*. The Nova Scotia decision must have been handed down before the passage of the imperial Act, (1790) 30 Geo. 3, c. 27, however, which legalized the importation of Black domestic slaves into British North America; the Act extended *proprio vigore* and therefore had no need of provincial legislative re-enactment.

Loyalists or their sons, however, failed to resolve the doubts which had arisen in the mind of the Loyalist Chief Justice as to the legality of slavery. Proof of purchase availed nothing against the purchaser's failure or inability to prove the vendor's title to the property conveyed; as usual, the ground for instructing the jury to find against the defendant was breach of title warranty. This unsuccessful attempt by slavemasters to bring off a test case by trying their property right showed that allowing the prerogative writ of *habeas corpus* would not necessarily compel the court to declare whether the law of the colony recognized slavery. Yet every slave case might potentially become a test case until the broad legal question was settled, either by judicial decision or by legislation.

One such attempt to force the issue by legislative interference, if not legislation, seems to have been made in direct response to the *Ditmars* decision. In July 1801, one of the country MHAs, William Allen Chipman (Kings), moved "[t]hat Commissioners should be appointed to enquire into the Rights which individuals in the Province have to the Service of Negroes and People of Colour, as Slaves; and also, to ascertain the Value of such Slaves, and that a Sum of Money be appropriated to pay such individuals for their Property in such Slaves."[79] Another country member, William Cottnam Tonge (Newport), who was obviously thinking in very much grander terms of a definitive judicial test, moved an amendment:

> And that such commissioners be authorized to try such Rights in the proper Courts in this Province, and if necessary, to prosecute an Appeal to the King in Council [Committee of the Privy Council for Trade and Plantations]; and that the Governor, Lieutenant-Governor or Commander-in-Chief, be empowered to draw by Warrant on the Treasury, the amount of the expense of such Enquiry, Trial and Appeal.

Professional opinion was divided: lawyer Wilkins (Lunenburg County), introduced a countermotion to defer consideration of the original motion and amendment, which was carried by a three-to-one majority, while lawyer Robie (Truro) and "paralawyer" Monk (Windsor), soon to be Justice Monk of the Supreme Court, voted against deferral. Attorney-General Uniacke, as Speaker, could express an opinion but not vote, while the Loyalist Solicitor-General, James Stewart, had lost his seat in the general election of 1799. The commission of inquiry into the legality of slavery thus never materialized; one of the MHAs opposing it was none other than the Ditmars bondsman, James Moody.

Concurrently with the legislative initiative, James DeLancey, another of the signatories to the Ditmars bond, launched an action in the Supreme Court at Annapolis to recover the "fair market value" of a slave, Jack, who had run away to Halifax in May 1800, apparently to enlist in the Royal Nova Scotia Regiment,

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[79] *Journals of the House of Assembly of Nova Scotia*, 16 July 1801 [hereinafter *JHA*].

and who had eventually found gainful employment.[80] DeLancey's lawyer, Ritchie, wrote to Jack's employer, one William Woodin, alleging unlawful detainer and threatening legal action if the fugitive were not returned. Woodin's lawyer, Attorney-General Uniacke, denied the allegation on the grounds that Jack "as well as all other Negroes in this Province were Freemen; there not being any law here to make them otherwise."[81] DeLancey thereupon commenced an action for trover, which was tried at the Annapolis annual circuit court in September 1801. The trial judge was James Brenton, a New England Planter from Rhode Island, who was the first (and until 1807 the only) professionally-trained lawyer to serve as a puisne judge of the Supreme Court of Nova Scotia.

DeLancey v. *Woodin* perfectly realizes D.B. Davis' characterization of "[t]he earlier judicial cases concerning Negroes" as involving

> 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 of trespass or trover, the latter being a way of recovering the value of personal property wrongly converted by another for his own use. The specific issue raised by such actions was whether English laws protecting personal property could be extended to protect the owners of errant slaves.[82]

The choice as to the form of the tort action, trover, rather than trespass *per quod servitium amisit,* was made on the advice of Joseph Aplin, who had been retained by DeLancey as watching counsel; Aplin was afterwards to describe Ritchie as a "younger Disciple of the Law," who had lost his "professional Maidenhead" in the case. A Rhode Island Loyalist, "who for twenty years past,

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[80]"But the Negro [Jack] never left his Master's Service, till after the Measure of enlisting Negro[e]s in this Quarter had been ado[p]ted: And about this Time it was universally believed among the Blacks, that whether they enlisted, or not, they would all be made free on coming to Halifax": Letter, J. Aplin to J. Stewart, 16 Nov. 1803, Sir Brenton Haliburton fonds, MG1, vol. 334, doc. 2, PANS [hereinafter Letter, Aplin to Stewart]. The measure was likely taken as a result of the ministerial decision to upgrade the provincial corps (1793-1802) from volunteer militia to fencible status.

[81]Source: anon. ([J. Odell, comp.,] *Opinions of Several Gentlemen of the Law, on the Subject of Negro Servitude, in the Province of Nova Scotia,* (Saint John, 1802) at 5 [hereinafter *Negro Servitude*]. There no longer remains a complete case report of *Delancey* extant. This pamphlet is the principle source of information available on the case. It may be inferred from the contents of the pamphlet that the compiler had access to the case file at the time the pamphlet was compiled.

[82]D.B. Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823* (Ithaca, N.Y.: Cornell University Press, 1975) at 477 and n. 14 [hereinafter Davis]. The *locus classicus* is *Butts* v. *Penny,* (1677), 12 E.R. 518 (K.B.), citing Co. Lit. 116: "[T]here could be no property in the person of a man sufficient to maintain trover." The most concise and influential 18th century exposition of trover as a tort remedy was given by Lord Mansfield, CJ in *Cooper* v. *Chitty* (1756), 97 E.R. 166 at 172 (K.B.). "This is an action of tort: and the whole tort consists in the wrongful conversion. Two things are necessary to be proved, to entitle the plaintiff to recover in this kind of action: 1st, property in the plaintiff; and 2ndly, a wrongful conversion by the defendant."

has been considered as one of the first special pleaders in America,"[83] Aplin was then living in indigent circumstances at Annapolis Royal,[84] where he was the only other resident legal practitioner. Despite his seniority (he had been admitted to the bar of Nova Scotia in April 1784), Aplin became involved in *DeLancey* v. *Woodin* as junior associate counsel holding a watching brief for the plaintiff. His role in the lawsuit was comparable to that of Ward Chipman in *R.* v. *Jones, ex parte Ann, alias Nancy* the previous year; just as Chipman had been a self-styled "volunteer for the rights of human nature", so Aplin was a volunteer for the rights of property in human beings. Yet despite their having been constantly identified with the leading cases concerned, neither Chipman nor Aplin was retained in the first instance as the attorney.

Ritchie's original intention had been to commence the special action of trespass *per quod servitium amisit* which, though well grounded in English adjudged cases, was tantamount to an admission that the plaintiff had no property right in the alleged fugitive slave. From this cautious and reasonable course, however, Ritchie was dissuaded by Aplin, who considered the leading English case against trover for Black slaves not only not "to stand in the Way of [the] proposed Action," but also "as an Authority pointedly in their Favour."[85] The decision concerned was *Smith* v. *Gould*,[86] in which the judgment in the leading, pre-*Habeas Corpus Act* case allowing trover for Black slaves had been overturned: "For *per totam Curiam* this action does not lie for a negro, no more than for any other man; for the common law takes no notice of negroes being different from other men. By the common law no man can have a property in another."[87] The precedent set by Lord Chief Justice Holt's anti-slavery decisions, however, had been overruled in 1749 by Lord Chancellor Hardwicke, who had "no doubt but trover will lie for a Negro slave; it is as much property as any other thing."[88] As *DeLancey* v. *Woodin* was to follow much the same course as *Smith* v. *Gould* a

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[83]"Mr. Taylor's Reply", in [J. Sterns & W. Taylor, comp.], *The Reply of Messrs Sterns & Taylor* ..., [London, 1789] 37 at 42-43. (The author of the compliment, made at the height of the Judges Affair, was the New Jersey Loyalist attorney, William Taylor, one of the two disbarred Loyalist lawyers at the centre of the controversy.) No pen-portrait of Joseph Aplin would be complete without Bell's engagingly apt description of him (in 1784) as "a busy, nervous Refugee lawyer eager to ingratiate himself ...": D.G. Bell, *Early Loyalist Saint John: The Origin of New Brunswick Politics, 1783-1786* (Fredericton: New Ireland Press, 1983) at 90 n. 10. Seventeen years later, nothing had changed.

[84]Drawn thither no doubt to attend to the 1,000 acres of land in Wilmot township, which had been granted him in 1785 and which was not escheated until the year following his death in 1810.

[85]Letter, J. Aplin to S.S. Blowers, n.d. [draft], Odell family fonds, New Brunswick Museum [hereinafter, Letter, Aplin to Blowers]. One cannot, of course, be certain that the letter was ever actually sent; Blowers' in-letters do not survive.

[86](1705), 91 E.R. 567; (1706), 92 E.R. 338 (K.B.), *per* Holt CJ [hereinafter *Smith* v. *Gould*].

[87]*Ibid.*, *loc. cit.*

[88]*Pearne* v. *Lisle* (1749), 27 E.R. 47, at 48 (Ch.), *per* Hardwicke C.

century before, there is sharp irony in Aplin's having persuaded young Ritchie that the judgment for the plaintiff in the latter, which exempted the Black from trover, favoured the plaintiff's case in the former.

The surviving sixteen pages of Ritchie's originally twenty-two-page "pro-slavery" brief, the argumentation of which is "conventional",[89] depends on English slave law, which is assumed to extend to the colonies thereby providing the legal basis for American colonial slavery. Those first six pages of Ritchie's address which are no longer extant[90] (they undoubtedly formed the exordium), make Ritchie sound like a 20th century Nazi ideologist, and shed dark light on the racist *mentalité* of Annapolis County's Loyalist plantocracy:

> [W]ith us, why are they black and we white, there can be nothing more diametrically opposite to each other, than those two colours, which serves to evince their inferiority to us. it may be said that their colour is owing to the Climate in which they reside. If it was why are not those who live under the same parallels of Latitude, of the like cast? No doubt can remain but that they were designed to be subservient to others: therefore may be very justly termed *slaves* by *Nature*.
>
> I shall now endeavour to show that the right of Slavery exists in the Province of Nova Scotia; and that, that right, is constituted by acts of the Legislature of Great Britain.[91]

Had the missing pages disappeared at the time, then perhaps Aplin might have been suspected of withholding or even suppressing the first six pages of Ritchie's brief as being too incendiary, or immaterial to the strictly legal argumentation which occupies pages 7 through 22. Despite his heavy emphasis on the statute law of England, Ritchie did not ignore the statute law of the colonies, which he considered to be purely regulatory of slaves rather than constitutive of the right of slavery. This important distinction prompted him to adduce the Nova Scotia *Innholders Act* of 1762, by which he supposed that "slavery is as much recognized as it is in those acts specially passed in regulation of slaves", legislation, of course, which existed in the former Thirteen Colonies as well as in the West Indies but never in Nova Scotia. Ritchie's construction of the statute is the same as Chipman anticipated that of counsel for the master in *R.* v. *Jones* would have been, had they known of the Act or chosen to cite it.

Ritchie had the misfortune of finding himself opposed by the Dean and head of the Bar, not to mention its ablest advocate, Richard John Uniacke, who was

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[89]Bell, *supra*, note * at 36 n. 85; cf. Bell & Rosevear, *supra*, note 53 at 4 § 21. The legal opinion which Aplin intended sending may not have been his own, of course, but a copy of Ritchie's; doubtless he had received the original from Ritchie himself.

[90]Author's pagination commences at "7". Though the fate of the missing holographs has not been determined, the New Brunswick Museum at least retains a photocopy of the remaining sixteen, courtesy of Professor Bell.

[91]*Ibid.*

acting for the defendant Woodin. Then at the height of his rhetorical powers, and in the habit of pleading or defending personal actions while prosecuting crown cases on the Supreme Court circuit, Attorney-General Uniacke was afterwards to argue, rather circularly, "[t]hat it appearing in Evidence that the servant Jack was a Slave, and there being / no Slaves in the Province, the Plaintiff could not recover the Loss of his Service."[92] In other words, if a fugitive slave could not legally enforce a claim for wages,[93] then a putative master could not sue for the recovery of whatever wages may have been paid to the alleged slave. Paradoxically, the plea to the action was based on the same grounds as had caused the plaintiff's attorney to change the form of the action from trover to *per quod servitium amisit*:

> It was strongly urged, on the part of the Defendant at the Trial, that instead of an action for Trover, the plaintiff should have brought his action for damages for detaining the Negro, *per quod servitium amisit*, as in the case of any other Servant; and that no action of Trover could be maintained for the Negro, as he could be no more the Slave of Mr. Delancey in this Province, than he could that of any other person in London, or elsewhere.[94]

Aplin wrote:

> As no Evidence was given on the Part of the Defendant, he [Uniacke] well knew I could not be permitted to follow him, let him fodder out to the Jury what he would. In short, I considered him all the Time rather as speaking to the Mobility behind him, in order to excite a Laugh, than as addressing himself to the Understandings of an intelligent Jury. By this Kind of Management, he certainly did gain a Laugh, but it [is] just as certain that he lost the Verdict.[95]

Not even Uniacke's courtroom pyrotechnics could turn a sceptical Annapolis jury against an Annapolis plaintiff (who happened to be not only a former member of both the Council and the House of Assembly, but also the most prominent Loyalist in the County), in favour of a Halifax merchant defendant, against whom judgment was given for £70. Though it "was urged on the Trover Action against Woodin, that small Damages ought to be given, from the Consideration, that the Negro was a runaway Negro",[96] the sum awarded seems to have been the amount sued for, the issue in trover, of course, being the value of the property wrongly converted. No one involved stopped to consider whether the salaried employment

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[92]Letter, Aplin to Stewart, *supra*, note 80. "Surely," commented Aplin, "if there was ever a Bull born on Earth, this must be one; for I cannot possibly conceive, how this same Jack could be proved to be a Slave in a Province where no Slavery exists.": *loc. cit.*

[93]Cf. the *obiter* of Chief Justice Mansfield in *The King* v. *The Inhabitants of Thames Ditton* (1785), 99 E.R. 891 at 892 (K.B.): "Where slaves have been brought here [England], and have commenced actions for their wages, I have always nonsuited the plaintiff."

[94]*Negro Servitude*: *supra*, note 81 at 5.

[95]Letter, Aplin to Stewart, *supra*, note 80.

[96]*Ibid.*

of a Black who claimed to be free could supply a basis for the tort of conversion; whether the wages paid supplied a basis for determining the value of the property alleged to have been wrongfully converted. What should have remained an issue of fact became an issue of law, the jury trying the latter as if it were the former. One cannot help wondering what sort of direction, if any, the jury received from the trial judge in his charge.

Post-trial developments in *DeLancey* v. *Woodin* support Davis' further point "that some of the judicial cases concerning slaves were decided by procedural technicalities."[97] The legal argument which was to provide the rationale of defence counsel's motion in arrest of judgment concerned adjective rather than substantive law, "that an action of Trover would not lie for the conversion of a Negro in this Province."[98] Uniacke took for his model the very English case which Ritchie had correctly apprehended barred the proposed action, *Smith* v. *Gould*: " ... it was moved in arrest of judgment, that trover lay not for a negro, for that the owner had not an absolute property in him."[99] Indeed Uniacke had no alternative but to put down the motion in arrest of judgment, as the circuit court was not a court of *nisi prius*, and an appeal did not lie to the Supreme Court en banc sitting at Halifax, as for civil judgments at *nisi prius* or in the Inferior Court of Common Pleas.[100] The motion was ordered to stand over for argument until the next sitting of the Annapolis court, in September 1802. Writing to the plaintiff DeLancey in the interim, Aplin clearly recognized the Attorney-General's *ratio legis*: "It is seen by the abettors of the motion [in arrest of judgment], that if no action more appropriating than an action *per quod Servitium amisit* would lie for

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[97]Davis, *supra*, note 82, *loc. cit.*

[98]*Negro Servitude*, *supra*, note 81 at 5.

[99]*Smith* v. *Gould*, *supra*, note 86 at 103.

[100]Both Bell (*supra*, note * at 16) and Moody ("DeLancey, James" (1983) 5 DCB at 239) wrongly suppose that "DeLancey's suit was overturned on appeal." As the circuit court was not a court of *nisi prius* but a distinct Supreme Court in each county, there was no question of an "appeal" to the Supreme Court en banc at Halifax. The route of appeal lay from the Supreme Court to the Council, of which the Chief Justice was *ex officio* president, and appeals were only permitted in actions where the amount sued for was greater than £300. Such appeals were rare and of their very nature extremely controversial, because, as in New Brunswick, not only the Chief Justice but also one or more of the puisnes sat at the Council board and might act as legal advisers or judicial assistants to the court of error and appeal. The motion in arrest of judgment was quite different from the application for a writ of error, which could only be made to the Lieutenant-Governor as *ex officio* president of the court of appeal. Though it may be assumed that the 1802 arrest of judgment in *DeLancey* v. *Woodin* led to a new trial, there is not a scintilla of evidence that DeLancey's 1803 action for damages was "dismissed". The suit may have been discontinued or extinguished by the death of the plaintiff DeLancey, which occurred in May 1804; Ritchie's declaration on his behalf, the only document known to be extant, was filed in August 1803, just in time for the annual sitting of the circuit court at Annapolis.

a Negro, the Master's right / to his person is extinct."[101] Slaves would thus be servants in the full legal rather than the pale euphemistic sense of the word; the offender would come within the compass of provincial regulatory acts; and no tort action, only breach of contract, would lie. Uniacke, characteristically, was aiming for nothing less than the judicial abolition of slavery as a property right.[102]

"[T]he Holders of Slaves in this Part of the Country", wrote Aplin in another letter to Chief Justice Blowers while the motion was pending, "consider themselves as equal Losers with Col. Delancey, in the Event of an Arrest of his Judgment against Woodin."[103] The result of the hearing on Uniacke's motion was that he obtained a rule to show cause why the verdict should not be quashed on the grounds of excessive damages. The venue then changed to Halifax, where DeLancey retained the Loyalist Solicitor-General, James Stewart, to argue before Chief Justice Blowers in chambers against Uniacke's motion for a new trial. The latter's apparent failure led, as Aplin foresaw, to DeLancey's suing Woodin anew in trespass for £500 damages. The action was set down for the Circuit Court at Annapolis in September 1803, but seems never to have come to trial. Nor, of course, did DeLancey obtain execution of his judgment against Woodin. Indeed, the smallness of the award prompted DeLancey to reconsider the magnitude of his loss, and thus to claim a much larger amount in trespass which did not involve establishing the plaintiff's right of possession.[104] Procedurally, trover for Black slaves was problematic because the plaintiff's property right had to be proved not only in default of possession, but also against the presumption that the alleged right had no basis in common law and would therefore not be actionable in tort on any grounds whatsoever.

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[101]*Negro Servitude*, *supra*, note 81 at 22-23. Aplin was replying to a letter from DeLancey dated 10 October 1801, well after Uniacke's motion had been put down, in which DeLancey invited Aplin to state his opinion on the case. The original letter from DeLancey is not extant, nor apparently is Aplin's reply, which was dated ten days later: Winks, *supra*, note 30 at 106 n. 21.

[102]In this respect he was being absolutely consistent. Cuthbertson (*supra*, note 33 at 4) makes clear that Uniacke's views on the ridiculousness of slavery were fully formed when he was twenty, at which time the future "old Attorney General" was himself a fugitive apprentice from the Exchequer attorney in Dublin to whom he was articled.

[103]Letter, Aplin to Blowers, *supra*, note 85. Some idea of how Aplin was advising counsel for the plaintiff to proceed on argument against the motion in arrest of judgment can be gleaned from Lieutenant-Governor Wentworth's reply to letters from Aplin concerning, among other legal matters, the *DeLancey* case: Letter, J. Wentworth to J. Aplin, 18 Sept. 1801, CO 226/18/fols. 256r-257r, PRO (mfm. at NA). Wentworth summed up the legal situation thus:

> There seems to be a general recognition of Slavery in all the public proceedings of Government, relative to the Colonies, & the Practice in all cases uncontroverted, tho' often adjudicated as property in this & every other Province. A late act of P. [(1790) 30 Geo. 3, c. 27] regulates the value of importation for a Negro brot [*sic*] here by a Loyalist removing with his property to settle in those Provinces.

[104]Letter, Aplin to Stewart, *supra*, note 80.

DeLancey v. *Woodin* was one of only two important slave cases known to Nova Scotia's legal history which was not a proceeding by the Crown under *habeas corpus*,[105] a feature which also distinguished it from both of the New Brunswick leading cases, as well as from *Somersett*. Thomas Chandler Haliburton, who learned his law at the foot of Judge Wiswall, and who practised at Annapolis for the eleven years preceding his own appointment to the bench in 1829, construed *DeLancey* v. *Woodin* thus:

> [S]ome legal difficulties having arisen in the course of an action of trover, brought for the recovery of a runaway, an opinion prevailed that the Courts would not recognize a state of slavery as having a lawful existence in the country. Although this question never received a judicial decision the slaves were all emancipated.[106]

Haliburton, whose History was published in 1829, denied that there were any longer any slaves in the province, but allowed that slavery was still legal. Murdoch, on the other hand, with unbecoming (but not atypical) lack of candour, altogether ignored the leading case and denied both the historical existence and the legality of slavery.

Haliburton's mentor and collaborator, Peleg Wiswall, would have been among "the eyewitnesses and ministers of the word" who might have opposed newcomer and interloper Joseph Aplin's view of the case. Finding that the bar (at which he had not practised for the better part of twenty years) was generally against his opinion, Aplin understandably became concerned enough with the ultimate outcome of the lawsuit to prevail on Colonel DeLancey to seek professional advice in England. Aplin suggested Attorney-General Sir Edward Law, soon to become Lord Chief Justice [Lord Ellenborough], and helpfully stated both the plaintiff's case and his own "argumentative" opinion on it.[107] He drafted the narrow procedural question thus: " ... whether an action of Trover was the proper form of action for Mr. Delancey to recover the value of his Negro Slave? Or what is his proper remedy for recovery of amends for the damage he has sustained."[108] The two documents were then forwarded to Colonel DeLancey's agent in London, whose reply included not only the opinion of the Attorney-General, but also that

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[105]The other was *Williams* v. *Stayner & Allen* (N.S.S.C. 1805); see *infra* note 145.

[106]T.C. Haliburton, *Historical and Statistical Account of Nova Scotia*, vol. II (Halifax, 1829) at 280 [hereinafter Haliburton], *loc. cit.*

[107]Letter, Aplin to Blowers, *supra*, note 85. Referring to the subsequent publication of the Attorney-General's "Opinion", in which he was not identified, Aplin wrote, "[b]ut since it appears to have been the Offspring of Sir Edward Law: And as it was dated the 21st. of May last [1802] we know it to have been given but a few weeks before he took his Seat as Lord C.J. of the Court of King's Bench.": letter, J. Aplin to J. King, 16 Nov. 1802: CO 226/18/fol. 242v, PRO (mfm. at NA).

[108]*Negro Servitude*, *supra*, note 81 at 5.

of Solicitor-General Spencer Percival,[109] and the eminent treatise-writer William Tidd, whom Aplin expansively described to Blowers as "the most learned Special Pleader in England."[110] Aplin's scheme originally was to bring out the material in the *New Brunswick Royal Gazette* (Saint John), safely across the Bay from Annapolis and out of the jurisdiction, which had set a precedent in July 1801 by publishing a legal defence of slavery written anonymously by puisne judge John Saunders of the Supreme Court.[111] Aplin advised against this, however, because a ruling on the motion in arrest of judgment was pending; the case was therefore still *sub judice*. Publication was delayed until after the motion had been heard and granted and the trial judgment reversed. The complete dossier was obtained from Colonel DeLancey by an "old acquaintance" of his in Saint John, who undertook to publish the papers in the interest of public legal education about slavery. (The Preface, in which the anonymous compiler declared his "motive" for publication, refers to the unadjudged, decisionless case of *R.* v. *Jones*.) Its sheer length forbade publication of the material in the *Royal Gazette*, but the papers were nevertheless published by the King's Printer as a pamphlet, entitled *Opinions of Several Gentlemen of the Law, on the Subject of Negro Servitude, in the Province of Nova Scotia*, which was advertised for sale in October 1802.[112]

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[109]Best-known to history as Britain's only assassinated Prime Minister.

[110]For this and much of what follows, see the draft of Aplin's letter to Blowers, *supra*, note 85.

[111]Bell, *supra*, note * at 22.

[112]*Supra*, note 81. Scarcely a month after its publication Aplin enclosed a copy of the pamphlet in his letter to the Under-Secretary of State for the Home Department: *supra*, note 107. A full bibliographic description is given in P.L. Fleming, *Atlantic Canadian Imprints, 1801-1820: A Bibliography* (Toronto: University of Toronto Press, 1991) 11 at § NB14 [hereinafter Fleming]. Her "Notes" rely heavily on Bell (*supra*, note * at 16 n. 24), who implies that Aplin himself was the anonymous editor-compiler. The internal evidence of the first-person Preface, which Bell allows "may be by Jonathan Odell", not to mention the highly suggestive fact of publication by New Brunswick's King's Printer, argues strongly that Secretary Odell was the compiler as well as the prefator. The letter was intended to have contained four enclosures: the first was Aplin's statement of DeLancey's case [*Negro Servitude*, *supra*, note 81 at 4-5]; the second was a copy of Aplin's formal "Opinion" [*ibid.* at 6-23]; the third and fourth were copies of the *pro forma* "Opinions" of Attorney-General Law [*ibid.* at 23-24] and Solicitor-General Percival [*ibid.* at 25], as well as of William Tidd [*ibid.* at 24-25], who was "generally allowed to be the most learned Special Pleader in England." The originals had been received by DeLancey about three weeks earlier, enclosed in a letter from his English agent. The fact that the pamphlet was published in Saint John, may be explained by its proximity to Annapolis Royal, marine communication with Saint John being much easier, faster and more direct than overland communication with Halifax, and supports the view that Odell was the anonymous compiler-prefator, while Aplin himself the chief contributor. It would be instructive to contrast Aplin's pamphlet with one written anonymously a decade or so earlier by the British "poetaster" and anti-slavery MP, Henry James Pye: *Doubts Concerning the Legality of Slavery in Any Part of the British Dominions* (London, 1789) at 14. Though Pye was addressing the illegality of slavery in the West Indies, his remarks apply *mutatis mutandis* to the British North American colonies: " ... but that the simple legal decision of a jury, would be as perfectly competent to annihilate slavery in the islands, as it was to annihilate it in this country, by the memorable verdict [*sic*: judgment] in the case of *Somersett*" (*ibid.* at 6). Pye's thesis was that slavery violates the common law, and is therefore unconstitutional wherever the common law is in

Winks, who superlatively described the pamphlet as forming "the most extensive legal defence of slavery ever offered in British North America" offers no evidence or analysis to support this view. Nor does Bell, who not only approvingly quotes the pamphlet, but also charitably describes it as "well-argued."[113] This twenty-five-page imprint may actually be less substantial than it purports and appears to be. The "several" lawyers amounted to four only, beginning appropriately enough with Aplin himself (counsel for the plaintiff), whose "Opinion" occupies sixty-eight per cent of the work, while that of Solicitor-General Percival is a nearly *verbatim* copy of Attorney-General Law's own very brief "Opinion" rubber-stamping Aplin's. The sources of Aplin's argument, which is a good deal more sophisticated than that of Ritchie's juvenile brief, are statutory construction and liability in tort. He also pays more attention to the lucubrations of highly select treatise-writers, however, one of whom (William Tidd) was his co-consultant, than to judicial authorities. Aplin's strategy was to destroy the grounds on which the motion in arrest of judgment had been applied for, namely, that the alleged offence was not against property so that an action of trover or detinue would not lie, only *actio per quod servitium amisit*. If the grounds on which Uniacke had obtained his motion were removed, however, then the original form of action would immediately revive. Aplin's position was that if Blacks were slaves and slaves were property, then the legality of "negro servitude" would have to be presumed. Whether they concerned realty or personalty, moreover, offences against property were always actionable at common law regardless of the nature of the property and the form of the action. The linchpin of Aplin's argument was that no colonial law creating the institution of Black slavery had been passed, because "this description of men were already made Slaves by those acts of Parliament which made them emphatically articles of traffic",[114] in other words, which legitimized the lucrative and very busy African slave-trade. The various trade and navigation acts supporting the mercantile economy of Great Britain, moreover, extended *proprio vigore* to the colonies. Colonial legislation was strictly regulatory of the customary, pre-existing state of slavery, and not declaratory of its legality; it recognized the fact that Blacks were slaves by taking appropriate measures to regulate their social condition. On this argument, the statutory establishment of slavery in the colonies would have been supererogatory. If Black persons could be legally imported into the colonies as slaves, then they could be held there as such. English statute law not only made slaves of Blacks, moreover,

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force.

[113]Winks, *supra*, note 30 at 106-07; Bell, *supra*, note * at 16 and 39.

[114]*Negro Servitude*, *supra*, note 81 at 8.

but also made movable chattels of slaves, the traffic in whom necessitated the existence of such a right.[115]

The imperial statute on which Aplin's argument chiefly depended was *An Act for the more easy Recovery of Debts in his Majesty's Plantations and Colonies in America*,[116] because it established the principle that Black slaves were chattels real and attachable in execution of a judgment: "[T]here is no Law that does, still more pointedly, make Negroes property in the hands of their Masters." Though Aplin was right to point out that "[t]his Act embraces all the Colonies without distinction", he omitted to mention that the material part of it had been repealed as recently as 1797.[117] If the Act of 5 Geo. 2 legalized slavery in the colonies, then the Act of 37 Geo. 3, which repealed the former "in so far as it had provided for the compulsory sale of Negro slaves taken under execution in His Majesty's plantations,"[118] should have rendered slavery illegal.[119] This indeed seems to have been the *ratio decidendi* of the judgment handed down by Chief Justice James Monk in *R.* v. *Fraser, ex parte Robin* in the Court of King's Bench at Montréal in 1800.[120] Statute or no statute, repeal or no repeal, Aplin was not exaggerating when he observed of Black slaves, "[t]hey have uniformly been sold here under Execution; and, add to all this, they are and always have been sold, in the common course of traffic, as other chattel interests are or were sold, and warranted by the

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[115]The very fact that colonial slavery had first gradually to be ameliorated and then ultimately abolished by Act of Parliament nevertheless lends credence to Aplin's view that English statutes were, at least by implication, "creative", not merely tolerative or recognitive of slavery in the colonies. Even Blowers, following Strange, was prepared to admit that the "statute law of England" was one of the legal grounds on which Black slavery might be maintainable.

[116](1732), 5 Geo. 2, c. 7. For a succinct analysis of the legal effects and implications of this Act, see W.R. Riddell, "When Human Beings Were Real Estate" (1921) 57 Canadian Magazine at 147-49. It is possible that the genesis of the Act of 1732 lay in the interpretation of colonial statutes, for in 1705 and 1727 Virginia enacted laws which treated slaves as real property: J.H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Octagon Books, 1950) at 504.

[117]*Negro Servitude*, *supra*, note 81 at 10, 11; *An Act to repeal so much of an Act, made in the fifth Year of the Reign of His late Majesty King George the Second, intituled, An Act for the more easy Recovery of Debts in His Majesty's Plantations and Colonies in America, as makes Negroes Chattels for the Payment of Debts*, (1797), 37 Geo. 3, c. 119. Aplin nevertheless concluded that a favourable ruling "on the motion [in arrest of judgment] would operate as an effectual repeal of the 5 Geo. 2. which ... makes personal Estate of Negroes in the Plantations, and subjects them to be sold, as such, under a *fieri facias* at the suit of English creditors." (*ibid.* at 23.) Had the offending provisions of the Act of 1732 not already been expressly repealed, it is difficult to see how a colonial case, however "solemnly adjudged", would involve a repeal by implication, the more so in view of the fact that the statute had no direct bearing on either the cause or the form of action.

[118]T.W. Smith, *supra*, note 1 at 95.

[119]"Si l'Acte Impérial de 1797 a eu l'effet d'abolir l'esclavage, il a dû avoir cet effet dans toutes les plantations de sa Majesté. Cependant tel n'a pas été le cas. L'esclavage n'a été abolie que par l'Acte de 1833, ch. 73": Viger & LaFontaine, *supra*, note 10 at 63.

[120]Winks, *supra*, note 30 at 101-02 and n. 12.

bill of sale to be the property of the seller."[121] Undermining the legal force of this argument was, of course, the evidentiary problem: the reason why sales of slaves were generally not registered in Nova Scotia was that the vendor's title could not be proved. Attempting to determine whether the vendor had the legal right to dispose of the "property" conveyed might therefore constitute a legal infinite regress. Trying the property right turned inevitably into an adjudication of the principal point: whether, at common law or otherwise, there could be property in human beings. If the former, then action in tort might lie, and the case would turn not on substantive law but on civil procedure. Breach of title warranty was the eye of the needle through which the camel of slavery could not pass. Slaves were either property or they had no legal personality whatsoever. The minor premise of Aplin's "pedantic syllogism", moreover, that "Negroes are, by express Act of Parliament [5 Geo. 2], made the subjects of property in this Province,"[122] was null and void by 1801. *Ergo*, trover did not lie for the wrongful conversion of a slave in Nova Scotia.

Aplin then undertook a revisionist reconstruction of the English leading case against trover, *Smith* v. *Gould*, in order to disprove the hypothesis that the action did not lie for a Black slave in the colonies. His assumption appears to have been that the scope or effect of the judgment was confined to England *per se* and did not extend by analogy to the colonies, where slavery had been legalized by Acts of Parliament extending *proprio vigore*. Construing *Smith* v. *Gould* with reference to *Smith* v. *Brown et al.*, though their subject-matter was different,[123] Aplin concluded, "[s]urely this Case [*Smith* v. *Brown et al.*], if it proves any thing, proves that the Negro was a Slave, and therefore property in Virginia. If property in Virginia, the same Law that made him property there makes him so in Nova-Scotia."[124] One wonders to which "law" Aplin was referring. If "the laws of England do not extend to Virginia" (Lord Chief Justice Holt), according to the statute law of which Black slaves were conveyable chattels, neither then would the laws of Virginia extend to Nova Scotia, which (unlike the latter) had no Acts regulating Black slaves. Aplin's conclusion is fallacious because reasoning *ex pari materia* presupposes that those cases which are construed with reference to each other must share the same subject-matter. Aplin's argument altogether fails this methodological test. The two cases *Smith* are comparable only in that they concern Black slaves; they address two very different forms of remedial action at common law. The pivotal point, moreover, was that the common law was

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[121] *Negro Servitude*, *supra*, note 81 at 12.

[122] *Ibid.*, *loc. cit.*

[123] The latter was an action for debt recovery, involving the sale in England of a Black slave held in Virginia, in which the plaintiff was nonsuited on a technicality, defective pleading: [c. 1706] 91 E.R. 566-67 (Q.B.).

[124] *Negro Servitude*, *supra*, note 81 at 14.

universally recognized to be in force in the colonies, and that if trover did not lie for the wrongful conversion of a Black slave in England, then *ipso facto* it would not lie in the colonies. Aplin nevertheless strove to circumvent the common law by asserting that the statute law, meaning English slave Acts extending *proprio vigore* to the colonies, distinguished sharply between Blacks and other humans.

In putative support of his view that trover for Black slaves would lie in the colonies, Aplin adduced Matthew Bacon's *A New Abridgement of the Law* (1763-1766), which has been described as "the first of the legal encyclopedias".[125] As for Bacon, so for his contemporary Blackstone, the common law of England against slavery had been brought to bear by Lord Chief Justice Holt on a few leading cases. The particular decision concerned was *Chamberline* v. *Harvey*, in which Holt observed that trover, not to mention trespass, would not lie for a Negro.[126] Aplin, rather straining for effect, took the italicized gloss on the imperial jurisdiction, "England", to imply that a person could have property in a Negro in the colonies adequate to sustain trover.[127] Aplin mistakenly supposed Bacon to mean "that although Trover would not lie for a Negro in England, where he is out of the reach of the Statute Law; yet in the Plantations, where he is under the immediate operation of it, this action is the proper, if not the only proper action."[128] It is no less difficult to understand how statutes extending *proprio vigore* to the colonies might, in respect of personal actions in tort, have the effect of subverting the common law rather than affirming or ameliorating it, than to understand how superseded English judicial decisions reinforcing the legality of slavery might be in force in the colonies, while operative decisions against it were not. Aplin's interpretation, of course, depends, as does his entire opinion, on the assumption that Acts of Parliament ("Plantation Laws") collectively supplied a *de facto* legal basis for slavery in the colonies.[129] For Aplin, despite the fact that his home colony of Rhode Island had enacted a gradual emancipation law as early as

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[125]A.W.B. Simpson, ed., *Biographical Dictionary of the Common Law* (London: Butterworths, 1984) at 27, s.v. "Bacon, Matthew" [hereinafter Simpson].

[126](1696), 91 E.R. 994 (K.B.), *per* Holt CJ.

[127]M. Bacon, *A New Abridgement of the Law*, 7th ed., (London, 1832) at 806: "(D) For what Injuries an Action of Trover lies". The other authority was, of course, *Smith* v. *Gould* (*supra*, note 86), the later editorial note on which reads, "[t]his must be understood of a British subject, who cannot have a property in a negro on which [one] can found a claim in a British court of justice." (Bacon's abridgment was originally published posthumously, between 1763 and 1766.)

[128]*Negro Servitude*, *supra*, note 81 at 16.

[129]"By Plantation Laws, is not meant Laws made by any of the Colonial Legislatures, but those Acts of Parliament which affect the Plantations. These latter Acts are indifferently called Plantation Laws, or Laws regulating Plantation Trade.": *Ibid.* at 20, n.(a).

1774, and an abolition law ten years later,[130] "Plantation jurisprudence" was slave law.

Aplin next adduced the first book of Blackstone's *Commentaries*, wherein Lord Chief Justice Holt's decision in *Smith* v. *Brown et al.* is also taken as the precedential authority. He damns Blackstone with faint praise for attempting to evade the common law, to get round *Smith* v. *Brown et al.*, by arguing the purely hypothetical distinction between property in the person of a Black slave and a proprietary right to the perpetual services of such a "slavish servant". While Aplin was unwilling to equate slavery with villeinage,[131] he appeared willing to equate it with indentured servantship. American colonial slavery was thus reduced to the level of English voluntary apprenticeship, which, unlike perpetual bondage or servitude, was a contractual relationship. "It is, therefore, by the Statute Law, which extends to the Plantations, but not to England," writes Aplin, "that the Master still retains an interest even in the services of the Negro."[132] On Aplin's reasoning, the so-called Plantation Laws abrogated the common law, according to which no man could be a slave in England *or* America; the statute laws concerned, however, were only in force in the colonies to which they extended *proprio vigore*. An English slaver could thus traffic between West Africa and America or the West Indies, but not drop anchor at Gravesend without contravening the common law; perhaps that is the reason why the slave-trade was statutorily abolished years before slavery in the colonies. The powers that were in Whitehall assumed that slavery in the colonies would be judicially abolished just as it had been in England.

On Aplin's argument, the common law courts in the colonies must always have displayed far less jealous a regard for the common law of England than the three superior courts at Westminster Hall which were its "Guardians". The solution to the paradox of colonial slavery was provided years later by Lord Stowell: slavery was never "the creature of law, but of that custom which operates with the force of law."[133] Intermediate between common law and statute law was consuetudinary law, whether of England or the colonies, on the basis of which, mercantile custom, the wrongful conversion of "property" in Black slaves had originally become actionable in trover.

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[130]H.T. Catterall, *Judicial Cases Concerning American Slavery and the Negro*, vol. IV (Washinton, D.C.: Carnegie Foundation, 1937) at 448.

[131]Murdoch appears to have done so: *supra*, note 23 at II.2.ii.74. Though the "villein in gross" was certainly the ancestor of the chattel slave, Murdoch was referring to the "villein regardant", which form of personal slavery had been abolished by the Caroline *Statute of Tenures*.

[132]*Negro Servitude*, *supra*, note 81 at 20.

[133]*R.* v. *Allen*, *supra*, note 67 at 190, *per* Lord Stowell.

Aplin concluded his lion's share of the "Opinions" with a solemn prognostication of the legal effects of an arrest of judgment in *DeLancey* v. *Woodin*; he was careful, of course, not to anticipate the outcome of the hearing, as the motion was still *sub judice* when Aplin was writing (it had been decided by the time the pamphlet was published):

> It is seen by the abettors of the motion, that if no action more appropriating than an action *per quod Servitium amisit* would lie for a Negro, the Master's right / to his person is extinct: [A]nd if it is once solemnly adjudged here, on the strength of *Blackstone*, and the case of *Smith* v. *Gould*, that no action more appropriating would lie, the Negro would be exactly in the same situation here, that a Negro is in London, where he is no more a saleable article than a Servant, or indeed any other Man. Should a Man here, therefore, be disposed to sell his Negro, he might probably seek for a purchaser in vain. But admitting some body or other might risk the purchase of him, he still must be delivered on a *habeas corpus*,[134] as any other Servant in England would be, should his Master there take it into his head to sell him as his property.[135]

The implication of Aplin's argument that, even if the judgment in *DeLancey* v. *Woodin* were allowed to stand, it would be rendered nugatory by an application for *habeas corpus*, was confirmed by the other known slave cases. If there was not property enough to warrant conversion and thus maintain trover, neither then was there property enough securely to execute a conveyance. The importance of *DeLancey* v. *Woodin* lay in the fact of its having established the principle that slaves were not property and therefore could not become choses in possession. Neither as realty nor as personalty could a slave have been eligible for *habeas corpus*, which took for granted equally that property could not be held in human beings and that the scope of *habeas corpus* did not include chattels, real or personal.

Sandwiched between the *pro forma* "Opinions" of Attorney-General Law and Solicitor-General Percival, both of whom gave their imprimatur to the "legal inference" which Aplin drew from the Act 5 Geo. 2 c. 7, was that of famed treatise-writer William Tidd, whose *Practice of the Court of King's Bench ... in*

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[134]The mere mention of *habeas corpus* in respect to slaves refers, however obliquely, not only to *Somersett*, but also to the other Nova Scotia adjudged cases as well as to the New Brunswick leading case, *R.* v. *Jones*, the inconclusive outcome of which is noted in the Preface to the pamphlet: "[T]he question, whether any such thing as Negro Slavery can legally exist in this Province, has ... lately undergone a judicial investigation, but without any judicial decision" (*Negro Servitude*, *supra*, note 81 at [2]). Ironically, however, the English leading case at the time when *Somersett* was decided, *Smith* v. *Brown*, *supra*, note 78, had nothing to do with *habeas corpus*. Lord Chief Justice Holt went even further in *Smith* v. *Gould*, *supra*, note 86: "If I imprison my negro, a *habeas corpus* will not lie to deliver him, for by *Magna Charta* he must be *liber homo*".

[135]*Negro Servitude*, *supra*, note 81 at 22-23. This is a perfect example of the judges of Loyalist Nova Scotia being about to do that which Bell chastised the judges of Loyalist New Brunswick for conspicuously having failed to do: "make the law for the occasion": *supra*, note * at 10.

Personal Actions (1790, 1794) "achieved the status of holy writ."[136] The leading Special Pleader of his time, Tidd may well have sympathized with Aplin as a fellow practitioner, for he took more pains over his two-page "Opinion" than either of the law officers.[137] "Considering a Slave, then, as saleable property," wrote Tidd, "I think there can be no doubt but that an action of Trover might be maintained for the recovery of his value ... ." Tidd denied that *Smith* v. *Gould* had any bearing on the case, though the only other case which he cited as supposedly lending support to the propriety of the action had nothing to do with trover for Black slaves.[138] There is nothing in "Tidd's Practice", moreover, which suggests that he thought that trover would lie for the wrongful conversion of a Black slave. Failure to prove the first of the three things necessary to maintain the action, namely, property in the plaintiff, supplied the grounds for allowing the motion in arrest of judgment, and ultimately quashing the verdict. Trover did not lie because the plaintiff's possessory right of property was insubstantiable. "The only doubt seems to be", concluded Tidd, "whether there was a proper demand and refusal of the Slave, previous to the commencement of the action? Or, whether the Evidence stated was sufficient to authorize the Jury in finding a conversion? But, as they have found it, that consideration cannot be material on a motion in arrest of judgment."[139] Of course, as it turned out, the court did not rule that the evidence was insufficient to ground the action; the issue was not the fact of conversion but the plaintiff's right to the alleged property. Slavery was illegal when challenged, there was no chattel to convert, and trover could not possibly lie. As the complaint was groundless in that regard, moreover, the plaintiff at law had no right to recover in the action. He ought to have been nonsuited, and certainly would have been had Chief Justice Blowers presided at the trial.

The person chiefly responsible for the arrest of judgment in *DeLancey* v. *Woodin* was, of course, Aplin himself, to whom Ritchie had shown the plaintiff's declaration and whom Aplin unwisely advised to alter the form of the action from trespass *per quod servitium amisit* to trover. The failure of *DeLancey* v. *Woodin*, followed a month later by the publication, in Saint John, of the pro-slavery pamphlet, of which Aplin was the principal author, produced a fire-storm among the slavemasters of Annapolis County. Aplin had been concerned lest DeLancey

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[136]Simpson, *supra*, note 125 at 507 s.n. "Tidd's Practice", incidentally, was the fourth work in the quadrivium of Part I of the law student's course of study recommended by Murdoch in the Introduction to the *Epitome*, *supra*, note 23 at I.i.13.

[137]*Negro Servitude*, *supra*, note 81 at 24-25.

[138]*Wilbraham* v. *Snow* (1669), 85 E.R. 624-45 (K.B.), contained an authoritative exposition of the law on trover; it also antedated by some eight years the leading case on trover for Black slaves: *Butts* v. *Penny*, *supra*, note 82, which made new law by enlarging the scope of the action to include "the Person of a Man" and which was overturned by Lord Chief Justice Holt (in *Smith* v. *Gould*, *supra*, note 86), who restored the Cokean *status quo ante Butts*.

[139]*Negro Servitude*, *supra*, note 81 at 25.

attempt forcibly to repossess the slave, Jack, without a warrant; another of the Ditmars bondsmen, Loyalist Colonel Frederick Williams, found himself prosecuted and convicted for assault for that very reason.[140] Before his second lawsuit against Woodin could be settled, however, Colonel DeLancey died (in May 1804), poisoned, according to an unsubstantiated family tradition, "by a disgruntled female slave to whom he had promised freedom on his death."[141] The last slave sold at Annapolis was reportedly in October 1804,[142] but mention of slaves in the records of the Grand Jury continued to be quite frequent previous to the watershed year 1808, when the third and last *Negro Bill* failed to pass the House of Assembly.[143] Ritchie and Aplin, who was using his contribution to the pamphlet as a springboard from which to relaunch his shattered legal career,[144] saw to it that the controversial pamphlet was widely circulated in Annapolis County. In 1805, two Halifax merchants who found themselves in the same situation as Woodin four years earlier, deposed:

> [T]wo or three years ago printed pamphlets were circulated in said County [Annapolis] containing the opinions of several Lawyers in favour of the existence of Slavery in this province by which it is highly probable the minds of many of the Inhabitants of said County were and do still remain prejudiced.[145]

In sum then, to parody Bell's encomium of Chipman,[146] the defence of slavery as formulated by a New England refugee lawyer in Loyalist Nova Scotia may be significant to Canadian comparative legal historiography not merely because it survives as a rare New Brunswick imprint; not merely because the very fact of its local publication was an incident in the legal debate on slavery in New Brunswick; not merely because it addresses "one of the grandest of all legal questions"; but also because it developed a reactionary line of argument in defence of the legality of slavery, which was conspicuously asynchronous with the prevailing views of Nova Scotia's bench and bar.

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[140]*R.* v. *Fennell et al.* (N.S.S.C. [HX] 1803): RG 39 "J" vol. 2 ("Pleas of the Crown") at 243, PANS. The incident is alluded to in Aplin's letter to Stewart, *supra,* note 80.

[141]Moody, *supra,* note 100, *loc. cit.*

[142]W.I. Morse, *Gravestones of Acadie and other Essays on Local History, Genealogy and Parish Records of Annapolis County, Nova Scotia* (London, 1929) at 70; the unacknowledged source is T.W. Smith, *supra,* note 1 at 64. The transaction was an unregistered private conveyance of an eight year old Black slave girl further to the settlement of an estate, not a public auction and sale; a typewritten transcript of the indenture is in the Miscellaneous Manuscripts Collection at PANS: MG 100, vol. 103, f. 3(a).

[143]W.A. Calnek, *History of the County of Annapolis* (Toronto, 1897 [reprint: Belleville, Ont.: Mika Studio, 1972]) at 284.

[144]This important point has been made only by Fleming, *supra,* note 112, *loc. cit.*

[145]*Williams* v. *Stayner & Allen* (N.S.S.C. 1805): RG 39 "C" (HX), box 90, PANS [hereinafter *Williams* v. *Strayner & Allen*].

[146]Bell, *supra,* note * at 40.

If "[v]irtually the whole of the loyalist legal establishment [in New Brunswick] sympathized with slavery",[147] then the non-Loyalist, essentially Anglo-Irish, tradition of the Nova Scotia bar, exemplified by Solicitor-General Uniacke, was generally hostile to slavery. Though the career of George Thomson, the most active anti-slavery lawyer at the pre-Loyalist bar, was foreshortened by his premature death, at age thirty-two, in 1782. Thomson's views were more representative of those of his contemporaries than Joseph Aplin's would be at the *fin de siècle*. Aplin himself commented that during the trial of *DeLancey* he had heard that the bar were generally against his opinion,[148] namely that bringing an action of trover for Blacks necessarily meant imputing the character or quality of property to them, while Blowers, from his quite different and better informed, though scarcely disinterested perspective, observed to Chipman in 1800, "[t]hough the question of slavery was much agitated at the Bar, I did not think it necessary to give any opinion upon it."[149] Ritchie himself might possibly have formed more enlightened, humanitarian and progressive views, had he not trained under a Loyalist attorney who owned slaves and whose wife, another DeLancey, became notorious in oral tradition for her cruelty to them;[150] had he not fallen under the malignant influence of a much older, conservative New England émigré lawyer who was an advocate of the legality of slavery; had not his law practice numbered among its clients the most prominent Loyalist slavemasters of the County; had he not married into a family of slave-owning Georgia Loyalists; and had he not "made his name" as a young lawyer through a celebrated lawsuit, *DeLancey*, which achieved in Nova Scotia a mythic status comparable to *Somersett* in England. Within the profession generally, there was not even an implicit division for and against the legality of slavery along Loyalist and non-Loyalist lines. The Loyalist Chief Justice Blowers was opposed; as was the non-Loyalist Attorney-General

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[147]Samuel Denny Street, who, apart from Chipman, was the chief and perhaps the only anti-slavery lawyer at the New Brunswick bar, was a non-Loyalist, English-trained attorney. Unlike Chipman, moreover, he was a consistent, ideological opponent of slavery, whereas Chipman viewed slavery more as a legal than as a moral issue and was therefore prepared to argue both sides of its legality, depending on the interests of his client.

[148]Letter, Aplin to Blowers, n.d., *supra,* note 85.

[149]Chipman, *supra,* note 9: letter, Blowers to Chipman, 7 Jan. 1800.

[150]"Mrs. J.M. [Isabella A.] Owen, of Annapolis ... has referred in the *Halifax Herald* to the tradition that Mrs. Barclay, wife of Colonel [Thomas] Barclay, of Annapolis, was responsible for the death of a slave through a severe whipping she had ordered him": T.W. Smith, *supra,* note 1 at 77. The psychology of guilt doubtless originated the folk-tale that the restless spirit of Mrs. Barclay haunts the scene of the crime, a 17th century residence which still stands in Annapolis Royal: C.I. Perkins, *The Oldest Houses Along St. George Street Annapolis Royal, N.S.* (Saint John, 1925) at 29, 31-32. Mrs. Barclay (née Susan DeLancey), 1754-1837, was a sister of James DeLancey, and a cousin of the Loyalist lawyer, provincial Lieutenant-Colonel Stephen DeLancey (*see infra,* note 169); both families came from New York, where the conditions under which domestic slaves lived were harsher than in New England. Major Barclay himself, as he then was, arrived in Nova Scotia with seven slaves: T.W. Smith, *supra,* note 1 at 24.

Uniacke, while the Loyalist Solicitor-General James Stewart acted for slavemasters such as James DeLancey. Almost alone among his own, as well as the younger generation of Loyalist attorneys, Joseph Aplin adopted an aggressive, pro-legality stance towards slavery.

Yet an exception should perhaps be made for poor Ritchie, who was young, inexperienced and susceptible to the byzantine machinations of an *éminence grise* such as Aplin, a role model older than both his own long-dead father and his departed principal, Barclay, and who was therefore an authority figure standing symbolically *in loco parentis*. Ritchie the young attorney, two or three years' standing at most, was conscientiously listening to the advice of one of his elders and betters at the bar, who had "been added to him as Counsel". Notwithstanding the final outcome, for which DeLancey's urbane legal counsel, Aplin and Stewart, must bear the blame, Ritchie obtained a verdict for the plaintiff in the first instance. What *Somersett* had been to Francis Hargrave, so *DeLancey* was to Ritchie, whose local reputation it made. The celebrity and prestige thus achieved as the slavemasters' attorney doubtless facilitated Ritchie's entry into the House of Assembly as Member for Annapolis County in 1806, when both the Loyalist incumbents (one of whom, James Moody, was an advocate of the property rights of his fellow slavemasters), retired. Ritchie thereupon dedicated himself with considerable energy and single-mindedness to pursuing the legalization of slavery by means other than judicial.

The next known slave case also involved an Annapolis military Loyalist, Colonel Frederick Williams, another of the Ditmars bondsmen, as plaintiff, and a partnership of Halifax merchants, John Stayner and John Allen, as co-defendants.[151] The plaintiff's declaration makes clear that the cause of action was identical to *DeLancey*; Jacob Francis, alias "Prince", was a fugitive slave (he had in fact absconded while *DeLancey* was pending), whom Stayner and Allen had retained in their employ, despite having seen Williams' advertisement in a Halifax newspaper.[152] Mindful of what had happened when the former case was tried locally on circuit, the defendants despaired of obtaining a fair trial at Annapolis. They therefore applied for a change of venue to Halifax, in the interest both of an impartial jury and of jurisdiction to try the action where the alleged wrong had been committed. The defendants deposed "that a similar point has already been strongly agitated in said County of Annapolis where the venue in this cause is laid and where a great number of persons reside who are in possession of and keep in their service people of the description called Negroes whom they claim a right to hold as Slaves." The application for a change of venue was resisted by the

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[151] *Williams* v. *Stayner & Allen*, *supra*, note 145.

[152] *Nova-Scotia Royal Gazette* [Halifax] (29 July 1802) 4. Williams threatened with prosecution, "with the utmost rigour of the Law", anyone who aided and abetted the fugitive slave to escape the province.

plaintiff, who must have got his way because it is obvious from the record that the case was not tried at the Supreme Court in Halifax, if indeed it ever came to trial, a possibility which seemed remote even to the attorney originally retained by the defendants.

Williams was set down for trial on circuit at Annapolis in September 1806. Though the outcome is not known, it seems probable, the more so in light of the decision in *DeLancey*, that the plaintiff would have been nonsuited. The plaintiff's attorney was Solicitor-General Stewart, who had been involved in post-trial argument in *DeLancey*. The defendants were represented by Stewart's precocious and upwardly mobile brother-in-law, Brenton Halliburton, a future puisne judge and Chief Justice. Originally retained to defend Stayner and Allen was Foster Hutchinson II, the highly-favoured protégé of ex-Chief Justice Strange and the "universally admitted premier at the Bar."[153] Hutchinson knew very well "that the right of the plaintiff to hold said Negro [Jacob Francis, alias Prince] as his slave and servant must necessarily come in question in this cause", in that *DeLancey* (which was already operating as indigenous case-law), had settled that there could be no property right sufficient to maintain trover for the wrongful conversion of an alleged slave. Hutchinson wrote:

> Taking for granted that the opinion of the Chief Justice [Blowers] is settled on the subject of Slavery, there appears to be a defect in the declaration in averring in both Counts that the Negro was the plaintiff's Slave & servant, which averments (being material) the plaintiff cannot possibly prove, if it is conceded that there is no Slavery in Nova Scotia.[154]

The plaintiff's argument appeared to be a *reductio ad absurdum*: there was no slavery in Nova Scotia, yet there were lawful slaves. The Loyalist slavemasters of Annapolis County could not at all events prevail against their Loyalist compatriots entrenched in the Halifax legal establishment, which was collectively opposed to slavery. The Chief Justice set the tone for both bench and bar, and by 1805, in which year his old comrade Ward Chipman found himself arguing in favour of the legality of slavery in another *habeas corpus* proceeding,[155] Blowers' patience had completely run out. How greatly the pace had accelerated since 1800, when Blowers was able to write with Olympian disinterest and condescension to Chipman, "[t]hough the question of slavery was much agitated at the Bar, I did not

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[153]J.G. Marshall, *A Brief History of Public Proceedings and Events ... in the Province of Nova Scotia, during the Earliest Years of the Present Century* (Halifax, [1879]) at 3 [hereinafter Marshall].

[154]Letter, F. Hutchinson to B. Halliburton, 16 Sept. 1806: Sir Brenton Halliburton fonds, MG 1, vol. 334, doc. 8, PANS.

[155]*R.* v. *Agnew, ex parte Hopefield:* Bell, *supra,* note * at 23 *et seqq.*

think it necessary to give any opinion upon it."[156] It was Hutchinson, moreover, who had procured the *habeas corpus* in favour of Prince,[157] when Williams came down to Halifax and seized the fugitive without the luxury of *a capias*. Hutchinson, who had begun his career as High Sheriff of Halifax County, also saw to it that Williams and his henchmen were prosecuted for common assault on Prince.[158]

Despite the notoriety of the slavemaster lawsuits, *DeLancey* and *Williams*, the case which verged most closely on the judicial abolition of slavery was *R.* v. *Ross, ex parte Edwards* (1806-07), a *habeas corpus* proceeding by the Crown which involved not an Annapolis but rather a Shelburne Loyalist. George Ross, a partner in the most successful mercantile firm in the town, daringly ignored a writ of *habeas corpus* directing him to bring up one Catherine Edwards and was afterwards prosecuted for contempt of court.[159] Another 1806 case, almost certainly the same one misremembered, was recorded in his brief memoirs by the nonagenarian superannuated chief judge of the Inferior Court of Common Pleas, John George Marshall, who at the time of the case had been apprenticed to Lewis Morris Wilkins, MHA, the lawyer acting for the slave. Speaking of "individuals of the slave population", Marshall wrote:

> One of them abruptly left his [*sic*] master's service, in Shelburne, and came to Halifax. The master pursued him, and by some legal process, or other means, procured his arrest, and was about to convey him back to Shelburne. Application on his behalf was made to Mr. Wilkins, who obtained a writ of *habeas corpus*, under which master and servant were brought before the Chief Justice, and the case, and the slave question were fully argued on each side, and the Judge legally and righteously decided, that this Province was not debased with that cruel and abominable slave system, which John Wesley appropriately characterized, as "*the sum of all villainies*." Thus the subject as to our free country, was settled for all time.[160]

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[156]Jack, *supra*, note 43 at 150: letter, S.S. Blowers to W. Chipman, 7 Jan. 1800. Perhaps it was five more years' accumulated experience of slavery adjudication which converted Blowers from a *quondam* emancipationist to a consistent judicial activist and abolitionist.

[157]*R.* v. *Fennell et al., ex parte Francis, alias Prince* (N.S.S.C. Hilary Term 1803), "Original Entries, 1791-1804": RG 39 "J" vol. 101 at 835, PANS.

[158]*Ibid.*

[159]Supreme Court, Halifax, Original Entries, Hilary Term 1807 at 208; Easter Term 1807 at 232: RG 39 "J" vol. 102, PANS.

[160]Marshall, *supra*, note 153 at 9. "But the question ['of the atrocious slave system'] did arise," wrote Marshall, "and was legally argued and decided. I think it was in the year 1806": *ibid.* at 8. (The identity of the lawyer who defended the legality of the system is not known.) It needs to be said that Judge Marshall was the son of a southern military Loyalist who owned slaves: T.W. Smith, *supra*, note 1 at 26.

The *Edwards* case brought matters to a climax.[161] The judicial war of attrition against slavery having nearly succeeded in extirpating it, the last offensive by the slavemasters was to be launched not in the courts but in the House of Assembly. Thomas Ritchie, who entered the legislature as MHA for Annapolis County in 1806, had at the top of his agenda to conciliate the slaveowning plantocrats of Annapolis County, all previous judicial attempts having failed to retrieve the situation. Legal recourse gave way to a legislative agenda for slavery. Ritchie also repaid his debt of gratitude to old and indigent Joseph Aplin, by arranging for him to be employed for the purpose of drafting bills.[162]

In December 1807, twenty-seven Loyalist slavemasters of Annapolis County, who among them owned some eighty-nine Black slaves, men, women and children, petitioned the House of Assembly for redress against the "firm judicial policy" of the Supreme Court which undermined their human property.[163] The material part of the petition reads:

> 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

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[161]The hostility and resentment felt by the descendants of southern slaveowning Loyalists towards northern judicial abolitionists is well illustrated by the following recension of an oral tradition deriving from Edwards:

> Early in 1812 Captain [Daniel] McNeill returned to Nova Scotia, bringing with him a considerable number of slaves. A short time before he landed at Windsor, doubts as to the legality of slave-owning in the Province had arisen, in consequence of some ill-considered, off-hand *dicta* of Chief Justice Blowers in deciding, upon a writ of *habeas corpus*, a question of the custody of a slave at Halifax who had run away from Shelburne. The deliverance of the Chief Justice was taken by the people for law. Slaves were encouraged to desert their service, and the losses to slave-owners proved serious in many cases. Most of these slave-holders were Southern Loyalists.

[Source: W.F. Parker, *Daniel McNeill Parker, M.D. ... Daniel McNeill and His Descendants* (Toronto, 1910) at 15 [hereinafter Parker]].

[162]*JHA*, 7 Dec. 1807.

[163]The subscribed original is at RG 5 "A" box 14, doc. 49, PANS (mfm). It is abstracted, and extensively quoted, in M. Ells, comp., *A Calendar of Official Correspondence and Legislative Papers Nova Scotia, 1802-1815* (Halifax, 1936) at 134-35 [hereinafter *Calendar*]; discussed in F.S. Boyd, Jr., ed., *A brief History of the Coloured Baptists of Nova Scotia [1895]* (Halifax: Afro-Nova Scotia Enterprises, 1976) at xxi-xxii. Most, though not all of the signatories were "proprietors of Negro Servants, brought from His Majesty's late Colonies now called the United States of America." A few, however, such as Winniett, Dowset and Heloson [*sic*], were non-Loyalist old settlers.

> life he exercised the rights of a free person, it is in vain that his possessor attempts to litigate with him.[164]

The issue was where the burden of proof lay; the master to prove title, or the slave to prove that he was either born free or had been set free. Unlike the masters, the courts did not assume that a Black was a slave; the onus was on the master to establish his claim by offering "more than ordinarily clear" or quiet title to the so-called property. The petition was presented, not by Ritchie, but by John Warwick, Loyalist MHA for Digby, and received on motion and division.[165]

Though the petitioners had not asked for a bill, they got one regardless. On the same day the slavemasters' petition was tabled (it appears to have been too controversial to proceed any farther), Thomas Ritchie introduced *A Bill for regulating Negro Servitude within and throughout this Province*, which addressed the grievances stated in the petition. These two initiatives had doubtless been preconcerted, the former preceding the latter on the Assembly's order paper. After first reading, an unsuccessful attempt was made by Thomas Roach, MHA for Cumberland County, to give the *Negro Bill* the three-month hoist. The motion was lost by sixteen to ten, however, all the lawyers in the legislature voting against it (doubtless on the principle of collegiality or collective professional responsibility). After second reading, the *Negro Bill* was committed for study by a Committee of the Whole House, which afterwards reported that they had deferred it for three months; this time the House agreed to the deferral.

At the next session Ritchie, not to be outdone, reintroduced the *Negro Bill*, having ameliorated the title from "Servitude" to "Servants";[166] it would be easier to regulate individuals than an institution which lacked *bona fide* existence. As on the previous occasion, the bill was read a first and a second time and committed, whereupon it was again given the three-month hoist. There is no evidence that the bill was ever presented again. Little useful purpose would have been served by resurrecting a twice-deferred bill in order to address the grievances of petitioners who professed themselves to be "far from pretending to advocate Slavery as a System",[167] and who also conceded that "perhaps the true interests of Humanity, may require, in this Colony, the abolition of that particular species of property" which they claimed as their legal right.

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[164]A synopsis of the petition is given in *J.H.A.*, 9 Jan. 1808 at 48, where the first of these two paragraphs was quoted *verbatim*.

[165]*J.H.A.*, 9 Jan. 1808; the vote, which was sixteen in favour nine against, did not record the individual appearances.

[166]*J.H.A.*, 3 Dec. 1808 *et seqq.*; see Appendix 1, *infra*.

[167]*Calendar, supra*, note 163.

More so than either of its predecessors in 1787 and 1789 the Ritchie Bill explicitly recognized the slavery of Blacks as a statute right. It may nevertheless also be viewed as a retrospective enactment of the judicial solution effected by Chief Justice Strange more than ten years earlier: "a limited service by Indenture has been generally substituted [for slavery] by mutual consent."[168] Though the Bill was by implication a gradual emancipation act (the movement was up from slavery to freedom through involuntary indentured servantship), one cannot help applying to it Riddell's description of the comparable (though much earlier), Upper Canada Act: "The Act of 1793 was admittedly but a compromise measure ... it was a paltering with sin."[169] Ritchie's Bill understandably addressed the failure of the courts to protect the property rights of the slavemasters, shifting the burden of proof onto Black persons to show that they were not "legal slaves". In the legislature Ritchie strove to pursue a different course from that which he would have been compelled to take in the Supreme Court, where the judges presumed in favour of liberty rather than imputing slavery, and the *"onus probandi"* was thrown upon the master. In other respects, the Bill more or less conformed to the judicial *status quo*: the burden was on the master to prove title to his human "property", against which claim a Black person might set up a legal defence by proving his or her "absolute freedom" through manumission, emancipation or free-birth. Far more subversive of the administration of civil justice, and decidedly retrograde, however, was Ritchie's attempt to tie up and embarrass the legitimate adjudicatory function of the Supreme Court by means of a narrow statutory definition of what constituted "legal and sufficient proof" of the master's property right. This after all, since Chief Justice Strange's time, had been the *ex hypothesi* ground for removing the plaintiff's cause of action: one could not prove ownership in that which could not be the subject of property. Yet even Ritchie was prepared to bow to the inevitable by conceding ultimate freedom to slaves-turned-indentured servants. The other aspect of his projected compromise was compensation for the slavemasters, which anticipated the method which would be adopted twenty-five years later by the imperial *Slavery Abolition Act*, in favour of those West Indies planters who owned most of the slaves. Even if the 1808 Bill had passed the House of Assembly, however, it would certainly have been rejected by the Council, just as its 1789 predecessor had been. Chief Justice Blowers, presiding *ex officio*, and Attorney-General Uniacke, a newly-appointed ordinary member, remained implacable opponents of Negro Bills. It seems probable, moreover, that among the several lawyer MHAs, Ritchie was altogether alone in advocating the legalization of Black slavery. He was merely playing to his audience of County constituents, on whom he made such a profound impression through his determined advocacy of their customary right to property in Black

[168]Chipman: *supra,* note 9: letter, Blowers to Chipman, 7 Jan. 1800.

[169]Riddell, *supra,* note 52 at 376.

slaves, that he was returned by acclamation to the House of Assembly in four consecutive general elections.

It would appear that after 1808 there were neither any slave cases, nor any further attempts at enacting a Negro Bill. The uncertainty and insecurity of title to their human "property", of which the petitioners had complained (Black slaves no longer "passed like other Chattels; Sometimes by Bills of Sale, at other times by mere tradition"),[170] was parenthetically noted in a Kings County deed of 1807, in which the administrators of Joseph Allison, late MHA for Horton township, sold a young Black woman as part of the residue of his personal estate: "(if a Negro can be considered personal property in Nova Scotia)."[171] Four years later, moreover, the Southern military Loyalist, Captain Daniel McNeill, attempted to retail in Nova Scotia "a considerable number" of slaves which he had accepted in North Carolina as settlement in kind of a debt. "However, Captain McNeill's slaves, on landing, were told by certain officious persons in Windsor / that they were 'free niggers' [*sic*] when they touched British soil, and nearly all the male slaves ran away."[172]

Though Bell, following Winks' survey of "the legal course of the slave issue in British North America as a whole",[173] rejects Smith's explanation that the "difference in opinion between the two leading judges of the two provinces [Blowers and Ludlow] may have been in some measure the result of their training,"[174] there is no denying that the legal culture of slavery, no less than slave law itself, was far from monolithic, and that lawyers' attitudes towards the institution varied widely within the former Thirteen Colonies. Regional differences in slavery jurisprudence and statute law among (and within) New England, the middle Atlantic colonies and even the South, might well account for ideological differences among lawyers and judges who had to grapple with the legality of slavery in a colonial backwater such as pre-American Revolution Nova Scotia was, while at the same time acculturating themselves to a small, insular indigenous bar which was generally hostile to, and uncomprehending of the American view of any matter. It bears remarking that the only New York Loyalist lawyer practising in Nova Scotia was Thomas Barclay of Annapolis, with whom Thomas Ritchie articled; New Brunswick was perhaps the worse affected for having a New York Loyalist lawyer and judge as Chief Justice for the first twenty-odd years of its existence. Smith's rather modest aim was to contrast attitudes towards the legality of slavery in Massachusetts and New York in terms of how Loyalists who had been

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[170]*Calendar, supra,* note 163.

[171]The instrument is reproduced *verbatim* in T.W. Smith, *supra,* note 1 at 65-66.

[172]Parker, *supra,* note 161 at 15-16.

[173]Bell, *supra,* note * at 27 n. 58.

[174]T.W. Smith, *supra,* note 1 at 102.

lawyers or judges in the old colonies behaved when they became judges in the new, and to explain the latter in terms of the former.

The role of precedential authorities generally, or case-law in particular, in the construction of both pro- and anti-slavery rationales by Loyalist judges and lawyers in colonial courts requires elucidating. For Nova Scotia, the impact of specifically English, rather than indigenous case-law on slavery adjudication is part of the much larger question of whether the jurisprudent Beamish Murdoch's view as to "which decisions of the British courts, are to be held obligatory in the tribunals of this province"[175] may be retrojected to the beginning of Murdoch's own lifetime, 1800, when slavery, despite Murdoch's retrospective denial of it, was still very much an established, though not unchallenged, fact of life in Nova Scotia, and the two or three definitive slave cases, the cumulative effect of which was the judicial abolition of slavery, were yet to come. Murdoch lectured the Law Students' Society in 1863:

> We are also bound by a rule of great importance in the observations of such decisions of the Courts of Law in the mother country, as elucidate the doctrines of the Common Law ... . [W]hen a question of law has been thoroughly argued and solemnly decided by the Superior Courts in England, such a decision is received generally as an obligatory interpretation of law in all the dominions of the British Crown."[176]

The reported English cases, which, as Bell convincingly argues,[177] were very much a mixed blessing, functioned more as authorities or analogues than as binding precedents. Allowing that the modern doctrine of *stare decisis* evolved later in the 19th century, the question is whether Murdoch's mid-century view of the matter, detailed above, can be transposed to the 18th and early 19th centuries without risk of anachronism. Could the decisions of the English superior courts act as sources of judge-made law in the colonies, when they frequently ignored, contradicted or misrepresented one another? Were they not prototypes or exemplars, source-books rather than case-law in the modern sense of the term? If a "prehistoric" version of *stare decisis* had been operative in 18th century England, then Lord Chief Justice Holt's decisions in *Smith* v. *Brown* and *Smith* v. *Gould*, which are as unequivocal a statement as one could wish of the illegality of Black slavery, would have abolished slavery as effectively as the *Statute of Tenures* had previously abolished villeinage. In 1705-06, however, neither English society nor the English mercantile class, to say nothing of the English colonies in

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[175]B. Murdoch, "An Essay on the Origin and Sources of the Law of Nova Scotia" [29 August 1863], in J.A. Yogis, ed., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984) at 187.

[176]B. Murdoch, "An Essay on the Origin and Sources of the Law of Nova Scotia" [29 August 1863], *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984) at 191.

[177]Bell, *supra,* note * at 12-13.

America, was ready for the judicial abolition of slavery by a civil libertarian jurist, even though Holt was the greatest judge, if not the greatest lawyer ever to dignify the office of Lord Chief Justice. "Cases" do not become "case-law", nor is judge-made, judge-given or judge-altered law rendered effective, unless it is strictly adhered to as a *ratio* in later adjudged cases, or confirmed by legislation.

Somersett, the construction of which Lord Stowell considered to be the "narrow question" determining the legality of slavery in the colonies, was of "limited effect"; not by analogy, extrapolation or inference could it be construed as affecting the legality of American colonial slavery. It was therefore worse than useless to radical proto-abolitionists. The closer one got to statutory abolition of colonial slavery by act of Parliament, however, the more *Somersett* began, in retrospect, to appear as the common law of England against slavery.[178] The mythical misconstruction of *Somersett* as a direct judicial decision abolishing slavery in England[179] did not develop until after statutory abolition of slavery in the colonies had become a foregone conclusion. That slavery had been illegal in England at least since the time of Lord Chief Justice Holt is demonstrated by the absence of any act of Parliament abolishing slavery in England itself. The *Somersett* decision was declaratory of what had been English law at least since the early 1700s, and was in any case concerned only with the security of tenure of American colonial slaves in England, not with the legality of slavery *per se* in England or in the colonies. It established only that a fugitive slave could not be deported from England for sale in the Americas, thus taking the prior abolition of slavery in England for granted. The recognition by the English courts that slavery was legal in the colonies rendered statutory abolition by act of Parliament inevitable. It was clear that colonial slavery, having been facilitated by English statute law for over a century, could not be abolished by any other means. The disallowance of the crown's appeal on behalf of the slave Grace in *R.* v. *Allen* finally stirred the British government to purposeful action. The fact that the appellants were represented by the King's Advocate and Dr. Stephen Lushington, a Whig MP and ardent reformer and abolitionist, and that the hearing of the appeal was referred to Stowell, JA by the Secretary of State for War and the Colonies, Earl Bathurst, who had been chiefly responsible for the statutory abolition of the slave trade in 1807, speaks volumes for the seriousness with which

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[178]It is arguable, of course, that the *Tenures Abolition Act* (1660), 12 Car. 2, c. 24, which abolished one of the two forms of villeinage, extended to and included by implication the other, i.e., the villein in gross, who most closely resembled, while possessing more rights than, a mere slave. This interpretation falls well within the scope of the equity of a statute rule of construction, and may perhaps explain why the statutory abolition of slavery in England was deemed extraneous by the powers that were in Parliament. All the acts (or unenacted bills) post-*Somersett* dealt with ameliorating colonial slavery or "deregulating" the slave-trade to the colonies, which had been closely regulated by statute for over a century.

[179]"The arguments of counsel in that decisive case of *Somersett*, do not go further than to the extinction of slavery in England": *R.* v. *Allen*, *supra*, note 67 at 184.

the government viewed the case. Though Lord Stowell's proposal for definitive parliamentary action was not acted upon immediately, as early as the following year (1828) an Order-in-Council was issued admitting West Indian Blacks "to the full protection of the law, and to all the privileges of British subjects."[180] Indeed, Lord Stowell's decision in *R.* v. *Allen*, which was both timely and politically influential, and includes a magisterial exposition of the precedents, stands as the strongest warning against the anachronistic, retroactive misconstruction, not only of *Somersett*, but also of the other adjudged cases bearing on slavery in the colonies.

The 17th and 18th century English decisions, inconsistently, inaccurately or indifferently reported though they were, functioned not as binding precedents but as digests from which special pleaders such as Joseph Aplin deployed useful arguments. As *stare decisis* was not yet a principle of adjudication in English or colonial courts, however, it is hardly proper even to speak of the extension of case-law, as distinct not only from common or statute, but also from consuetudinary law, which was uniquely indigenous to the colonies and which, for example, formed the basis of Chief Justice Ludlow's defence of the legality of slavery. These are important issues raised by slavery adjudication, though it is beyond the scope of this paper to address their significance for colonial reception law.

In the *Epitome*, the publication of which nearly coincided with the statutory abolition of slavery throughout the empire, Beamish Murdoch categorically asserts that slavery does not exist in Nova Scotia. He is no less careful not to say that it never existed, thus evading the historical conundrum of its disputed legality, than to omit from his detailed discussion of "Taverns and Inns" any reference to the incidence of the locution "negro slave" in the *Innholders Act* of 1762.[181] "Faced with a conflict between his strong anti-slavery views and the reality of past practice", writes Girard, "he [Murdoch] chose to ignore the latter and to portray the current law in an unhistorical manner."[182] Even as an epitomist, however, Murdoch seems vulnerable to the criticism that he sinned twice against history by also portraying non-current law in an equally unhistorical manner. He might well have responded, of course, that there was no slave law to epitomize; all three attempts at statutory legislation had been defeated by the hostility of the leaders of bar and bench. The only law existing was attenuated case-law (Blowers'

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[180]"Lushington, Stephen," in *Dictionary of National Biography*, vol. 34 (London, 1893) at 291. (See now also the new biography by S. Waddams.)

[181]No doubt Murdoch would simply have referred an objector to his tenth rule of statutory construction: "Laws absolutely absurd or impossible to be obeyed, though enacted in parliament, are void": *supra*, note 23 at I.iii.24.

[182]P. Girard, "Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his *Epitome of the Laws of Nova Scotia*" (1993) 11 *Law and History Review* 101 at 123 [hereinafter Girard].

"adjudged cases"); Murdoch's oblique allusion to it as the *ratio decidendi* in a leading case on *habeas corpus*, moreover, demonstrates that *Smith* v. *Brown*, though its impact was trifling outside (perhaps even within) legal circles in early 18th century England, was nevertheless good law in late 18th century Nova Scotia.[183] Haliburton, on the other hand, given his Annapolis legal upbringing and practice, was much more candid about the presumptive legality of slavery. As late as 1829, when Murdoch was about to begin composing the *Epitome*, Haliburton summarized the question as follows: "The most correct opinion seems to be, that slaves may be held in the Colony ... . [O]n this subject there prevailed much romance and false sentiment in Nova-Scotia, as well as in England. The effect produced by this latent [*sic*] abandonment of slavery is, however, beneficial to the Country."[184]

Nova Scotia was an example of a current British North American colony in which legislative action in favour of slavery failed while judicial action against it succeeded. New Brunswick, on the other hand, was unique, excepting only Prince Edward Island where legislation favouring slavery succeeded early on, in resisting the "abolitionist impulse" simultaneously on both fronts. Paradoxically, Annapolis County, the epicentre of pro-slavery agitation in Loyalist Nova Scotia, may even have contributed to the entrenchment of slavery in New Brunswick. The old royal capital and British North America's first city faced each other across the Bay of Fundy, while Aplin's pro-legality pamphlet was conceived in the former but delivered in the latter. The number of slaves in New Brunswick, moreover, according to Smith,[185] " ... was considerably increased by the arrival a very little later [than the spring of 1784] from Nova Scotia of several of the more important slave-proprietors in the county of Annapolis." This Digby-Annapolis-Saint John axis sustained the vitality of slavery on both shores of the Bay of Fundy throughout the period when the legality of slavery was being progressively undermined in Nova Scotia's courts.

The end of the Loyalist Ascendancy in Nova Scotia (the "Brandy Election" of 1830 is generally considered to have sounded its death-knell), the end of Blowers' thirty-five-year-long tenure as Chief Justice of the province, and the passage of the imperial Act abolishing slavery in the colonies all occurred within three years of each other. The legislature responded rather mean-spiritedly to the prospective coming into force of the *Slavery Abolition Act* by passing *An Act to prevent the ... Landing of Liberated Slaves*,[186] the preamble to which broadly suggested that the recent emancipation of slaves had been for all practical purposes confined to the

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[183]Ditmars, *supra*, note 78.

[184]Haliburton, *supra*, note 106 at 280.

[185]T.W. Smith, *supra*, note 1 at 29.

[186]*S.N.S.* (1834) 4 Wm. 4, c. 68.

West Indies. There was irony in the fact that while the legislature in 1789 had been concerned with the illegal exportation of free Blacks to enslavement in the West Indies, the same legislature in 1834 was equally concerned to prevent emancipated slaves from emigrating to Nova Scotia lest they become an insupportable charge on the public purse. Girard[187] draws attention to the fact that Nova Scotian sentiment on the occasion was anti-abolition or even anti-Black rather than anti-slavery, and prefers to see in Murdoch's reticence and casuistry about this issue a sign of moral conscience. He neglects to mention, however, that the Act was disallowed by Order-in-Council, and that the Lieutenant-Governor was subjected to a withering rebuke from the Secretary of State for having assented, despite the absence of a suspending clause, to an Act which was morally reprehensible and verged on contempt of Parliament.[188] Nova Scotia's legislators, moreover, not only knew that slavery had been judicially abolished years before, but they had also historically been opposed to the enactment of any law relating to slavery, whether colonial or imperial. The implementation of the *Slavery Abolition Act* in the slave-ridden societies of the West Indies was not their problem, and they did not wish it to become so as a result of modish moralizing in Whitehall.[189]

Perhaps the best formulation of the significance of the legal history of slavery in Nova Scotia is the sociological one offered by Joy Mannette:

> The problem we are faced with in our examination of Blacks in Nova Scotia is: what occurs in a social formation when one of the regulatory bodies, the law, fails to uphold the claims of owners to their property as in the case of the Nova Scotia courts in the late 18th and early 19th centuries .... What we are forced to examine is the relationship of legal forms (as one site of hegemonic order and class struggle) to concrete practice. We argue that a practice and its ideological forms cannot simply be overturned through a legal act. These practices merely become modified in terms of a new ideology.[190]

The ideology, of course, is racism, and the rout of the slavemasters in the first decade of the 19th century fostered a heritage of resentment which has vitiated race relations in Annapolis-Digby until the present day. The judicial failure to deal equitably with the murder in 1985 of Graham Cromwell [Jarvis], himself the

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[187]Girard, *supra,* note 176, *loc. cit.*

[188]Letter, Aberdeen to Campbell, 4 Feb. 1835: CO 218/31/fol. 77r, at 82v-83v, PRO (mfm. at PANS); cf. *JHA* (1836), Appendix No. 13.

[189]On the state of Black civil rights in Nova Scotia between the "legal destruction" of slavery and its statutory abolition, see above all "Slavery" [*sic*] Copy of notes by W.S. Moorsom, Halifax 16 March 1831, concerning "Negro Settlement at Hammonds Plains" typewritten transcript, 7 p.: W.C. Milner fonds (shelf 12, box 12, folder 48, doc. 2), NBM.

[190]J.A. Mannette, "Setting the Record Straight: The Experience of Black People in Nova Scotia, 1780-1900" (M.A. thesis, Carleton University, 1983), at 24. Cf. E.D. Genovese, "The Hegemonic Function of the Law" *Roll, Jordan, Roll: The World the Slaves Made* (New York: Ragweed Press, 1974) at 25-49.

descendant of Annapolis County Loyalist slaves, shows indeed the truth of the adage plus ça change, plus c'est la même chose. Not even in late 18th century Nova Scotia could a Black slave have been murdered by his white master with so high a degree of virtual impunity.[191] Not only did historians, moreover, pay greater attention to the so-called "Black Loyalists" during the American bicentenary of 1976 than during the Nova Scotia Loyalist bicentenary of 1982-84; little or no attention has ever been paid to Black Loyalist slaves, except by Marxist sociologists. This credibility gap in the existing conventional historiography should make historians of the Black experience in Nova Scotia wary of "rewriting" Black history before it has been satisfactorily written in the first instance. The still very fashionable socially dangerous emphasis on the myth of the "Black Loyalists", which, decoded, means the free Blacks, especially the smart ones who joined the exodus to Sierra Leone, should not be allowed to distract historians' attention away from those unfree Blacks who were the slaves of white Loyalists. Such an uncritical acceptance of what is, after all, a historian's mere fabrication or misinvention should stand as a warning to sceptics of the collective moral, if not legal and psychological guilt permeating the slave society which Loyalist Nova Scotia undoubtedly was. Had it not been so, the Exodus back to the Promised Land would never have taken place.

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[191] See J.A. Mannette, "Social Constructions of Black Nova Scotians: the Weymouth Falls Case, 1986" (paper prepared for the Atlantic Association of Sociologists and Anthroplogists Annual Meeting, Acadia University, Wolfville, 13-16 Mar. 1986, 29 p.); S. Kimber, "A Black Man's Death Puts White Man's Justice on Trial" (Apr. 1986) 8:4 *Atlantic Insight* at 32-34; and G.E. Clarke, "The Birmingham of Nova Scotia: the *Weymouth Falls Justice Committee vs. the Attorney General of Nova Scotia*" (Jan. 1987) 5 *New Maritimes* at 4-7 [reprinted as I. McKay & S. Milsom, eds., *Toward a New Maritimes: A Selection from Ten Years of New Maritimes* (Charlottetown: Ragweed Press, 1992) at 17-24].

APPENDIX 1

Nova Scotia's Unenacted Negro Bills, 1789 and 1808

An Act for the Regulation & Relief of the free Negroes within the Province of Nova Scotia[192]

Whereas the free Negroes residing in this Province are daily increasing, and many inconveniences are likely to arise if the strictest good order and regularity be not observed among that class of people, and Whereas upon every principle of justice and humanity they are entitled, equally with the rest of the community, to every right and priviledge of British Subjects, and no person or persons whatsoever can by authority of Law enslave them unless they are proved by Birth or otherwise to be bound to Servitude for Life, And Whereas attempts have been made to carry some of them out of the Province, by force and Strategem, for the scandalous purpose of making property of them in the West Indies contrary to their will and consent, for preventing whereof,

Be it Enacted by the Lieut. Governor Council and Assembly

That from and after the publication hereof all Negroes residing within this province who are not Slaves by Birth or otherwise and who shall be convicted before any three Justices of the County in which such a Negro shall be found of not having a fixed place of abode or a proper means of Subsistence, or of being / an Idle Desorderly person, it shall and may be lawful for such Justices to bind by Indenture said Negro or Negroes, without his or their consent, to any person or persons whatsoever for any term not exceeding seven years, provided that the Master or Mistress of the said Negroes shall not transport nor carry them out of the Province upon pain of incurring the penalty herein after mentioned. –

And be it further enacted, That if any Negro or Negroes shall refuse to submit to such examinations as is before directed, or after examination, become refractory and unwilling to serve any person or persons to whom, by order and with the approbation of the said Justices, such Negro or Negroes shall be bound as aforesaid, that then it shall and may be lawful for the said Justices to commit such Negro or Negroes to the House of Correction [Bridewell] or County Gaol and there keep him or them at hard labour until such time as they consent to be examined or bound as aforesaid. –

And be it further enacted, That the said free Negroes residing within the Province shall be entitled to the Security and protection of the Laws in as full and ample a manner as the rest of His Majestys liege Subjects within this Province now enjoy them, and that their persons and property shall at all times be subject to the same Astrictions and indulgences.–/

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[192]RG 5 "U" box 1 (1789), PANS. The bill exists in two forms, a corrected original draft written by Charles Hill, MHA, and an engrossed official version transcribed by the Clerk of the House. It is the latter which is reproduced here.

And be it further Enacted, That if any Master or Mistress of the said Negroes, or any other person or persons whatever, shall upon any pretence, or from any cause or motive whatsoever, carry any Negro or Negroes out of the Province, without his or their Consent being first expressly declared before three Justices of the Peace, such person or persons so carrying them away shall on Complaint and conviction thereof in any Court of record within this Province forfeit and pay One Hundred pounds for each and every Negro so taken and carryed away to be recovered by Bill, Plaint or Information, and be moreover obligated in a Bond or Recognizance to be taken in the Court wherein he was convicted, to bring back again to the Province the Negro or Negroes so taken away, or to incur a forfeiture of the Penalty therein specified. -

Provided always, That if any Negro or Negroes shall think him, her or themselves injured or aggrieved by the proceedings of the Justices, they may complain to the Justices in their General Sessions of the Peace, for Relief therein. -//

An Act for regulating Negro Servants within and throughout this Province[193]

Be it enacted by the Lieut. Governor, Council and Assembly, that all Negroes within this Province whether male or Female, between the respective ages of twenty one and thirty years, and whose Masters or Mistresses have a claim to their Services for life (in manner as such is herein after expressed) shall, from and after the Publication hereof, be held to serve their said Masters and Mistresses, respectively for the Term or Space of four Years, and no longer, and that, from and after the expiration of the Term or Space of four years, such Negroes shall be altogether absolved and freed from any subsequent claim of their said Masters and Mistresses to his, her, or their respective services: And such Master or Mistress shall be entitled to receive out of the Treasury of this Province, as a full compensation for their respective losses in as aforesaid incurred for each Negro whether male or female, the sum of [BLANK]

And be it further enacted, that from and after the Publication hereof, all Negroes within this Province, whether Male or Female, and within the respective Ages of 30 and 40 years, and whose Masters or Mistresses have a claim to their services for life, as aforesaid, shall be held to serve their said Masters or Mistresses, respectively, for the space or term of three years, and no longer: and that, from and after the expiration of the said three years, such Negroes shall be altogether absolved and freed from any subsequent claims of their said Masters or Mistresses to / his, her or their respective services. And such last mentioned Masters or Mistresses shall be entitled to receive out of the Treasury of this Province, as a full compensation for their respective losses, in as aforesaid incurred, for each negro whether Male or Female, the sum of [BLANK]

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[193]RG 5 "U" box 4 (1808), PANS. The bill exists in draft form only, as a Thomas Ritchie holograph.

And be it further enacted, that all Negroes within this Province whether male or female of the full age of 40 years, whose masters or mistresses have a claim to their services for life as aforesaid, shall, from and after the publication hereof, be altogether absolved and freed from any subsequent claim of their respective Masters, or Mistresses, to his, her or their respective services - and such last mentioned Masters or Mistresses shall be entitled to receive out of the Treasury of this Province, as a full compensation for their respective losses, in as aforesaid incurred, for each Negro, whether Male or Female the sum of [BLANK]

And be it further enacted, that all Negroes within this Province whether male or female, and who may be under the age of 21 years, who[se] masters or mistresses have a claim to their services for life as aforesaid shall be held to serve their said Masters and Mistresses, respectively, until they shall have attained the full age of 25 years and no longer, and that, from and after the expiration of the said twenty five years, such negroes shall be altogether freed and absolved from any subsequent claim of their said Masters and Mistresses to his, her or their respective services. And such last mentioned Masters or Mistresses shall be entitled to receive out of the Treasury of the Province, as a full compensation for their respective losses, in as aforesaid / incurred, for each Negro whether Male or Female, the sum of [BLANK]

And be it further enacted, that all Negro Children, whether Male or Female, which shall or may, from and after the publication hereof, be born in this Province of Parents, to whose services for life any person or Persons therein may be intitled, shall be held to serve their Masters and Mistresses, respectively, until such Negro Children shall have attained the full age of twenty one years, and no longer, and that from and after their so attaining the said Age of twenty one years, they shall be altogether freed and absolved from any subsequent claim of their Masters or Mistresses to his, her or their services. –

Provided nevertheless, and it is hereby enacted, that if any Negro or Negroes within this Province, whose services shall or may be claimed by any Person or Persons therein, for and during the respective Periods of Service herein before mentioned are now absent from, or shall quit or leave the service of such claimant or claimants, and any dispute shall arise at Law touching the absolute freedom of such Negro or Negroes, and the right of such claimant or claimants to his, her or their services as aforesaid; that then if such claimant or Claimants shall satisfactorily prove such Negro or Negroes to have come to his, her or their possession, either by purchase or Descent, or shall prove such Negro or Negroes to have quietly served such claimant or claimants for the span of [BLANK] years, without asserting his, her, or their respective Freedom, the same shall be deemed a legal and sufficient proof for the purposes aforesaid, unless such / Negro or

Negroes shall be able to prove his, her or their Freedom, respectively, by manumission or otherwise. –[194]

And be it further enacted, that all persons within this Province who shall or may, after the publication hereof be justly intitled to the services of any Negro or Negroes, for and during the said respective Periods of service, shall provide for such Negro or Negroes, respectively, a sufficiency of wholesome Food and comfortable Clothing; and upon complaint of a deficiency therein, or of ill treatment towards such Negro or Negroes, to his Majesty's Supreme Court, or Court of General Session of the County where such supposed offences shall have been committed, and due proof made of the matter of such complaint, it shall and may be lawful to and for the said Supreme Court or the said General Session of the Peace (and they are hereby respectively required to take Cognizance of such Complaint) to make an order thereon, either in full discharge of such Negro or Negroes from his, her, or their respective service or Services, or applying such other remedy as the real justice of the case may require. –

And be it further enacted, that if any Negro Servant in this Province, shall leave or abandon the Service of his or her Master or Mistress, it shall and may be lawful to and for any Justice of the Peace within the County where such offence shall have been committed, upon complaint made thereof, to issue his warrant for the apprehension and bringing before him the said delinquent Party, and upon due proof of the matter of such complaint, to make an order for compelling such Negro to return again to the service of his or their Master or Mistress, and to / add double the Term of time in which such Negro may be absent as aforesaid. to the Period of Time for which he ought yet to serve: and in case any such Negro shall behave or demean himself or herself, in a violent or refractory manner, to his or her Master [or] Mistress, such Justice, upon complaint thereof, and due proof made of the same, is hereby authorised and required to commit such violent or refractory Negro to Gaol, for such space of time as he may judge expedient; and also to compel such Negro to make up his deficiency of service in manner as aforesaid. –

And be it further enacted, that any Master of a vessel in this Province who may hereafter take on board his vessel and carry away any Negro, to whose services any subject therein may be in any degree intitled, shall upon due conviction of such offence before the Supreme Court or before the General Session of the Peace, in and for the County where the same shall have been committed, pay a fine of [BLANK] to the person or persons intitled to the services of the Negro so taken away as aforesaid//

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[194]Ritchie's extremely well-informed retrospective on the state of slavery adjudication contains a reference to the Annapolis test cases of 1801 and 1806, respectively, *DeLancey* v. *Woodin*, *supra*, note 33 and *Williams* v. *Stayner & Allen*, *supra*, note 145. He was consciously addressing what he perceived to be the "juridical failure" (quoting T.G. Barnes, out of context) of the Annapolis Royal Supreme Court to protect the property rights of slavemasters.

APPENDIX 2

New Brunswick's Unenacted Negro Bill, 1801[195]

A Bill relating to Negroes [6 February 1801] - Original Draft

Whereas in and by an Act of Parliament made and passed in the thirtieth year of the Reign of His present Majesty intituled 'An Act for encouraging new Settlers in His Majesty's Colonies and Plantations in America', any person or persons being a Subject or Subjects belonging to the territories of the United States of America were authorised to bring into the territories belonging to His Majesty in North America, any Negroes household furniture and other articles therein mentioned under the regulations and restrictions in said act contained: And whereas "all Sales or bargains for the Sale of any Negro or other article so imported which should be made within twelve calendar months after importation thereof, are by said Act declared null and void."

And Whereas disputes may arise respecting the Sale of such Negroes, and the several parishes may become chargeable with the maintenance and support of such negro or negroes by improper Sales or manumissions

i Be it therefore enacted by the Lieutenant Governor Council and Assembly that whenever any Negro imported under the said Act, or other Negro or Negroes whatsoever, shall become aged sick or infirm, or otherwise disabled or rendered

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[195]RS 24 S14 - B9, PANS (mfm.). The Bill exists in two drafts, the first shorter the second longer, between which there are material differences. For the legislative history and a penetrating analysis of the legal and political character of the Bill, see Bell, *supra,* note * at 20-22. By contrast with its likewise unenacted Nova Scotia counterparts (1787, 1789 and 1808), New Brunswick's *Negro Bill* was intentionally an Act to regulate slavery. The fact that the Imperial Act of 1790 had earlier been reprinted in the *Royal Gazette*, just weeks before the trial of *R.* v. *Jones*, *infra* note 134 in Feb. 1800; that it there formed the basis of one of the arguments in defence of the legality of slavery; and that it was afterwards reconsidered by Judge Saunders as tantamount to parliamentary recognition of the legal existence of slavery in the colonies, strongly support Bell's contention that the "Act was invoked by the partisans of slavery to give the New Brunswick Bills a guise of legitimacy": Bell, *supra,* note * at 21. The Imperial Act of 1790 was required to play no such role in Nova Scotia, where the provincial Act of 1762 was thought by the partisans of slavery to serve the same essential purpose of recognizing the right to hold a Black slave as property by the "statute law of England, and the Colony." The preambular Imperial Act simply provided the New Brunswick Bill with a pretext, not so much for "regulating Negroes", as for regularizing property transactions involving Black slaves. There was no logical connection between the 1790 Act and the 1801 Bill, except that the licence to sell operates as the strongest possible proof of ownership of property, nor is Bell correct to assert that the latter "anticipates the similarly unsuccessful Nova Scotia Bill of 1808" (q.v.). That was a gradual emancipation and slavemasters compensation bill, which attempted unsuccessfully to mediate between the die-hard anti-slavery judges of the Supreme Court and the equally die-hard Loyalist slavemasters of Annapolis County. Unlike its New Brunswick counterpart, therefore, the Nova Scotia Bill can by no means be described as "an ill-disguised attempt to give direct legislative recognition to the existence of slavery" in the province: Bell, *supra,* note * at 21.

incapable of supporting themselves, the master or masters, owner or owners of such Negro or Negroes shall be liable and obliged to maintain and support them: and in case of refusal or neglect, the overseers of the poor in such parish where such aged sick infirm or disabled negro may reside, shall by and with the consent of two of His Majesty's justices of the peace, provide suitable maintenance and shall recover from the master or owner of such Negro pauper the sum of such expenditure with costs of suit in any Court proper to try the same.

ii And be it further enacted that all and every Bill of Sale or Deed of Manumission made by any master or owner of any Negro whatsoever with intent to / exempt him or themselves from the support or maintenance of such negro, or to subject any town or parish to the support or maintenance of any such negro, every such Bill of Sale or deed of manumission shall be deemed, and is hereby declared to be null and void, and every such master or owner their heirs executors and administrators shall be obliged to maintain and support such negro so sold or manumitted, such bill of Sale or deed of manumission notwithstanding.//

A Bill relating to Negroes [12/13 February 1801] - Revised Draft

Whereas in and by an Act of Parliament made in the 30th year of the Reign of his present Majesty intituled "An Act for Encouraging new Settlers in his Majesty's Colonies and plantations in America,"[196] – Any person, or persons being a Subject or Subjects belonging to the Territories of the United States of America, were authorized to bring into any of the Territories belonging to his Majesty in North America any Negroes, Household Furniture and other Articles therein mentioned under the Regulations and Restrictions, in said Act contained: "And whereas all sales, or Bargains for the sale of any Negro, or other Article is imported, which should be made within twelve calendar months after Importation thereof, are by said Act declared null and Void": And Whereas Disputes may arise respecting the sale of such, and Other Negroes, and the several parishes in this province may be subject, and become chargeable with the maintenance and support of such Negro or Negroes by improper Sales, or manumissions.

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[196]This Act, (1790) 30 Geo. 3, c. 27, was the subject of a pro-slavery exegesis in the *Royal Gazette & New Brunswick Advertiser* (28 July 1801) by a "worthy and learned Judge," whom Bell has identified as John Saunders, a future Chief Justice and, ironically, one of the two puisne judges of the Supreme Court who had been prepared to grant the *habeas corpus* in favour of the Black slave in *R.* v. *Jones* the previous year: Bell, *supra,* note * at 22-23; the text is reproduced *verbatim* by T.W. Smith, *supra,* note 1 at 112. (Another countervailing force operating to change Judge Saunders' view of the legality of slavery may have been that, though formerly a slave-owning Virginia Loyalist, he had read most of his law not in America but at the Middle Temple, where he was called to the bar scarcely one year before his appointment to the colonial bench.)

i Be it therefore enacted by the Lt. Gr. Council & Assembly that all sales, or Bargains for the sale of any Negro, or Negroes shall be registered in the Registers Office in the several and Respective counties in the same Manner, and under the same Regulations and / Restrictions as Deeds or Conveyances of Real Estate.[197]

ii And be it further enacted that whenever any Negro or Negroes whatsoever shall become aged, sick, or infirm the Master or Masters, Owner or Owners of such Negro shall be liable and Obliged to maintain and support them; and in case of Refusal, or neglect the Overseers of the poor in such parish where such aged, sick, or infirm Negro may reside shall provide suitable maintenance, by and with the consent of two of his Majesty's Justices of the peace, and shall recover from the Master, or Owner of such Negro pauper the sum of such Expenditure with Costs of suit in any Court proper to try the same.–

iii And be it further enacted that all Ownership shall be deemed, and computed from the Female, or mother of such child or children whose state and condition shall Regulate, and direct the state and condition of the Offspring X
[X And be it further enacted that all and every Negro child that may be born in this province from and after the passing of this Act, shall, and hereby are declared at the Age of – to be freed from all and every claim of service whatsoever –]

iiii And be it further enacted that if any person, or persons shall receive, harbour or conceal any Negro servant or detain them from the service of the Owner or master for the space of – Hours, every person, or persons, so receiving, harbouring, and concealing, or detaining such Negro servant, or servants shall incur the / penalty of – pounds to be levied by Distress [*sic*: Distraint] and Sale of the Offenders Goods and Chattles upon conviction before any One of his Majestys Justices of the peace upon the complaint of the Master, or Owner of such servant, one moiety of which penalty with the costs of prosecution shall be for the use of such Master, or Owner, and the other to the use of the poor of the parish in which such Offence shall be committed

[197]Apparent evidence of the fact that the Imperial Act of 1790 was tangential to the Bill is that the former treated Black slaves as personal chattels, not realty; this inconsistency may nevertheless highlight the true intention of the Bill (*infra*, § v). For an example of the delayed registration of a bill of sale of a teenaged female slave, see NBGIC St. John County Registry Office (1791), Book C 1, page 61 (No. 447), J. Johnson to S. Duffy; the conveyance had been executed in New York in 1778. The object of recording the conveyance so many years after its execution doubtless was to secure title with a view to a further transaction.

v Provided always that Nothing in this Act shall be construed to render the Right of servitude as real Estate; but the same shall be considered as personal Estate; and as such liable to pay any Bona fide Debts of the Masters or Owners respectively//[198]

[198]This clause would have effectively re-enacted the material provisions of the Imperial Act (1732) 5 Geo. 2, c. 7, which had been repealed by Act of Parliament in 1797. The Upper Canada Act of 1793, by contrast, repealed so much of the Imperial Act of 1790 as would have enabled the Lieutenant-Governor to grant import licences for introducing yet more Black slaves into the province. This was followed by an unsuccessful effort to renew slave importation in 1798: A.P. Stouffer, *The Light of Nature and the Law of God: Antislavery in Ontario, 1833-1877* (Montréal: McGill-Queen's University Press, 1992) at 222 n. 15.