Dalhousie Law Journal

Volume 21 | Issue 2 Article 6

10-1-1998

The Course of Law Cannot be Stopped': The Aftermath of the Cumberland Rebellion in the Civil Courts of Nova Scotia

Jim Phillips
University of Toronto

Ernest A. Clarke
McGill-Queen's University Press

Atlantic Legal History

Ernest Clarke and
Jim Phillips*

"The Course Of Law Cannot Be Stopped": The Aftermath Of The Cumberland Rebellion in The Civil Courts Of Nova Scotia

This article examines a series of cases launched in the Nova Scotia courts following the Cumberland Rebellion of 1776. In these cases loyalists sued former rebels, including those granted amnesty by the authorities, for losses sustained during the rebellion. The article traces the history of the cases and places them in the context of post-rebellion government policy. It argues that such proceedings were without precedent and effectively took the place of official schemes of expropriation of rebel land and compensation to loyalists. It also suggests that the use of civil courts in this way prolonged and exacerbated the social and political tensions in a county badly split in its reactions to the American Revolution. Finally, it links this litigation, and particularly some questionable decisions by judges of the Supreme Court, to criticisms of the administration of justice in late eighteenth-century Nova Scotia.

Dans cet article, les auteurs examinent une série de causes intentées en Nouvelle-Écosse suite à la Rébellion de 1776, au cours desquelles les loyalistes poursuivèrent d'anciens rebelles, incluant ceux à qui l'amnistie fut accordées, pour les pertes subies lors de la révolte. Les auteurs situent ces litiges dans le contexte de la politique gouvernementale de l'après-Rebellion. Ils avancent l'idée que ces litiges étaient sans précédents et ont effectivement remplacé des pratiques officielles d'expropriation des terres appartenant aux rebelles et de compensation aux loyalistes. Ce recours aux tribunaux civils a maintenu et exacerbé les tensions sociales et politiques dans un comté déjà divisé dans ses réactions envers la Révolution américaine. Finalement, ces litiges sont utilisées afin d'examiner le bien-fondé des critiques à l'endroit de l'administration de la justice vers la fin du 18e siècle en Nouvelle-Écosse.

---

* Ernest Clarke is an independent historian whose book *The Siege of Fort Cumberland 1776: An Episode in the American Revolution* has recently been published by McGill-Queen's University Press. Jim Phillips is Associate Professor, Faculty of Law and Centre of Criminology, University of Toronto. We thank Philip Girard, Archibald Kaiser, and the anonymous reviewer for the Journal for their comments on an earlier verison. Support for the research was provided by the Wright Foundation for Legal Research, Faculty of Law, University of Toronto.

Introduction

In November 1776 a small band of pro-American residents of Cumberland County, Nova Scotia, led by Colonel Jonathan Eddy, opted decisively for the American side in the struggle with the British crown by laying siege to Fort Cumberland. Some 200 men, most of them Cumberland residents who had moved from New England a decade or so previously, were able to bottle up the garrison for a month or so. During the same period they took over effective control of local government. In doing so they displaced, and in some cases plundered and abused, the other significant immigrant fraction in the county, Yorkshire-born settlers who all took the loyalist side. The hope that this action would bring Nova Scotia onto the continental side was soon dashed, however, when a relief force arrived and together with the garrison easily dispersed the besiegers. Eddy's force broke and ran. A few were captured, and some 60 or so made it to the safety of New England, while most took advantage of an immediate amnesty offer from Lieutenant-Colonel Joseph Goreham, commander at Fort Cumberland, that promised his intercession for official pardons for those who laid down their arms. The county was quickly brought back under official British rule, although tensions remained high and only the presence of the military prevented a recurrence of rebellion.[1]

---

1. For the Cumberland rebellion see E. A. Clarke, *The Siege of Fort Cumberland 1776: An Episode in the American Revolution* (Montreal and Kingston: McGill Queen's University Press, 1995).

Official policy in the wake of the Cumberland rebellion proved remarkably lenient. Goreham's amnesty was honoured, and only a handful of men, captured before it was offered or who tried but failed to escape, were held and threatened with treason proceedings. Of these only two were tried and convicted of high treason, and they avoided the gallows by escaping from their prison cells.[2]

The fact that the armed rebellion was easily dealt with, and that the heavy hand of the law of treason was little in evidence, does not mean that the consequences of rebellion were short-lived, nor does it mean that retribution against the perpetrators was negligible. In fact, to concentrate only on the official use of the treason laws would be to miss a crucial aspect of the rebellion. The events of 1776 also precipitated a series of suits in the civil courts which began in 1778 and lasted for at least 30 years. A study of this civil litigation provides an opportunity to consider a theme largely untouched in the Canadian historical literature—the extent to which intra-community conflict can be played out in the civil courts. Political, economic and religious fora are the traditional ones discussed by historians when they examine such struggles. While Cumberland county saw community conflict aplenty in such areas, before and after 1776, that conflict also infused the legal system. Indeed, we would argue that the availability of that system for rebellion-related litigation was a principal contributor to the longevity of tensions in the Cumberland community.

I. *John Eagleson and Christopher Harper Go To Law, 1778-1780*

While few of Cumberland's loyalists had a good 1776, the Reverend John Eagleson, representative in Cumberland Township of the Society for the Propagation of the Gospel, had a particularly bad one. In November of that year not only were his house and lands seized for patriot use, and his goods expropriated and used or sold for the same cause, but he also found himself taken prisoner and conveyed to New England. There he was forced to reside until the early summer of 1778, when he was released.[3]

---

2. For the treason trials and related events see E. A. Clarke & J. Phillips, "Rebellion and Repression in Nova Scotia in the Era of the American Revolution" in J.B. Wright & F.M. Greenwood, eds., *Canadian State Trials Volume One: Law, Politics and Security Measures, 1608-1837* (Toronto: University of Toronto Press and Osgoode Society for Canadian Legal History, 1996).

3. For this see E.A. Clarke, "Cumberland Planters and the Aftermath of the Attack on Fort Cumberland" in M. Conrad, ed., *They Planted Well: New England Planters in Maritime Canada* (Fredericton: Acadiensis Press 1988) at 53-54. For Eagleson generally see E.A. Clarke, J. Phillips, & S. Waddams, "The Trials and Trial of John Eagleson" (unpublished ms., 1995) and G. Tratt, "John Eagleson" *Dictionary of Canadian Biography* (Toronto: University of Toronto Press 1966-), vol. 4 at 258-259.

He seems to have been the only Cumberland loyalist thus treated, and the cause may well have been his success in an earlier court case, decided in 1773, in which the local New England Planters Congregationalist church had lost its glebe lands to the Church of England presided over locally by Eagleson.[4] Whatever the reason for this forced exile, Eagleson was a very bitter man on his return. His resentment only increased when he was confronted by the fact that his house had been destroyed by the patriots.[5] He had indeed "sustained heavy losses by the rebels," and tried without success to obtain some official compensation.[6] He concluded that it was "a duty I owed myself to Endeavour to Recover, if possible, some part of my Property," and as a result filed a suit in the Halifax Supreme Court against seven patriots for damages totalling £700.[7]

Eagleson's action was probably started in mid-1778, although no formal proceedings were held until the court sat in Michaelmas Term (October-November) of that year.[8] His counsel was George Thompson, probably a loyalist refugee from the rebellious colonies and thus sympathetic to the cause of his clients.[9] Eagleson's pleadings complained that

---

4. For a detailed account of this see E.A. Clarke, "The Cumberland Glebe Dispute and the Background to the American Revolution in Nova Scotia, 1771-1774" (1993) 42 U.N.B.L.J. 95.
5. Letter of 4 July 1778, in Journals of the Society for the Propagation of the Gospel [hereinafter SPG Journals], Nova Scotia Archives and Records Management [formerly Public Archives of Nova Scotia and hereafter NSARM], Manuscript Group [hereinafter MG] 17, vol. 21, 330.
6. Eagleson to Chipman, 8 April 1788, Chipman Papers, New Brunswick Museum, [hereinafter Chipman Papers] F 1, Packet 6, No. 34, and Letter of 30 July 1779 in SPG Journals, MG 17, vol. 21, 670.
7. *Eagleson* v. *Oulton et al.*, NSARM, Supreme Court Records, Record Group 39, Halifax County [hereinafter RG 39], Series J, [Proceedings], vol. 3, 179; vol. 6, 83; vol. 98, 419, and Series C [Case Files], vol. 20. All details of the suit are from the case file unless otherwise specified. The action was tried in Halifax County because circuits to Cumberland County had been suspended in 1776 and were not renewed until 1782: see NSARM, Council Minutes [hereinafter Minutes], 30 April 1776, RG 1, vol. 189, and Bulkeley to Tonge, 23 Aug 1782, RG 1, vol. 136, 304. One factor in Eagleson's decision to use the civil courts in this way may have been the success of the crown in suing some patriot absconders for small debts (£6 and £8) in the previous year: see *R.* v. *Elijah Ayer Jr. and William Eddy* and *R.* v. *Elijah Ayer Sr. and William Maxwell*, RG 39, Series J, vol. 6, 40-41.
8. See Eagleson's later comment that "as soon as I returned home, I consulted counsel and entered my suit in the Supreme Court at Halifax." Eagleson to Chipman, 8 April 1788, Chipman Papers, F 1, Packet 6, No. 34. The defendants were first summoned to appear on 29 July 1778: see RG 39, Series J, vol. 98, 419.
9. Very little is known about Thompson, not even his date of admission to practise at the bar. However the Supreme Court proceedings books show that he first practised in Halifax from 1778, which was presumably around the time that he arrived there: see RG 39, Series J, vols. 1 and 3-8. He died in 1783: A.E. Marble, *Deaths, Burials and Probate of Nova Scotians, 1749-1799* (2 vols., Halifax: Privately Published, 1990), vol. 2 at 108.

in November 1776 the defendants had broken into his house, and damaged it and stolen food, furniture, farm implements, household goods, livestock, timber, clothing, books and miscellaneous other goods. The pleadings also complained of his confinement and transportation to "his majesty's rebellious colonies," where he "was imprisoned, insulted, maltreated and abused," and was "put to great expense to support and maintain himself and to secure and effect his liberation and escape."

Of the seven defendants selected by Eagleson, three—William Howe, Ebenezer Gardner, and John MacGowan—were among those who had decamped to New England following the lifting of the siege of Fort Cumberland. Howe was one of the most notorious rebels, one of only five men considered sufficiently beyond the pale to have been excluded by Goreham from his amnesty offer. He, as well as Gardner and MacGowan, was the subject of an outstanding treason indictment. The other four—Charles Oulton, Jesse Bent, John Fillmore and Robert MacGowan—had all also taken part on the patriot side but were still in Nova Scotia in 1778. Bent likely took immediate advantage of the amnesty, but Oulton, Fillmore and MacGowan did not and all spent time in Halifax jail in the early months of 1777. Fillmore obtained his release when he took the oaths of allegiance in April 1777 and MacGowan likely followed suit. Oulton, Fillmore's brother-in-law, escaped with the two men convicted of treason, was retaken, and was actually out on bail in 1778 with an indictment for treason still outstanding against him.[10]

Eagleson must have selected these defendants for two reasons. First, they were, as he put it, "most forward & Active in the Insurrection and the plundering of my House and Property." That is, it was not enough to show that he had suffered damage, he had also to show that the defendants were responsible. Second, and equally importantly, Eagleson needed to sue men with property, to be in a position if he won to "Recover ... some part of my Property out of the Estates of the Absconding Rebels."[11]

The defendants engaged Daniel Wood Sr. to argue their case, the most senior member of the local bar and probably its most experienced and accomplished litigator; he was also, probably not coincidentally, the man chosen the year before by Parker Clarke to defend him on a charge of high treason arising out of the rebellion.[12] In October 1778 a default judgment

---

10. Clarke & Phillips, *supra* note 2 at 180-184 and 189-190.
11. Letter of 30 July 1779, SPG Journals, MG 17, vol. 21, 670.
12. Wood was one of perhaps two lawyers who came with the first settlers to Halifax in 1749, and he was sworn in as attorney of the General Court in August 1750. In addition to his extensive court practice he acted as Clerk of the Peace for Halifax County for many years: see E.C. Wright, *Planters and Pioneers*, 2nd ed. (Wolfville, N.S.: Lancelot Press, 1982) at 293;

was entered against the three absconders, while the case against the other defendants was adjourned. A further adjournment was granted in January 1779, and although witnesses were summoned to attend a trial in April,[13] there is no record of it having ever taken place. What did occur in April 1779, however, was an assessment of Eagleson's damages and in the summer of 1779 he received a formal judgment in his favour for £700 damages and £22 costs against the three absconders, a sum that was rumoured locally to have been well in excess of what he had actually lost.[14] It was presumably his success in obtaining these judgments that caused Eagleson not to pursue the case against the other defendants, or another suit he had begun in the summer of 1778, against patriots Mark Patton Sr. and Mark Patton Jr., for £300 in damages.[15]

In the other major suit, launched in 1779, Christopher Harper, a prominent Cumberland loyalist and justice of the peace (J.P.), also engaged Thompson's services, to sue a total of nine patriots.[16] Like Eagleson he selected men prominent in the rebellion, and also like Eagleson he chose both absconders and those who had stayed and officially rehabilitated themselves after the lifting of the siege. The former group comprised three men: Parker Clarke, resident of Fort Lawrence, farmer, doctor, a leading patriot, and one of the two men convicted of high treason in April 1777; and Simeon Chester and Elijah Ayer Sr., both members of Cumberland's ruling "committee of safety" in 1776, who were among the group of Cumberland patriots who made good their escape in December 1776 and who thus had treason indictments waiting for them if they returned. The latter group comprised Samuel Smith, William Jones, Mark Patton Sr., David Forrest, John Simpson, and William Lawrence. Simpson had been in Halifax jail in April 1777 under

---

J.B. Cahill, "The Origin and Evolution of the Attorney and Solicitor in the Legal Profession of Nova Scotia" (1991) 14 Dal. L. J. 273 at 279; RG 39, Series J, vols. 1 - 11, *passim*; Petition of Daniel Wood Sr. to Assembly, 12 March 1789, RG 5, Series A, vol. 2, No 143. For Wood's defence of Clarke see Clarke & Phillips, *supra* note 2 at 183.

13. Witnesses were called for 26 April. They were principally Cumberland loyalists: Christopher Harper, William Duncan, Richard Fritton, William Milligan, Joseph Cousins, and Thomas Robinson.

14. Order of 3 August 1779, RG 39, Series J, vol. 6, 83. Some 11 years later Anglican Bishop Charles Inglis noted that in a conversation with an Annapolis lawyer "many particulars were ... mentioned of his [Eagleson] recovering damages from disaffected persons for his losses in the Rebellion at the expense of truth." Journal of Charles Inglis, 16 June 1790, MG 1, vol. 480.

15. *Eagleson* v. *Patton and Patton* (1778), RG 39, Series J, vol. 3, 181, and vol. 98, 422. Information on this case is very scanty; all we know is that the summons was issued to the Pattons on 28 August 1778 but was not returned into court, perhaps because they could not be found. However, Mark Patton Sr. was available a little later to be sued by Harper; see *infra* note 16.

16. This case can be followed in RG 39, Series J, vol. 6, 126-127; vol. 99, p. 9, and in Series C, vol. 22. The following account is taken from the case file unless otherwise stated.

indictment for treason, but most of the others had likely taken the oaths immediately after the siege.[17] The fact that Harper's suit was launched in April 1779 suggests that Eagleson's success may have served as something of an inspiration to him.

Harper sued all nine defendants on two grounds. One writ was issued for "trover and conversion."[18] It complained that in November 1776 a large variety of Harper's goods—livestock, stored grain, farm implements, and household furniture and articles—had ended up in the possession of the defendants, who had "converted the said goods and chattels to their own . . . use." Harper claimed that the goods converted were worth £1,366 and requested damages of £1,500. A second writ was issued in "trespass vi et armis," and accused the defendants of having been responsible for pillaging Harper's farm on 6 November, 1776, the day that an open armed rebellion began, and on "divers other days and times between that day and the first day of December."[19] The writ complained that they had broken into his house, frightened and driven away his family, pillaged his goods, torn down buildings and taken away building materials, and burned some of the structures. On this writ he sued for a total of £2,000. As with Eagleson, there is evidence that Harper's demands were excessive.[20]

All the defendants—those still in the jurisdiction and the absconders—denied the allegations through their counsel, Gerald Fitzgerald.[21] Delays again ensued, with the result that the trial did not take place until July

---

17. See Clarke & Phillips, *supra* note 2 at 181-182 and 189-190.

18. The action in trover was used in any circumstances in which the defendant came into possession of personal property belonging to the plaintiff; nothing turned on how it got there, indeed the fiction in trover was that the property had been "found" by the defendant—all the plaintiff had to prove was the "conversion," the use by the defendant of the property for him or her self. See J.H. Baker, *An Introduction to English Legal History*, 3rd ed. (London: Butterworths, 1990) at 449-451, and J.B. Ames, "History of Trover" (1897) 11 Harv. L. R. 277.

19. "Vi et armis" translates literally as "with force and arms." This was a form of action used when an interference to person or property was perpetrated "against the peace," with violence. It was used in all trespass actions before the late seventeenth century, even when this was merely a fiction and the action was really in negligence of some kind. See Baker, *ibid.* at 71-75 and 464-467.

20. "[I]t was well known that the Account exhibited by . . . Harper of his Losses was false and fraudulent." Answer of John Bent, in NSARM, Chancery Court Records, RG 36, Series A, No. 82.

21. Default judgment forms in the case file suggest that Thompson attempted to obtain judgment against the absconders in January 1780, but he must have been unsuccessful. Fitzgerald may, like Thompson, have been a loyalist refugee, for he was called to the Nova Scotia bar in October 1778. He was an active litigator in 1779-1780 and again in 1784-1786. He died in 1788: RG 39, Series M, vol. 24A; RG 39, Series J, vols. 5-8; *Nova Scotia Gazette*, 2 Dec. 1788.

1780. By that time Simpson's name had disappeared from the list of defendants, although the records contain no clue as to why. On July 25, 1780 six of the defendants—Clarke, Smith, Ayer, Jones, Chester and Lawrence—were found liable in both trover and trespass, with no liability attaching to Patton or Forrest. Damages were set at £585 for both the trover and trespass suits, plus costs of £42 16s for the former and £36 5s for the latter, for a total of almost £1,250.

Thus while the Cumberland loyalists did not have the satisfaction of seeing large numbers of their political enemies convicted of treason in the criminal courts, two leading members of that loyalist community won substantial victories over those enemies in the civil courts. Yet we cannot see these as simply "ordinary" civil proceedings. While the suits would have been unexceptionable responses to the actions of the defendants outside the context of a rebellion, given that context they were somewhat unusual. Two particular features of them should be noted. In the first place the men who had either been convicted of treason (Clarke) or indicted but never tried because they had escaped (Ayres, Chester, Gardner, Howe, and MacGowan) were all liable to see their property forfeited to the crown, either as a result of conviction or as a consequence of outlawry.[22] Yet large-scale confiscations do not appear to have taken place; instead unofficial actors were able to achieve the same thing. This represented a departure from prior British practices; substantial confiscations of property followed the English Civil War, the Cromwellian conquest of Ireland, and the Jacobite rebellions.[23]

Secondly, in the case of those who had repented of their part in the rebellion and obtained an amnesty, the amnesty was substantially devalued through the exaction of private retribution in the civil courts. The effective contradiction here was not lost on the defendants, who at some point, probably in early 1779, tried to head off the litigation by invoking the amnesty. They were even able to persuade Goreham to intercede on

22. We have discussed elsewhere the fact that outlawry proceedings against Cumberland absconders were started but not taken very far, probably as a result of British policy: see Clarke & Phillips, *supra* note 2 at 192-195.

23. See D. Pennington, "The War and the People" in J. Morrill, ed., *Reactions to the English Civil War 1642-1649* (London: MacMillan, 1982); D. Underdown, *Somerset in the Civil War and Interregnum* (Newton Abbott: David & Charles, 1973) at 160-161; A. Fraser, *Cromwell: Our Chief of Men* (London: Weidenfeld & Nicolson, 1973) at 497; L. Gooch, *The Desperate Faction: The Jacobites of North-East England 1688-1745* (Hull: University of Hull Press, 1995) at 98.

their behalf with the Halifax authorities.[24] This intervention produced little more than another lawsuit,[25] however, for the Halifax authorities rejected Goreham's argument unequivocally: "The petitioners may be entitled by your declaration and by several proclamations to their Liberty and the repossession of their property and to pardon for offences they committed against the Crown," he was told, but not to "an exemption for the injuries they may have done to private people." For the Governor to intervene would be to exercise "an authority arbitrary and illegal" for "the course of Law cannot be stopped and the injured have a right to seek remedy."[26]

This refusal to intervene is instructive. In part it may have derived from the stated motive, an unwillingness to interfere with the civil courts. While contemporary legal literature provides no insights into whether a government could, or should, have intervened,[27] there was a precedent for doing so in the indemnity measures of the Commonwealth.[28] Moreover, the Supreme Court clearly had the power to prevent the cases going forward, just as they later stayed all executions based on the litigation.[29] Thus this explanation likely conceals a clear policy choice. Decisions to prosecute or not to prosecute for treason and other lesser offences, and whether to confiscate the property of rebels, were matters of government

---

24. According to Eagleson this intervention occurred "shortly after I had entered my suit," and he found it scandalous that Goreham had dared to support the defendants, to "in a dark and Underhand manner . . . Use all his Influence & Interest . . . to have my suit laid aside." Letter of 30 July 1779, in SPG Journals, MG 17, vol. 21, 670 and 671.

25. In June 1779 Goreham sued Eagleson for "scandal and defamation," asking for £5,000 in damages. The case does not seem to have proceeded past the initial filing stage: *Goreham v. Eagleson*, RG 39, Series J, vol. 99, 10, and Series C, vol. 20. Doubtless this resulted from Eagleson's complaining about Goreham's intervention, and perhaps particularly from suggestions by the irascible Eagleson that Goreham's loyalty was questionable. In the same letter home in which he recounted the argument over the terms of the amnesty Eagleson stated that he "must observe" that Goreham was "*born & Educated* in *New England*," and he perhaps was less oblique in making statements locally. Letter of 30 July 1779, in SPG Journals, MG 17, vol. 21, 671 (emphasis in original).

26. Bulkeley to Goreham, 8 June 1779, RG 1, vol. 136, 272-273. The court records indicate that the summonses were served in mid-May 1779 on those still in the colony, and while there is no record of letters to Halifax, the timing of the government's response suggests that the defendants immediately responded by invoking the amnesty.

27. Neither Sir William Blackstone's *Commentaries on the Laws of England* (4 vols., Oxford: Clarendon Press, 1765-1769), nor any of the other contemporary works we consulted, had anything to say on this question, suggesting that it had not seriously been raised.

28. Both parliamentary and royalist forces were prevented from taking actions at common law. See J.S. Morrill, *The Revolt in the Provinces: Conservatives and Radicals in the English Civil War 1630-1650* (London: Allen and Unwin, 1976) at 76.

29. *Infra*, text accompanying note 81.

policy, not issues that would normally be left to a "course of Law." It was perfectly plausible for the former patriots to paint the litigation by loyalists as an attempt to subvert the general amnesty policy, and thus for the authorities to have justified an intervention. There is a fine line between "offences against the crown" and "injuries done to private people," a line so fine that it often becomes invisible. Presumably the authorities would not have countenanced criminal prosecutions or damage suits based on the wounding of men who had fought on the loyalist side. It could equally well be argued that amnesty for acts of rebellion should have included amnesty for property destruction or damage caused in the course of rebellion. Instead, by not stopping these private suits, government was effectively permitting loyalist claims to be charged directly to individual rebels—indeed in some cases to those rebels who had returned to their allegiance.

Thus one must conclude that the government approved of the activities of Eagleson and Harper, and perhaps even saw it as an opportunity to "punish" a rebel community which had, for a variety of reasons, largely escaped without penalty. Certainly Chief Justice Bryan Finucane, who presided in both cases, appears to have shown much sympathy for the plaintiffs.[30] The civil litigation also compensated loyalists, and without cost to government. If it was considered necessary to reimburse those who had lost property during the rebellion, some form of official compensation scheme could have been arranged, similar to those that had been used in the past,[31] or those that would be used in the future—for example, the Loyalist Claims Commission put into place after 1783 or the rebellion losses legislation in the Canadas in the 1840s.[32] This was not done, and indeed the whole imbroglio might have struck some Halifax officials as a very welcome development, for it allowed loyalists to be compensated, government to pursue the official policy of leniency, and some "punishment" to be meted out to rebels.

II. *Executing the Judgments and Retaliatory Patriot Litigation, 1779-1780*

The loyalists may have won in court, but that was by no means the end of the matter. Judgments needed to be executed, and both Eagleson and Harper wished to take the lands of the defendants to satisfy their claims.

---

30. Eagleson attributed his success "in great measure" to the "Abilities and knowledge" of Finucane: Letter of Eagleson, 30 July 1779, in SPG Journals, MG 17, vol. 21, 671.

31. See Underdown, *supra* note 23 at 161, for compensation given to the town of Taunton and certain individuals.

32. See the discussion of the Loyalist Claims Commission, *infra* note 88.

In England this was impossible, for at common law land could not normally be seized in execution for a money judgment, although the income from land could be taken.[33] However by both an imperial statute which made land in the colonies available for seizure, and local law, this could be done in Nova Scotia.[34] This did not mean that the land could simply be seized, for there was a complicated procedure to try to ensure that the acquisition of a debtor's title by a creditor was a last resort. First, real property could only be taken if the debtor had insufficient personal property to cover the debt. Second, if land was to be attached, the provost marshall (the local equivalent of the English sheriff), was required to have the lands appraised, both as to their value and as to the rents they yielded, by three "discreet indifferent men," one chosen by the debtor, one by the creditor, and one by himself. If the appraisers believed that the rents of the land over two years would be enough to cover the debt (including costs and interest), then execution would be levied on the rents only. Third, only if the rents by themselves were not, in the opinion of a majority of the appraisers, considered sufficient to pay the debt could the land itself be seized—part of the land if it could be partitioned, all of it if not.[35] In this instance the provost marshall was to deliver title to the creditor.[36] Fourth, such delivery of title was subject to an "equity of redemption," a right in the debtor to pay the debt in full within two years and take back the title.[37] Finally, it should be noted that local law distinguished between situations where the land was appraised as being worth more than the value of the debt, and those where it was not. In the former case, once the two years had passed, the land had to be sold by public auction conducted by the provost marshall and accounts adjusted accordingly.[38] By impli-

---

33. Baker, *supra* note 18 at 78.

34. The English statute is at 5 Geo II, c. 7 (1732). The Nova Scotia legislation, passed by the colony's first assembly, is *An Act for Making Lands and Tenements Liable to the Payment of Debts, Statutes of Nova Scotia* [hereafter S.N.S.] 1758, c. 15. This statute was amended later, and relevant amendments are discussed below.

35. A later amending statute stipulated five appraisers to be appointed if only part of the land was to be taken, and required that they take steps to prevent the retained lands being rendered relatively worthless: *An Act to further explain and amend . . . An Act for Making Lands and Tenements Liable to the Payment of Debts*, S.N.S. 1773, c. 4, s. 2.

36. Title could also be taken after two years if the appraisers' opinion that rents would suffice turned out to be incorrect.

37. The 1773 amending Act contained another provision which could have turned out to be very relevant to persons concerned in these cases. It stated that "femes covert, persons non compos mentis, imprisoned, or in captivity, minors, or persons out of the Province" had six years after the end of their legal disability in which to sue for recovery of the equity of redemption: *An Act to further amend and explain . . .*, S.N.S. 1773, c. 4, s. 3.

38. See *An Act to further explain and amend . . .*, S.N.S. 1773, c. 4, s. 1, which elaborated on the notice required for such sale.

cation, land appraised as worth less than the debt could stay in the name of the creditor after the two-year period.[39]

All of this explains Eagleson's concern, expressed as soon as he had won his case, that "whether I shall ever be able to levy this sum is uncertain as their Estates cannot be sold in less than two Years after Judgment."[40] His fears were misplaced. In December 1781 a public auction was held in Halifax to dispose of the "Sundry real Estates" of How, Gardner and MacGowan, which had been "taken by Execution at the Suit of John Eagleson . . . , the term of Redemption . . . being expired."[41] Eagleson himself bought the How lands, with Cumberland loyalist J.P. Robert Scott purchasing those of Gardner.[42]

Harper had more problems, primarily because he found himself confronted with "retaliatory" litigation by the local patriots, in particular by one John Bent, who had been a member of the county's committee of safety and been indicted for treason although he formally returned to his allegiance in June 1777. In 1779, after Harper's suit was entered but before it had been decided, Bent sued two of the defendants in *Harper* v. *Ayer et al*, Clarke and Chester, in the Inferior Court of Common Pleas for Cumberland county, sitting at Fort Lawrence.[43] Common Pleas was the lower civil court, organised by county and by districts within counties and presided over by non-legally trained locally-based judges.[44] The ostensible basis of Bent's lawsuits was that he had lent money and provided supplies to Clarke and Chester's families for their support after the men had absconded or been captured, had billetted the families for a time, and had helped them with passage money when allowed to join their adscording husbands. Bent was brother-in-law to Simeon Chester, Chester having

39. At that point the creditor could take out another execution against any remaining property of the debtor, or if there was none, have the debtor committed to prison.

40. Letter of Eagleson, 30 July 1779, in SPG Journals, MG 17, vol. 21, 671.

41. *Nova Scotia Gazette*, 25 Sept, and 2 and 16 Oct, 1781.

42. NSARM, Register of Deeds, RG 47, Reel 555, Nos. 173 and 185.

43. Unfortunately the records of the Fort Lawrence Inferior Court of Common Pleas have not survived, but there is ample testimony as to the existence and timing of Bent's lawsuits: see the Judgment Roll, Petition of Thomas Watson, and Answer of John Bent, all in RG 36, Series A, No 82, from which all information about this case is taken unless otherwise specified. See also the depositions of Christopher Harper, William Black, and Thomas Robinson, 23 June 1789, in *ibid.*; and *The Reply of Messrs Sterns and Taylor to the Answers Given by the Judges of the Supreme Court of Nova Scotia* . . . (Halifax, 1788) at 57.

44. There is unfortunately no comprehensive study of the operation of the Courts of Common Pleas in Nova Scotia. A useful introductory survey is contained in J.B. Cahill, "Richard Gibbon's 'Review' of the Administration of Justice in Nova Scotia, 1774" (1988) 37 U.N.B.L.J. 34.

married his sister Elizabeth. Bent was successful, in early July 1780 receiving judgments against Clarke and Chester for c. £100 each.[45]

Bent therefore had claims against Clarke and Chester's lands and other property that were dated prior to those obtained by Harper in the Halifax Supreme Court. Some contemporaries argued that this litigation was both collusive and based on spurious claims, all designed to prevent Harper from seizing the absconders' lands. As the loyalist J.P. William Black put it a few years later in a deposition in one of the later cases in this saga, "he was . . . of opinion that the accounts then given in by John Bent against Simeon Chester was done in a collusive manner to cover said estate for Chester."[46] Assessing the validity of Bent's claims is made difficult by the fact that most witnesses and commentators, in 1779-1780 and later, can be identified with the loyalist or the patriot side. However, the record is fairly clear about the fact that Bent did indeed incur expenses in helping the families of Clarke and Chester in the months and years following the failure of the siege. Testimony to this effect comes from friends of Bent and former patriots like Alpheus Morse, Ephraim Church, and Bent's brother Jesse. Morse, for example, stated that Bent "supplied Mrs. Chester and Mrs. Clark with hay, wood and other things for the support of their families."[47] It was not only Bent's former comrades in rebellion who acknowledged that he had helped the Chester and Clarke families; members of the loyalist community like John Atkinson of Fort Lawrence and J.P. Thomas Robinson also stated that, in Robinson's words, after Chester absconded Bent "had supplied Mrs. Chester . . . with some necessaries." Atkinson deposed that after Clarke was captured "Mrs. Clark was sometime with Captain Burns in the garrison," and that Bent "paid him about £30 on account of Mrs. Clark."[48]

---

45. Against Clarke for £91 16s 11d and against Chester for £104 1s 2d, in both cases for debt and costs combined.

46. Deposition of William Black, 23 June 1789, RG 36, Series A, No 82. Thomas Lusby of Amherst also insisted that "the suit instituted by John Bent was done in a collusive manner in order to cover their property," and he also noted that Chester was "a man as clear of debt as any of his neighbours" and had "as good a stock as any of his neighbours": Deposition of Thomas Lusby, 24 June 1789, *supra* note 43. For others who argued that the entire proceedings were fraudulent, see Petition of Thomas Watson, in *ibid.*, and the assertions of Jonathan Sterns, in *Collection of the Publications Relating to the Impeachment of the Judges of His Majesty's Supreme Court of the Province of Nova Scotia* (Halifax, 1788) at 20.

47. Depositions of Alpheus Morse, 24 June and 3 July 1789, of Ephraim Church, 24 June 1789, and of Jesse Bent, 25 June 1789, RG 36, Series A, No 82. Church claimed that in 1779 he had "delivered by order and on account of John Bent . . . goods to the amount of £25 or thereabouts to Mrs. Chester." Jesse Bent acknowledged that some of the money came from him.

48. Deposition of John Atkinson, 25 June 1789, and Deposition of Thomas Robinson, 23 June 1789; see also Deposition of Samuel Gay, 24 June 1789, *ibid.*

Thus it seems highly probable that Bent had indeed advanced money and goods to the two families, a conclusion supported by the fact that it would have been his natural duty to help his sister's family and by the fact that he likely assisted other absconders' families as well.[49] Indeed a substantial number of the patriot community in Cumberland suffered greatly in the aftermath of the siege, with crops and stock plundered.[50] Perhaps the amounts claimed by Bent were inflated,[51] in order to prevent them being satisfied by any personal property or by rents alone—that is, to at least tie up Clarke's and Chester's assets for the two years that had to pass before their lands could be sold, for at that point any surplus was seizable by other creditors.[52] The fact of some assistance nevertheless appears undeniable. In addition, it should also be noted that Bent had to persuade a loyalist bench of the validity of his claims. The lack of court records means that we cannot say precisely who heard the case, but in 1779 the four men entitled to serve as I.C.C.P. judges were Edward Barron, then commander at Fort Cumberland, and Yorkshiremen James Law, Charles Dixon, and, interestingly, Harper.[53] It seems rather unlikely that Harper actually sat on this occasion, but those who did were his friends and political allies. They would not have been sympathetic to former patriots—Dixon, for example, had seen his house plundered by the rebels in 1776 to finance the campaign.[54] Perhaps they judged the case as simply being one between a repentant former rebel—Bent—and unregenerate traitors like Clarke and Chester. More likely they were little more fond of Bent than of the others, but saw no way within the law to deny his claims.

---

49. Ephraim Church and Robert Sharp both deposed that Samuel Sharp (Robert's brother) owed Bent some £82 6s, of which Church himself had paid £43 to Bent. In addition, in 1779 loyalist James Law apparently paid Sharp £23 "on the account of John Bent": Depositions of Church, Sharp, and Law, all 24 June 1789, *supra* note 47.

50. Depositions of Alpheus Morse, 24 June and 3 July, and of Jesse Bent, 25 June 1789, *supra* note 47. For suggestions that there were still some cows on the Chester farm in 1778-1779 see depositions of John Atkinson, 25 June 1789, and of Rhoda Terrace, 3 July 1789, *supra* note 47. For the economic and political fate of the Cumberland rebels' families after the siege, see Clarke & Phillips, *supra* note 2 at 192.

51. Part of Bent's claim was based on Morse having worked on the Chester lands and having received payment for that from Bent. Deposition of Morse, 3 July 1789, RG 36, Series A, No 82.

52. Harper later claimed that this was actually the case despite any inflation: "at the time of his [Bent] taking out the writs he might have satisfied [them] . . . on . . . personal estate which at that time was very considerable," Deposition of Christopher Harper, 23 June 1789, *ibid.*

53. See the commissions issued to these four men in RG 1, vol. 168, 421, 469, 541 and 549.

54. Clarke, *supra* note 1 at 180.

That the debts were genuine does not mean that the litigation was not launched, in the words of deputy provost-marshall for Cumberland Thomas Watson, who we will shortly see was very much a victim in all of this, "in order to defeat and defraud . . . Christopher Harper and . . . prevent him from obtaining satisfaction for the damages he had sustained."[55] It seems highly unlikely that Bent would have sued his friend and relation by marriage in different circumstances, but in taking advantage of the legal processes open to him he was merely being as opportunistic as Harper. Nor does the genuineness of the debts mean that the proceedings to obtain satisfaction of them were entirely above board. They were surely "collusive" in the sense that probably nobody defended Bent's actions. Indeed, there would have been nobody available to defend them, for a married woman had no legal personality separate from her husband, and could not contract debts on her own behalf—anybody dealing with a married woman contracted with her husband. Thus the money and services given to Judith Clarke and Elizabeth Chester represented debts of Parker Clarke and Simeon Chester respectively. In addition, the actions were also probably collusive in the sense that the wives provided Bent with the evidence he needed; there is some confusion over the receipts given to Bent, but it does nonetheless seem clear that they were not signed until July 1779, well after many of the advances were made but only just after Harper had launched his suit.[56]

Having found for Bent, early in July 1780 the court issued him writs of attachment against the Clarke and Chester lands (attachment designates property as being in the custody of the court for the purpose of satisfying a debt).[57] These were served by Watson on July 5 (Clarke lands) and July 8 (Chester lands). News of all this quickly reached Halifax, before the conclusion of Harper's suit later in the month. As soon as the jury had given its verdict in favour of Harper, Thompson successfully moved for Bent's writs to be set aside, Chief Justice Finucane apparently stating that he believed that the Common Pleas suits were collusive. On July 27 the Supreme Court issued an order, stating its findings that the suits had been started "collusively to cover the property" of the defendants and that judgment had been obtained "by deceit of the

55. Petition of Thomas Watson, RG 39, Series A, No 82.

56. Deposition of Alpheus Morse, 24 June 1789, *ibid.*

57. This account of the proceedings in both courts is taken from documents in the case file in *Harper* v. *Ayer et al*, RG 39, Series C, vol. 22; Short Brief of Cause, and Deposition of Hance Baker, 25 June 1789, in RG 36, Series A, No 82; and *Collection of the Publications*, *supra* note 46 at 20.

parties." It ordered that no lands should be seized based on Bent's writs and that "writs of *certiorari* [should] . . . go to the . . . inferior court . . . to remove all records" of "all . . . causes and plaints instituted against any of the present defendants" into the Supreme Court.[58]

This was a strange action by Finucane. He appears only to have heard from Harper's counsel, Thompson, and he issued the order preferring Harper's claims to Bent's at exactly the same time that he ordered the Common Pleas records to be brought up by *certiorari*—yet it was on this record that he should have made his decision on the validity of Bent's case. As we have seen, Bent's action was opportunistic but probably not fraudulent. It appears likely, therefore, that Finucane was very sympathetic to the attempts by 1776 loyalists to make good their losses, and happy to bend procedural rules a little to that end. In any event, the order was given to Harper, along with writs of execution dated 31 July 1780 to satisfy both his judgments.

Harper took the documents to deputy provost-marshall for Halifax William Shaw, obtained from him deeds transferring possession and title to Harper subject to the equity of redemption and an order to Watson to prefer Harper's claims over Bent's. So armed, Harper raced off to Cumberland, arriving there as the Clarke and Chester lands were being appraised for Bent, under the supervision of Watson.[59] Harper presented Watson with the Supreme Court's order and the lands were then appraised again, this time for Harper.

Events moved swiftly thereafter. We do not know what the appraisals said,[60] but we do know that property stated by Shaw to be worth almost £700 was seized for Harper; most of this represented the value of lands and fixtures seized (£583), with the rest made up of personal property taken and sold. By saying that the lands were seized we mean that deeds were given to Harper which still allowed the debtors to retrieve the land by paying in full what was owed. Not only were the lands and personal property of Clarke and Chester taken in this way, but those of Smith,

---

58. *Certiorari* literally means "to make certain," and is one of the prerogative writs. It was used for a higher court to review the proceedings of any body acting judicially: see Baker, *supra* note 18 at 170-172; and L.L. Jaffe & E.G. Henderson, "Judicial Review and the Rule of Law: Historical Origins" (1956) 72 L. Q. R. 345.

59. For the appraisal process, and the disputes surrounding it, see Petition of Thomas Watson, Depositions of Thomas Robinson, 23 June, of William Black, 23 June, of Christopher Harper, and of Alpheus Morse, 24 June 1789, in RG 36, Series A, No 82.

60. Other much later accounts suggested that the Clarke lands were worth, £4 per annum, those of Chester £10 per annum. These figures for rent, of course, do not indicate what the selling value would have been. Depositions of Thomas Lusby, 24 June, and of John Atkinson, 25 June 1789, *ibid.*

Lawrence and Ayer were likewise acquired. The relevant values for lands and fixtures seized were: Clarke, £132; Smith, £131 6s; Chester, £100; Lawrence, £100; and Ayer £160. According to Shaw, £642 3s of the total taken by execution was enough to satisfy the damages plus costs in the trespass action, with £47 3s going towards the judgment in the suit in trover and conversion.[61]

At various times thereafter at least some of these lands were sold by sheriff's sale following the expiry of the redemption period. Smith's property was bought by loyalist J.P. Charles Dixon in 1785, Clarke's went in the same year to Roger Robinson, son of J.P. Thomas, and Chester's was acquired at an unknown time by one William Freeman.[62] There is no evidence about what happened to the other lands.

III. *"Reduced to Wretched Indigence": Law, Politics and Power in Cumberland, 1780-1785*

Bent's attempts to stop Harper wreaking economic vengeance on the former patriot community had failed, and apparently shortly thereafter he decamped to New England and stayed there until after the passage of a general amnesty in 1783.[63] His initial success may have persuaded others to follow his example, but there is only the slimmest evidence of that;[64] certainly his action was the only one by patriots which created a problem for the enforcement of loyalist claims in the 1780s.

Bent left behind him a community increasingly fractured, and one in which many members faced ruin. Not only did Harper's and Eagleson's lawsuits impoverish a number of people, their success encouraged others to go to law as well. In 1782 an inquiry into the state of the county reported that "many inhabitants who took an active part with the rebels . . . during

---

61. *Harper* v. *Ayer et al*, RG 39, Series C, vol. 22.

62. RG 47, Reel 555, Nos 340 and 360; Deposition of James Watson, 3 July 1789, and Defence of John Bent, RG 36, Series A, No 82.

63. The amnesty statute is at S.N.S. 1783, c. 3. The assertion that Bent returned only after the amnesty is from Jonathan Sterns in *Collection of the Publications*, *supra* note 46 at 20, who claimed to be informed of it by Watson. It seems unlikely that this would have been the reason for Bent's return, for he had taken the oath of allegiance and was not under any threat of treason proceedings. He may, however, have been induced to return by the passage of the 1783 statute to adjust litigation losses, discussed below in this section.

64. One such suit may have been *Sharp* v. *Allen and Chester* (1778), which has come to our attention only because the Supreme Court issued a writ of error in the case in 1778: RG 39, Series J, vol. 98, 423. But it is rather early to be part of a retaliatory strategy. The only other evidence for additional suits comes from Harper's later assertion that "[t]here were several law suits commenced . . . against the people that had been in arms . . . on purpose to cover and conceal their effects for making good the damages they had done the King's Subjects": Deposition of Christopher Harper, 23 June 1789, in *Watson* v. *Bent*, RG 36, Series A, No 82.

the time of the invasion in 1776 . . . have since been harassed by law prosecutions at the suits of Christopher Harper, John Eagleson and others for damages . . . sustained in the general devastation made . . . by both rebels and the British troops." The result was that "many . . . had had their whole property seized and taken from them" so that they and their families were "destitute of every support" as a result. Moreover, others lived "under the Terror" of "the same Persecution" and "the continual dread of being reduced to a Wretched Indigence."[65] Such comments echo the complaints of one former rebel, John Starr, who in 1779 was sent to Nova Scotia by General Gates as a spy and who complained then that "[m]any who are Friends to America have been prosecuted in Halifax and judgement recovered against them in a very unjust manner by which themselves and Familys are ruined."[66] The rebellion may have been over, and official retribution mild. But the legal system was yoked to a substantial and long-lasting private retribution process.

Other evidence clearly indicates that there were a variety of suits other than the major ones we have examined, and the existence, if not the results, of many of them can be traced in the court records. The earliest person to follow Eagleson's lead appears to have been Robert McClintock, who successfully sued perhaps as many as 10 former patriots, most of them members of Eddy's Pictou contingent.[67] But most cases appear to have been started in 1780-81 after Eagleson and Harper had so spectacularly shown the way. Joseph Cossins sued 11 former patriots for £1,000 in damages, and while the court records do not indicate the result of the case, Cossins did attach and then sell by public auction lands that once belonged to one of the defendants, Josiah Throop.[68]

---

65. Report of Supreme Court Judges Isaac Deschamps and James Brenton, 8 Sept 1782, RG 1, vol. 221, No. 61.

66. John Starr to John Allan, 18 May 1779, in F. Kidder, *Military Operations in Eastern Maine and Nova Scotia During the Revolution* (Albany, N.Y.: Joel Munsell, 1867) at 81. In fact Starr's comments likely related only to the actions by Harper and Eagleson.

67. The record is a little confusing on this. In August 1779 eight men—Nathaniel Reynolds of Amherst, Benjamin Allen, Richard Jones, and Jonathan Bramble of Baie Verte, Cumberland County, and Daniel Earle, James Watson, Joseph Horton, and Dr. John Harris of Pictou—apparently had their property formally attached in consequence of McClintock's action for trespass in which he claimed damages of ,1,000: RG 39, Series J, vol. 99, 22. Of these only the case file for *McClintock* v. *Earle* (1779) could be located, and it includes a court order for the sale of Earle's property by public auction. However, the same result was reached in two other cases for which there are case files, *McClintock* v. *James Fulton* (1779) and *McClintock* v. *Matthew Harris* (1779): RG 39, Series C, vol. 20.

68. RG 39, Series C, vol. 21, and Series J, vol. 99, 71; RG 47, Reel 555, No 77. The other defendants were Alpheus Morse, Robert Foster, William Maxwell, Nehemiah Ayer, Samuel Hicks, John Fillmore, Timothy Copp, Mathew Dickey, Elijah Freeman and Elijah Freeman Jr. Most of these men had fled to New England after the siege, although some, including Morse, returned to Cumberland later.

Perhaps the most active litigant in these years was William Allan, an extensive landowner in Cumberland county, successful Halifax businessman, and father of rebel leader John Allan although he remained staunchly loyal and disowned his son. In 1781 he sued over a dozen former patriots, including Charles Oulton, a defendant in Eagleson's suit, and Obadiah, the by-then deceased brother of Elijah Ayer Sr., in trespass for plundering his property and destroying his buildings. He demanded damages of £2,000. Ironically Allan's lawyer on this occasion was not Thompson, who represented the other loyalists, but Richard J. Uniacke, who had taken part in the rebellion on the patriot side, been captured, and, in circumstances that are somewhat mysterious, obtained his release.[69] Six of the defendants were personally served with a summons in September 1781, but Watson could not serve the others because five had absconded, two were dead, and one was found not to exist. Unfortunately there is no further record of the case.[70] Allan also launched another action, *William Allan* v. *Robert MacGowan and Benjamin Reynolds*, for £500.[71] Allan also, it should be noted, had earlier sued some of the fort's 1776 defenders as well, winning an arbitrated award of over £400.[72] His actions were quite legitimate in that there is evidence that his property,

---

69. For Uniacke's role in the Eddy rebellion and his fate thereafter see Clarke & Phillips, *supra* note 2 at 180 and 191.

70. For all of this see *Allan* v. *Ayer et al.*, RG 39, Series C, vol. 23, and Series J, vol. 99, 78. In addition to extensive tracts of farmland, Allan's property in Cumberland township consisted of a "mansion house," eleven other "houses," and a number of barns and other structures; descriptions of the property appear in the case file and in John Allan's Memorial to Congress, 26 March 1800, RG 1, vol. 364. Those served were Oulton, Elijah Freeman Sr, Elijah Freeman Jr, Israel Thornton, Gideon Smith Sr, and Gideon Smith Jr. Zebulon Roe and Robert Forster, major players in the events of 1776, were not in the jurisdiction, nor were Atwood Fales, John Starr, or Nathaniel Reynolds. Amasa Killam and Obadiah Ayer were dead, and Allan apparently sued a non-existent person, Thomas Thornton. Josiah Throop's name also appears in one of the sources but not the other.

71. RG 39, Series J, vol. 99, 173.

72. In 1779 Allan sued at least six men who had been members of the Fort Cumberland garrison in 1776: Goreham, Major Thomas Batt, J.P. James Law, engineers William Spry and John Collett and Philip Baylie. He pleaded damages done to his house and lands, and for plunder, and his demands ranged from £1,500 from Batt to £100 from Baylie. On this occasion Allan was, like other loyalists, represented by George Thompson, while the attorney for at least some of the defendants was solicitor-general James Brenton. While no result appears to have been reached in the suits against Batt, Baylie, Collett and Law, the claim against Goreham went by consent to arbitration in April 1780. The arbitrators set the total value of goods taken from Allan and used for the fort at £407 and ordered that "as the aforesaid materials were applied to the service of his majesty" they "ought to be paid for" by the crown and "not by the defendant": see RG 39, Series J, vol. 99, 16-18, 23, 46, 72 and 73, and Series C, vol. 19; James Brenton Benchbook, Acadia University Archives (microfilm at NSARM), August 1782. See also the successful small debt suit in *Thomas Batt* v. *Joseph Goreham*, RG 39, Series J, vol. 6, p. 149 (1781).

unfortunately located close to Fort Cumberland, had been plundered by both sides.[73]

A variety of other cases were also begun in the Halifax Supreme Court in this period, although they were not concluded, perhaps being settled out of court. They included *Joshua Winslow* v. *Jesse Bent*, for a mere £30; *John McMonagle* v. *Mark Patton*, for £100; and *Joseph Goreham* v. *Estate of Benoni Danks*, for £300.[74] Other suits were likely prosecuted locally in Common Pleas, for there are circumstantial references to two such cases.[75] It may be that these suits ground to a halt when the execution process was suspended in the late summer of 1782, a matter discussed below. Thus while the record is thin as to results, it is clear that other members of the old loyalist community, besides Eagleson and Harper, took their revenge on the rebels through the civil courts.

As they did so they exacerbated the social and politcal divisions in the county and caused some to take the law into their own hands. One patriot response to the loss of lands and other property was a resort to threats of physical violence.[76] Eagleson was sufficiently unpopular to be unable or unwilling to venture out of Cumberland township during the next few years, and to fear that if given the opportunity patriot forces would again "carry him off a prisoner".[77] In some cases threats became reality, as arson was indeed resorted to by patriots on a number of occasions. But

---

73. Goreham took fence rails and other lumber to shore up the fort's defences, and later on during the siege Eddy burned many of Allan's buildings. Some of what remained was then scavenged for fuel by members of the hard-pressed garrison: See Clarke, *supra* note 1 ch. 7.

74. RG 39, Series J, vol. 99, 71-72.

75. Thomas Ratchford sued Elijah Freeman in the Horton (King's County) Inferior Court, and Ebenezer Barnham, Abel Peck, Robert Dickson and William Daniels sued the Proprietors of Hopewell Township in the Cumberland Inferior Court of Common Pleas: Court Order, 1 Sept 1782, RG 39, Series C, vol. 25. In addition at least one suit based on rebellion losses came before the Supreme Court on circuit at Horton in May 1782: see Benchbook of James Brenton, May 1782.

76. See for example an anonymous letter written in August or September 1780 to Watson. It was said to come from "R. Revenge" of "Scrutiny River," and singled out Harper for his "diabolical proceedings." Watson was warned to "desist from executing any instrument of what name or nature so ever against any person or persons in your county who have been under arms against the Fort"; if not he would "neither have house nor barn many days after." Halifax's response was to offer a £100 reward for "the discovery of the author or authors of said letter": Minutes, 22 Sept 1780, RG 1, vol. 189; Proclamation, RG 1, vol. 170, 307-308. See also Eagleson's claim that "several anonymous seditious letters" were sent to "the Sheriff and other executive Officers of justice," which threatened "to burn and destroy their property, and maltreat their persons, should they presume to execute any writ or verdict of the Courts . . . against them": Letter of May 1781, in SPG Journals, MG 17, vol. 23, 257.

77. Letter of 7 May 1781, in SPG Journals, MG 17, vol. 23, 258-259.

abuses were by no means only perpetrated by former patriots, and ex-loyalists were just as ready with the torch.[78]

By mid-1782 the situation in Cumberland county gained sufficient notoriety that the Assembly demanded a judicial inquiry into the "oppressive measures" which "have been exercised towards the Inhabitants of Cumberland." The resolution particularly complained of "sundry judgments surreptitiously obtained against the estates of absentees and others," and asked for executions consequent on those judgments to be suspended.[79] The requested inquiry was undertaken by Supreme Court judges James Brenton and Isaac Deschamps, who visited the county in the summer of 1782 on the resumption of the Supreme Court circuit there. During their time in Cumberland they seem to have heard what were effectively appeals in "a variety of law causes" and "adjusted" matters "consistent with the principles of law and justice," sometimes by court orders and sometimes by putting the cases to juries.[80] In addition, shortly after returning to Halifax, they ordered the cessation of all executions consequent on loyalist suits.[81]

In addition to tinkering with particular cases, the judges recommended the removal of Harper from the commission of the peace and from his judicial offices, for they concluded that he had "in a variety of instances been guilty of violent and oppressive measures against a number of inhabitants," and that those people had "great reason" to complain about "the injuries and oppressions they have suffered under the abuse of his Authority." The judges unfortunately did not elaborate, although one example of these "oppressions" was likely the illegal seizure of cattle belonging to Isaac Danks, whose late father Benoni Danks had been a

---

78. Victims of arson included Christopher Harper. In 1788 his house, which happened to be Elijah Ayer's old house and was by then in New Brunswick, was burned to the ground. Other victims included Stephen Millidge: Millidge to Ward Chipman, 23 Jan. 1788, New Brunswick Museum, Hazen Collection, F1, Packet 6; see Clarke, *supra* note 3 at 57.

79. *Journals of the House of Assembly* [hereafter *Assembly Journals*], 27 June 1782.

80. Report of Supreme Court Judges, 8 Sept 1782, RG 1, vol. 221, No. 61. All quotations which follow are from this report unless otherwise stated. The judges may have been referring, when they talked of putting matters to juries, to disputes about the value of lands seized in execution. One defendant certainly claimed later that Harper had received much more value than the damages awarded. When applying for compensation from the American government in the late 1790s Ayres submitted documents stating that while he had only been credited with lands worth £160, it was worth £500 at the time of seizure. Of course, he may well have been gilding the lily for higher compensation: see *Letter from the Commissioners Appointed Pursuant to the Act Entitled an Act for the Relief of the Refugees from the British Provinces of Canada and Nova Scotia, enclosing certain documents relative to the claims of Elijah Ayer, deceased, and Elijah Ayer, Jr.* (Washington, 1802) at 25-27.

81. Supreme Court Order, 1 Sept 1782, RG 39, Series C, vol. 25.

leading patriot; Isaac won a civil judgment against Harper for this.[82] But if we do not know exactly what was meant by the judges, two cases give some indication of how the loyalist J.P.s were wont to act towards former patriots. In one 1783 incident a newly-arrived New York loyalist, Captain Kipp, assisted by three armed men, ejected from his house and lands Moses Desledernier, whose loyalty in 1776 had been suspect at best. Successive appeals by Desledernier to J.P.s Harper, James Law and Charles Dixon went unheeded, although Desledernier eventually was able to have Captain Edward Barron, a J.P. and the commander at Fort Cumberland, intervene on his behalf.[83]

Our second incident occurred much later, but it is evocative of the problems of the early 1780s. In 1795 Christopher Harper, never one to let matters drop, sued Josiah Throop for £3, the basis of the debt being an alleged delivery of grain that Harper had made to Throop in 1775! By then both men were residents of Westmoreland County, N.B., and the small debt case came within the jurisdiction of a single J.P. That J.P. turned out to be Charles Dixon, who was in the Cumberland commission in the early 1780s. Harper had no documentary evidence, Throop claimed he had paid for the grain, and the debt, if it existed, was 20 years old. None of this hindered Dixon, who found for Harper. When asked to explain his action by way of a writ of *certiorari* issued by the New Brunswick Supreme Court, Dixon acknowledged that "the credibility of [the litigants'] . . . testimony was all the ground I had to go upon". That of course made the case easy, for Dixon was "intimately acquainted" with both men and was also aware of the fact that Throop had been "secretary to Colonel Eddy" and after the siege "to save his neck [had] run off to the States." Moreover, Dixon knew Throop, knew he was "at that time . . . very poor" and "never forward in paying debts." Finally, Throop had offered no proof of payment.[84] In such circumstances Dixon's claim that he "acted from principle not prejudice" rings somewhat hollow, and suggests the kinds of ways in which he and others might have behaved a dozen or so years previously when the memory of rebellion was much fresher.

---

82. *Danks* v. *Harper* (1781), RG 39, Series J, vol. 6, 156 and vol. 99, 86.

83. From Dixon Delesdernier got the response that "the Capt. had very good credentials" and that "he [Dixon] could say nothing to my Character, indeed he could say nothing in the matter at all." Law protested that "he did not know how to proceed as the Captain was a stranger just arrived," and Harper claimed that he simply did not know what to do: Deposition of Moses Delesdernier, July 1783, RG 1, vol. 223, No 7; see also *ibid.*, No 8. Desledernier also appealed to the Governor in Chancery: Petition of Moses Frederick Desledernier, 2 Aug 1783, RG 36, Series A, No. 60.

84. *Harper* v. *Throop*, (1795) Provincial Archives of New Brunswick [hereinafter PANB], RS 42.

Despite incidents such as these the judges' recommendation to do something about the J.P.s was not acted on immediately in 1782, although they were later censured over the Delesdernier affair, and Harper was removed from the commission.[85] Nor were Deschamps' and Brenton's recommendations about dealing with the most serious problem in the county—the economic consequences of the loyalist civil litigation—taken up in 1782. In a tone distinctly sympathetic to the former patriots, the judges noted that some of the 1776 rebels had only taken part "through fear and compulsion," and now faced the "evil" of ruinous civil litigation. Their suggested solution was the appointment of "three or more judicious and impartial men" to calculate all losses and "apportion the whole equitably upon such of the inhabitants or their estates as were any ways concerned in supported or aiding the rebels." In this way compensation "would fall on a number, and not be laid on a few." There were certainly precedents for this kind of post-rebellion redistribution in British history,[86] and Brenton and Deschamps claimed that such a scheme was widely supported, with "even some of those who had recovered judgements" being "willing to relinquish their executions, and to share in common with others."

Although the judges' report asserted that the idea of apportionment of losses had the support of both factions in Cumberland, it was not adopted in 1782. The following year, however, a statutory solution to the problem was at last achieved. Unfortunately there is no record of debates around this measure, and no committee reports or other sources to enable us to say more about it. Had such existed they would undoubtedly have greatly enriched our knowledge not just of the statute but of all the events of the previous few years.

The statute of 1783 recorded the Assembly's conviction that persons who had successfully launched suits for losses "sustained . . . by reason of the depredations of the enemy" had actually received judgments "for a much greater amount than the losses really sustained," and that "the

---

85. Minutes, 22 Aug 1783, RG 1, vol. 189. Harper later became a J.P. in New Brunswick: see E. Clarke, "Christopher Harper: Loyalist" (1986) 24 Loyalist Gazette 16. Ironically Delesdernier himself was appointed a J.P. for the county the following year: Minutes, 29 March 1784, RG 1, vol. 190. Later in 1783, on October 20, Uniacke moved for the dismissal also from the Commission of the Peace of Dixon, Law and William Black. When this produced no response an Assembly resolution of November 18 adverted to the continuing "discontents" in the county, which was blamed on "the Misconduct of many of those who have been heretofore intrusted with Commissions for the Administration of Justice," and requested again the dismissal of J.P.s Dixon and Black: *Assembly Journals*, 20 Oct and 18 Nov 1783; Minutes, 12 Jan 1784, RG 1, vol. 190.

86. See Pennington, *supra* note 23 at 125, and Fraser, *Cromwell* at 497.

manner in which the said judgments have been carried into execution is grievous and oppressive" because "the estates of a few individuals [had] ... been wholly seized to satisfy the same."[87] The statute further provided for the apportionment of liability recommended by the judges the previous year. Three commissioners would be appointed in each county to receive claims and hold hearings, and then report to the Chief Justice "the amount of the real losses of each person or persons, who have recovered judgments" and "a list of the persons ... who ought properly to be charged with the payment of such losses." Other provisions tried to deal with those who had already received excessive judgments in their favour. The Commissioners' reports were to be filed in the Halifax Supreme Court for a term, and thereafter the judges would decide, by comparing actual losses with amounts received in lawsuits, whether any judgments had been "surreptitiously obtained" or whether any litigant had "by ... unfair means, recovered more than the value of the real losses ... sustained." The court could also decide if there were other inhabitants, presumably those who had escaped lawsuits, who ought to make a contribution to the losses bill. In any of these circumstances the court could set aside existing judgments and order the "real losses" of such people to be made good by all those considered by the commissioners to be chargeable for rebellion losses. The final section of the Act suspended the operation of all current suits and executions.

While the 1783 statute attempted a partial reform of the Cumberland legal system, it should be noted that it also confirmed the principle that otherwise forgiven individuals should provide compensation to loyalists. Moreover, it did so at the same time that the British government was putting into operation its scheme for compensating loyalists who had lost lands in the newly-independent American states. In June 1783 the Loyalist Claims Commission was established, and the work of assessing claims and making compensatory payments and land grants went on in London and in the British North American colonies until 1790.[88] One of those successful in making a claim was Christopher Harper.[89]

---

87. *An Act for the Relief of Sundry of His Majesty's Subjects in this Province, against whom Judgments have been recovered, on account of Losses sustained by the Depredations of the Enemy*, S.N.S. 1783, c. 2.

88. For the Loyalist Claims Commission see generally H.E. Egerton, ed., *The Royal Commission on the Losses and Services of American Loyalists, 1783-1785* (London: Oxford University Press, 1915); W. Brown, *The King's Friends: The Composition and Motives of the American Loyalist Claimants* (Providence, R.I.: Brown University Press, 1965). The reports of the commissioners are reproduced in *Second Report of the Bureau of Archives for the Province of Ontario* (Toronto: Archives of Ontario, 1905).

89. Clarke, *supra* note 3 at 57.

It may well have been the existence of this imperial compensation scheme that was partly responsible for what appears to have been a dilatory and half-hearted approach to putting the local one into operation. In fact, we know very little about the working of the local statute. The commission authorized by it was not established until late in 1784.[90] It must have done something, for the Supreme Court judges' role in the apportionment process led to one of the charges in their attempted impeachment by a coterie of newly-arrived loyalist lawyers in the later 1780s. Specifically, Deschamps and Brenton were accused of having acted in a "partial and shameful Manner" in settling apportionment matters, and of favouring "the side of the Rebels against the King's Loyal Subjects." Chief Justice Finucane, it was alleged, had also been guilty, not of direct preference for rebels but of resisting complaints about his puisne judges.[91] This was a strange charge given his precipitate favouring of Harper in 1780, but it probably resulted from his patronage, from 1781, of fellow Irishman and Cumberland rebel Richard John Uniacke.[92] It is perfectly reasonable to suggest that Finucane was simply unwilling to brook the improprieties and abuses of loyalists. Unfortunately, no records of the apportionment process have survived, and thus there is no evidence about what it actually achieved. Moreover, to rely on the evidence of the judges' opponents is to give dubious preeminence to the views of men—new, post-1783 loyalists—who were struggling for power and preferment in their new home and who were never averse to painting any old resident as a rebel or rebel sympathizer.

IV. *Postscript: John Bent, Thomas Watson, and the Court of Chancery*

The story should end here, a decade after a small band of armed Cumberland residents made their ultimately insignificant contribution to the great imperial schism. But it does not, for the Cumberland rebellion provided yet more work for the courts. Litigation continued between Harper and Ayer, for example, over the Ayer lands, in the courts of New

90. It was comprised of Jotham Gay, Thomas Scurr, and George Foster, all of Cumberland: Minutes, 8 Dec 1784, RG 1, vol. 190.

91. *Halifax Journal*, March 1788, reproduced in *Collection of the Publications*, *supra* note 46 at 11. For more on the context of these complaints, see the section below on the judges' affair.

92. For Finucane's relationship with Uniacke, and the criticism that it engendered in some quarters, see J.B. Cahill, " 'Fide et fortitudine vivo': The Career of Chief Justice Bryan Finucane" (1986) 42 Collections of the Royal N.S. Hist. Soc. 150 at 157-158.

Brunswick.[93] More importantly, John Bent re-entered the picture. It will be remembered that in 1780 his attempts to have the Clarke and Chester lands seized pursuant to his judgments failed, and that he decamped to New England. At some point he returned, and in 1786 he successfully applied to the Cumberland Inferior Court of Common Pleas for an *alias* execution consequent on his 1780 judgements; an *alias* execution was one issued after the original one had been returned without achieving its purpose.[94]

It is a mystery how the court could issue the executions; surely the imbroglio over the lands was well known in the community, even if a search of the title did not reveal that they had already been seized for Harper and sold by him to others. Nonetheless, on orders of the court, Charles Baker, sheriff of Cumberland County, had the lands appraised (by Alpheus Morse and Ephraim Church, who would surely have known about the previous dealings, and one Nathan Traverse), and attempted to get the occupiers, David Pugsley who rented the former Chester lands from William Freeman, and Roger Robinson, the owner of the former Clarke lands, to attorn to Bent.[95] Pugsley did so but Robinson refused,[96] at which point Baker seems to have become aware for the first time that the lands had already been sold. A relative newcomer to the county, Baker decided that "he had been too fast." He spoke to Bent, who apparently told him that "he did not wish to bring [Baker] . . . into any difficulty," and that if it seemed to Baker that the lands had already been sold he, Bent, "would not insist on his [Baker] doing anything that he did not think himself perfectly safe in."[97] Baker then returned the executions into court with a notation to the effect that "the late sheriff had given a deed as of fee to Christopher Harper," and that "at the request of the plaintiff [Bent]," he "stayed any further proceedings."

---

93. See *Harper* v. *Elijah Ayer and Nehemiah Ayer* (1785); *Harper* v. *Elijah Ayer and Nehemiah Ayer* (1787); and *Harper* v. *Elijah Ayer and Nehemiah Ayer* (1789); *Ayer* v. *Harper* (1808), all at P.A.N.B., RS 42; Affidavit of Stephen Millidge, 21 Sept 1798, in *Letter from the Commissioners*, *supra* note 80 at 27.

94. This section on the 1786 proceedings is drawn from Petition of Thomas Watson, Depositions of Thomas Robinson, 23 June, of Alpheus Morse, 24 June, of David Pugsley, 23 June, of Charles Baker, 23 and 25 June 1789, all in *Watson* v. *Bent*, RG 36, Series A, No 82; *Reply of Sterns and Taylor*, *supra* note 43 at 58.

95. Attornment was the process by which a tenant accepted the higher estate of a new landlord. Tenants were required by provincial statute, on pain of prosecution for forcible detainer, to attorn to those who obtained either title or the rights to the rents through executions for judgment debt: see *An Act for making Lands and Tenements liable to the payment of debts*, S.N.S. 1758, c. 15, ss. 1 and 2, and *An Act to explain and amend . . .* , S.N.S. 1763, c. 8.

96. Pugsley attorned to Bent and paid him a shilling, "which Bent returned him immediately." He also agreed to a rent of £10 *per annum* to be paid to Bent, although he never paid it.

97. Deposition of Charles Baker, 25 June 1789, in *Watson* v. *Bent*, RG 36, Series A, No 82.

The ease with which Bent gave up on enforcing his executions suggests that his purpose was not to get the lands, which he presumably knew was impossible, but to sue Thomas Watson, the man who had refused to levy his executions initially. Whether this was planned in 1786 or not, the fact is that on 25 July 1787 he commenced a suit against Watson in the Supreme Court at Amherst, before Isaac Deschamps sitting alone, complaining that Watson had not executed the writs he was supposed to from the 1780 judgments and demanding £300 in damages.[98] On its face this was a perfectly legitimate suit, an action against a sheriff (or an equivalent officer of the court) for not having levied an execution. However, Watson's attorney, Amos Botsford, offered two principal defences. First, he argued that Bent's action was statute barred, being launched more than six years after the cause of action arose.[99] Second, he asserted that Watson could hardly be liable for non-feasance because he had relied on the Supreme Court's order that he execute Harper's writs in preference to any others. While these might seem very good arguments, especially the latter, Bent was successful in August 1787, the court awarding him £283 16s in damages and issuing an execution against Watson's property to satisfy the judgment.[100] According to Watson the court made its decision without referring the matter to the jury and "in a private and secret manner," not in open court. Watson alleged later that he only found out that the decision had gone against him when "the sheriff came to him with an execution." While Bent threatened to make good on the execution, there is no evidence that he actually did so.

It is difficult to explain this proceeding, as the court records have not survived. We get some help, however, from the fact that in the late 1780s and early 1790s this piece of Cumberland rebellion litigation played a small role in another *cause célèbre* in Nova Scotia's history, the so-called "judges' affair." This was the ultimately unsuccessful attempt by the Assembly to impeach Judges Deschamps and Brenton on the grounds that

---

98. There are no records from the Supreme Court sitting at Amherst. This paragraph on the 1787 suit is taken from Judgment Roll and Answer of John Bent in *ibid.*, and from documents reproduced in *Reply of Sterns and Taylor*, *supra* note 43 at 17-18, 22 and 56-59, and *Collection of the Publications*, *supra* note 46 at 16 and 20.

99. This was an action of "trespass on the case," and the six-year limitation period was laid down in *An Act for Limitation of Actions, and for avoiding Suits of Law*, S.N.S. 1758, c. 24, s. 4.

100. This total was comprised of £195 18 for the original judgements against Clarke and Chester, £81 18 for interest since 1780, and costs.

they had acted partially and/or incompetently in a series of cases.[101] The details of the affair do not concern us; what does matter is that in two ways the complaints against the judges overlapped with our story. First, the judges were early on accused of being partial to those who had served on the patriot side in 1776 when they carried out their duties under the 1783 apportionment statute. This did not, however, form the basis of any of the articles of impeachment against them.[102]

Second, and more importantly, it was asserted that the judges had acted incorrectly in *Bent* v. *Watson*, which was one of the sixteen cases specifically complained of by the judges' opponents. Indeed it represented the fifth formal article of impeachment of seven presented to the Assembly in April 1790.[103] The principal complaints were that the judges had, as Sterns put it, "punished an officer for obeying their Orders, who was entirely under their Controul, and could have been fined and imprisoned at their Discretion for not obeying them," and that they had assessed damages themselves and not employed a jury when a "trial by Jury" was "the known and Darling Privilege of Englishmen."[104]

The judges' response to the complaints concerning *Bent* v. *Watson* is instructive.[105] First, they asserted that the court order issued in July 1780 to prefer Harper's claims to Bent's was "particularly directed" by the late Chief Justice Finucane. Second, they argued that "the whole cause rested upon" the limitations question, and was therefore "a question of law." That is, "whether the statute would run upon an action against the sheriff, for not levying money on execution, where he might have done it." The court decided that "as the debt was founded on a judgment, and a matter

101. The leading critics of the judges were two loyalist refugee lawyers, Jonathan Sterns and William Taylor, although they had numerous allies among other members of the profession and, ultimately, in the Assembly. The best account of it is J.B. Cahill, "The Judges' Affair: An Eighteenth Century Nova Scotia Cause Célèbre" (unpublished ms., 1986). The following account of the role of Cumberland rebellion litigation in the judges' affair is based on Cahill and on *Collection of the Publications*, *supra* note 46 and *Reply of Sterns and Taylor*, *supra* note 43.

102. *Halifax Journal*, March 1788, reproduced in *Collection of the Publications*, *supra* note 43 at 11.

103. For the articles see Cahill, "Judges' Affair" at 236-251.

104. *Collection of the Publications*, *supra* note 46 at 20-21. Sterns and Taylor also complained about the fact that the judges had allowed interest on the money owing from the time that Watson had failed to serve the first execution, whereas they had consistently refused to do so in other cases except under special circumstances. This last accusation is really not relevant to us here, as it involved a difference of legal opinion about how closely the law as laid down by the English courts should be followed.

105. Judges' Responses addressed to Governor Parr, reproduced in *Reply of Sterns and Taylor*, *supra* note 43 at 18-19.

of record, the statute could not bar." The judges also claimed that Botsford, Watson's attorney, "was very well satisfied, and acquiesced in the opinion of the court." Moreover, in such circumstances there was no need for a jury either to decide the substantive issue or to assess the damages.

There are a number of obvious problems with this defence. First, there appears to be an implicit argument that it was somehow acceptable for the court in 1787 effectively to impugn the order of July 1780 because it was the particular work of Finucane and thus the unjustifiable product of his personal prejudices. Deschamps and Brenton presented no evidence for this assertion, and Deschamps had also sat on *Harper* v. *Ayer et al* and signed the order. As the judges' critics rightly argued, the order in question "purports to be an order made in and by the Supreme Court," and there was "not... the smallest pretence for ascribing it to the Chief Justice, more than to any other judge."[106]

Second, the judges were incorrect on the limitations point, for they based their decision on the notion that Bent was simply trying to collect a debt found valid by a court, and in such an instance there is no limitation period. This was (and is) true, for limitations govern only the period of time in which a plaintiff must sue after the cause of action has accrued. But the judges' argument misstated the issue, for Bent was not trying to collect a judgment debt from Clarke or Chester more than six years after a decision; rather, he was suing on an entirely separate matter, the failure of the officer charged with the responsibility of collecting the debt to do so.[107] If there was a cause of action at all in the case it arose in August 1780 when Watson refused to levy the executions, and the period for suing on that expired in August 1786. Ironically, Bent himself later claimed that the limitation period did not apply, not for the reasons ascribed by the judges, but because he had first sued Watson in August 1786, which he said was within the limitation period.[108]

The most significant part of the judges' response in 1788, however, was what they did not say. Their reply entirely fails to deal with the fact that Watson was being sued because he obeyed a Supreme Court order. The court, differently constituted, had issued conflicting decisions seven years apart. This should have given the court two reasons for rejecting

---

106. *Reply of Sterns and Taylor, ibid.* at 22.

107. As Sterns and Taylor correctly pointed out in response, Watson's failure to collect the debt owed by Clarke and Chester to Bent did not create a debt between Watson, even if he was a negligent collector, and Bent: *Reply of Sterns and Taylor, ibid.* at 19-21.

108. Answer of John Bent, RG 36, Series A, No 82.

Bent's suit. First, it could have been argued that the matter was subject to the doctrine of issue estoppel—the issue of the validity of Bent's executions had been decided already and he was effectively trying to re-litigate exactly the same point.[109] Second, and more importantly, given that Watson had simply obeyed an order of the court it is impossible to see how he could have been liable for non-feasance at all even if the issue went to a trial. Sterns and Taylor made this point, noting that Watson had been found liable by the judges for "a nonfeasance in office," but the failure complained of had been "occasioned . . . when he was bona fide acting under their own order."[110]

Given all this, it is very difficult to discern why Deschamps made the decision he did. He was not a supporter of the patriot fraction, but had been able to overcome his political feelings towards them in the early 1780s when he saw first hand the loyalist abuses of power in Cumberland. This does not mean that he became a closet republican, only that he disliked the injustice in this instance. The critics' charges that the judges acted in a partial manner in relation to particular individuals on other occasions likely had more substance, particularly in regard to persons represented in court by Sterns and Taylor and those who supported them.[111] Thus an explanation might be the bench's dislike of Watson, for another case complained of, *Cousins* v. *Watson*, also involved an apparently statute-barred suit against Watson which was nonetheless allowed to proceed.[112] But there is no evidence of why the judges should have had an animus against this one individual. It may be that, in the end, it was not partiality but incompetence that decided *Watson* v. *Bent*. It may also be the case, although this is not the subject of this essay, that *Watson* v *Bent*, with its evidence of incompetence and its political overtones, lent a particular force to the campaign against the judges. While that campaign had much to do with newly-arrived loyalist lawyers' ambitions, it also represented genuine dissatisfaction with the administration of justice. The new loyalists were used to closer attention to the rule of law, and

109. Strictly speaking this could not be considered *res judicata*, for at that time one needed both the same issue and the same parties for such a finding.

110. *Reply of Sterns and Taylor*, *supra* note 43 at 21. In a rhetorical flourish they also asserted that Deschamps "had give[n] up . . . the power of discrimination between right and wrong," that this was a "flagrant" case of injustice in which any fair man would have been astute "to have found out some legal grounds on which they might have protected this honest and injured man": *ibid.* at 36.

111. For a review of the many cases complained of see Cahill, "Judges' Affair," *supra* note 101. This is not Cahill's judgment, but ours, based on that account.

112. See Cahill, "Judges' Affair," *ibid.* at 157.

Watson v. *Bent* must have seemed a particularly egregious example of how it was lacking in Nova Scotia.

All of this aside, the fact is that Watson lost in 1787, and his options were limited. Decisions of the Supreme Court in civil cases could only be appealed to the Governor and Council as a Court of Error where the matter in dispute was £300 or more. Watson's only recourse was to seek an injunction in the Court of Chancery to prevent Bent making any use of his rights acquired at common law in the Supreme Court. The history of the relationship between courts of common law and the court of equity, or Chancery, in the English legal system is a long and complex one.[113] The principal feature of it for our purposes is that Chancery had since the thirteenth century operated as a parallel system of justice to the common law courts, recognizing causes of action not available at common law and providing remedies supplementary to the law. The most important equitable remedy was the injunction, a device which exemplifies both Chancery procedure and the theory on which equity was based.[114] A person who had lost in a court of common law was able to go to equity and argue that the successful litigant should not be able, as a matter of "good conscience," to enforce his or her legal rights. The court (the Chancellor, a royal minister initially but later the title of the judge of the Court of Chancery) investigated the matter through an inquisitorial procedure rather than holding an adversarial hearing. If the court agreed that the case was one suitable for intervention, it would not purport to overturn the ruling of the common law court, but would issue an injunction telling the defendant not to enforce rights acquired there. Equity thus operated in theory as merely supplementary to the law, but in effect as a kind of appeal court. Over the centuries the kinds of circumstances which would invoke equitable intervention became regularized,[115] even to some extent ossified, and the court lost much of its ability to intervene in a purely discretionary manner "whenever equity and good conscience required."

The colony of Nova Scotia was given an equitable jurisdiction from the founding of Halifax in 1749, although for many years, until the appoint-

---

113. For the general history of equity see, *inter alia*, Baker, *supra* note 18, ch. 6.

114. In this account we use the terms "Court of Equity" and "Court of Chancery" interchangeably, which is correct. Note also that in all historical and modern accounts "equity" is used to mean either the court, or the rules which came to define jurisdiction, that is, when the court would intervene, or to indicate, in a manner consistent with colloquial understandings, a general sense of fairness and justice.

115. Chancery came to exercise exclusive jurisdiction over, among others, trusts, the administration of estates, partnership, guardianship, custody, and the foreclosure of mortgages. The last category accounts for the vast majority (76 *per cent*) of cases during the existence of the Nova Scotia Chancery Court: see J. Cruikshank, "The Chancery Court of Nova Scotia: Jurisdiction and Procedure, 1751-1855" (1992) 1 Dal. J. of Legal Studies 27 at 33.

ment of a Master of the Rolls in 1825, the Governor remained the central figure in the Chancery Court.[116] As the court's leading modern historian has noted, "[a]n action in Chancery was often nothing more than a covert appeal from a judgment of the superior common law court," for "the scope of equitable relief was broad enough to include miscarriages of justice in the Supreme Court."[117]

This was the avenue pursued by Watson. Represented by Attorney-General Sampson Salter Blowers, he applied to the Governor as Chancellor in September 1787, immediately receiving an interim injunction barring Bent from enforcing his judgment.[118] His formal prayer for relief in the form of a permanent injunction argued that the Supreme Court judgment in Bent's favour was clearly contrary to law but that as there was no appeal (for a matter less than £300) his only recourse was to the "equity and good conscience" of the Governor as Chancellor. In the body of the application he recounted the circumstances of the Harper and Bent suits, the difficult choice he had been faced with in 1780 in having two sets of executions and an order from the Supreme Court to prefer one set over another, and the fact that he had done what he thought was necessary and that Bent had apparently accepted this for 7 years. He then complained that the 1787 suit launched by Bent was instituted when "most of the witnesses, parties and actors who had knowledge, had been concerned in, and were privy to" the original events were "either dead or absent from

---

116. The history of Nova Scotia's Chancery court is well-reviewed in Cruikshank, "The Chancery Court of Nova Scotia"; J.B. Cahill, "*Bleak House* Revisited: The Records and Papers of the Court of Chancery of Nova Scotia, 1751-1855" (1989-1990) 29 Archivaria 149, and "From Imperium to Colony: Reinventing a Metropolitan Legal Institution in Late Eighteenth-Century Nova Scotia," in D.W. Nichol et al., eds., *Transatlantic Crossings: Eighteenth Century Explorations* (St. John's: Memorial University of Newfoundland 1995); P.V. Girard, "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia, 1820-1867," in Girard & J. Phillips, eds., *Essays in the History of Canadian Law Volume Three: Nova Scotia* (Toronto: University of Toronto Press and Osgoode Society for Canadian Legal History, 1990) at 106-113. An older but still partially useful account is C.J. Townshend, *History of the Court of Chancery in Nova Scotia* (Toronto: Carswell, 1900). For another account of a Chancery case in Nova Scotia see P.V. Girard, "Taking Litigation Seriously: The Market Wharf Controversy at Halifax, 1785-1820" in G.B. Baker & J. Phillips, eds., *Essays in the History of Canadian Law Volume VIII: In Honour of R.C.B. Risk* (forthcoming, University of Toronto Press and Osgoode Society for Canadian Legal History, 1999).

117. Cahill, "*Bleak House* Revisited," *ibid.* at 151. Note, however, that recourse to the court for this or any other purpose was not common, for the average case load of the court in the eighteenth century was four cases a year. Watson's suit was one of three launched in 1789: Cruikshank, "Chancery Court of Nova Scotia," *supra* note 115 at 30-31.

118. The progress of Watson's Chancery suit can be followed in RG 36, vol. 75 (C); RG 39, Series J, vol. 72, 8. Watson's petition, Bent's defence, and the written testimony of witnesses are all contained in RG 36, Series A, No 82.

[the] . . . province." The suit, said Watson, was intended to "vex and injure" him.

Bent was able to obtain the services of solicitor-general Richard J. Uniacke for this case, an ironic choice given that Uniacke had also spent time in jail in 1777 following involvement in the Cumberland insurrection. Bent's denial included an assertion that the 1787 Supreme Court judgment in his favour was not given in secret, but otherwise he admitted the story of the proceedings as given by Watson. For some reason, perhaps the mounting crisis of the attempted judicial impeachment, nothing appears to have happened through 1788, but in March 1789 the Court issued a commission to three Cumberland J.P.s to take written evidence; Bent chose Charles Baker, Watson chose William Black, and the court itself added George Foster. The commissioners collected testimony on 23, 24 and 25 June, and 3 July 1789, at the Amherst courthouse. Statements were taken on Watson's behalf from Christopher Harper, William Black, Thomas Robinson, Hance Baker, David Pugsley, John Atkinson, Thomas Lusby, James Watson (son of Thomas), and Rhoda Terrace, formerly servant to the Chester family. On Bent's behalf the evidence of Ephraim Church, Samuel Gay, Jesse Bent, James Law, Alpheus Morse, and Robert Sharp was taken. This evidence was returned to the court in August, and another delay ensued before oral hearings took place in February 1790. Governor Parr eventually, and not surprisingly, found for Watson in June 1790, issuing a permanent injunction against Bent enforcing what he had won at common law. Any sympathy for Bent was limited to a refusal to give Watson costs.

Conclusion

With the Governor/Chancellor's decision the principal part of the rebellion-related litigation from Cumberland County—the suits begun in the late 1770s by Eagleson and Harper—came to an end. While we must be wary of drawing too many general conclusions from what is essentially one case study, this account does allow a glimpse of both the operation of the legal system in early Nova Scotia and the role of law in that society. With regard to the former, we can, to some extent, find support for contemporary criticisms about the quality of civil justice in the colony,[119]

---

119. We refer here both to the "judges' affair," discussed above, and also to the kinds of criticisms, albeit centered on the lower civil courts, made by James Monk Jr. and Richard Gibbons Jr. in the mid 1770s: see Cahill, "Richard Gibbon's 'Review'," *supra* note 44 and the same author's "James Monk's 'Observations on the Courts of Law in Nova Scotia', 1775" (1987) 36 U.N.B.L. J. 131.

and, as noted above, we can speculate that the litigation described here played a large role in the impeachment campaign. The decisions of the Supreme Court in 1780 and 1787, particularly the latter, are, to say the least, difficult to explain, and must have struck many as an affront to the most basic principles of the rule of law. We can also see the importance of the Court of Chancery in doing justice where a common law court could, or would, not, a point made in one of the few other studies of civil litigation in Canadian history.[120]

More broadly, these cases also tell us something about the role of law and litigation in society. We see here both a pronounced willingness to use the legal system, a sense that it was available to men of relatively modest means, and some knowledge of its procedures and possibilities. We suspect that law and courts were not foreign to eighteenth-century Nova Scotians, that civil litigation was a part of everyday life for a wide spectrum of people. One has only to glance at the finding aids for the civil records of the Supreme Court of Nova Scotia for Halifax to see that a small population could produce a large volume of everyday litigation,[121] and communities outside the capital appear to have acted the same way. Whether this was a product of New England influence—many studies have shown high rates of litigation in colonial New England—is a question that must await further study.[122] But there certainly seems to have been no reluctance to go to law.

Finally, we would note the communal divisiveness that could result from civil litigation. Along the way the cases discussed here engaged many of Cumberland county's families and, more importantly, the civil litigation was the major, if not the only, contributor to fanning the flames

---

120. See Girard, "Taking Litigation Seriously" *supra* note 116.

121. See RG 39, Series C, vols. 1 *et seq, passim.*

122. For New England see, *inter alia*, B. Mann, *Neighbours and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 1987); W.E. Nelson, *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825* (Chapel Hill: University of North Carolina Press, 1981); D.T. Konig, *Law and Society in Puritan Massachusetts, Essex County, 1629-1692* (Chapel Hill: University of North Carolina Press, 1979). There are very few quantitative studies of civil litigation in Canadian history, and most of them deal only with one area of the law: see, for example, R.C.B. Risk, " 'This Nuisance of Litigation': The Origins of Workers Compensation in Ontario," in D. Flaherty, ed., *Essays in the History of Canadian Law: Volume Two* (Toronto: University of Toronto Press and Osgoode Society for Canadian Legal History, 1983), and L. Chambers, *Married Women and Property Law in Victorian Ontario* (Toronto: University of Toronto Press and Osgoode Society for Canadian Legal History, 1997). A recent more general account is J.P. Couturier, "Courts and Business Activity in Late 19th Century New Brunswick: A View from the Case Files" (1997) 26 Acadiensis 77.

of intra-community political and personal discord. The local rebellion was long over, the treason proceedings following it long stayed, but arguments and enmities dragged on in the civil courts. And the sequence of events described here represents more than simply the fact that the courts provided a forum for playing out old rivalries, although they certainly did that. Litigation was not simply the medium, it became the message, became both the device used to wreak political revenge for the rebellion and, because the law and the courts were fora open to all, litigation was also a shield for those under assault. We know very little about how large political, economic and social conflicts have been historically played out in our civil courts; this example suggests that we ought to know a good deal more.