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## The Impeachment of the Judges of the Nova Scotia Supreme Court, 1787-1793: Colonial Judges, Loyalist Lawyers, and the Colonial Assembly

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Jim Phillips\*

The Impeachment of the Judges of the Nova Scotia Supreme Court, 1787–1793: Colonial Judges, Loyalist Lawyers, and the Colonial Assembly

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*In 1790 the Nova Scotia House of Assembly passed seven "articles of impeachment" against two of the colony's Supreme Court judges, the first attempt by a British North American assembly to remove superior court judges. Although the impeachment failed when the British government rejected the charges, it is noteworthy nonetheless. The product of a dispute between newly arrived loyalist lawyers and a local elite of "old inhabitants," it was at one and the same time a political struggle between the Assembly and the executive branch, and one that involved concerns about judicial competence. The impeachment crisis also demonstrates the close links between the judiciary and executive in the pre-responsible government era.*

*En 1790, la Chambre d'assemblée de la Nouvelle-Écosse a adopté sept « articles de dénonciation » à l'égard de deux juges la Cour suprême de la colonie, première tentative par une assemblée britannique en Amérique du Nord de limoger des juges d'une cour supérieure. Même si la procédure de destitution a échoué, le gouvernement britannique ayant rejeté les accusations, elle vaut tout de même d'être mentionnée. Résultat d'un différend entre les avocats loyalistes nouvellement arrivés et une élite locale de « résidants de longue date », c'était à la fois une lutte politique entre l'assemblée et le pouvoir exécutif, conflit qui soulevait des questions relativement à la compétence des tribunaux. La crise entourant la procédure de destitution illustre également les liens étroits entre les pouvoirs judiciaire et exécutif à l'époque qui a précédé le gouvernement responsable.*

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### *Introduction*

Isaac Deschamps and James Brenton, puisne judges of the Nova Scotia Supreme Court [NSSC], had, charged the colonial Assembly in April 1790, committed “divers illegal, partial, and corrupt acts” such as to justify “Impeachment” for “High Crimes and Misdemeanours.”<sup>1</sup> These words come from the preamble to a list of seven “articles of impeachment” passed by the Nova Scotia Assembly on 5-7 April 1790. The seven articles, distilled from thirteen draft articles which had been introduced on 10 March, listed ten cases in which the judges were alleged to have acted incompetently or partially, or both, and also included accusations that they had lied to the Lieutenant-Governor’s Council of Twelve when it had conducted an inquiry into some of the allegations two and a half years earlier.

The “trial” of the judges on these articles of impeachment took place before the Committee of the Privy Council for Trade and Plantations in London, and resulted in their complete exoneration. This was one of only two occasions on which pre-confederation Canadian colonial assemblies passed “impeachment” articles against superior court judges, and both failed.<sup>2</sup> Judges were removed, but by executive power, for they did not hold their commissions on “good behaviour” and, thus, enjoy independence. The best known Canadian examples of executive removal are Robert Thorpe and John Willis in Upper Canada, but three other British North American judges were removed by colonial executives—Cæsar Colclough

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1. Printed in *The Humble Petition of the House of Representatives of the Province of Nova Scotia ...to the King’s Most Excellent Majesty; together with the Articles of Impeachment exhibited by the House against Isaac Deschamps and James Brenton, Esquires, justices of his Majesty’s Supreme Court for the said province* (London: Privately Published, 1790) [*The Humble Petition*].

2. The other was the attempt to remove Jonathan Sewell and James Monk, respectively Chief Justice of Lower Canada and Chief Justice of the Montreal District King’s Bench. See Evelyn Kolish & James Lambert, “The Attempted Impeachment of the Lower Canadian Chief Justices, 1814–1815” in F Murray Greenwood & Barry Wright, eds, *Canadian State Trials, Volume 1: Law, Politics and Security Measures, 1608–1837* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1996) at 450. There were other campaigns against judges in Lower Canada, but none saw formal articles passed. In addition one Chief Justice of Newfoundland, Thomas Tremlett, was investigated by the Privy Council in 1811 following complaints by the colony’s merchants, while another, Henry Boulton, was dismissed by the Privy Council in 1838 at the request of an Assembly delegation, although no formal “articles of impeachment” were passed: see for these examples Hereward & Elinor Senior, “Henry John Boulton,” online: *Dictionary of Canadian Biography* <<http://biographi.ca>> [DCB]; Gertrude E Gunn, *The Political History of Newfoundland, 1832–1864* (Toronto: University of Toronto Press, 1966) at 19; and JM Bumsted & K Matthews, “Thomas Tremlett” in *DCB*.

and Thomas Tremlett in Prince Edward Island, and Richard Gibbons in Cape Breton.<sup>3</sup>

The Nova Scotia Assembly's failure matters much less than the attempt; the long, drawn out saga of the efforts to censure and remove the NSSC judges is of interest to historians of colonial legal systems. It represents a chapter in the history of judicial professionalization, for much of the rhetoric aimed at the judges, especially Deschamps, concerned their basic competence. The event also reveals the role played by colonial judges within local power structures. The modern notion of a separation of powers between executive and judiciary was no part of the British system of colonial governance, with judges expected to be firm supporters, indeed active members, of government and receive in turn the backing of the executive. Hence, the Nova Scotia judges received unqualified support from the Lieutenant-Governor and his Council. Conversely, the failed impeachment shows that the elected branch of the constitution had as little control over the dismissal of judges as it did over their appointment.

While the impeachment crisis is a significant event in Canadian legal history, and while that is the focus of the article, the events of the late 1780s and early 1790s also contribute to our understanding of the province's general history, in particular of the transformations that took place after the American revolution. The attempted impeachment was both a product of and a contributor to an internecine dispute for legal and political power between old inhabitants and the newly-arrived elite loyalist lawyers who came to the colony after the revolution. The latter wanted legal work and official preferment, and sought to achieve both by supplanting the pre-revolutionary legal elite. But more than personal ambition, the impeachment crisis both exposed and substantially contributed to an ideological rift between the new arrivals and the entrenched oligarchy of the colony. In the 1780s and 1790s the groups were at loggerheads not just over the judges but also over the relative rights of Assembly and executive government in general. Just as the Assembly asserted a right to review the conduct of and discipline judges, it also insisted, for example,

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3. The best account of the Willis and Thorpe cases is John McLaren, *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800–1900* (Toronto: University of Toronto Press for the Osgoode for Canadian Legal History, 2011) chs 6-7. See also John McLaren, "The King, the People, the Law...and the Constitution: Justice Robert Thorpe and the Roots of Irish Whig Ideology in Early Upper Canada" in Constance Backhouse & Jonathan Swainger, eds, *People and Place: Historical Influences on Legal Culture* (Vancouver: University of British Columbia Press, 2003) at 11; Robert L Fraser, ed, *Provincial Justice: Upper Canadian Legal Portraits from the Dictionary of Canadian Biography* (Toronto: University of Toronto Press for the Osgoode Society, 1992) 188, 195. For the other cases mentioned see Bumsted & Matthews, "Thomas Tremlett," JM Bumsted, "Cæsar Colclough" and RJ Morgan, "Richard Gibbons" in *DCB*, *supra* note 2.

on its right not to have its money bills amended by council. The colonial executive quickly came to resent the emerging radicalism of the Assembly; to Lieutenant-Governor Parr the “loyalists” were men with “leveling republican principles.”<sup>4</sup> Historians have recently insisted on the richness and diversity of the loyalist experience, and this story should be seen in that light.<sup>5</sup> American loyalists brought with them their distinctive legal and political culture and, as with their counterparts in the new loyalist colony of New Brunswick, that culture clashed with the more authoritarian views of government held by the ruling elite.<sup>6</sup>

The principal elements of the impeachment story are reasonably well known, although there is no comprehensive published account of it.<sup>7</sup> In what follows I tell the story of the attempt to impeach the judges. My account proceeds in two parts. In the first I provide a narrative of the impeachment, placing it in the context of both local politics and the broader themes of Canadian judicial history, from the first Assembly investigation into the judges in November and December 1787 to the final resolution by a Committee of the Privy Council in London in August 1792. The second part analyzes the cases that were contained in the final articles of impeachment, offering a mixed verdict. While the judges did in a few instances make serious errors, the Assembly failed to make out a case for wholesale incompetence. At the same time the authorities in London largely ignored the real problems raised by some cases, in the interests of supporting a bulwark of local colonial authority.

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4. Lieutenant-Governor Parr to Evan Nepean, Under Secretary of State (18 March 1790) Nova Scotia Archives and Records Management [NSARM], Colonial Office Series [CO] 217, vol 62 at 21. Later references to archival sources are all at NSARM unless otherwise noted.

5. See Jerry Bannister & Liam Riordan, “Loyalism and the British Atlantic, 1660–1840” in Bannister & Riordan, eds, *The Loyal Atlantic: Remaking the British Atlantic in the Revolutionary Era* (Toronto: University of Toronto Press, 2012) at 3.

6. DG Bell, “Sedition Among the Loyalists: The Case of Saint John, 1784–1786” in Greenwood & Wright, eds, *Canadian State Trials, Volume 1*, *supra* note 2 at 223.

7. The fullest account is an unpublished one by J Barry Cahill, “The Judges’ Affair: An Eighteenth Century Nova Scotian Cause Celebre”; I am grateful to Mr Cahill for letting me see a copy of this and for help with sources. Beamish Murdoch’s *History of Nova Scotia, or Acadie*, vol 3 (Halifax: Barnes, 1867), devotes quite a few pages to the subject and reproduces some sources at 56-57, 66-72, 87-92, and 101-102. For brief discussions elsewhere see Barry Cahill & Jim Phillips, “The Supreme Court of Nova Scotia: Origins to Confederation” in Philip Girard, Jim Phillips & Barry Cahill, eds, *The Supreme Court of Nova Scotia, 1754–2004: From Imperial Bastion to Provincial Oracle* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2004) at 67-71; Jim Phillips, “The Court and the Legal Profession: Loyalist Lawyers and the Nova Scotia Supreme Court in the 1780s” in Constance Backhouse & W Wesley Pue, eds, *The Promise and Perils of Law: Lawyers in Canadian History* (Toronto: Irwin Law, 2009) at 161; Margaret Ells, “Nova Scotian ‘Sparks of Liberty’” (1937) 16 Dal Rev 475; Neil MacKinnon, *This Unfriendly Soil: The Loyalist Experience in Nova Scotia, 1783–1791* (Montreal: McGill-Queen’s University Press, 1986) at 127-134; J Murray Beck, *Politics of Nova Scotia, Volume One: 1710–1896* (Tantallon, NS: Four East Publications, 1985) at 47-50.

1. *Investigation and impeachment, 1787–1793*1. *Background: Loyalist lawyers and the Nova Scotia Supreme Court in the 1780s*

In the immediate aftermath of the American Revolution some 30–35,000 loyalists came to what was then Nova Scotia, and although some 15,000 provided the bulk of the founding population of New Brunswick in 1784, those who remained in Nova Scotia doubled its population and strained its resources.<sup>8</sup> Some settled in established centres such as Halifax and Annapolis, many others in new settlements at Shelburne on the south shore and in the Guysborough region to the east. The influx meant that land had to be escheated, surveyed, and re-granted, and provisions supplied to keep the new arrivals alive until they could become self-sufficient. Lieutenant-Governor John Parr found himself constantly beset by loyalist demands and complaints on the one hand, and, on the other, by London's strictures over his excessive expenditures. Even after some communities were well established others struggled and it was years before the acrimony between government and elements in the loyalist community subsided. It was all especially galling to Parr, an Irish professional soldier who had been delighted to secure such a plum post in 1782, at the age of 57. Instead, the loyalist migration "changed a lucrative and easy posting into a nightmare of responsibility,"<sup>9</sup> a nightmare exacerbated by his age and his worsening gout. He worried that factions among the loyalists wanted him replaced with one of their own (they did), and tended to see all opposition as the work of self-interested and ambitious men not overly imbued with true "loyalty." As he acidly observed in 1788, after the first phase of the judicial crisis, "it is not an easy matter to manage and satisfy an expecting loyalist, their present want is every office in government."<sup>10</sup>

The loyalist influx included a substantial number of lawyers, a good many of whom had been elite and highly experienced members of their respective colonial professions. Prior to the revolution, the Nova Scotia legal community was very small with most of them resident in Halifax. A dozen or so lawyers, including the crown law officers and court clerks, provided enough service for a town of 5–6,000 people. When the loyalist lawyers arrived in numbers in the 1780s the new men competed with the

8. The most complete account of the loyalist migration and settlement in Nova Scotia is MacKinnon, *This Unfriendly Soil*, *supra* note 7. See also John G Reid, "The 1780s: Decade of Migration" in Reid, *Six Crucial Decades: Times of Change in the History of the Maritimes* (Halifax: Nimbus, 1987) at 61.

9. MacKinnon, *This Unfriendly Soil*, *supra* note 7 at 91. For Parr generally see Peter Burroughs, "John Parr" in *DCB*, *supra* note 2.

10. Parr to Nepean (18 April 1788), CO 217, vol 60 at 177.

established legal elite in both law and politics.<sup>11</sup> Their ranks included four men who would play prominent roles in the impeachment crisis: Sampson Salter Blowers, Jonathan Sterns, William Taylor, and Thomas Barclay.

Blowers, later the province's chief justice, arrived in September 1783, by which time he was in his early 40s.<sup>12</sup> A Harvard graduate who had studied law with Thomas Hutchinson, a future governor of Massachusetts, he had been admitted to the Massachusetts bar in 1766. His loyalism—which included helping to defend the soldiers involved in the “Boston massacre” in 1770—made him the target of increasingly vociferous criticism, and despite having one of the largest law practices in Boston he left for England at the end of 1774. He spent the war either in England or in British-held colonies, where his stay included stints as a judge of the Vice-Admiralty Courts of Rhode Island and New York, and as solicitor-general of the latter. He was admitted to the Nova Scotia bar in 1783, and quickly established a good practice.<sup>13</sup> His status and connections (he came to Nova Scotia with a letter of introduction from Sir Guy Carleton) were such that he was offered the post of attorney-general of New Brunswick after the new colony was founded, but he declined. In January 1785 he was appointed attorney-general of Nova Scotia, and later that same year he became an MHA for Halifax County. When the Assembly met he was unanimously elected speaker. He was by all accounts both able and learned; he “stands like an apple tree among shrubs in our Supreme Court,” noted one observer in 1784. He was the best of the bar “in point of... Character, and professional talents,” said Chief Justice Strange in 1792.<sup>14</sup>

From an elite New York family, Thomas Barclay was a Columbia graduate who studied law with John Jay and briefly practised at the bar of New York.<sup>15</sup> He saw a good deal of active service during the war on the loyalist side, and when he immigrated he settled first at Wilmot and then in Annapolis Royal, where he resumed law practice. He was a “competent lawyer,”<sup>16</sup> and in 1785 won election to the Assembly as member for the county, quickly establishing himself as one of its most prominent members.

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11. The Barristers' Rolls show 19 additions between 1783 and 1787, most of them loyalists: Supreme Court Records, Record Group [RG] 39, Series M, vol 24A. The dates of admission for the individuals discussed below are from this source.

12. For Blowers see principally Phyllis R Blakeley, “Sampson Salter Blowers” in *DCB*, *supra* note 2.

13. For his court appearances see the NSSC proceedings books, RG 39, Series J, vols 7-8.

14. Gregory Townsend to Ward Chipman (13 August 1784) in Chipman Papers, Manuscript Group [MG] 1, vol 164C, no 1; Memorandum of Chief Justice Thomas Strange on the Bar of Nova Scotia (10 March 1792), CO 217, vol 63 at 353 [Strange's Memorandum].

15. See generally Judith Tulloch, “Thomas Henry Barclay” in *DCB*, *supra* note 2.

16. Strange's Memorandum, *supra* note 14 at 354.



Jonathan Sterns, like his friend Blowers, was a Harvard graduate.<sup>17</sup> He was admitted to the Nova Scotia bar in 1782 and built up an extensive practice in the Supreme Court and in Vice-Admiralty. In 1783 one contemporary described him as the best lawyer in Halifax, Blowers having not yet arrived. He was married to the daughter of loyalist merchant Thomas Robie.

William Taylor had been a member of the New Jersey bar and “a man of reputation in his profession.”<sup>18</sup> He came from a loyalist family of Monmouth County, NJ, where his father had been a county judge, and many of his relatives were imprisoned when the revolution broke out. He escaped and spent the war in New York, although his property was confiscated by the New Jersey legislature. He went to England shortly before the evacuation of New York in late 1783, received a grant of £40 per annum from the Loyalist Claims Commission in 1784, and emigrated to Nova Scotia in 1785. He was admitted to the Nova Scotia bar in April 1786.

It quickly became apparent that the market for legal services in Nova Scotia was too small to afford good livings for the existing bar and all the newcomers. Shortly after he arrived in September 1783 Blowers lamented that although he had been told by “several of the great men here” that he would “soon find business,” he doubted it. From what he had seen so far “there is very little business in our way to be done here, and that but indifferently paid for.” Moreover there was “no want of lawyers.”<sup>19</sup> Blowers was right for others, although not for himself. Taylor, for example, survived but did not prosper—“my business has not been great,” he told the Assembly in November 1787.<sup>20</sup> Those who lived outside

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17. For Sterns see Shirley B Elliott, ed, *The Legislative Assembly of Nova Scotia, 1785–1983: A Biographical Directory* (Halifax: Province of Nova Scotia, 1984) at 209 [*Assembly Directory*]; Supreme Court Records, RG 39, Series J, vols 7-11; Edward Winslow to Ward Chipman (7 July 1783) in WO Raymond, ed, *Winslow Papers 1776–1826* (Saint John: Sun Printing Company, 1901) at 97. For his friendship with Blowers see the latter’s comment that the two at one point “lived in Habits of Intimacy”: Blowers, Letter to the Editor, *Halifax Journal* (21 February 1788) 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 6 [*Collection of the Publications*]. This pamphlet was put together and printed by Sterns following the Assembly investigation of December 1787 and a virulent newspaper debate of early 1788, for both of which see below. It consists principally of newspaper articles and a variety of other official documents.

18. Information on Taylor, including the quotations given here, is mostly from the records of the Loyalist Claims Commission, held at the United Kingdom National Archives. The records of his claim are at AO 12, vols 13, 100, 109, 112A and 310. See also Peter Wilson Coldham, *American Migrations, 1765–1799* (Baltimore: Genealogical Publishing Co, 2000) at 436, and Gregory Palmer, *Biographical Sketches of Loyalists of the American Revolution* (Westport, Conn: Meckler, 1984) at 851. He estimated his losses at £3,117.

19. Blowers to Ward Chipman (25 September 1783) in *Winslow Papers*, *supra* note 17 at 134-135.

20. Taylor’s Affidavit, RG 1, vol 302, no 37.

Halifax had similar problems. Rufus Chandler, for example, stayed at Annapolis Royal for just three years, making a meagre living. The six lawyers resident in Shelburne in the mid-1780s, not then on the circuit, had to content themselves with litigating small suits in the local Inferior Court of Common Pleas.<sup>21</sup> There were exceptions. As noted, Sterns soon became one of the most active lawyers in the city, and Blowers appeared often in the NSSC as well.<sup>22</sup>

Whether as a result of the difficulty of finding legal work or from personal inclination, or both, a number of the loyalist lawyers soon turned their attention to politics, seeking official preferment in lieu of professional success. None did so more quickly or with more success than Blowers, who owed his elevation to the attorney-generalship over more long established members of the bar to his connections and his high Tory politics. Sterns was rather less successful in the political sphere; he failed in a bid to become clerk of the Assembly in November 1783 and lost the Halifax County election in 1785 and again in 1787.<sup>23</sup> His failure to achieve official preferment was likely in part due to his lack of connections, and in part to his whiggish politics—both distinguished him from his friend Blowers.

The 1780s were also difficult years for the NSSC, the result of a general shortage of manpower and an even more serious lack of judges of learning and stature. Founded in 1754, the Supreme Court operated with just one judge, Chief Justice Jonathan Belcher, for its first ten years.<sup>24</sup> Two assistant (puisne) judges were added in 1764, but neither of the original appointees had legal training, and nor did the two who replaced them, including Isaac Deschamps, appointed in 1770. Nova Scotia was not exceptional in having superior court judges with no legal training, and it does not seem to have been an issue during the two decades prior to the loyalist influx. Lawyer and solicitor-general James Monk Junior was one of the few critics, complaining in a 1774 pamphlet of the lack of “jurisprudent abilities” of Deschamps and his then colleague, Charles Morris.<sup>25</sup> Unlike the assistants, all the Chief Justices were legally-trained and all were men who came to

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21. See Barry Cahill, “The Origin and Evolution of the Attorney and Solicitor in the Legal Profession of Nova Scotia” (1991) 14 Dal LJ 277 at 283.

22. For a sample of Sterns’s and Blowers’s appearances in the NSSC see RG 39, Series J, vol 8, for 1786–1788.

23. See Brian Cuthbertson, *Johnny Bluenose at the Polls: Epic Nova Scotian Election Battles, 1758–1848* (Halifax: Formac, 1994) at 35.

24. For the general history of the NSSC in this period see Cahill & Phillips, “Origins to Confederation”, *supra* note 7.

25. Barry Cahill, “James Monk’s ‘Observations on the Courts of Law in Nova Scotia,’ 1775” (1987) 36 UNBLJ 131 at 143.

the colony to serve. Belcher died in 1776 and was succeeded by Bryan Finucane, Irish-born and raised, but a graduate of the Middle Temple and a London barrister, who arrived in 1778.<sup>26</sup> Finucane was away on leave of absence for all of 1782 and most of 1783, and when he returned Parr sent him to the Saint John River to mediate disputes among the loyalists about township lots, and he was not back in Halifax until May 1784. Finucane sat for just three more terms (Trinity and Michaelmas 1784 and Easter 1785) before his death in August 1785. It then took three years before a replacement, Jeremy Pemberton, one of the loyalist claims commissioners, arrived. Pemberton stayed in the colony only a few short months and presided for just one term (Michaelmas 1788) before leaving, dissatisfied with the salary.<sup>27</sup> Thus for most of the period between early 1782 and mid-1790, when Thomas Strange arrived from England as Chief Justice, the court was staffed only by the two assistant judges. Their workload was substantial—three terms a year of sittings in Halifax and a circuit that took in spring and fall visits to Annapolis, Cumberland, Kings and Hants counties—and both judges were required by law to travel.<sup>28</sup>

The senior assistant, and thus the acting chief justice despite his lack of legal training, was Deschamps. Probably originally Swiss, he had arrived in Halifax in the fall of 1749, a few months after its founding.<sup>29</sup> A reasonably successful merchant in the early 1750s, in 1754 he became manager of the truckhouse run by the colony's richest and most influential merchant, Joshua Mauger, at Windsor. In the late 1750s he acquired substantial land grants in Windsor and in the new townships of Falmouth, Newport and Horton. Through the 1760s he carried out a large number of official commissions and held many minor offices, through which he built up excellent connections with the Halifax elite. He served in the Assembly from 1759, the year after its founding, until 1783, representing in turn Annapolis County, Falmouth Township, and Newport Township. In 1783 he became a member of the Governor's Council of Twelve, and vacated his Assembly seat in consequence. While a member, Deschamps also

26. For Finucane and Pemberton see respectively Barry Cahill, "The Career of Chief Justice Bryan Finucane" (1986) 42 Collections of the NS Hist Soc 153, and Joseph Chisholm, "Three Chief Justices of Nova Scotia" (1949) 28 Collections of the NS Hist Soc 148 at 150-153.

27. Gregory Townsend to Ward Chipman (4 October 1788), Saint John, New Brunswick Museum, Hazen Collection, Ward Chipman Papers, F2.

28. For the circuit see Jim Phillips & Philip Girard, "Courts, Communities, and Communication: The Nova Scotia Supreme Court on Circuit, 1816-1850" in Hamar Foster, AR Buck, & Benjamin L Berger, eds, *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: University of British Columbia Press for the Osgoode Society for Canadian Legal History, 2008) at 117.

29. For Deschamps see generally Grace M Tratt, "Isaac Deschamps" in *DCB*, *supra* note 2.

served as clerk of the house, jointly from 1761–1765 and solely thereafter until 1783. Reflecting the period's rather different view of the separation of powers than our modern one, therefore, he was variously an MHA, Assembly clerk, and then councillor for all his years on the bench. He owed his Supreme Court appointment to his political and business connections and his willingness to serve government. Yet he did have some judicial experience on appointment, even if no legal training. From 1761 he sat as a judge of the Inferior Court of Common Pleas for King's County and by 1770 was its chief justice. He was also an active JP and at least twice before his appointment to the bench had been on special commissions of oyer and terminer and general gaol delivery.<sup>30</sup>

The other assistant judge was James Brenton, a lawyer but with relatively little judicial experience—he was appointed to the NSSC in 1781—when complaints began to be made about the judges.<sup>31</sup> A native of Newport, Rhode Island, and from an elite family in the colony, Brenton clerked in Boston for James Otis Junior. After qualifying for the bar he emigrated to Nova Scotia c 1760, probably because of a useful family connection: his sister Mary was the wife of Joseph Gerrish, naval storekeeper and a member of the Council. He practised law in Halifax and won election to the Assembly, serving as MHA for Onslow Township (1765–1770) and for Halifax County (1776–1785). By then a judge, he declined to run again when the Assembly was dissolved in 1785. He was solicitor-general from 1768–1774 and 1776–1777, and from 1779 until his appointment to the bench in 1781 served as attorney-general.

Lieutenant-Governor Parr believed that the impeachment crisis would not have happened had a judge of experience and status been chief justice in the mid-to-late 1780s. In June 1787 he told London, not for the first time, that the colony was “disagreeably circumstanced...from not having a Chief Justice appointed,” and asked for one immediately. It had to be, moreover, a person with “a thorough professional knowledge...dispassionate and impartial.” He reiterated these views later the same year, after the Assembly had asked for an inquiry into the judges, as discussed below. The colony was under a “great inconvenience,” he stated, for the lack of “an able impartial Chief Justice,” a man “who would keep up the dignity of the bench, make it respected by supporting that order so absolutely necessary, and at the same time be looked up to by the bar.” For Parr “the future happiness and welfare of this country depends greatly upon the...choice” of the appointee, who had to be “an Englishman of

30. For these see Council Minutes for 1762 and 1767, RG 1, vol 188 at 293, and vol 189 at 84.

31. For Brenton see principally Allan C Dunlop, “James Brenton” in *DCB*, *supra* note 2.

professional knowledge and understanding”; only such accomplishments would “protect” him from “the abuse and browbeating of a tribe of Lawyers from the United States.”<sup>32</sup>

2. *Precursor to impeachment: The Assembly’s demand for an inquiry, December 1787*

It is not clear exactly when complaints began to be voiced among the members of the bar about the conduct of the judges. Sterns stated in 1788 that the problems had gone on “[f]or a long Time past,” and that dissatisfaction among the bar was widespread by 1787.<sup>33</sup> Most of the cases cited in the Assembly investigation of December 1787 were litigated in that year, and relations between the bench and bar, especially Sterns, were very poor by the fall. The September 1787 circuit session at Annapolis seems to have been a flashpoint of controversy, mostly between Sterns and the bench. The latter later noted that “the Conduct and behaviour of Mr. Sterns during this term towards the Court had been so glaringly indecent in address and language that they were frequently tempted to proceed to measures of severity with him, that the Order and Dignity of the Court might be preserved.” Sterns frequently interrupted and attempted to correct Deschamps, in a “rude and disrespectful” manner.<sup>34</sup>

When the Assembly met for its 1787 session in late October, the judges’ loyalist opponents were ready to go after them. Here something must be said about the loyalists in politics. Nova Scotia’s Fifth Assembly, elected in 1770, was finally dissolved in October 1785, and the election of November of that year thus gave the new arrivals the opportunity to enter politics—an opportunity enhanced by the creation of the new counties of Shelburne and Sydney, areas settled by loyalists. Thirteen of the 39 members elected to the Sixth Assembly were loyalists, and over time they were able to exert an influence disproportionate to their numbers. A loyalist was speaker for the first three sessions, loyalists moved more than half of the successful resolutions in 1789, and they made up some forty per cent of committee members. They also proved a highly cohesive bloc, generally all voting the same way on an issue. To the extent that they were

32. Parr to Nepean (7 June 1787 and 5 December 1787), CO 217, vol 60 at 21 and 75.

33. As stated by Sterns in *Halifax Journal* (12 March 1788) in *Collection of the Publications, supra* note 17 at 7.

34. As cited in *The Reply of Messrs Sterns and Taylor to the Answers given by the Judges of the Supreme Court of Nova Scotia to the Facts by Them related, when summoned before the House of Assembly of that Province, in Committee, for the Purpose of Investigating the Official Conduct of the said Judges* (London: Privately Published, 1789) at 9 [*The Reply of Sterns and Taylor*]. This was a pamphlet published in London when Sterns and Taylor were resident there and seeking reinstatement to the Nova Scotia bar.

successful in using the Assembly to further their concerns, they did so because they were able to coalesce with an existing group of “opposition” members, the “hinterland” assemblymen who had a tradition of being at odds with those beholden to the Halifax establishment. The influence of men used to powerful assemblies increased the “constitutional awareness” of many existing members.<sup>35</sup> As we will see, this proved to be a crucial alliance in the impeachment.

The judges formally became an issue in the Assembly on 28 November 1787, when Major Thomas Millidge, the loyalist member for Digby Township and a former surveyor-general of New Jersey, moved that “dissatisfactions having prevailed...relative to the Administration of Justice in the Supreme Court,” there should be a committee of the whole house to investigate the facts. His motion was unanimously approved,<sup>36</sup> and the committee of the whole met on the next two days. Sterns and Taylor appeared before it and also presented written statements. Most of the oral evidence came from Sterns, given in answer to leading questions.<sup>37</sup>

Sterns began his testimony by asserting generally that “in many instances...the judges did not appear to have justice always in view” and “were not competent for the administration of Justice.” When asked for particulars he suggested that “the rules of Practice have been strictly adhered to against some who were not favourites” yet “relaxed upon other occasions.” One of those apparently favoured was Assembly speaker and attorney-general Blowers. Sterns complained about the judges’ conduct in other respects: giving inconsistent opinions on the same issue, giving a charge to a jury that Sterns “conceived not to be law,” preventing a lawyer from examining witnesses. Generally, he claimed, the NSSC judges “are so little respected that...their opinion is barely of any weight with Juries” and that most of the practising lawyers “have expressed their dissatisfaction” with them. Taylor provided a written statement that cited half a dozen cases and corroborated Sterns, concluding with his opinion “that the Judges of the Supreme Court are both incompetent and partial, and altogether unequal to the administration of Justice.”<sup>38</sup>

A committee was then appointed to prepare an address to Parr on the basis of Sterns’s testimony, consisting of loyalists Barclay and Isaac

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35. Beck, *Politics of Nova Scotia*, *supra* note 7 at 46.

36. *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia* (28 November 1787) at 24 [*Assembly Journals*]. There is an account of this also in Murdoch, *History of Nova Scotia*, *supra* note 7 at vol 3, 56-57.

37. The evidence before the Committee of the Whole was recorded and is at RG 1, vol 302, no 17. The following paragraph is from this source unless otherwise stated.

38. Taylor’s Statement is at RG 1, vol 302, no 37.

Wilkins, and planter John Day of Newport, Hants County.<sup>39</sup> The address was written and approved in one day, on 1 December; it simply adverted to “Complaints” about “the improper and irregular administration in office of His Majesty’s Justices of the Supreme Court.” It referred to the “Proofs” the house had received and concluded: “we . . . request you will be pleased to institute an Enquiry into their Conduct, in such a Manner, that a fair and impartial Investigation may take place, that the Public be fully convinced of their Innocence or Criminality, and that they themselves may be satisfied in what they have an undoubted right to expect, a Trial by their Peers.”<sup>40</sup> Written versions of Sterns’ and Taylor’s testimony accompanied the address. No vote on adopting the address or appointing the committee is noted in the *Assembly Journals*, and as they usually recorded divisions one must assume that the House was unanimous, as it had been when it agreed to Millidge’s original call for an inquiry.

Concerns about the judges were, therefore, widely shared by lawyers and non-lawyers and by loyalists and non-loyalists. Yet those concerns were peremptorily dismissed by the Lieutenant-Governor and his Council. Parr, weary of problems with the loyalists whom he blamed for the criticisms of the judges, was hardly disposed to be sympathetic to the attack on pillars of the local establishment.<sup>41</sup> He asked for a response from the judges, and got one on 10 December, which flatly denied all the allegations and called them “the bare Opinions and Assertions of two dissatisfied Practitioners.”<sup>42</sup> The following day Parr replied formally to the Assembly, an ambiguous response that acknowledged that the charges against the judges were “of so serious a Nature as to require a very deliberate Investigation,” but then went on to say that it seemed to him that many of the charges were “Matters of legal opinion in which the Judges and some of the Practitioners have differed,” and such differences were not uncommon—they happened in England also. Moreover, he said, where the complaints were not about differences in opinion but were “Insinuations of a more criminal nature,” they appeared to him to be “entirely void of Foundation”; he thought that “no Charge of Partiality or Corruption in Office can in any degree be

39. The term “planter” is now usually used to denote the European settlers of Nova Scotia prior to the American Revolution. It includes those traditionally called planters—settlers who immigrated to the colony from c 1760 to take up land previously occupied by the Acadians—as well as the small group who came in the 1750s and those who occupied non-Acadian lands after c 1760.

40. *Assembly Journals* (1 December 1787).

41. It was just two days after receiving the Assembly’s address that Parr pleaded for the appointment of a chief justice and made the reference quoted above to “the abuse and brow beating of a tribe of lawyers from the United States.”

42. The judges’ response appears in *The Reply of Sterns and Taylor*, *supra* note 34; the quotation is at 4.

imputed to them.” Having exonerated the judges, he nonetheless assured the Assembly that “you may rely on it, that the whole shall be considered in such Way as to do ample Justice to all concerned”; but, as to when, the investigation “cannot at present be gone into.”<sup>43</sup>

In fact the Council did not deal formally with the matter until late February 1788, by which time the Assembly had been prorogued and its former speaker, Blowers, was a member of the Council, having been appointed to that body in early January 1788. It seems reasonable to assume that his elevation and the inquiry into the judges were linked; either he was put on the Council because he thought the charges wrong, or he traded support for the judges for a seat on Council and further preferment. Evidence from a few years later certainly suggests that Blowers’s actions were strongly influenced by visions of a seat on the bench.<sup>44</sup> Sterns had no doubt at the time that Blowers had “sold out,” having been at one time as critical of the judges as anyone but having decided to support them to advance his own interests. A little later Sterns published a statement that Blowers had told him that the judges “were, in his Opinion, totally unfit for and incapable of the Duties of said Office.” He had also apparently “solemnly pledge[d]” himself to assist in the demands for an inquiry.<sup>45</sup>

At the end of February the Council unanimously rejected the allegations, calling them “groundless and Scandalous” and also asserting that the judges had “fully acquitted themselves of all imputation of mal-Conduct in office.” The first attempt by the Assembly to censure the Supreme Court judges therefore failed. The Council’s final act was to publish extracts from its proceedings in the *Halifax Gazette* on 4 March. It did so “to prevent as far as can now be done the Mischievous tendency of the Accusation & in vindication of the Character of the Justices of said Court.”<sup>46</sup>

Parr sent all the documents to London, making it clear what that “mischievous tendency” was: the loyalist lawyers had too much of their American background and politics in them. “[W]hatever Loyalty these

43. Parr’s response is in *Assembly Journals* (11 December 1787).

44. There is not space here to discuss this in detail, but Sir Thomas Strange, chief justice from 1790 until 1797, believed it: see Strange’s Memorandum, *supra* note 14 at 353–355, and Blakeley, “Blowers”, *supra* note 12.

45. *Halifax Journal* (6 March 1788). See below for the “press war” of which this was a part. In fact before the Council carried out any investigation Sterns sought to have Blowers and another councillor, Henry Newton, the collector of customs, disqualified from considering the Assembly’s address on the ground that they had been beneficiaries of the judges’ partiality. A terse minute recorded the Council’s view that Sterns’s petition was “altogether undeserving” of Parr’s notice: see Memorial of Sterns and Taylor (18 February 1788) in *Collection of the Publications*, *supra* note 17 at 2–3, and Council Minutes (28 February 1788), RG 1, vol 213 at 139–140.

46. Council Minutes (28 February 1788), RG 1, vol 213 at 139–140.



Lawyers may have brought with them from the States," he said, "is so strong tinctured with Republican Spirit, that if they meet with any encouragement it may be attended with dangerous consequence to this Province." For Parr the attack on the judges was tantamount to disloyalty; it was an assault on the institution of the NSSC itself, and, more importantly, the arrogation to itself by the Assembly of the right to censure the judges threatened the colonial constitution. It was but one step in a process by which the power of the crown's representative was to be reduced, and that of the Assembly enhanced. Parr consistently referred to his opponents in this matter as "republicans." Sterns and Taylor, he said later, had "made a strong party, chiefly among the new Inhabitants, who have shown a seditious factious Spirit upon the occasion, many of whom I am sorry to say have introduced Republican Principles, who came here under the specious pretence of Loyalty." In similar vein he told Secretary of State Sydney that "these Gentlemen have stirred up a seditious factious Party against most of the Officers of Government here, and I hope they will be considered turbulent Spirits on your side of the Atlantic." The stakes were as high as they could be: "if the several Officers of Government are not supported, a few years may put a period to the British Constitution in this Province."<sup>47</sup>

To this invective was joined a personal critique of the lawyers, who were unscrupulously seeking the jobs of the men whom they sought to remove. "[T]he great point in view of the Attornies," he told Under-Secretary of State Evan Nepean, "is to displace the Judges, in order to bring their friends in their room." Sterns and Taylor were not the only ones. In a missive which strikes the reader as bordering on the hysterical, Parr complained about others who were too friendly with the Americans and about Richard Gibbons, Chief Justice of Cape Breton, who was making "seditious" speeches to the Grand Jury and fomenting dissatisfaction against him. He was, he lamented, "surrounded with a number of Fanatical, diabolical, unprincipled, expecting, disappointed, deceitful, lying Scoundrels who

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47. Quotations in this paragraph are from Parr to Nepean (8 March 1788 and 18 April 1788), CO 217, vol 60 at 173 and 177, and Parr to Secretary of State Sydney (20 April 1788), CO 217, vol 60 at 175. See also the references to "seditious meetings" and "Republican attornies" in Parr to Nepean (20 April 1788), CO 217, vol 60 at 73.

exist upon Party of their own creating, eternally finding fault with, and complaining against, their Superiors in Office.”<sup>48</sup>

Parr’s Council unanimously agreed with his handling of the complaints and, to the extent to which we have evidence of it, with his attitude to the complainants. Five of the seven councillors were pre-loyalists, men thoroughly connected to the indigenous establishment. The two loyalists on the Council were Blowers and Dr. John Halliburton, and the latter was not only a high Tory averse to critiques of institutions like the NSSC, but also an old friend of Blowers and Brenton’s brother-in-law—indeed Halliburton named his son Brenton.<sup>49</sup> Halliburton shared Parr’s view that the personal ambition of Barclay and Sterns was behind the whole thing and defended the judges: Deschamps had been on the bench for almost twenty years without such complaints while Brenton, he said, was “vastly superior” in ability to his loyalist opponents.<sup>50</sup>

### 3. *The interregnum, March 1788–December 1789*

More than two and half years passed before the Assembly came back to the NSSC judges, but the issue did not entirely go away. March 1788 saw what one contemporary described as a virulent “press war” in Halifax,<sup>51</sup> as Sterns and Taylor responded to the Council’s decision in the pages of the *Halifax Journal*,<sup>52</sup> published by John Howe, a loyalist sympathetic to Sterns. A series of documents and articles attacking not only the judges, but also the Council for its handling of the Assembly’s petition and, mostly, Blowers for his alleged desertion of the lawyers’ cause, appeared in the *Journal*. Sterns and Taylor also sought to show that the concerns raised about the judges were shared widely, that it was not simply a case of them fomenting discontent. Blowers responded, mostly anonymously, with three letters in the *Halifax Gazette* under the soubriquet of “Plain

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48. Parr to Nepean (18 April 1788 and 5 May 1788), CO 217, vol 60 at 177, 180. This hysteria had not much abated after a few months with Sterns and Taylor away. In August 1788 Parr said: “I am informed the latter gentlemen are now in London...advancing and fabricating the most enormous falsehoods against me and His Majesty’s Council. Be assured my dear sir that those people are equally inimical to all regular governments...they fret and vex me, I am a fool for my pains, it all proceeds from my anxiety for the welfare of this Province, which they do not care a damn about”: Parr to Nepean (13 August 1788), CO 217, vol 60 at 226.

49. His wife was Brenton’s sister Susannah: see Phyllis R Blakeley, “Brenton Halliburton” in *DCB*, *supra* note 2. Brenton Halliburton became a judge of the Nova Scotia Supreme Court, succeeding his uncle James Brenton in 1807. He stayed on the court for 53 years, until 1860, and served as Chief Justice from 1833.

50. John Halliburton to Nepean (20 April 1788), CO 217, vol 60 at 289.

51. The phrase is John Halliburton’s: see Halliburton to Nepean (20 April 1788), CO 217, vol 60 at 288.

52. The *Halifax Journal* has not survived, but the articles on the judges’ affair were published in 1788 in *Collection of the Publications*, *supra* note 17.

Truth,” defending the judges and accusing the lawyers of attacking them out of self-interest.<sup>53</sup>

Although the articles did not employ intemperate language about the judges, they did include the substance of Sterns’ and Taylor’s assembly testimony and in doing so publicized broadly their critiques of the judges. The judges’ response was swift and decisive. When Easter Term of the court opened on 1 April 1788, the judges called Sterns and Taylor, who were in court and prepared to argue a variety of cases, before them and demanded to know if they were the authors of the press articles. As soon as they admitted authorship Deschamps ordered their names stricken from the barristers’ rolls for contempt. He also denied a request that they be given the opportunity to speak in their defence.<sup>54</sup> The statements made about the judges, Deschamps said, “are too atrocious to pass unnoticed.” The lawyers had perpetrated “one of the boldest attacks that ever was made publicly to asperse the Characters of the Judges,” something which “aims at the subversion of the Constitution of the Court itself.” Deschamps’s speech offered little authority for his assertion that criticizing judges out of court was contempt, although he apparently had sought opinions on the point from the crown law officers. We do not know what those opinions stated, and in fact what authority there was for seeing the lawyers’ actions as contemptuous was both relatively recent and very controversial in England. Known there as “scandalising the court,” criticism of judges out of court was only made contempt in the early eighteenth century. Although Blackstone approved of it, the doctrine was heavily criticized as an infringement on English liberties and there was no eighteenth-century English case employing it after 1770, leading one author to conclude that “the contempt of power of scandalizing the court was thus very nearly stillborn.”<sup>55</sup> Nonetheless, the judges were within their rights, even if they were procedurally incorrect not to have allowed the lawyers to say something in their defence. Shortly thereafter, because the press articles had criticized the Council, Sterns and Taylor were also barred from practising before that body, which served as the Court of Appeal. Also, because the Lieutenant-Governor was Chancellor, they were barred from Chancery work.<sup>56</sup>

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53. *Halifax Gazette* (11, 18, and 25 April 1788).

54. This account of the contempt proceedings and its aftermath is from *Halifax Gazette* (8 April 1788), and Phillips, “The Court and the Legal Profession”, *supra* note 7.

55. Douglas Hay, “Contempt by Scandalizing the Court: A Political History of the First Hundred Years” (1987) 25 *Osgoode Hall LJ* 431 at 475. This discussion of the law is from Hay and a summary of it appears in Phillips, “The Court and the Legal Profession”, *supra* note 7 at 168-169.

56. Council Minutes (3 April 1788), RG 1, vol 213 at 142-143.

The judges' actions against the two lawyers did not end there. Before leaving for London to plead his case there, Sterns tried to make arrangements to maintain his practice. He advertised to his clients that their cases would be looked after "by a Gentleman of Probity and Abilities, who will act in his behalf."<sup>57</sup> This was the leading non-loyalist lawyer Daniel Wood Senior, who had been prothonotary of the Supreme Court until superseded in 1786, and who thereafter practised extensively in the NSSC.<sup>58</sup> Wood was to have the use of Sterns's office and clerks, and take all fees from clients, and in return would pay Sterns £300 a year. Wood appeared in court for one client, at which point the judges became aware of what was going on, and through an intermediary told Wood that they "would not permit any practitioner" concerned with Sterns "to carry on business." Wood backed out of the arrangement, fearful that the judges "may dismiss me unheard in the same manner they have you."<sup>59</sup> The judges' reaction to criticism was swift and effective, even if, in the case of Wood, it was arguably illegal and certainly a gross abuse of their power. It demonstrates the extent to which they, like Lieutenant-Governor Parr, saw intimate links between the NSSC and the government, between law and political order and conformity. The NSSC was an integral part of the colonial power structure: nobody could criticize its judges without being seen as disloyal and nobody could assist such critics in any way.

Sterns and Taylor, after an unsuccessful attempt to rally popular support for their cause in the colony, left to fight their case for reinstatement in England. Their parting gesture was an open letter to "the Freeholders and other Inhabitants of the Province" in which they reiterated their determination to get the judges removed.<sup>60</sup> But their principal mission was to obtain reinstatement at the bar. They assiduously lobbied the government to intervene on their behalf, but to no avail. The opinion of the London law officers was that the Assembly had been cursory in framing unjust, or at least unproven, charges and that Sterns' and Taylor's conduct in writing the newspaper articles was "reprehensible." In the circumstances the judges were justified in disbarring them and reinstatement could only be achieved

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57. *Halifax Journal* (17 April 1788). The account which follows of the arrangement between Wood and Sterns, and of the judges' response to it, is from Sterns to Wood (10 April 1788) and Wood to Sterns (19 April 1788), CO 217, vol 60 at 325-327.

58. See Petition of Daniel Wood Senior to Assembly (12 March 1789) in Assembly Petitions, RG 5, Series A, vol 2, no 143; Supreme Court Records, RG 39, Series J, vols 3-11; and Lieutenant-Governor Sir John Wentworth to Henry Dundas (23 November 1792), CO 217, vol 72 at 90.

59. Wood to Sterns (19 April 1788), CO 217, vol 60 at 327.

60. *Halifax Journal* (24 April 1788).

by an apology and petition to the Council and the Court.<sup>61</sup> Eventually Sterns gave up and returned late in 1789 to Nova Scotia to fight the battle there. Taylor, whose career in Halifax had been less successful than Sterns's, did not return. He gave up the struggle, got married in London to the daughter of fellow New Jersey loyalist Major Philip Van Cortland of Halifax, and eventually returned to New Jersey, where he died in 1806.

In the interim the judges were not discussed in the Assembly, for the simple reason that Parr prorogued it when it was supposed to meet in March 1788, and a number of times thereafter, so that it did not convene again until March 1789. Thus it was not until then that Parr's official response to the address of December 1787 was given to the Assembly, and, perhaps in an attempt to placate those Assemblymen who thought their complaints had been dismissed without serious consideration, it turned out to be a rather tepid vindication of the judges. Whereas the Council resolution of February 1788 had called the Assembly's charges "groundless and scandalous," Parr now said that they were "not supported by the Proofs which accompanied [the] address."<sup>62</sup> When the loyalist group tried to revive the issue with two motions which questioned the Council's handling of the 1787 request for an inquiry, they failed narrowly,<sup>63</sup> and the proceedings demonstrated a clear split between some of the old inhabitants and the loyalists which had not been obvious when the request for an inquiry had been made fifteen months earlier. Many of the former had been prepared to conduct a preliminary investigation into the judges, but they were not ready to attack the Lieutenant-Governor and his Council. Conversely, many of the loyalists had brought with them a view that the elected branch had the power to hold the executive to account on any issue, including this one.

The fault lines became clear in the debate over a third motion by Isaac Wilkins, the loyalist member for Shelburne, which asked Parr to remove "those evil and pernicious councillors" who had advised him badly over the judges. Cleverly Wilkins argued that it was the judges who had been

61. See Sir Archibald MacDonald's Opinion (1788), and Lord Sydney to Sterns and Taylor (14 December 1788), both in Brenton Halliburton Papers, MG 1, vol 334, no 1. For Sterns's and Taylor's sojourn in London and their correspondence with officials there see Sterns to Nepean (23 August 1788 and 25 October 1788), CO 217, vol 60 at 323 and 331; Sterns to Secretary of State Grenville (3 and 8 October 1789), CO 217, vol 61 at 237, 297-298; Sterns and Taylor to Evan Nepean (20 September 1788), CO 217, vol 60 at 329; Sterns and Taylor to Lord Sydney (2 May 1789), CO 217, vol 61 at 179; Taylor to Grenville (9 January 1790), CO 217, vol 62 at 248; and Evan Nepean to Taylor (15 January 1790), CO 217, vol 62 at 250.

62. *Assembly Journals* (12 March 1789).

63. A motion to ask the Council for all the documents they had relied on lost 14-13, and one that resolved that Parr's response was "satisfactory" passed 15-14: *Assembly Journals* (12 March 1789); RG 5, series A, vol 2, no 175. A third motion is discussed immediately below.

done a disservice; a proper investigation might well have cleared them, but, as it was, the Council's inaction had "indelibly" fixed "a stigma of guilt and reproach upon them," and they were now "tainted." Barclay "read his fellow legislators a lesson in constitutional theory" and argued that they were "the natural guardians of the rights of Nova Scotians, invested with the authority to review the conduct of the Council and indeed of the lieutenant-governor himself." In stark contrast, Alexander Howe, a pre-loyalist member for Annapolis, said that Wilkins' motion "tended to rebellion," a phrase that drew some ire from Wilkins and Barclay. The loyalists lost by the substantial margin of 20-9.<sup>64</sup>

#### 4. *The loyalists triumph in the Assembly, 1790*

"All matters were quiet and comfortable," Parr told London in March 1790, "until the return of Mr Sterns," who had by then "revived the old Subject of complaint against the Puisne Judges."<sup>65</sup> Sterns spent most of his time in the early months of 1790 organizing another Assembly assault on the judges, as we shall see, but he also went to court. On 27 February 1790 two writs were filed in the NSSC. In one Sterns, representing himself, sued the Councillors who had disbarred him for £3,000; the writ was returnable in Halifax. In another suit entered on the same day, Taylor, represented by Barclay, sued the same men for the same amount, the writ being returnable at Annapolis. Nothing seems to have happened in these cases; they were perhaps merely an impudent attempt to keep alive the resentment at their disbarment.<sup>66</sup>

More importantly, Sterns not only "revived" the subject of the judges, with his principal ally Thomas Barclay he was able to have them "impeached" in March 1790. This was perhaps surprising, given how the Assembly had dealt with the Council's handling in 1789 of its prior complaint. But three things had changed by the time the Assembly convened in February 1790. First, Sterns was back in Halifax, and, while we know little about his personality, he was clearly a fighter and also clearly an effective advocate in his own cause. John Halliburton detested "the principal of the two Incendiaries," but he also grudgingly conceded that he had been able to "set every engine to work to have [the Judges] impeach'd by the lower House of Assembly."<sup>67</sup> Second, and at least as importantly,

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64. For this paragraph see *Assembly Journals* (14 March 1789); Tulloch, "Barclay", *supra* note 15, and, for the quotations, a report of the debate which appeared in the *Weekly Chronicle* (21 March 1789). This edition of the *Chronicle* has not survived, but is quoted extensively in Murdoch, *History of Nova Scotia*, *supra* note 7 at vol 3, 66-72.

65. Parr to Nepean (18 March 1790), CO 217, vol 62 at 21.

66. See Supreme Court Records, Docket Book, RG 39, Series J, vol 100.

67. Halliburton to Nepean (24 April 1790), CO 217, vol 62 at 266.

there were new cases to complain about, one of them a criminal case, *R v Bartling*, which had excited considerable public controversy in mid-1789. Third, when he returned Sterns also alleged that the judges had lied in their response to the earlier complaints when they gave their answers to the Council in late 1787. This document had not been made public in Halifax, but Sterns and Taylor were given it while in London.<sup>68</sup> These three factors must have helped Sterns. A more negative factor from which he benefitted was that while a new chief justice had been appointed in 1789 by London in the person of Sir Thomas Strange, Strange delayed his journey to Halifax until mid-1790. With no new chief justice *in situ*, the NSSC was still without a prestigious leader.

The Assembly convened in late February, 1790, and two weeks later it became clear that Sterns and his legislative allies had been working hard on preparing their case. On 10 March Barclay introduced thirteen “draft articles of impeachment” which accused Deschamps and Brenton of “High Crimes and Misdemeanours.”<sup>69</sup> The thirteen draft articles noted sixteen cases where the judges had acted either incompetently or partially, or both, between 1785 and 1789. Eleven of the cases derived from 1787. Seven were from the Annapolis circuit and seven from Halifax, with the other two from Cumberland and Windsor. Two of the cases were criminal proceedings, the vast majority civil ones. Nine of the cases had been cited in the Assembly when Sterns and Taylor had given evidence in November 1787, although a further four cited then did not make their way into the 1790 draft articles. The eighth and ninth draft articles also accused the judges of lying in their response to the Council in 1787–1788.

The significance of the Assembly calling its process an “impeachment” cannot be overstated, because in doing so it was invoking a direct comparison between the British parliament and itself, a comparison captured also in some members’ reference to the Assembly as “the Commons of Nova Scotia.” In making this comparison Assemblymen were echoing an important theme in the pre-revolutionary political history of the American colonies. By the middle of the eighteenth century colonial assemblies were the most powerful political bodies in most colonies and their right to govern internal affairs seen as the foundation of colonial constitutions. Just as the British parliament regulated the affairs of the metropolis, colonial

68. This had prompted their rebuttal pamphlet, *The Reply of Sterns and Taylor*, *supra* note 34.

69. *Assembly Journals* (10 March 1790). See “Articles exhibited by the Representatives of the People of Nova Scotia, in General Assembly Convened, in the Name of themselves and the Commons of the said Province, against Isaac Deschamps and James Brenton, Esquires, Justices of his Majesty’s Supreme Court of and for the said Province of Nova Scotia, in maintenance of their Impeachment against them for High Crimes and Misdemeanours in their said Office” at RG 1, vol 302, no 38.

constitutions were based “on the assumption that colonial Britons might not be taxed or subjected to laws relating to their internal affairs without the consent of the representatives in their own parliamentary bodies.”<sup>70</sup> The loyalists brought such ideas to British North America, for their “loyalty” was to the crown, not to aristocratic government.<sup>71</sup>

But whatever authority local assemblies had, no explicit power was given to colonial assemblies to sanction judges, and this was the first occasion on which a British North American assembly tried to do so. In the eighteenth century colonial executives could get rid of judges they did not like—and not infrequently did so—because the judges held office “at pleasure” and thus could be dismissed by the crown at any time.<sup>72</sup> The principal reason for this was that judges were viewed as vital players in colonial governance and “at pleasure” appointment was an effective way of ensuring a Baconian judiciary, loyal to colonial executives—of which the judges, especially chief justices, were usually members in any event.<sup>73</sup> In eighteenth-century America this power was tempered only by a royal instruction that governors not do so “without good and sufficient cause,” which was to be relayed to London.<sup>74</sup> It was also limited by the fact that before 1782 colonial governors could only dismiss judges appointed by the local executive; judges appointed by London, including the chief justice

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70. Jack P Greene, “Introduction: Empire and Liberty” in Greene, ed, *Exclusionary Empire: English Liberty Overseas, 1600–1900* (Cambridge: Cambridge University Press, 2010) 1 at 12 [Greene, “Introduction”]. See also Elizabeth Mancke, “The Languages of Liberty in British North America, 1607–1776”, in *ibid* at 25; and Jack P Greene, “Traditions of Consensual Governance in the Construction of State Authority in the Early Modern Empires in America” in M Jansson, ed, *Realities of Representation: State Building in Early Modern Europe and European America* (New York: Palgrave Macmillan, 2007) at 171.

71. See Greene’s pithy assertion that the rise to power of colonial assemblies “had made Britain’s American colonies functionally republican long before they became anti-monarchical”: Greene, “Introduction”, *supra* note 70 at 13.

72. For a general overview of the constitutional position of colonial judges see McLaren, *Dewigged, Bothered and Bewildered*, *supra* note 3, ch. 4; Joseph H Smith, “An Independent Judiciary: The Colonial Background” (1976) 124 U Pa L Rev 1104; and Leonard Woods Labaree, *Royal Instructions to British Colonial Governors, 1670–1776*, vol 1 (New York: Appleton-Century, 1935) at 367: “all commissions to be granted by you to any person or persons to be judges, justices of the peace, or other necessary officers, be granted during pleasure only.” See also for the continuation of this practice well into the nineteenth century Alpheus Todd, “Colonial Judges in Relation to the Crown and Parliament” in *Parliamentary Government in the British Colonies*, 2d ed (London: Longmans, Green, and Co, 1894) at 827 et seq.

73. For a broader discussion of this see Jim Phillips, “The British North American Judiciary: Appointment, Tenure, and Separation of Powers” (2011) [unpublished]. A “Baconian” judiciary, which takes its name from Sir Francis Bacon, James I’s attorney-general, was, in one author’s words, “one which overwhelmingly guided its behaviour and reasoning by the political needs of the governors”: F Murray Greenwood, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution* (Toronto: Osgoode Society, 1993) at 4.

74. For this instruction see Labaree, *Royal Instructions*, *supra* note 72, vol 1 at 369.



of Nova Scotia, could only be dismissed by London. This distinction was removed in 1782 by the *Colonial Leave of Absence Act* (also known as *Burke's Act*),<sup>75</sup> which stipulated that anybody holding a colonial office by virtue of a royal patent could be removed by the governor for absenteeism without cause or leave, neglect of duty, or misbehaviour. The intention was to bring under local control all officials, whether they were appointed from London or locally, although the *Act* also gave the party removed a right to appeal to the King in Council.

All of this was well established, and the converse was also true—colonial assemblies could play no role in disciplining judges. English judges, following the *Act of Settlement* of 1701, which established that they held their commissions “during good behaviour,” could only be removed on an address of both houses of Parliament to the Crown. But the *Act of Settlement* did not apply to the colonies, and thus colonial judges were, as noted above, both appointed “at pleasure” of the crown and not susceptible to proceedings against them by the elected branch. The very different situation in the colonies was made clear in 1782 when the Assembly tried to give the puisne judges good behaviour appointments as a *quid pro quo* of making their salaries a permanent charge on the provincial treasury, rather than payable by annual appropriations vote.<sup>76</sup> London disallowed the statute, because it would put the puisne judges “upon a better footing than the judges in Great Britain” as there would be no method of removing them at all.<sup>77</sup> That is, tenure on good behaviour would take away the crown’s power to dismiss and no method existed for the Assembly to do so.

In 1787 the Assembly had asked the Council to investigate its allegations. Following the failure of that first attempt, the Assembly tried to give itself new powers. In the same 1789 session in which some had unsuccessfully sought to censure Parr over his handling of the earlier complaints, the Assembly passed a statute to provide for permanent salaries for the puisne judges. Unlike in 1782, this time there was no

75. 1782 (UK), 22 Geo III, c 75. *Burke's Act* superceded the royal instructions which had previously been the origin of governors’ power to dismiss judges: see Todd, *Parliamentary Government in the Colonies*, *supra* note 72 at 828-830.

76. *An Act to Provide for the Support of the Puisne Judges of His Majesty's Supreme Court*, 1782 (UK), 22 Geo III, c 14.

77. *Assembly Journals* (8 October 1783). Note also that the 1782 *Act* only applied to the puisne judges, and thus they would have had a tenure more secure than the chief justice. For disputes emanating from a few other colonies’ attempts to give good behaviour commissions in the eighteenth century see Leonard Woods Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783* (New Haven: Yale University Press, 1930) at 390-400. British North American judges did not get good behaviour appointments until well into the next century: Upper Canada in 1834, Nova Scotia in 1848, and New Brunswick at Confederation.

attempt to give the judges “good behaviour” appointments. Rather, the second section of the Act stated: “Provided always, That nothing herein... shall be construed to...change the nature of His Majesty’s commissions to such Judges, but the Puisne Judges shall be removed at the pleasure of His Majesty, or upon the joint address of the Council and Assembly, to the ...Lieutenant-Governor.”<sup>78</sup> This last phrase thus provided an alternative method of removal to unilateral crown action, a method which mirrored that for removing English judges. It thus stands as evidence of Assemblymen’s belief that they had a right to seek dismissal of the puisne judges in the same way that the Commons had in Britain. It is rather surprising that Parr gave this section his assent, and indeed that London did so, for it broke with the long-established policy that only the crown could dismiss a colonial judge and was, to my knowledge, the first successful attempt to give a colonial Assembly any say in the matter. Yet its significance was more apparent than real. In requiring a joint address from Assembly and Council it prevented the Assembly from acting unilaterally and required, in effect, the Lieutenant-Governor to be in favour of dismissal—and the Lieutenant-Governor could dismiss a judge in any event.

Presumably for this reason the Assembly did not try to use this new procedure in 1790. It did not seek to combine with the Council on a joint address to the Lieutenant-Governor, for it must have realized that the Council would not co-operate. Instead it chose a process it called impeachment. Impeachment was a procedure originating in the fourteenth century that was intended for the removal of any government official who had broken the law. Although Blackstone still insisted in the mid-eighteenth century that an impeachment was “a prosecution of the already known and established law,” it had increasingly been used in the seventeenth and eighteenth centuries for essentially political prosecutions.<sup>79</sup> The only reference we have as to why the Assembly chose “impeachment” suggests that its attraction lay in its flexibility as a judicial/political device.

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78. *An Act to Provide for the Better Support of the Puisne Judges of His Majesty’s Supreme Court*, 1789 (UK), 29 Geo III, c 12 [emphasis added].

79. William Blackstone, *Commentaries on the Laws of England*, book 4 (originally published 1765–1769; Chicago: University of Chicago Press facsimile edition, 1979) at 256. For impeachment generally see John Hatsell, *Precedents of Proceedings in the House of Commons*, 2d ed, vol 4 (South Hackensack, NJ: Rothman Reprints, 1971) at 56–84; Peter Charles Hoffer and NEH Hull, *Impeachment in America, 1635–1805* (New Haven: Yale University Press, 1984) ch 1; and a very useful brief summary in AW Bradley, “Personal Responsibility and Government: A Role for Impeachment?” in Geoffrey Carnall & Colin Nicholson, eds, *The Impeachment of Warren Hastings: Papers from a Bicentenary Commemoration* (Edinburgh: Edinburgh University Press, 1989) at 164.

Whether or not Assemblymen understood what “impeachment” meant,<sup>80</sup> presenting the accusations in the Assembly surely appealed to men like Barclay because it allowed the Assembly to propagate its image of itself as the “Commons” of Nova Scotia, and thus conveyed a wider message in the ongoing struggles with the executive. Ironically, the Assembly used impeachment at a time that historians now think it was rapidly becoming obsolete—cabinet government obviated the need for it as a means of controlling the King’s ministers and more clearly “criminal” prosecutions were thought better conducted in the ordinary courts.<sup>81</sup> But the colony did not have responsible government, let alone cabinet government, and Speaker Uniacke captured the sentiments of a majority of members when he stated on the day that the articles were introduced that “[i]t was the right of any member of that House to impeach any officer of government, if it appeared to him the public good required it.”<sup>82</sup>

Yet the Assembly did not follow the usual impeachment procedure, which in Britain involved an accusation by the Commons and the finding of formal charges which were then tried in the Lords; the best-known contemporary example was the impeachment of Warren Hastings, former governor-general of India.<sup>83</sup> Rather, the Assembly requested a “trial” on the impeachment articles in Nova Scotia by some body constituted by the home government. It makes sense that it would not ask for a trial by the Upper House—the Council sitting in its legislative capacity—since that body had already shown itself highly unsympathetic to complaints about the judges. This hybrid process—accusation by the Assembly and trial by London—was exactly the same one employed by the Lower Canadian Assembly more than two decades later in 1814.<sup>84</sup>

The introduction of the articles of impeachment on 10 March resulted in a long debate over whether they should be received and evidence heard in support of them. Barclay’s short opening speech contained little about

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80. There is some evidence that the Assembly thought it had already attempted “impeachment” in 1787; in the press war of 1788 Sterns consistently referred to the brief Assembly investigation as such: see *Collection of the Publications*, *supra* note 17, *passim*. Indeed, see the full title of this publication: *Collection of the Publications Relating to the Impeachment of the Judges...*

81. In addition to the sources cited above see PJ Marshall, *The Impeachment of Warren Hastings* (Oxford: Oxford University Press, 1965) ch 4. Marshall argues that by the time that Hastings’s impeachment, which began in the Commons in the late 1780s, reached the Lords in the 1790s opinion had shifted against such a political use of impeachment and it was accepted that both the charges and the evidence ought to conform to common law standards of precision and admissibility.

82. *Nova Scotia Magazine and Comprehensive Review of Literature, Politics and News* (April 1790) [*Nova Scotia Magazine*]. The *Nova Scotia Magazine* was a monthly that lasted just three years, 1789–1792.

83. Marshall, *Impeachment of Warren Hastings*, *supra* note 81.

84. See Kolish & Lambert, “Impeachment of the Lower Canadian Chief Justices”, *supra* note 2, esp at 470–471.

the substance of the charges, concentrating rather on the way in which the previous request for an inquiry had been handled, which had resulted only in “greatly increased” concerns about the administration of justice in the Supreme Court.<sup>85</sup> He told the Assembly that the intention, should the charges be accepted, was to petition the King “to institute a court for the trial of those judges.” Speaker Uniacke told members the Assembly had a right to investigate, and asked them to “avoid all unnecessary warmth” and to proceed with “propriety.” A long debate on the motion to receive the articles ensued. Many of the members who voted to consider the articles made the argument that the matter had to be properly resolved one way or the other. Philip Marchinton, for example, a loyalist Halifax merchant, complained that the issue had been “the topic of conversation a hundred times over in all companies” and there was “a dark cloud hanging over the law and the practice of it” that needed to be dispelled. Major Jonathan Crane, a pre-loyalist and a member for King’s County, said much the same, although he also insisted that many in the colony were indeed dissatisfied with the fact that “the Judges do not fail to favour their friends.” Isaac Wilkins, a clergyman, referred similarly to “the fountains of justice” being “choked up” and complained that “almost every person who had a cause depending in that court, was solicitous to keep off the determination of it, through want of confidence in the bench.” In line with the very use of the term “impeachment,” the loyalists also frequently adverted to their view of the Assembly as “representatives of the people” (Wilkins) or the guardian of the “public good” (Barclay), employing the language of Assembly power against the unelected branches of government. In addition to those individuals mentioned, three other men spoke in favour of receiving the articles: loyalist Thomas Millidge of Digby and pre-loyalists Benjamin Belcher of Kings County and John McMonagle of Windsor.

The only person to make an extended argument against the motion was Charles Hill, a Halifax businessman and a pre-loyalist who sat for Amherst. In two speeches he called himself a friend to the judges, and accused others of trying to “create strife and animosity.” For the most part, he argued both that the complaints were merely those of dissatisfied lawyers, and that the charges had already been disposed of. He expressed some sympathy for Sterns, “a gentleman of respectable character,” and wished for his restoration to the bar, but did not wish the house to “revive the rancour” of 1787. Apart from Hill only John Butler Dight of Cumberland

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85. The source for the debate over the introduction of the articles is the *Nova Scotia Magazine* (April 1790). Substantial extracts from this newspaper were published in Murdoch, *History of Nova Scotia*, *supra* note 7, vol 3 at 85-92.

spoke against the motion, and that was to ask for an adjournment on the ground that no notice had been given of the introduction of the articles and the House was thinly attended as a result.

Barclay's motion prevailed 17-10,<sup>86</sup> with eleven of the thirty-nine members not present (Uniacke was speaker), meaning that Dight was partly correct. The voting on this occasion presaged a more or less consistent pattern throughout the next few weeks. Of all the loyalists present, eight voted for the motion and all ten who voted against were planters. Crucially, therefore, ten old inhabitants voted with the loyalists. In the weeks preceding the session Barclay and Sterns, very much the "managers" of the impeachment, had been able to split the old inhabitants into two clear groups, with a solid phalanx being sufficiently persuaded that the judges' conduct fell well short of the ideal.

Although the voting numbers increased slightly over time as other members turned up who had not been there initially,<sup>87</sup> the pattern established at the beginning remained more or less the same. Across the six substantive and procedural votes where voting totals are recorded in the *Assembly Journals*,<sup>88</sup> majorities in favour of impeachment were 17-10, 21-8, 18-12, 17-12, 18-11, and 17-10—substantial in every case but overwhelming in none. Using those same six recorded votes, three interest groups can be identified. First, the loyalists consistently voted as a bloc against the judges, the eight who voted to receive the draft articles on 10 March voting against the judges on all subsequent occasions.<sup>89</sup> Three loyalists—Benjamin James, Alexander Leckie, and James Putnam—never attended, and the only loyalist vote cast for the judges was that of Michael Wallace, who was absent for five of the votes, but did vote for the invitation to allow the judges to make a defence.<sup>90</sup>

86. *Assembly Journals* (10 March 1790).

87. Absenteeism was always an issue. In the six recorded votes discussed immediately below, absentees were eight once, nine three times, and eleven twice. Six members never showed up to vote on any occasion. I have counted non-voters as absentees, which seems reasonable, although in fact the *Journals* do not record abstentions, so some members might have been present on some occasions.

88. The *Journals* do not give either the numbers of voters or indicate who voted on which side for all divisions. The six votes for which voters' names are given in the *Journals*, which are discussed below, are the vote to receive the articles on 10 March, the vote on 20 March not to consider charges discussed in 1787, the 29 March vote on an adjournment to allow the judges to make a defence, two votes on 6 April on the second and third of the draft articles of impeachment, and the vote on 8 April to strike out some of the wording of the draft address to the crown: *Assembly Journals* (10, 20 and 29 March 1790 and 6 and 8 April 1790).

89. They were Thomas Barclay, James DeLancey, Elisha Lawrence, Charles McNeal, Philip Marchinton, Thomas Millidge, Gideon White, and Isaac Wilkins.

90. It was noted above that thirteen loyalists were elected in the 1785 election, but by 1790 there were only twelve, because Blowers was elevated to the council in 1788.

Second, there was a group of consistent supporters of the judges, all old inhabitants and many of them men closely connected to the mercantile/official establishment. They included Charles Morris II, son of a former NSSC judge; JM Frere Bulkeley (Sydney County), the son of the provincial secretary Richard Bulkeley; Benjamin Dewolfe (Hants County), a businessman, merchant, and slave-owner from Windsor who later became the county sheriff; John Butler Dight, a Cumberland MHA and the nephew of former councillor John Butler; John George Pyke, one of the original Halifax settlers and a JP for the town since 1777<sup>91</sup>; and Charles Hill, a Halifax commercial grandee who married into the powerful Cochran family and sat for Amherst Township. All of these men supported the judges on every vote when they were present, with one exception.<sup>92</sup>

The most significant group were a third category—old inhabitants who consistently supported impeachment. Nine such men voted to receive the articles on 10 March, and six of them voted against the judges on all five votes thereafter. They were all rural members: Matthew Archibald (Truro Township), Benjamin Belcher (Cornwallis Township), Jonathan Crane (King's County), John Day (Newport Township), Robert McElhinney (Londonderry Township), and Casper Wollenhaupt (Lunenburg Township). They were joined after 10 March by three other out-settlement representatives who had been absent initially but attended regularly thereafter: Simeon Perkins and Benajah Collins of Liverpool and Samuel Poole of Yarmouth. Very few individuals changed sides on any issue.<sup>93</sup>

On 15 March the judges were informed of the charges and the taking of evidence, both oral testimony and the production of documents, began the same day. It occupied most of eight days between 15 and 31 March, with the House dealing with routine business on other days. Sixteen witnesses testified, including, of course, the star witness Sterns. There were four other lawyer witnesses: Barclay, who was also very much the manager of the impeachment, doing most of the questioning, Daniel Wood, Rufus Chandler, and Martin I Wilkins. Three parties in the cases appeared—

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91. Many sources state that Pyke was a lawyer, but he has been definitively shown not to have been one in Philip Girard, "The Rise and Fall of Urban Justice in Halifax, 1815–1866" (1988) 8 NS Hist Rev 57 at 65.

92. Morris voted against the motion, discussed below, not to consider charges discussed in the 1787 investigation. Two other consistent but not complete supporters of the judges were John Fillis, one of Halifax's leading merchants, and Detlef Jessen, one of the first Lunenburg settlers and variously ICCP Judge, registrar of deeds, and excise collector.

93. John McMonagle, for example, the planter member for Windsor Township, voted to receive the articles on 10 March, but in a debate on 20 March, discussed below, when the question was whether the House should discuss articles dealt with in 1787, he spoke against doing so: see *Nova Scotia Magazine* (May 1790). John William Schwartz was the most consistent "swing voter." He voted for the judges three times and against them three times.

merchant Jonathan Tremain and Christian and Mary Bartling, whose cases are discussed below—as did court and enforcement officials and some jurors. As in 1787 the evidence was taken mostly in the form of answers to rather leading questions.<sup>94</sup> The judges were allowed counsel and were represented by “two young lawyers”: probably Edward Brabazon Brenton, James Brenton’s son who had studied at Lincoln’s Inn and was a lawyer of five years’ standing, and James Stewart, the son of loyalist merchant Anthony Stewart and a protégé of Blowers, who had been called to the bar only in 1787.<sup>95</sup> Their cross-examination of witnesses had to be done through an MHA and John George Pyke mostly performed that role. The proceedings were described by Parr as having “all the Forms of a Court of Judicature,” with “witnesses summoned and sworn to give Evidence, then examined and cross examined with all the Formality of a trial.” It was also, of course, a great spectacle. “[A]most half the town...were admitted by Tickets,”<sup>96</sup> noted Parr, and member Simeon Perkins of Liverpool recorded in his diary that: “The lobby of the House was so crowded yesterday [15 March] that the House resolved to make out a number of tickets, and not to admit any but what were introduced by members.” Each MHA was given two tickets each at first, but when it was found that the building would accommodate more, members got three.<sup>97</sup>

Two attempts were made by the judges’ supporters to disrupt the process. On 20 March, Pyke moved that any charges on which the Council had acquitted the judges in 1788 be removed. A long debate ensued, with Barclay taking the lead in opposing the motion because no real investigation had taken place—he called the Council proceedings a “mock enquiry.” He also, as before, stressed the right of the Assembly and its members to consider questions whether or not the Lieutenant-Governor and the Council wished to do so. As a member of the House, he said, he was “a person in whom the public had reposed their lives, liberties and properties,” and it was the duty of each member to consider the charges and accept or reject them, without intervention from the Council. Those

94. For just one of many examples, see this question to Thomas Wood, Clerk in the Halifax County Prothonotary’s office, from Barclay, in the case of *R v Bartling*, discussed below: “Q. 2. Did not Judge Brenton then and there declare in your presence and in the presence of the said Jas. Clarke that Bartling had been guilty of an enormous Crime and that he could not or would not Bail him?”: RG 5, Series A, vol 3, no 46.

95. The records do not indicate who the judges’ counsel were, and the suggestion that they were Brenton and Stewart comes from JB Cahill, “Edward Brabazon Brenton” in *DCB*, *supra* note 2. Both men later became judges, Brenton on the Newfoundland Supreme Court and Stewart on the NSSC, 1815–1830.

96. Parr to Grenville (24 April 1790), CO 217, vol 62 at 32.

97. Charles Bruce Fergusson, ed, *The Diary of Simeon Perkins 1790–1796* (Toronto: Champlain Society, 1961) at 482.

supporting the motion relied entirely on the argument that the Council had fairly disposed of some of the charges in 1787–1788, which in the circumstances was simply untenable. Pyke's motion was defeated 21-8.<sup>98</sup>

A second attempt to at least delay the proceedings was made after most of the evidence was in, on 29 March.<sup>99</sup> Dight moved that once all the evidence was in the judges be allowed to enter answers to the charges. The ensuing debate turned on the procedural question of whether the motion was proper or whether the judges themselves had to petition the House for an opportunity to present answers. The latter was Barclay's position, couched in terms of parliamentary procedure; he "conceived it his duty to explain to the House what the mode of parliamentary proceedings was on such an occasion." He used the example of Warren Hastings' impeachment; he had been allowed to present answers after petitioning for the right to do so. Again, therefore, we see that lying behind the specific issues in the investigation were ideas about the constitutional role and rights of the Assembly. The judges' supporters argued that it was implicit in Dight's motion that he was asking on behalf of the judges, but whether that was true or not was irrelevant. The judges had to ask, and in doing so to acknowledge the validity of the proceedings. As Detlef Jessen of Lunenburg put it, while it was "perfectly constitutional for every British subject to be heard in his defence...the application for a hearing to that House should be by petition, as he believed it to be the parliamentary mode." When Dight amended his motion to state that the judges should be heard by petition, it did not remove the objections. The judges had first to tell the Assembly that they wanted to be heard. Some members were prepared to entertain the motion if additional words were added to show that it was made at the judges' request, but Dight in his turn objected to this. In the end the matter went nowhere, a motion for deferral succeeding 18-12.

The climax came on 5–7 April, with a series of resolutions passed to the effect that enough evidence had been presented to sustain some of the charges. The only recorded votes were those on the second and third draft articles, which passed 17-12 and 18-11 respectively, but no votes were recorded for any of the others. Some of the draft articles failed as "not being supported by sufficient evidence." An address to the King accompanied the resolutions, asserting that complaints against the judges were "daily increasing to the great dissatisfaction of the Community." The

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98. *Assembly Journals* (20 March 1790); *Nova Scotia Magazine* (May 1790).

99. For this paragraph see *Assembly Journals* (29 March 1790), and *Nova Scotia Magazine* (June 1790).



address asked London “to institute such a Court here for the trial of those Judges as may be competent to that purpose” or “such other relief” as the King “shall think proper.”<sup>100</sup> The address did not specify who would preside over such a trial—John Halliburton thought that the intention was to have the New Brunswick judges try their colleagues<sup>101</sup>—but it was a remarkable demand, an indication that the Assembly did not put its faith in any London institution, presumably fearful that it would be overly influenced by Parr and his Council. The demand for a Halifax-based court was but further indication that the loyalty of the loyalists, and their newly-won supporters among the old inhabitants, was to what they saw as the principles of the British constitution, not to any particular British government or policy.

Parr was also asked by the Assembly to suspend the judges in the interim, but his Council voted 5-1 against doing so. The surprise perhaps is that one councillor sided with the Assembly: Irish merchant and former Assembly speaker Thomas Cochran. Cochran was a member of a small Irish clique that had considerable influence in the colony, and had been very close to the former Irish Chief Justice Bryan Finucane. Nothing in his life or connections suggests a fondness for the loyalists; indeed he was exemplary of the pre-revolutionary elite that they were trying to supplant. One can only speculate that he was perhaps simply persuaded of the merits of the Assembly’s case, or at least that it had sufficient merit to warrant a suspension until the judges could be exonerated.<sup>102</sup> In any event, Parr had the backing of all his other advisers. Privately he was entirely unmoved; the charges were either old ones that had been already dealt with or new ones, which “on a fair investigation will be found equally frivolous.”<sup>103</sup>

##### 5. *Exoneration: The Privy Council*

The passage of the articles of impeachment saw the locus of the dispute shift to London. In addition to the official correspondence, a voluminous collection of letters went across the Atlantic from partisans on both sides. The Assembly also sent an agent, Colonel Elisha Lawrence, to London to organize the prosecution, under a pretext that he was going to raise money

100. For the votes see *Assembly Journals* (5-8 April 1790). The final articles are in *The Humble Petition*, *supra* note 1; quotation is at 4.

101. John Halliburton to Nepean (24 April 1790), CO 217, vol 62 at 266.

102. Council Minutes (7 April 1790), RG 1, vol 213 at 217-218. For Cochran see *Assembly Directory*, *supra* note 17 at 37; Philip Girard, “Taking Litigation Seriously: The Market Wharf Controversy at Halifax, 1785–1820” in G Blaine Baker & Jim Phillips, eds, *Essays in the History of Canadian Law, Volume 8: In Honour of R.C.B. Risk* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1999) at 213; Cahill, “The Career of Bryan Finucane”, *supra* note 26; and Anon, “The Charter Membership of the Charitable Irish Society” (1986) 6 NS Hist Rev 8.

103. Parr to Grenville (24 April 1790), CO 217, vol 62 at 32-33.

for a college to be established at Windsor.<sup>104</sup> Dubbed a “firebrand” by Parr,<sup>105</sup> in London Lawrence worked with Taylor and they published many of the documents with an introduction by Taylor which asserted that the impeachment articles contained “only a few of the charges which will be exhibited against those judges,” and that if the King ordered a trial others would be brought forward at that time.<sup>106</sup>

The proceedings in London ground along very slowly with no decision until the summer of 1792, a little more than two years after the case shifted to the metropole. But one decision was made quite quickly; London would not constitute a court in Nova Scotia to “try” the impeachment.<sup>107</sup> Instead the matter was referred to the Privy Council in August 1790, which in turn referred it to a committee of its members in October.<sup>108</sup> This may have been the first time such a procedure was used, although by no means the last,<sup>109</sup> and if so it was the origin of what became accepted as the Privy Council’s original jurisdiction over allegations of misbehaviour by colonial judges. By the later nineteenth-century it became accepted that colonial Assemblies had an “undoubted constitutional right” to address the Crown for the removal of a judge.<sup>110</sup>

Parr’s reaction to the 1787–1788 crisis had been to paint the judges’ opponents as seditious republicans who threatened the colonial constitution, and he took the same view in urging London to dismiss the impeachment. The Assembly’s actions, he said, “entirely proceed[ed] from a cursed factious party spirit, which was never known here before the emigration

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104. In fact, Lawrence and Isaac Wilkins were made agents for the Assembly in London, but Wilkins did not go. When the first resolution to appoint agents was presented, on 12 April, it stated that the purpose was to raise money, presumably so that the Council would concur in the resolution and share the cost. The Council took the view that London-based agents would suffice, but the Assembly went ahead with its plan and, not surprisingly, the instructions to Lawrence and Wilkins included promoting the impeachment. For all this see *Assembly Journals* (12, 13, 16, 20 and 21 April 1790).

105. Parr to Nepean (12 June 1790), CO 217, vol 62 at 68.

106. This is *The Humble Petition*, *supra* note 1.

107. Secretary of State Grenville to Parr (6 October 1790), CO 217, vol 62 at 287.

108. Grenville to Lord President of the Council (22 August 1790), and Privy Council Committee Minutes (1 October 1790), United Kingdom National Archives, Privy Council Records, 2008, # 1 at 30 and 63 [PC Records].

109. As noted above, it was employed also in the case of the Lower Canadian chief justices in 1815 and for Newfoundland Chief Justice Henry Boulton in 1838, *supra* note 2. In 1832 the Grenada Assembly unsuccessfully petitioned the Privy Council to remove Jeffrey Bent: see John McLaren, “Men of Principle or Judicial Ratbags? The Trials and Tribulations of Maverick Colonial Judges in the 19th Century” (2009) 27 Windsor Rev Legal Soc Issues 145 at 158-159.

110. See Todd, *Parliamentary Government in the Colonies*, *supra* note 72 at 835. See also at 831-832: the crown may “refer to the consideration of the judicial committee a memorial from a legislative body, in any of the colonies, complaining of the judicial conduct of a judge therein.” See also F Roger, “Memorandum of the Lords of the Council on the Removal of Colonial Judges” in (1870) 6 Moo PCNS 9, 16 ER 827 (PC) and McLaren, *Dewigged, Bothered and Bewildered*, *supra* note 3, *passim*.

of the Loyalists, who brought with them those levelling republican principles.”<sup>111</sup> Parr’s invective conveniently ignored the fact that it was a combination of loyalists and old inhabitants which had consistently provided substantial majorities in favour of the impeachment articles. Nonetheless he made a direct link between the impeachment and loyalty. As the Lower Canadian authorities did two decades later in defending judges attacked by the Assembly,<sup>112</sup> Parr claimed that the impeachment threatened the very foundation of British rule: “if the conduct of His Majesty’s Council is not supported and approved of...I cannot answer for the consequence,” because “some of the members of the Assembly tread exactly in the same steps as the leaders of the late rebellion, their factious, seditious, levelling principles are much the same.” In another letter he complained of the “assumption of authority” by the Assembly.<sup>113</sup>

Others on both sides wrote to London officials to put their version of the case. John Halliburton used personal ambition to explain why it was not just the loyalists who had voted for impeachment. There was a coalition, with “each having their respective person in view if they finally succeeded in supplanting the judges.” The loyalists supposedly wanted Isaac Wilkins, the old inhabitants George Henry Monk.<sup>114</sup> On the other side Alexander Leckie, the loyalist MHA for Shelburne, had much sympathy for Sterns and insisted that if the judges were not given a “fair and candid trial,” in future “no confidence can be placed in them.”<sup>115</sup>

The committee struck by the Privy Council consisted of two lawyers: Lord President of the Council Lord Camden, who had formerly been Chief Justice of Common Pleas and Lord Chancellor, and Sir Richard Arden, Master of the Rolls. The other three members were true political heavyweights; Prime Minister and Chancellor of the Exchequer William Pitt; Lord Sydney, who had been Home Secretary in two previous administrations; and current Home Secretary Henry Dundas, later Lord Melville. It did not meet until 9 March 1791, nearly a year after the impeachment proceedings in Halifax. When it did do so, with Col. Lawrence and a Mr. Rashleigh, solicitor for the judges, in attendance, Rashleigh said he had received instructions from his clients only the evening before, and he asked for and was granted an adjournment. At this meeting also the

111. Parr to Nepean (18 March 1790), CO 217, vol 62 at 21.

112. See Kolish & Lambert, “Impeachment of the Lower Canadian Chief Justices”, *supra* note 2, esp at 471-475.

113. Parr to Nepean (24 April 1790), CO 217, vol 62 at 36, and Parr to Grenville (24 April 1790), CO 217, vol 62 at 32- 33.

114. Halliburton to Nepean (24 April 1790), CO 217, vol 62 at 266. See also to similar effect John Brenton to Nepean (24 April 1790), CO 217, vol 62 at 262-265.

115. Alexander Leckie to Nepean (26 March 1790), CO 217, vol 62 at 258-259.

committee tersely minuted that the request for a court to be established in Nova Scotia to try the charges “cannot be complied with.” On 24 March the committee met again, and decided to send the judges copies of the articles of impeachment and to give them a chance to gather further evidence and to submit written answers.<sup>116</sup> Lawrence, probably correctly, saw this as a delaying measure, although he was sure it would “only put off the evil day as far as possible.” The Judges had already sent “every species of proof they have,” but it was “too weak” for a defence and Rashleigh “wishes for time, in hopes something unforeseen...may turn up to save his Clients from...Justice.”<sup>117</sup> It was true that the judges had provided a set of answers in 1790, and these had been forwarded by Parr in May of that year.<sup>118</sup> Somebody obviously thought that better answers were needed.

This resort back to Nova Scotia shifted the action to the Assembly again. The new session opened on 9 June 1791, and on the 15th Barclay, anticipating that the Committee’s request to gather evidence meant that witnesses for the defence would be called in the Assembly, successfully moved that he, Sterns, and Foster Hutchinson Junior, a young lawyer and future NSSC judge, be counsel for the Assembly to cross-examine them. Two days later he also persuaded a majority of members to allocate £200 to be given to Lawrence and Richard Cumberland, the Assembly’s regular agent in London, to enable them to retain counsel for the impeachment hearings. The Council would not agree to this latter resolution. The refusal brought a familiar oration from Barclay about the rights of the Assembly and its spending power. The Nova Scotia constitution, he stated, was “as nearly similar to the parent state as local circumstances would admit.” While Lieutenant-Governor and Council “did not fully possess all the requisites” of King and Lords, nonetheless “the Commons of Nova Scotia were in every particular a perfect and complete third part” of the constitution.<sup>119</sup>

Not surprisingly the judges did not elect to collect defence evidence in the Assembly. Instead they revised their previous answers, given in 1787–1788, and swore them before Chief Justice Strange in July; Strange had finally arrived in Halifax in May 1790, just after the impeachment

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116. For the Committee’s proceedings see Minutes (9 and 24 March 1791), in PC Records, *supra* note 108.

117. Lawrence to Speaker RJ Uniacke (28 April 1791), RG 1, vol 302, no 20(a).

118. “The Explanation of the Puisne Judges of the Supreme Court relative to the Several Articles of Charge exhibited by the House of Assembly” in Parr to Grenville (5 May 1790), CO 217, vol 62 at 85-89.

119. See *Assembly Journals* (15, 17, and 23 June 1791); *Weekly Chronicle* (25 June 1791).

proceedings were concluded.<sup>120</sup> Additional sworn depositions on their behalf were also taken before Strange, who seems to have kept himself busy organizing a defence for his colleagues.<sup>121</sup> Having done so, he himself sailed for England on 24 October 1791. Six weeks after Strange sailed, Parr died—to be replaced temporarily by provincial secretary Richard Bulkeley and permanently, in 1792, by Sir John Wentworth, a loyalist.

With the judges' answers delivered, the next meeting of the Committee took place on 31 January 1792. By now Lawrence had engaged a Mr. Lawton as solicitor and Thomas Erskine, the brilliant radical lawyer who specialized in defending seditious libel cases, as a barrister, even though he had no funds from the Assembly for this expense.<sup>122</sup> When the Committee met, the Assembly was represented by Erskine and a junior, defence counsel George Bond, of the Middle Temple,<sup>123</sup> and the judges by attorney-general Sir Archibald MacDonald and one Lins.<sup>124</sup> Given that he had departed for London after only eighteen months in Halifax, it is hard not to believe that Strange went there to help organize the judges' defence. He sent Dundas a memorandum about the impeachment crisis, and certainly had conversations with Dundas about arrangements for the courts and judiciaries of the new or recently-created colonies of New Brunswick, Upper Canada, and Lower Canada. He surely must have impressed his views on Dundas regarding the necessity of resisting the impeachment, although he was not fond of the idea of judges without legal training. He thought the best solution would be to provide a pension for Deschamps to retire.<sup>125</sup>

Nothing happened at that first meeting, because the Committee members had to attend Parliament. They met again on 7 February, when Bond read the articles and some of the evidence in support of them. He was not finished when the committee adjourned until 16 February. Apparently

120. For Strange see Donald F Chard, "Sir Thomas Andrew Strange" in *DCB*, *supra* note 2.

121. These included affidavits from James Clarke, Halifax sheriff, on the *Bartling* case, and from William Thomson, prothonotary of the Supreme Court, on this and other cases, both sworn in July 1791. The various depositions are at RG 1, vol 302, no 41 (the judges) and nos 42-45 (others).

122. For Lawrence's activities in London in support of the prosecution see his letter to Grenville (6 August 1790), CO 217, vol 62 at 268, and his correspondence with Speaker of the Assembly Uniacke in 1791-1793, at RG 1, vol 302, nos 20(a), 46-49, 51 and 52. See also Lawton's Account, in PC Records, *supra* note 108. For Erskine see John Hostettler, *Thomas Erskine and Trial by Jury* (Chichester: Barry Rose Law Publishers, 1996), and David Lemmings, "Thomas Erskine, first Baron Erskine (1750-1823)" in *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004).

123. See JM Rigg, "George Bond (1750-1796)" in *Oxford Dictionary of National Biography*, *supra* note 122.

124. For MacDonald see David Lemmings, "Sir Archibald MacDonald (1747-1826)" in *ibid*.

125. Strange's Memorandum, *supra* note 14. See generally Barry Cahill, "Henry Dundas' Plans for Reforming the Judicature of British North America, 1792" (1990) 39 UNBLJ 158.

there were witnesses there who gave testimony, although we do not know who and apparently they were “abused” by Macdonald. The prosecution evidence was finished that day and MacDonald opened the defence. According to Lawrence’s reports to Uniacke, he denied corruption only, and admitted the judges’ “ignorance” in some respects. He excused this with marvellous condescension: they were like “County Justices of the Peace in England, who first opened a law book with their Commission.”<sup>126</sup>

The Committee held its final day of hearing evidence on 21 February and on the same day Erskine delivered a closing speech; unfortunately there is no evidence of what was said. At some point the Committee asked for and received details on the number of appeals from Nova Scotia to the Privy Council, and discovered that there had been only twelve since the court was founded, ten of which were from the Vice-Admiralty court. One was directly from the NSSC, in 1781, and the other was from the Lieutenant-Governor and Council, which served as the colony’s Court of Appeal, in 1785. This was presumably evidence of the competence of the colony’s judges, although, as Lawrence later pointed out in an angry letter to the speaker of the Assembly, the committee seemed not to take account of the fact that a case needed to be worth £300 to permit an appeal to London.<sup>127</sup>

The committee produced two “reports,” although only one is in that form. The minutes from a meeting of 19 June include extensive discussion of, and conclusions about, the various cases, and represent its detailed assessment of the charges. These minutes contain a variety of annotations and crossings out and in a number of places a note to “omit” some of it, but while it appears, therefore, to be a draft it never seems to have been made into a final report. I have relied on it extensively in the assessment in Part II of the cases involved in the impeachment and will not detail its findings here except to note that it substantially exonerated the judges. The final report, approved by the committee on 14 July, was much briefer and had very little to say about the cases themselves beyond the fact that for most of them the evidence did not substantiate the charges. This final report was accepted by the King in Council on 1 August 1792.<sup>128</sup>

The final report dealt not with the cases but with standards of judicial training and competence. It first, with obvious reference to Deschamps, opined that while judges ought always to be “men of judgment and learning

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126. Minutes (7, 16 and 21 February 1792), PC Records, *supra* note 108. The quotations are from Elisha Lawrence to Uniacke (18 February 1792), RG 1, vol 302, no 20 (h).

127. Lawrence to Uniacke (11 August 1792), RG 1, vol 302, no 49.

128. See Minutes, (19 June 1792 and 4 July 1792), PC Records, *supra* note 108, and RG 1, vol 302, no 50.

in the law,” it could not be expected that colonial judges would always be legally trained. Sometimes it was necessary to appoint laymen “who if they are men of Understanding may be useful as assistant judges in matters that are not involved in legal difficulty.” When legal questions arose, it said, “as to all such points the Chief Justice gives the rule.” This rather ignored the problem that Deschamps, as the senior judge, had been acting Chief Justice when the difficulties occurred. The committee then went on to note that even if mistakes had been made, they did not show any “corruption or partiality,” and no “criminal inference” could be made. That is, even if all the Assembly’s complaints were valid, the whole was nothing more “than a Collection of Errors or Mistakes, without the least proof to [show] they proceeded from any such corrupt motive.” According to the committee Erskine himself, with one exception, “candidly exculpate[d]” the judges “from any such Wicked or Malignant Motives.”

Finally, the committee conceded that even without corrupt motives, wholesale ignorance could still be a valid cause for censure or dismissal. But it did not accept that this had been the case. It drew a distinction between errors in judgment and ignorance. The former was “the frailty of human nature,” to which everybody is susceptible. There was also a distinction between “gross and general” ignorance and “the want of knowledge in one or more points.” The latter was again something that all men are capable of, and it would be wrong to dismiss judges for it. The judges “in two or three Instances...may have mistaken the Law, or may have dropped an unguarded Expression.” Yet generally they had exculpated themselves by their answers, and except for a few instances “have conducted themselves without Reproach, during the whole time they have presided in the Supreme Court, which is near nine years.” In short, there was no cause even to censure the judges, let alone dismiss them.

## II. *The charges against the judges: The cases*

I turn now to the substance of the charges against the judges—the cases in which they were alleged to have behaved incompetently and/or improperly. I will deal only with the cases which made their way into the final articles of impeachment, not those mentioned in the draft articles and for which the Assembly did not find enough evidence to include them in the formal charges. Making an assessment of these cases is at times difficult. Typically case files, when they have survived, contain only the pleadings, and we have no transcript or minutes or judges’ note books for any of the cases. In addition, we know very little of late eighteenth century procedure and practice, and thus when the judges and their critics disagreed on procedural questions there is sometimes no standard against

which to judge who was right. Yet there is enough evidence about all of the cases to offer a reasoned assessment of each. And when one does so a very mixed bag emerges. In two cases—*Squires v Seamark* in article 1 and *Sullivan v Storey* in article 3—the accusations turned on the fact that the judges and the loyalist lawyers had a different view of the law. The judges could not be condemned as either incompetent or partial in such circumstances. In a further four cases—*R v Bartling* in article 2, *Kerrin v Bonnell* in article 6, and *Pineo v Katherns* and *Wheelock v Messenger* in article 7—it seems very clear that the judges got it right and their critics were simply in error. Thus in six cases there were really no grounds at all for complaint. There were three charges, however, involving four cases that, in my view, show the judges in a poor to very poor light: *Tremain and Stout* in article 1, *Bent v Watson* in article 5, and what I will term the Annapolis partition cases, *Morse v Morse* and *Morse v Kent*, in article 4.

Having said that, the assessment of an historian writing more than two centuries after the fact was not, in significant respects, shared by the Privy Council committee that investigated the charges. The committee almost entirely exonerated the judges. They did so in part by correctly exposing the weaknesses in some of the Assembly's charges. But, I hope to demonstrate, in two instances—*Tremain and Stout* and the Annapolis partition cases—they acknowledged but made too little of what the judges did, and in one, *Bent v Watson*, they simply ignored the real issues. As a result serious breaches of judicial protocol, demonstrating at the very least incompetence and possibly animus towards some lawyers, were glossed over.

1. *Article 1: Tremain and Stout v Yorke and Squires v Seamark*<sup>129</sup>

Two cases were cited in the first of the final articles. *Tremain and Stout v Yorke* was an action for payment for goods supplied principally by Jonathan Tremain, a Halifax rope maker. It first came to court in Trinity Term (July) 1786. It was continued three times, to Easter, Trinity and Michaelmas terms 1787. The plaintiffs were represented by Sterns and Taylor and the

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129. While pinpoint references are provided where appropriate, the principal sources for the discussion of this case and all the charges is based on a set of principal sources which will not be repeated each time. They are: the draft and final articles of impeachment; *The Reply of Sterns and Taylor* (which includes the judges' answers of 1787), *supra* note 34; the judges' answers of 1791, which are at RG 1, vol 302, no 41; the Privy Council's Minutes from its meeting of 19 June 1792, in PC Records, *supra* note 108; and testimony before the Assembly. The citations are different for the last between the various cases: for *Tremain v Yorke* the relevant testimony was that of Sterns (15 March 1790), of Sterns, merchant William Lyon, litigant Jonathan Tremain, (16 March 1790), merchant and juror William Veitch and attorney Daniel Wood (18 March 1790) and that of prothonotary clerk for Halifax county Thomas Wood on the 16th and the 18th: see RG 1, Vol 302, nos 21-24, and RG 5, series A, vol 3, nos 41, 44.



defendant by Blowers, the attorney-general. When it did finally come up for trial in Michaelmas Term 1787, the plaintiffs were non-suited by the bench; that is, the court decided after the plaintiffs had closed their case that there was insufficient evidence to go to the jury.

Article 1 found fault both with the granting of two of the continuances and the non-suiting of the plaintiff. It alleged that the plaintiff was ready for trial in Easter Term, 1787, and that the case was deferred purely as a favour to Blowers. This caused considerable expense and inconvenience to the plaintiff because he had brought witnesses from Cape Breton Island. In his evidence before the Assembly, Sterns alleged more specifically that the first continuance had been granted without any affidavit from the defendant explaining why he wanted it and that the second had also been initially granted with no affidavit. Only when Sterns protested did the judges order Blowers to produce one, and he did so, but that affidavit did not state, as it should have, that he needed delay to obtain *material* evidence. Sterns also alleged that when challenged, the judges had said words to the effect that they were pleased to indulge Blowers both because he was a public officer and because he was civil to them. A number of witnesses testified in the Assembly that the judges had indeed made a statement about favouring Blowers. As with a number of the charges, Sterns also chose to allege that the court was inconsistent: "I have known them refuse continuances to Clients of mine when they had...a much better ground in my opinion for a continuance than I conceived the Att. Genl. had...in this Cause."<sup>130</sup>

The judges' response was to assert that the first continuance was by consent and that the second was by affidavit in proper form, and generally to deny favouritism and insist that "there is no impropriety in their having said that they would be willing to grant to the Attorney General both from his personal Conduct and professional Character as a Public Officer even a preference in personal accommodation as far as was consistent with the Rules of Justice." This last phrase was significant. Questions to Sterns in the Assembly from the judges' supporters sought to elicit an admission that while the judges may have said something about indulging Blowers they had qualified it with some such form of words—that any indulgence would only be given "consistent with the Rules of Justice."<sup>131</sup> One witness, Thomas Wood, a clerk in the prothonotary's office, thought that "there was something of that kind said."<sup>132</sup>

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130. Evidence of Sterns (15 March 1790), RG1, vol 302, no 24.

131. Question by James Bulkeley, son of Provincial Secretary Richard Bulkeley, to Sterns (15 March 1790), RG 1, vol 302, no 24; Question from Unknown to Sterns (16 March 1790), RG 1, vol 302, no 21.

132. Evidence of Thomas Wood (16 March 1790), RG 1, vol 302, no 22.

The committee held the judges not to be at fault over the continuances. In doing so they accepted the affidavit evidence of prothonotary William Thomson that the first continuance had been by consent.<sup>133</sup> On the issue of the affidavit, the committee held that it was common practice for the judges to ask for a supporting affidavit after a request for a continuance was made and, regarding its alleged inadequacy, noted that whether or not an affidavit was adequate was a question of judgment and the court was not “tied so strictly to the letter, or the common usage, as not to relax, where they think it may be done without injury to the other Party.” Yet the committee seemed to want to have its cake and eat it on this issue. They accepted that Blowers’s affidavit was “loosely penned” and ought to have been drawn better, but, the committee concluded, the most that can be said was that the judges “were irregular in putting off the Trial for want of a positive oath, that the Evidence was material.” The committee asserted that it could be inferred from Blowers’ affidavit that he thought so and that the plaintiff suffered no prejudice from the delay. It also added, though without any real supporting evidence, that it was “inclined to think” that Sterns “was not furnished with evidence to prove his case, if the Trial had come on.”

Most importantly, the committee accepted that the words about indulging Blowers were spoken, but both excused them—they had been said “in the heat of a dispute” when “Sterns had the indecency to charge the Judges in open Court with partiality”—and mitigated them by accepting that “the words were soon after corrected by adding as far as the Rules of Justice would permit.” It would be “cruel and unjust,” insisted the committee, to “impute the Crime of partiality to a hasty expression, uttered in anger, at such a time and upon such a provocation, more especially as the Words during the same Dispute were so explained as to become perfectly innocent.” In truth this was not a very convincing defence. By excusing the use of the words because Sterns had accused the judges of partiality the committee did not seem to notice that the words spoken went some way to proving Sterns’s point! Moreover, no judge ought ever to say, for any reason, that one lawyer was given preferential treatment. The qualifying words surely meant little—could the “rules of justice” ever permit such favouritism? The generosity of the committee’s assessment on this point strongly suggests that it would do all it could, when it could, to at least mitigate any fault.

Article 1 also charged that the non-suit ordered by the judges was improper. A non-suit was a judgment given by the court against the

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133. Affidavit of William Thomson, Prothonotary (8 July 1791), RG 1, vol 302, no 42.

plaintiff, without the case going to the jury. It could be ordered by the court if the plaintiff had not turned up for trial, or had done so but had provided no evidence. In such cases the plaintiff had no option to refuse the non-suit. A non-suit could also be ordered if the plaintiff had presented evidence, but the court felt it was so inadequate that a jury could not possibly find for him or her. In such a case the plaintiff still had a right to insist upon the case going to the jury. Counsel invariably accepted the non-suit order, in part because it seemed pointless to go to a jury when the court's opinion was such, presumably as that opinion would be reflected in the judge's remarks to the jury and partly because withdrawing the case before a verdict left the plaintiff with the option of starting another suit.

On this occasion Sterns, who had offered some evidence for his client, refused to accept the non-suit and a somewhat heated conversation took place as a result. Sterns prevailed, and the matter was given to the jury. But before the jury could deliver a verdict, Brenton ordered one of the jurors to be withdrawn, with the result that the jury was improperly constituted and could not render a verdict. With that the non-suit was recorded. The judges insisted they had acted correctly, according to the "uniform...course of proceeding in Cases where the Evidence offered by the Plaintiff does not in the Apprehension of the Judge amount in Law to proof of the Issue in the Cause and ought not therefore to be left to the Jury as capable of supporting it." While they conceded that in retrospect they perhaps should have given the case to the jury and directed a verdict, they also defended the withdrawal of the juror as a way to discharge the jury in a case in which they believed "no Evidence appeared to have been adduced which could authorize a verdict to be given."<sup>134</sup> This was not much of a defense; the judges effectively argued that Sterns should have accepted the non-suit, even though it was his right not to do so, and that when he did not they could employ any expedient they wished to force it on him. Evidence given before the Assembly, not from Sterns but from clerk Thomas Wood, implied that the judges did not trust the jury,<sup>135</sup> which in itself might have been the result of Sterns' criticism of the bench—they did not trust the jury to agree with them and not with Sterns. A rule (motion) was immediately taken out to show cause why the non-suit should not be set aside, and that case was still pending when the Assembly conducted its impeachment proceedings.

The Privy Council condemned this proceeding, noting that the charge relating to *Tremain v Yorke* was "better supported than in any other part

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134. Answer of the Judges (1790), RG 1, vol 302, no 41.

135. Evidence of Thomas Wood (18 March 1790), RG 5, series A, vol 3, no 44.

of the impeachment.” The withdrawal of the juror was “clearly wrong and illegal.” Given that it was “common practice in clear cases” to order a non-suit and that counsel invariably accepted it, a person might think that judges had the power to insist. But they did not, perhaps, suggested the committee, from ignorance. Having made this finding, the Privy Council went on to mitigate the fault by noting that the judges had both granted the rule—allowed Sterns to make a motion to overturn the non-suit—and delayed a hearing on the rule until Strange should arrive, as “they did not wish to be judges in their own cause.” Moreover, Strange granted the rule, so that ultimately no injustice had been done. The committee also castigated Sterns, suggesting that in fact he did not have good evidence and noting that he had not moved for a new trial.

While the question of the adequacy of Sterns’s evidence was one that reasonable people might disagree on, there is clearly no doubt that the judges acted wrongly when they resorted to the tactics they did to prevent a jury verdict. By their own admission they did this in order to stop Sterns going to the jury for a verdict, which it was his right to do. Whether or not the decision was later overturned by Strange did little to mitigate the fault. It also seems to me that the Privy Council committee was wrong not to seek to relate the two aspects of the complaint in *Tremain v Yorke* to each other. If the evidence was so weak, why were the judges so afraid of the case going to the jury? The answer might be that they knew the jury could find for Tremain, and thus for Sterns and against Blowers, and their evident hostility towards Sterns, as evinced by their comments about him, may have led them to insist on a non-suit. Yet the committee treated the two aspects separately, ascribing the comments about indulging some counsel to the heat of the moment and not considering whether a clearly wrong decision on the merits might show there was more to it than that. *Tremain v Yorke* was the only case specifically referred to in the committee’s brief final report and all it said was that in some respects the proceedings had been “irregular,” a rather tepid conclusion about serious breaches of procedure and protocol.

The second case which made up Article 1 was *Squires v Seamark*, a Halifax suit from 1786–1787. The plaintiff Squires, represented by Sterns, brought an action against the defendant in Trinity Term 1786, asking, typically, for bail from the defendant to guarantee his appearance.<sup>136</sup> Seamark put in “special bail,” which meant two or more people joining him in standing surety for any judgment. The case was continued on more

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136. The relevant Assembly testimony for this case is that of lawyers Daniel Wood and Sterns (20 March 1790), RG 1, vol 302, nos 25-26. See also the case file at RG 39, Series C, vol 50, nos 29-30.

than one occasion because Squires was out of the jurisdiction, and in Michaelmas Term 1786 Seamark, on a motion by his lawyer Blowers, was released from “special bail” by the court and allowed to go free on “common bail,” a bond containing fictitious names and a procedure available when it was judged that the defendant would not flee the jurisdiction.<sup>137</sup> This should have been done with notice to the plaintiff, but apparently was not or, depending on which version of the story was true, notice was given but Sterns was ill and did not appear in opposition. The litigation dragged on for two more terms into 1787, with Sterns starting a new action, because Squires was not able to bring to court a witness he needed, but before the case could be heard Seamark had indeed left the jurisdiction. According to the article of impeachment Deschamps and Brenton had given Seamark common bail “for the sole and avowed purpose of permitting the said Richard Seamark” to leave the colony and escape his liabilities.

No evidence was presented in the Assembly for this last assertion, and some contrary evidence given that the problem was caused by Squires and his lawyer Sterns, who failed to present their case when it first appeared for trial. The judges’ defenders in the Assembly pointed out that this ought to have been done when a defendant was under special bail or in prison. The judges themselves argued that it was common practice to relieve a defendant from special bail when the plaintiff did not pursue the case at the first opportunity, and that Sterns should have applied for a continuation of the special bail. As for Seamark decamping, that was “not imputable” to the judges, “nor was it subject to their Control.”

The committee exonerated the judges on this charge. It had been incumbent on Sterns to either prosecute the case at the first opportunity or to ask for the special bail again. He did not and the judges “could do no other than discharge him [Seamark] upon common bail.” The committee accepted that notice had been given to Sterns and that he had not attended because he was ill, but the fact of that illness preventing him from attending was irrelevant; the case was marked for trial and his absence was no reason to depart from common practice. The committee noted that when a defendant was held to special bail it behoves the plaintiff to bring the case on at the first opportunity, or show some good reason to the court for delay, because while the defendant is on special bail he is in “a state of imprisonment and cannot leave the Province.” The committee also attacked Sterns, as it had done in *Tremain v Yorke*, for his failure to

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137. This was essentially standard common law bail procedure, to which there were added provincial statutory provisions of a purely procedural nature: see Beamish Murdoch, *Epitome of the Laws of Nova Scotia*, vol 3 (4 vols, Halifax: Howe, 1832–1834) at ch 7.

show why the defendant should not be released on common bail and for his request that the court order the case to go to arbitration on the grounds that his evidence was admissible before arbitrators but not before a jury. As the committee pointed out, he was complaining that he could not get special bail in a case he knew he could not win. The committee's dismissal of this charge seems entirely correct. Even if the judges had discretion to maintain Seamark on special bail when no application was made to that effect, they were "wrong" only in the sense that they made a bad judgment call, for Seamark did decamp. In fact they seem to have acted correctly, albeit to Sterns's annoyance and to the frustration of his client.

## 2. *Article 2: R v Bartling (and R v Small)*

Article 2 principally concerned *R v Bartling*, one of only two criminal cases among the allegations, the other being *R v Small*, which was used not so much as a ground of complaint but as a contrast to the Bartling case. *Bartling* and *Small* were the two cases from 1789 that, I suggest above, provided part of the catalyst for a successful re-raising of the judges' question early in 1790, at a time when Parr believed the crisis was long over.

Christian Bartling was a very early settler in Halifax/Dartmouth and, by the 1780s, a substantial landowner on the Dartmouth side of the harbour.<sup>138</sup> In May 1789 he got into boundary disputes with Jonathan Foster, Nathaniel Macy, and Barnabas Swain, all recent arrivals and all members of a group—some 40 families—of Nantucket Quaker whalers who had moved to the area in 1785. Although encouraged and indeed subsidized by Parr and his Council, the move was controversial both in London and Halifax in part because a considerable amount of land had been expropriated for them from absentee proprietors and in part because this particular economic development project was seen as aiding Americans and evading the imperial *Navigation Acts*.<sup>139</sup> Bartling, apparently convinced that Swain et al were trespassing, defended his turf with a shotgun, and a considerable amount of shot ended up in Swain. He lost an eye to the assault.

Bartling was remanded for trial by a JP, and an application for release through a writ of habeas corpus in mid-June was denied. He went

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138. This account of the *Bartling* case is based on the general sources cited above, and the testimony before the Assembly on 18 and 19 March 1790 (lawyers Daniel Wood and Martin Wilkins, Halifax sheriff James Clarke, Clerk Thomas Wood, Gaoler John Neville, sureties Charles Oldendorff and George Closhman, Grand Jury foreman Major Philip Van Cortland, and Christian and Mary Bartling), all at RG 5, series A, vol 3, nos 44, 46. Both the *Bartling* and *Small* cases are well documented in the Criminal Case Files in the Supreme Court Records: RG 39, series C, vol 56, no 65 (*Bartling*) and no 74 (*Small*), and in the Supreme Court Criminal Proceedings Books, RG 39, series J, vol 2 at 81 and 86.

139. See Margaret Ells, "The Dartmouth Whalers" (1935) 15 Dal Rev 85.

to trial a month or so later in Trinity Term. Although, as was common, the indictment was prosecuted by Attorney-General Blowers, the grand jury rejected it. When the judges were told this Brenton asked Blowers if he had another charge to prefer, but he did not. In Bartling's lawyer Martin Wilkins' words, he "turned his Back upon the Court and remarked that he washed his hands Clear of it and their Honors must decide for themselves." Solicitor-General Uniacke, also in court, then declared "with some degree of heat" that "he would prefer Bills to...Grand Jury after Grand Jury, against Bartling so long as there was a Grand Jury in the Country, until a Bill was found...or until the Prisoner had a Public Trial." Brenton remanded Bartling, although his further confinement lasted only one day; he was discharged when the court met the following morning. According to lawyer Daniel Wood, Deschamps gave no reasons but told Bartling "that in consideration of his long confinement and Large family they would then release him, without his giving Security, notwithstanding the Grand Jury had tho[ugh]t proper to acquit him, his Crimes appeared to be very enormous, and hoped the indulgence they then gave him would have some good effect upon him."<sup>140</sup>

The second article of impeachment criticized two aspects of Brenton's handling of this case; Deschamps was not involved in the charges. It complained that Bartling had not been given bail when habeas corpus was applied for, as he should have been for committing a trespass. It was here that a contrast was drawn to *R v Small*.<sup>141</sup> William Small was one of a group of black men and women who became involved in an altercation with three young, and drunk, white men returning home from a night of carousing in late November 1788. The whites had assaulted a fiddle player, George Warner, and Warner ran for refuge to Small's house. When the whites tried to follow Warner in, Small came out armed with a spade. In the melee William Lloyd was struck with the spade and he died almost two months later. A coroner's jury found that Lloyd had died from the blow inflicted by Small and he was arrested. A week later Small was bailed, by Brenton, with the sureties being William Brenton, the judge's half-brother, and loyalist merchant Samuel Hart. Article 2 made the contrast between the two cases: Brenton had refused bail to Bartling but he had earlier "bailed a certain William Small, a negro man, positively charged by, and committed on the Coroner's Inquest, for [a]...felonious murder."

140. Quotations in this paragraph from Testimony of Martin Wilkins and Daniel Wood (19 March 1790), RG 5, series A, vol 3, no 46.

141. For the *Small* case see RG 39, series C, vol 56, no 74, and RG 39, series J, vol 2 at 81.

The Privy Council made short work of the bail complaint, not even advertg to the contrast with *Small*. The evidence before the Assembly had made a lot of the fact that Brenton waited a day to hear the habeas corpus application, and the committee simply, and rightly, held that a Judge was not required to hear the application “the moment it is presented to him,” as “[i]t may be often material to enquire for what...crime” a person had committed “before he is brought up in order to be prepared in some sort to judge how it would be either legal or proper to Bail him.” When Brenton did hear the application, he was prepared to grant bail, but no sureties could be found, always a requirement for bail. In the Assembly the prosecution had alleged that Bartling had lost his sureties by the delay, but the evidence also showed, and the committee accepted this, that the reason he could find no sureties was that the men willing to do so were only prepared to stand bail for his appearance in court, not to be answerable for his keeping the peace, because Bartling “was apt to be in liquor.” The committee also adverted to evidence from Halifax sheriff James Clarke that he had summonsed possible sureties to court but they had refused to come.<sup>142</sup>

The committee also noted that the statement in Article 2 that Bartling had been arrested for trespass was inaccurate, that he had been arrested for a felony, a serious assault leading to a wounding. As the indictment put it, Bartling had inflicted “several grievous wounds” and “the sight of one of [Swain’s] eyes” had been “ruined and destroyed.”<sup>143</sup> The committee made nothing more of this mis-statement in the charge, perhaps because if Brenton could have been criticized for anything in this stage of the proceedings it was that he was prepared to bail Bartling at all. The Marian bail laws were in force in Nova Scotia and they made remand the default option in the vast majority of felonies. It was extremely rare for anybody charged with a felony to receive bail—only ten of the more than 700 defendants who appeared in the NSSC at Halifax between 1754 and 1803 were bailed.<sup>144</sup> Evidence given before the Assembly suggested that it was known that Parr favoured remand, and thus Brenton had somehow been improperly influenced by the Lieutenant-Governor. But since Brenton

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142. Affidavit of James Clarke, Sheriff of Halifax (13 July 1791), at RG 1, vol 302, no 44.

143. RG 39, series C, vol 56, no 65A.

144. This figure is from my data set of cases prosecuted in the General Court (1749–1754) and Supreme Court, from 1754, compiled from the NSSC Proceedings in RG 39, series J, vols 1, 2 and 117, and from the Case Files, not all of which have survived, in RG 39, series C, vols 1–101. For the Marian bail laws see JM Beattie, *Crime and the Courts in England 1660–1800* (Princeton: Princeton University Press, 1986) esp at 281–283.



granted bail that complaint amounted to naught and did not find its way into the article of impeachment.

All in all the Assembly's complaint about the bail process was worthless; ironically, as noted, they would have had a stronger case if they had attacked Brenton for *not* remanding Bartling. There was not even any validity to the contrast with the Small case—the latter was a highly exceptional but nonetheless explicable exercise of discretion, and, given contemporary attitudes towards blacks, criticisms of Brenton were surely a product of racism as much as anything else.<sup>145</sup>

The second principal cause for complaint over the Bartling case was the re-committal following the failure to get an indictment. Certainly it was an unusual proceeding—normally a defendant not indicted or found not guilty was immediately released from custody. Yet there were other cases in which defendants were recommitted and another indictment drawn up, and in this instance Solicitor-General Uniacke declared that he would do so. Questioning of witnesses before the Assembly tried to elucidate testimony to the effect that Brenton remanded Bartling before Uniacke made his declaration, but witnesses were either contradictory or unsure on the point. The committee asserted that a recommitment pending another indictment was “the common practice at the Old Bailey,” and criticized the grand jury's decision in any event. It was clearly a felony and there seemed to be enough evidence to proceed to trial. The committee could have made more of this point. A marginal note in the proceedings states that if the English “Black Act” was in force in the colony it certainly was a felony. What it did not say was that it was not just a felony, but a capital offence, and it seems surprising that the committee did not pursue this question further, for malicious shooting at somebody was indeed a capital

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145. The bail granted to Small was unusual, as the discussion above of the operation of bail laws makes clear. Indeed Small's case was one of only three in which someone charged with murder was bailed. Like the other cases of bail in a murder charge, those of William Andrews in 1756 and Thomas Leatham in 1759, who were clearly believed to have killed in self-defence, it was probably thought that Small was justified in defending both his property and his friend against an attacker. That was certainly the view of the jury, who very quickly found him not guilty despite it being very clear that the fatal blow had come from him. It was also the view given later by William Thomson, prothonotary of the Supreme Court; he claimed that the evidence was very favourable to Small both as to the circumstances and as to his character, and he called the bail granted by Brenton “an act of justice and humanity,” an act moreover that was concurred in by the prosecutor, Attorney-General Blowers: Affidavit of William Thomson (8 July 1791) in RG 1, vol 302, no 42. This affidavit was drawn up as part of the judges' defence before the Privy Council. For the Andrews and Leatham cases, see Jim Phillips, “The Operation of the Royal Pardon in Nova Scotia, 1749–1815” (1991) 42 UTLJ 401 at 416.

offence in the colony.<sup>146</sup> That they did not do so is perhaps attributable to the problem raised above: Brenton was very much at fault for bailing a person accused of so serious a crime.

It seems likely that the Bartling case became something of a *cause célèbre* because of its political overtones. Neither the loyalists who supported Bartling out of resentment at the American whalers nor the elements in government and the city who sided with the whalers behaved particularly creditably. The JP who initially took down the parties' depositions, loyalist James Gautier, does not appear to have committed Bartling or issued recognizances to prosecute, as he should have done. It was only later that another JP, William Folger, one of the whalers, did so. Parr, a supporter of the whalers, might well have had an opinion, along with many other people in the city, but as we have seen that opinion cannot have influenced Brenton. The fact that the contrast with Small included the statement that he was "a negro man" suggests that racism played a role; the contrast of Bartling's treatment with somebody else's would not have mattered had not that other person been a black resident.

As already noted, the really questionable decision was the grand jury's turning back of the indictment. Attorney-General Blowers probably should have had another indictment to put forward, but seems from the evidence given above to have been too peeved, and perhaps surprised, to bother. Solicitor-General Uniacke had to intervene on the spur of the moment; he was a vigorous supporter of the whalers' move to Dartmouth and obviously wished the law to be used against those who resisted their integration into the community. Initially exasperated at a form of "grand jury nullification," we can only suppose that he thought better of the politics of preferring another indictment on reflection. But the principal point for our purposes is that the Assembly's criticisms of Brenton in this case were misplaced. It was a case riven with politics and prejudice, which may have inflamed local passions on all sides, but not one which showed the court in the bad light the Assembly tried to cast on it.

### 3. *Article 3: Sullivan v Storey*

Article 3 concerned *Sullivan v Storey*, a 1789 suit by Halifax trader Timothy Sullivan against Frances Storey, wife of one William Storey, for

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146. The *Black Act*, 1723, 9 Geo I, c 22 as such was not in force, but its provision stating that "whosoever shall maliciously shoot at any person...shall suffer as felon[s], without benefit of clergy," was in *An Act Relating to Treasons and Felonies*, SNS 1758, 32 Geo III, c 13, s 21, and made shooting a capital offence.

a debt she had contracted.<sup>147</sup> Sullivan was represented by Solicitor-General Richard John Uniacke, while Storey had Daniel Wood as counsel. The Storeys had been married in New York in 1782 before coming to Halifax, and in 1789 William Storey left the colony for England. In response to Sullivan's suit his wife pleaded coverture, that is, argued that as a married woman she could not contract debts and only her husband was liable, even though she had been the person who received the goods supplied. Sullivan won and Frances Storey was ordered to pay some £16. The defendant took out a rule to challenge the decision, but the case had not been heard by the time of the impeachment

The charge in the impeachment article simply stated these facts and asserted that in finding for Sullivan the judges had "no respect for the laws of the land" because Storey, as a married woman, could not contract debts on her own account. The article did not say that the court had in fact held that Storey fell under one of the common law's exceptions to the coverture of married women, that she was a *feme sole* trader by the custom of London. Uniacke suggested in court that the custom extended to Nova Scotia and the court agreed. Although we have no record of the legal argument at that time, in their later defence the judges cited two English cases for the proposition that when a married woman "transacted Business in the Province as a Sole Trader without the Intervention of her supposed Husband," the law was that "a Wife having traded separately and having separate property was solely liable to answer for the Debts contracted." The judges' decision was supported by William Thomson, prothonotary of the Supreme Court, who later asserted that it was very clear that she had contracted the debt as a *feme sole* trader, and indeed had acted as such for some time.<sup>148</sup>

This bare summary suggests that this was no more than a clear case of disagreement about the law in force in the colony. The committee gave the charge very short shrift on this precise ground: "Whether a *feme covert* may be treated as a *feme sole* in this kind of case," it said, was "a point that has been much controverted, and is not finally settled." That was certainly true. We know very little about the law relating to *feme sole* traders in British North America, but it was a well-established principle in England that, in appropriate and limited circumstances, a married woman could

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147. In addition to the same sources noted for the other cases, see the case file at RG 39, series C, nos 57, 66, the Proceedings Book at RG 39, series J, vol 9 at 155, and the testimony of Daniel Wood Junior and Martin Wilkins given to the Assembly on 19 March 1790, at RG 1, vol 302, no 27.

148. Affidavit of William Thomson (8 July 1791), in RG 1, vol 302, no 42.

trade on her own and be responsible for her debts.<sup>149</sup> It is also worth noting that in the last two decades of the eighteenth century there was considerable controversy in England about whether the principle should be extended, with Lord Mansfield taking a liberal view and his successor, Lord Kenyon, reining in the exceptions. Assuming that Nova Scotian judges knew the law—and indeed they do seem to have, for the two cases cited by the judges in their defense were two that are seen as seminal by historians<sup>150</sup>—we simply have here an instance of a legal controversy. Moreover it was a controversy about which Uniacke, counsel for Sullivan, and the judges, seem to have had more knowledge than Daniel Wood and, presumably, Sterns. It is very clear that there was no valid cause for complaint here. The committee also criticized the Assembly for dealing with a case that was *sub judice* upon a writ of error: “Such a proceeding would divert the course of justice settled by the constitution into a new channel, to the... subversion of all Judicial Authority.”

#### 4. Article 4: *Morse v Morse and Morse v Kent*

Article 4 likely represented a valid charge of incompetence by the judges, explicable perhaps by their animosity towards Sterns. In two cases, *Morse v Morse* and *Morse v Kent*, both heard on the Annapolis circuit in 1787, the judges likely gave contradictory opinions.<sup>151</sup> The problem in both cases had its root in the practice of government in the 1750s and 1760s to grant township lands to groups of settlers, meaning that they held them in common.<sup>152</sup> Those grantees who actually relocated to Annapolis from

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149. For the variety of exceptions, see James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004) at 325-328; Karen Pearlston, *At the Limits of Coverture: Judicial Imagination and Women's Agency in the English Common Law* (PhD Thesis, Osgoode Hall Law School, 2007); and the same author's "Married Women Bankrupts in the Age of Coverture" (2009) 34 *Law & Soc Inquiry* 265. The principal requirements were those mentioned by the judges: that the woman had been trading separately for a time and that she had separate property.

150. See *Ringsted v Lady Lanesborough* (1783), 3 *Doug* 197, 99 *ER* 610 (KB); and *Barwell v Brooks* (1784), 3 *Doug* 371, 99 *ER* 702 (KB).

151. In addition to the general sources cited above, see for these cases the testimony before the Assembly on 27 March 1790 of Rufus Chandler and Sterns, and that given on 29 March by Barclay, at *RG* 1, vol 302, nos 29-31.

152. For a discussion of the early land grant and settlement of Annapolis Township see WA Calnek, *History of the County of Annapolis* (Toronto: Briggs, 1897) ch 10; and DC Harvey, "Notes on the Early Settlement of the Annapolis Valley...after the Expulsion" [unpublished, archived at *MG* 1, vol 1780, folder 11]. A Council Committee granted the township to a list of over 100 names in 1759 (NSARM, Oversize Series, no 192; *RG* 1, vol 359, no 11), but no individual crown grants were ever made. Strictly speaking, given the common law presumption then in place the grantees held them in joint tenancy, so that the right of survivorship eliminated the interests of heirs of the original grantees. However, all references in the documents are to the inhabitants being tenants in common, the various part interests in the land thus being inheritable. And according to the colony's best known legal author it "had never been contemplated by the government or the grantees, that survivorship was to arise under these grants": see Murdoch, *Epitome of the Laws of Nova Scotia*, *supra* note 137, vol 2 at 149.

the colonies to the south appointed a local committee to divide up the land in the early 1760s, the division evidenced by an unsealed lot plan. In *Abner Morse v Samuel Morse*, an ejectment action heard at Annapolis in May 1787, the effect of this document was at issue. Sterns represented Abner Morse, and argued that he held his land by virtue of twenty years' possession. Counsel for Samuel Morse introduced the lot plan and argued that it was effective to convert the common interests into severalty, that is, to partition the land into individual lots. There are inconsistent accounts of what followed. Sterns claimed that the judges accepted that the plan was good to partition, and thus ruled against his client. He asserted that they had said that "it would introduce confusion into the township, and many others in the province, if my doctrine was admitted into law." He also conceded that the ruling was consistent with one they had previously given in a case involving Cornwallis Township.<sup>153</sup> Indeed the issue was settled by statute in 1791, which declared all such plans to have effected partitions.<sup>154</sup>

The judges offered a different version of events; they agreed that the plan had been admitted into evidence, but only to show boundaries, and denied that they had ever ruled that the plan effected a partition. In their view the right of each of the Annapolis proprietors, including both Abner and Samuel Morse, was founded only on possession, and Abner Morse lost the case because the plan showed the boundary of his lands, and thus that Samuel was not occupying any part of his land. There was nothing unreasonable about the judges' ruling in *Morse v Morse*; the issue in contention was whether they had in fact said anything about whether the plan was good to partition.

That question assumed relevance from a case argued a few months later, at the September circuit at Annapolis, *Abner Morse v Arod Kent*. Sterns again represented Morse, this time in an action against Kent for trespassing on Morse's land and taking away some hay. Again, we have inconsistent accounts of what occurred. Sterns claimed that this time it was he who introduced the lot plan, and argued that according to what the judges had said on the May circuit Morse's individual title to the land, and thus to the hay, was established by it. But, he alleged, the judges reversed field, holding that the document was not good to partition, and therefore

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153. *The Reply of Sterns and Taylor*, *supra* note 34 at 10-11.

154. See *An Act in Amendment of an Act...for confirming Titles to Lands, and quieting Possessions*, SNS 1791, 31 Geo III, c 10. Section 1 converted all joint tenancies into tenancies in common for the purposes of inheritance, and section 2 provided that where co-owners "have divided...their interests... by survey and plans, such survey and plans shall be henceforth deemed...to be a legal division of the same...equally as if the same had been made by deed or partition."

that Morse could not maintain his trespass action. This was the session which led to the judges' complaint, cited above, about the disrespect of Sterns towards them. That disrespect involved Sterns pointing out the inconsistency with their former ruling. He told the jury how the court had ruled in the previous case and "that he the Plaintiff had a right to expect the same Rule would be administered in the present Cause as had in the former, by which he had before lost his Cause." Apparently Deschamps responded angrily that the bench "would not suffer him to cite the former opinions of the Court without their leave, ordered him to sit down and threatened to proceed to severe measures for doing it."<sup>155</sup> The judges then told the jury to ignore Sterns's statement and, according to Kent's lawyer Rufus Chandler, also opined that Morse could not maintain a trespass action against Kent because the two were tenants in common.<sup>156</sup> The jury nonetheless found for Morse.

The judges' version was different. They acknowledged that the plan had been brought into evidence, but again said that it was used to show boundaries, not as an affirmation of title, and that the litigants' right to the land rested on possession. Since Abner Morse was able to prove possession, he won the case.

Thus the principal matter at issue in Article 4 was whether the judges had given any opinion on the issue of whether the plan could effect a partition. If they had indeed said so in the first case, it was certainly incompetent that they gave a contradictory opinion on the same point a few months later. Without supporting evidence, it is impossible to be sure about what the judges did say. The only witnesses who fully supported Sterns's version were himself and Barclay; a third witness in the Assembly, Rufus Chandler, was equivocal about what was said regarding the plan, but he was also adamant both that title to land was in question and that the bench was angry at Sterns. Conversely an affidavit by deputy prothonotary of Annapolis, Joseph Winniett, gathered for the judges' defence, stated that the lot plan was not made the basis of title.<sup>157</sup>

But there is some implicit support for Sterns's version from the judges' own answers. Having denied that they said anything at all about partition, both in their answers to Parr's Council in 1788 and in their later replies forwarded to the Privy Council, they went on to say that if they had said anything their opinion was obiter. In the former document they referred

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155. Quotations from Sterns's 29 March 1790 Assembly testimony, at RG 1, vol 302, no 30. See also a similar assertion in *The Reply of Sterns and Taylor*, *supra* note 34 at 12.

156. Testimony of Rufus Chandler (27 March 1790), RG 1, vol 302, no 29.

157. Affidavit of Joseph Winniett, Deputy Prothonotary of the Supreme Court at Annapolis (13 July 1791), RG 1, vol 302, no 45.

to any such statement as “extra-judicial,” and in the latter as “obiter only and not solemnly delivered.” In stating both that they said nothing and that anything they may have said was obiter, the judges undermined their case, making it likely that they said something they later regretted. On this point the Privy Council committee’s report becomes uncomfortable. While overall not critical of the judges on article 4, it clearly felt compelled to address this question. It conceded that the judges might “with propriety ...in discoursing upon this instrument give it considerable weight as a legal partition,” yet “such discourse, if it was no more, could never be called a solemn opinion.” In short, the committee sought to avoid the charge of inconsistency by depicting anything said by the court as musing, not a “solemn opinion.” Moreover, it went on to defend even a change of position, if that had occurred. “The question turns upon this foolish distinction, whether the opinion was obiter or Solemn. Even if it was solemn the judges have a right to change their minds without blame or reproach.” In short, they did not give contradictory opinions, but if they had done so, it was acceptable. Strictly speaking the committee was correct on this last point, but assuming the judges did contradict themselves this was much more than a “foolish distinction.” It was a highly incompetent piece of judging to offer contradictory opinions in the same year relating to a vital matter in the same community. The Privy Council’s conclusions in the Annapolis partition cases, unlike many of the other cases, owed much to its desire to exonerate the judges at all costs. And it is surely relevant, if the judges did indeed give contradictory opinions, that they changed their minds at the September 1787 Annapolis circuit meeting. That was the session in which relations between them and Sterns were at their lowest, and it is at least possible that the otherwise inexplicable turnabout was the result of their trying to find against Sterns’s client.

##### 5. *Article 5: Bent v Watson*

The critics’ best case was *Bent v Watson*, which formed the fifth of the final seven articles of impeachment and was the only case from Cumberland County.<sup>158</sup> Ironically it was the case which received the shortest shrift from the Privy Council. It had its origins in the brief contribution of Nova Scotia to the American Revolution—Jonathan Eddy’s siege of Fort Cumberland in 1776. The rebellion by some 200 men, mostly New

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158. This account of the case is from the same general sources as all the others. While documents relating to the case were delivered to the Assembly on 27 March 1790, no oral evidence was taken in 1790 for *Bent v Watson* perhaps because, as discussed below, it was *sub judice*. There was testimony in 1787, given on 29 November: see RG 1, vol 302, no 17. A full account of this case and its background is contained in 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” (1998) 21 Dal LJ 440.

England-born immigrants to the colony, was easily put down, and most rebels took advantage of an official amnesty and quickly returned to their allegiance.<sup>159</sup> But this did not save them from the revenge of those they had plundered and imprisoned during the brief time the rebels had control of the county, and from 1778 local loyalists, mostly the county's Yorkshire-born faction, launched a series of civil suits against their neighbours, for depredations that had taken place in 1776. In the largest suit Christopher Harper, a prominent Cumberland loyalist and JP, sued nine defendants in the NSSC, including men who had absconded and others who had taken advantage of the amnesty and who were back on their farms. A request that government halt the litigation fell on deaf ears, the Council deciding that the amnesty only covered official prosecutions for treason.

The defendants instead hit on an alternative litigation strategy. Two of them, Simeon Chester and Parker Clarke, were sued by a fellow former rebel, John Bent, in the Cumberland County Inferior Court of Common Pleas, the lower civil court. The suit was not defended and judgments were rendered for Bent before Harper's case was heard in the NSSC. Based on those judgments Bent obtained writs of attachment against the defendants' lands which were served in July 1780 by Cumberland's deputy provost-marshall Thomas Watson. The litigation was collusive and its purpose was to "cover" the land with a prior attachment and prevent Harper attaching it when he won his suit.<sup>160</sup> But Harper foiled this, temporarily. He obtained an *ex parte* order from then Chief Justice Finucane holding that the Bent litigation was collusive, that no lands should be attached pursuant to Bent's writs, and that *certiorari* should issue to bring the Inferior Court case up to the NSSC. Armed with this order Harper had the defendants' lands appraised and obtained a deed transferring them to him.

That should have been the end of the story, but it was not. Encouraged by Harper's success other loyalists from 1776 indulged in an orgy of litigation against their ex-rebel neighbours, which brought violent and other forms of resistance. The problems in turn led to an Assembly request for a judicial inquiry, carried out in the summer of 1782 by Brenton

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159. For the rebellion and the official reaction to it, including treason trials, see Ernest Clarke, *The Siege of Fort Cumberland 1776, An Episode in the American Revolution* (Montreal: McGill-Queen's University Press, 1995), and Ernest A. Clarke & Jim Phillips, "Rebellion and Repression in Nova Scotia in the Era of the American Revolution" in Greenwood & Wright, eds, *Canadian State Trials, Volume 1*, *supra* note 2 at 172.

160. Nova Scotia did not have sheriffs until 1782, the job of the sheriff being done by a provost-marshall for the colony and his deputies in various counties. Local statutes made it possible to seize lands to pay debts, although the process was complicated and included a two-year equity of redemption for the debtor. For more details see Clarke & Phillips, "The Course of Law", *supra* note 158 at 450-451.



and Deschamps while they were there on circuit. They were broadly sympathetic to the plight of former rebels, and, *inter alia*, issued a court order barring executions based on loyalist suits against former rebels.<sup>161</sup> Four years later, in 1786, John Bent returned to the county, and successfully applied to the Cumberland Inferior Court for an alias execution to replace the one rendered nugatory by Finucane's 1780 order. Bent had the sheriff appraise the lands, but then told him to desist when it became clear that they had already been sold pursuant to Harper's execution. Instead, he sued Watson for his failure to enforce the original 1780 executions—and won the case before Deschamps and Brenton in the NSSC on circuit in Cumberland in 1787. Thus, Thomas Watson was held liable by the NSSC judges in 1787 for obeying an order from the Chief Justice of the same court in 1780. According to Article 5 they also lied in their answers to the Council in 1787–1788, by saying that the 1780 order “appears to have been particularly directed by” Finucane. That is, they suggested that it was somehow his work and his alone; as Sterns and Taylor pointed out, “it is, and purports to be, an order made in and by the Supreme Court.”<sup>162</sup>

The judges' response to this charge in 1791 dealt with technical questions such as the nature of Bent's 1787 suit, whether the *Limitations Act* applied, and whether interest should have been awarded to Bent. But their response to the main cause of complaint, that they had given judgment against Watson for obeying an order from Finucane, was weak indeed. They asserted that the judgment obtained by Bent against Clarke and Chester “remained in full force and effect notwithstanding the said Order of the Supreme Court.” But they gave no reasons why this was the case, presumably because they had none to offer. It was true that Finucane's order was formally to stop the execution, but it did also state the litigation had been collusive, and even if the original judgment had somehow not been overturned by that order, allowing a court officer to be held liable for obeying the Chief Justice's order was surely wrong. The judges gave no indication of any reason for holding Finucane's order to be invalid at the time, and even if that were the case, surely Watson should not have been liable for obeying it. In *Bent v Watson* the judges were at best grossly incompetent; what made the case a powerful one for their loyalist opponents is that their decision, like their 1782 report on the crisis in Cumberland County, favoured those who had rebelled in 1776 over

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161. This blanket prohibition was an unusual proceeding. It can be explained by the fact that the judges were really acting in an executive capacity, pursuant to their commission to investigate conditions in Cumberland. Strictly speaking the Council should perhaps have issued the order, but questions would have been raised about the legality of such an intervention in the civil justice system.

162. Both quotations from *The Reply of Sterns and Taylor*, *supra* note 34 at 18 and 22.

those who had remained loyal. While the civil litigation amnesty they ordered in 1782 was a reasonable political decision in the circumstances, for the loyalists there was probably no more suitable example of their alleged unfitness to hold high office. And, ironically, in vindication of the judges' critics, Watson finally won the case. He applied, through his attorney Blowers, for a Chancery injunction to prevent Bent enforcing his common law judgment. He won, the Chancellor (Parr) awarding the injunction in June 1790, two months after the passage of the formal articles of impeachment. In other words the Lieutenant-Governor himself effectively conceded that the judges had been in error.

Yet the Privy Council committee concluded that the "heavy charge" in Article 5 was not made out, indeed that "every word of it is false." Their analysis concentrates on minor points—the nature of the action, the dispute over interest. On the main question the committee's report is silent. They were able to do this because the Assembly did a poor job of making out a case. As already noted, no oral testimony was taken in 1790, only written documents entered. There was oral testimony in the 1787 investigation, but it is unclear whether the committee had that. But they did have the formal charge, which adverted to the long history of the case, and were able to simply ignore it by saying, correctly, that there was no formal evidence to support the charge. Indeed they attacked the Assembly vigorously over this article: "The Committee here cannot help remarking that the Assembly must have been grossly abused and imposed upon by those who penned these Articles, in this instance, for if they had used their own Judgment and had compared the principal part of this charge with the Record it is impossible they would have assented to this article." Yet the weakness of the record could have been dealt with. Erskine had asked for time to collect evidence, but been refused. The committee knew that Watson had gone to Chancery, but instead of inquiring into the result of that action castigated him for doing so rather than taking out a writ of error in the Supreme Court. In short, no case more clearly demonstrates the extent to which at least parts of the committee investigations were a "whitewash."

#### 6. *Article 6: Kerrin v Bonnell*

Article 6 cited another Annapolis case, *Kerin v Bonnell*, decided on the September 1787 circuit visit to the town which had also seen the angry stand-off between Sterns and Deschamps over *Morse v Kent*. *Kerrin* involved a dispute over land in Digby Township, with the plaintiff Terrence Kerrin represented by Barclay and the defendant Bonnell represented by

Sterns.<sup>163</sup> The loyalist influx had resulted in a grant of some 120,000 acres in the Digby area in the western part of the county, in the early- to mid-1780s, to a list of individuals in much the same way that the grants at Annapolis had been made in the 1750s. Agents were then appointed to assign individual lots, and one lot went to Kerrin. Attached to the grant was a condition that the land be improved within six months, and according to one version of the evidence he failed to abide by the condition and some or all of the original grant was given to Bonnell, a local JP and Common Pleas judge, instead. Kerrin was nonetheless able to get his grant confirmed in Halifax by the Lieutenant-Governor. Bonnell occupied all or part of it and Kerrin brought an action for ejectment.

The gravamen of the complaint was that after Kerrin had introduced his evidence to support his title in the form of the conditional grant, the court refused to allow Sterns to introduce similar evidence of the subsequent grant to Bonnell. According to Sterns they said that “the said assignments had no effect upon the Title...and refused to suffer him to remark on the Plaintiff’s title set up under that Assignment.” Having said that the grants from the agents were not good to establish title, in giving their charge to the jury, the judges then stated that the grant from the agents to Kerrin was good. Sterns tried to introduce evidence of non-compliance with the conditions, but the court would not admit it. Article 6 asserted that the judges acted “partially” and “corruptly” because having said the original grants were not good they “ground[ed] the preferable title of the said Terence Kerin [sic], solely on the acts or assignments of the said agents.” The judges’ response was simple: they had accepted that Kerrin had the better title on the basis of his patent from Lieutenant-Governor Parr; combined with the original assignment from the agents this gave him “a preferable Title.”

As with some of the cases previously discussed, we have here a dispute over the law and one in which the judges cannot be said to have acted unreasonably. As Barclay, ironically, said in giving evidence to the Assembly: the judges found for Kerrin, his client, on the ground that “the subsequent assignment to the Deft. was nugatory and void, the Agents having by the original Assignment parted with the Right they could possibly have to the Lands.”<sup>164</sup> That is obviously a correct principle—you cannot give what you do not have—and having given the title to Kerrin

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163. This account is from the same general sources as for the other cases, and the testimony before the Assembly of Barclay and Sterns, on 27 and 31 March 1790 respectively, at RG 1, vol 302, nos 32, 33. See also Affidavit of Joseph Winniett, Deputy Prothonotary of the Supreme Court at Annapolis (13 July 1791), RG 1, vol 302, no 45.

164. Testimony of Barclay (27 March 1790), RG 1, vol 302, no 33.

they could not then give it to Bonnell. Sterns argued that the judges had been contradictory in saying that the allocations by agents were not good to establish anybody's title and then using them to support Kerrin's, but it is entirely plausible that what they actually said was that Kerrin's title was better because of the combination of an assignment from the agents and its confirmation by Parr. From the evidence he gave to the Assembly it seems that Sterns's real complaint was that he was prevented from attacking Kerrin's right based on non-compliance with the conditions; as elsewhere, his tone in later writing about the case was very much one of lecturing the judges on his superior knowledge of the law.<sup>165</sup>

The committee wholly supported the judges on this article. They accepted, based on deputy prothonotary Winniett's evidence, that the patent from the Lieutenant-Governor had been put into evidence and found it decisive in the case. This instrument "put the second assignment out of the question," and "would of itself have overruled the second if that had stood single." Kerrin's title was "clear and unquestionable," and it did not matter what was said about the agents' assignments. If indeed the judges had preferred the first one, they were right to do so because it had been confirmed by Parr. If instead they had said that they would take no notice of either assignment, and then gone back on that statement, they should be commended for doing so, for the first assignment was "a material part of the Plaintiff's title." In all this the committee was correct. Kerrin had the better title, either by virtue of having the prior title from the agents or by virtue of the Lieutenant-Governor's patent, or both. The only argument that would have succeeded for Bonnell was one based on non-compliance with the conditions, which might possibly have made the assignment to him valid. But this issue was not part of the case, and even if it had been it is difficult to see how the superior title that came from the official patent could have been ignored. The committee also used this occasion to castigate Barclay's behaviour. He had been counsel for the plaintiff and he had won, the jury giving their verdict for Kerrin "upon a Title as clear as the sun." And yet he "thrust himself forward" to "criminate the judges" for accepting an argument that he must have made if he was to do his duty by his client.

7. *Article 7: Pineo v Katherns and Wheelock v Messenger*

Article 7 contained two cases. The first, *Peter Pineo v Samuel Katherns*, was an action on a bill of exchange tried in the May 1787 circuit session at

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165. See *The Reply of Sterns and Taylor*, *supra* note 34 at 23-24.

Annapolis, with Barclay representing the plaintiff.<sup>166</sup> The action was tried summarily pursuant to local legislation that permitted this.<sup>167</sup> Katherns won, although according to the complaint the court did not announce that in court but waited until after the term had concluded, when they “privately” endorsed the writ. In the next session, in September, Barclay applied for a rule to set the judgment aside on the ground that it had not been delivered in open court. The court said such a rule was not necessary, as they would there and then announce their judgment and refused to hear argument on the rule.

The judges’ response to this complaint was simply that they had followed the usual practice in summary cases on circuit. Such cases were heard in a single day at the end of the term, after the jury cases had been disposed of, and sometimes the court gave judgment immediately, on other occasions they took time for reflection and decided the case in Chambers later. As for refusing to hear argument on the motion, they said it was not necessary to take out a rule, which would have involved costs to the plaintiff, but were prepared to explain the proceeding to counsel and hear any objections. Assuming all this to be true, and the judges’ accusers did not say differently, the complaint of giving a “private” judgment seems to be simply wrong.

Why Sterns pursued this charge at all is explained by what he said in *The Reply of Sterns and Taylor*, published after the failed 1787 investigation. Although his testimony in the Assembly in 1787 inquiry focused on the “private” judgment and the refusal to hear the rule, what Sterns was really concerned about was the original finding for the defendant. He was not involved in the case as counsel, but he was in court and believed that the defense was “very weak.” Moreover, he chose to tell the court that: “I was induced, as a friend to the court, to state to them the reasons on which I conceived they were bound to give judgment for the plaintiff.” This was indeed a remarkable proceeding—a lawyer not involved in the case intervening and telling the judges what to do. Yet it is revealing of the contempt in which the loyalist lawyers, especially Sterns, seem to have held the judges. Later in the same discussion of *Pineo v Katherns*, Sterns referred to Barclay as having been in practice in New York, “where the

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166. For these cases see the same sources as before and the testimony in the Assembly on 27 March by Rufus Chandler, and on 31 March by Barclay and Sterns: RG 1, vol 302, nos 34–36. See also Sterns’ testimony before the Assembly (29 November 1787), RG 1, vol 302, no 17, and Affidavit of Joseph Winniett, deputy prothonotary of the Supreme Court at Annapolis (13 July 1791), RG 1, vol 302, no 45.

167. *An Act for the Summary Trial of Actions*, SNS 1765, 5 Geo III, c 11, as continued and amended by SNS 1767, 7 Geo III, c 10 and SNS 1773, 13 Geo III, c 9.

law was correctly administered.”<sup>168</sup> Nova Scotia’s judges, he clearly had come to believe, did not follow the procedures the loyalist lawyers were familiar with.

The Privy Council committee, again, sided entirely with the judges, in one short paragraph. With the help of deputy prothonotary Winniett’s affidavit it accepted that the usual practice had been followed, and thus when the loyalist lawyers claimed it was not regular to delay judgment and decide cases in Chambers they spoke “either falsely or Ignorantly.” The charge was “frivolous and unsupported.”

Article 7 also contained a reference to another Annapolis case from the May 1787 session, *Obadiah Wheelock v Ebenezer Messenger*, but there was very little information given. One sentence only in Article 7 states that the judges granted counsel a rule to set aside an attachment and then refused to hear argument on the rule. The Assembly heard only two short questions and answers on the case, part of Sterns’s testimony on 31 March, which said the same things.<sup>169</sup> It is surprising that the case made it into the final articles with so little evidence to support it or even explain what the problem was. The judges’ response simply denied any refusal to hear a rule and insisted that they had heard several. One in particular concerned whether Messenger should be taken into custody for refusing several times to abide by the terms of an attachment.

The committee, not surprisingly, found for the judges. They noted that Messenger had had ten months to obey the court order to pay and had promised to do so immediately when eventually brought to court for default. He was then discharged without costs on the promise. Article 7, commented the committee, “seems thrown in” as a “make weight to close the Impeachment,” and the charge was “frivolous” and “altogether unsupported by evidence.” It is difficult not to agree with that assessment.

#### *Conclusion and postscript*

This review of cases suggests that they can be grouped into three categories. *Bent v Watson* shows the judges to have been either grossly incompetent or partial; no other explanations can reasonably be offered for finding somebody liable for acting in obedience to an order of the Supreme Court. In *Tremain v Yorke* the judges clearly acted improperly in insisting on the non-suit and in withdrawing a juror, and were certainly at best unwise to

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168. Quotations from *The Reply of Sterns and Taylor*, *supra* note 34 at 31.

169. Testimony of Sterns (31 March 1790), RG 1, vol 302, no 35. The session in which these questions and answers appear was one in which the vast majority of the time was given over to testimony about *Pineo v Katherns*. See also Affidavit of Joseph Winniett, Deputy Prothonotary of the Supreme Court at Annapolis (13 July 1791), RG 1, vol 302, no 45.

have suggested they made decisions based on Blowers's greater civility to them. And, if we assume that the judges did give contradictory opinions in the Annapolis partition cases, that too shows at the very least considerable incompetence. Thus in three cases the judges acted quite improperly, and quite probably partially. A second category comprises four cases in which the judges were to all intents and purposes correct: *Bartling*, *Pineo v Katherns*, *Kerrin v Bonnell*, and *Wheelock v Messenger*. Here the judges' accusers were the ones in error, misrepresenting the nature of Bartling's offence, making incorrect statements about what was and was not the usual procedure, etc. The final category comprises two cases, *Sullivan v Storey* and *Squires v Seamark*, in which the judges can be said to have given a defensible opinion on a contentious legal question. Whatever some lawyers might have thought about the substance of that opinion, it was entirely reasonable for the judges to have taken the view that they did of the law (*Sullivan v Storey*) or their discretion to decide bail conditions (*Squires v Seamark*).

This categorization leaves three questions to be answered. Why did the Privy Council committee effectively whitewash the judges in the cases in which they were at fault? Why did Sterns and his close allies include cases which were not at all favourable to their cause? And why did so many members of the Assembly vote for articles which were very unlikely to succeed? The first of these questions is not difficult to answer. The London government, whatever the private opinions of individuals may have been, was intent on supporting the judges and their Lieutenant-Governor against the ambitions of a colonial Assembly flexing its muscles. This was a period of building the "second empire" out of the wreck of the first following the American Revolution and colonial policy-makers were determined not to repeat the mistakes of the past. Allowing assemblies too much power was seen as one of the causes of the revolution, and the new empire—witness the arrangements for Upper Canada—was to have strong executive governments. Superior court judges were seen as crucial members of those strong executives. Thomas Erskine surely got it right when, after pleading before the Committee, he referred to it as an "unwilling tribunal," which "must determine whether the Political or the Judicial body must fall."<sup>170</sup>

In short, it is very likely that the authorities in London bought completely into Parr's analysis that the proceedings were the work of dangerous radicals and that this kind of attack on a central institution of the colony's government could not be tolerated. The loyalists, of course, were

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170. Erskine to Elisha Lawrence (1792), enclosed in Lawrence to Uniacke (4 May 1792), RG 1, vol 302, no 46.

not republicans. Many had lost a great deal in fighting republicanism, but they were also not Tories. Many were American colonials who believed in a large measure of local self-government, but who had rejected rebellion. Like some of their fellow loyalists in New Brunswick, the newly-created loyalist colony to the north, they believed in the glories of the English constitution, including its democratic elements, and were not pleased to find so much power in the hands of the undemocratic elements of that constitution.<sup>171</sup> And the impeachment of the judges was not the only issue that saw the Nova Scotia Sixth Assembly more at loggerheads with the colonial executive than any of its predecessors. There were battles over the intrusion of the Naval Officer's deputies into coastal trade, over who should control the qualifications of electors and candidates, and the duration of assemblies, powers held by the council which the Assembly wanted for itself. There were demands for the creation of new counties to give newly-settled (loyalist) populations better representation in the House. Most importantly, these years saw a classic confrontation over money bills; in both 1789 and 1790 the Assembly refused to accept Council amendments to revenue measures, declaring on the former occasion that it was the "inherent right" of the House "to originate all Money bills."<sup>172</sup> But the London government was not interested in fine distinctions among varieties of loyalism.

Turning to my second question, about Sterns, there is no doubt that the Privy Council's task of supporting the judges no matter what was made easier by the fact that so many of the charges were worthless. It was one thing to ignore the real issues in one case, and downplay misbehaviour in two others, it would have been much more difficult to maintain the whitewash for a more extensive set of cases. London's job was made easier by Sterns' and Barclay's insistence on going with "bad" cases. That they did so, I would argue, had a lot to do with Sterns's arrogance about his own superior abilities as a lawyer and his contempt for the judges. In some of the cases discussed above it is clear that what Sterns was really concerned about was that the judges made what he considered to be the wrong decisions given the facts of the case. That he would dare to stand up, when simply an observer in court, and tell the judges they were getting it wrong was a compelling testament both to his arrogance and lack of

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171. See Bell, "Sedition Among the Loyalists", *supra* note 6 at 224, referring to the branding of some New Brunswick loyalists as disloyal so soon after the revolution as an "ineffably ironic, almost Kafkaesque epilogue to the revolution."

172. Cited in MacKinnon, *This Unfriendly Soil*, *supra* note 7 at 125. For all these issues see *ibid* at 124-127.



political judgment. The latter also led him to believe that somehow his own conviction about the cases would persuade others.

It is also worth noting that the managers of the impeachment made some poor choices about how to conduct the proceedings and what evidence to adduce. As noted above, Barclay asked all the questions, except when he was the witness and some unknown member took over the job, asking questions that Barclay himself had prepared. Many of the questions were “leading questions.” The Privy Council committee was, as a result, able to impugn the process. On more than one occasion they castigated Barclay for his multifarious roles and in its concluding section the draft report noted that he put every question to the witnesses, and in four cases he “changes his character” and turns witness, handing over his questions “to some nameless person to be repeated to himself.” Given his performance the committee concluded that he was not credible and that it would give “perfect credit where he happens to be contradicted.” As for Sterns, he was “exceptionable in another light.” He had been disbarred for his role in the 1787 investigation and subsequent events, had failed to win reinstatement, and had then returned to Halifax and fomented the impeachment. He was to be given little credit either.<sup>173</sup> Barclay and Sterns also made a large tactical error in having no oral testimony given about *Bent v Watson*, in my view their strongest case, allowing the committee to comment on the fact that no evidence had been produced to support the charge.

Answering the question of why so many Assemblymen were prepared to support the impeachment in these circumstances is more difficult. One can speculate that three factors may have played a role. First, most Assemblymen were ignorant of the legal questions involved; they simply did not have the capacity to separate the wheat from the chaff in the accusations. There were only three lawyers in the Assembly and two of them, Barclay and James DeLancey of Annapolis, consistently supported impeachment. The third lawyer Assemblyman was RJ Uniacke, and he was speaker. DeLancey voted against the judges every time, but he was a very new member of the Assembly, elected in a 1790 by-election and only taking his seat towards the end of February.<sup>174</sup> The vast majority of members were thus heavily reliant on the assertions of Sterns and Barclay, and the former in particular was, of course, a man extremely confident in his own opinions. Second, many members may have both seen Sterns as a martyr who deserved support and been resentful of the way the whole

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173. For all this see Privy Council Minutes (19 June 1792) in PC Records, *supra* note 108.

174. See Elliott, ed, *Biographical Directory*, *supra* note 17 at 49.

issue had been handled from 1787. The Assembly had done no more in 1787 than ask for an inquiry, and the Council's treatment of that request had been perfunctory and dismissive. Then the judges, in April 1788, had shown themselves to be vengeful and overbearing in their disbarment of Sterns and Taylor. One can speculate, and it is only speculation, that some men may have felt there was something to hide—more to it than met the eye, given the official reaction.

Third, the assemblymen who voted for impeachment may well have cared little about the merits of the case. The judges simply provided for them a *cause célèbre* over which to attack the established order. As already noted, there were a number of issues on which Assembly and executive collided at this time. This explanation draws some support from the diary of Liverpool representative and merchant Simeon Perkins. He did not arrive in Halifax until 12 March, two days after the House had received the articles, and while he noted the impeachment proceedings every day he paid no more attention to them than to a variety of other matters, public and private, and reserved his greatest indignation for disputes with the Council over the Naval officer and appropriations. "We are now at a loss how to manage with the Council," he frustratedly declared on 13 April. No such animation appears in his earlier entry for 4 April: we "acquainted [Parr]...that we had impeached the Judges," he laconically minuted.<sup>175</sup>

Whatever the explanations we can offer for how events unfolded, the Privy Council committee's report was the end of the matter. When he transmitted the report to Speaker Uniacke, Lawrence insisted that "if the Assembly suffers itself to be beat in this business," it would be "of very little consequence" and "the Representation of the People will be at an end."<sup>176</sup> But nobody in the Assembly tried to revisit the question, in part because war with revolutionary France broke out in 1793. But in any event Strange's prestige and influence seem to have calmed matters down considerably.

It is difficult to speculate on what broader effect the failed impeachment had on British policy and colonial judiciaries. In this regard it should be noted that the Nova Scotia impeachment crisis did not lead to a new policy of not appointing lay judges to colonial superior courts. As the committee itself noted: "mere laymen," so long as they were "Men of understanding," served a useful purpose. Although the majority of British North American judges appointed after c 1790 were legally trained, they by no means all were, as loyalty to government as a qualification for judicial office

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175. *Diary of Simeon Perkins*, *supra* note 97 at 487-488.

176. Lawrence to Speaker Uniacke (11 August 1792), RG 1, vol 302, no 49.

continued to override legal training. Deschamps's successor on the NSSC, George Henry Monk, was probably not legally trained when he took office in 1801, nor were most of the early judges of the Prince Edward Island Supreme Court. Laymen were appointed as both chief and puisne judges of Cape Breton Island in the 1790s and early nineteenth century.<sup>177</sup> Even in more populous colonies men with political influence rather than legal training got judicial appointments, the last being Edward Winslow in New Brunswick in 1807.<sup>178</sup> The same mix of legally trained and lay judges can be found elsewhere in the late eighteenth- and early nineteenth-century empire, although there was considerable variance among colonies. Most, though not all, Australian judges were lawyers, although Western Australia only acquired a professional judiciary from 1860. In contrast, only half of the British West Indian colonies had professional chief justices in the 1820s, and those that did typically had lay puisnes.<sup>179</sup>

Nor did the impeachment alter the ways in which judicial discipline was conducted in the broader empire. As noted above, after 1782 colonial governors' power to dismiss judges was tempered by a right of appeal to the Privy Council, but was otherwise unconstrained and did not require Assembly participation. Appeals against dismissals, as well as rare cases of attempts by Assemblies to remove judges, were heard by ad hoc committees of the Privy Council until 1833. In that latter year the Judicial Committee of the Privy Council was formally established by statute and it took jurisdiction over colonial judges.<sup>180</sup> But none of this seems to have been affected by the failed Nova Scotia impeachment. Ad hoc response was the method of dealing with judicial problems in the colonies, an approach exemplified by, rather than changed by, the events described here.

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177. The qualification regarding Monk is because, although he was the brother of Sir James Monk, who became Chief Justice of Lower Canada, and although he served as clerk of the crown in Halifax for many years, there is no evidence that he was ever called to the bar. He served for many years as an MHA and Superintendent of Indians, and was disappointed with the NSSC appointment, as he preferred a job as customs collector: see GH Monk to Sir James Monk (23 August 1801) NSARM, Microbiography Series, Monk Papers, Reel 1. See also Cahill, "Henry Dundas' Plan," *supra* note 123 at 164. For Prince Edward Island, whose assistant Supreme Court judges were unpaid, see JM Bumsted, "Robert Gray," "James Curtis," and "Joseph Robinson" all in *DCB*, *supra* note 2. Gray served almost forty years on the court from the 1780s to the 1820s, at times as acting chief justice. For Cape Breton see RJ Morgan, "Ingram Ball" and "William Smith" both in *DCB*, *supra* note 2.

178. In addition to Winslow, Peter Russell was made a temporary judge of the Upper Canada Court of King's Bench in 1796, and businessman Thomas Dunn was named to the newly-established Quebec Court of King's bench in 1794. For all these men see Edith G Firth, "Peter Russell," Ann Gorman Condon, "Edward Winslow," and Pierre Tousignant & Jean-Pierre Wallot, "Thomas Dunn" all in *DCB*, *supra* note 2.

179. For all this see McLaren, *Dewigged, Bothered and Bewildered*, *supra* note 3, *passim*.

180. See McLaren, "Men of Principle", *supra* note 109 at 147-148.

In one respect the impeachment may have had a more lasting effect. More than half a century after the impeachment crisis Nova Scotia's judges received good behaviour appointments in 1848; this development had already occurred in what is now Ontario and Quebec in 1834 and 1843 respectively.<sup>181</sup> In the years between 1790 and 1848 no Nova Scotian judge was dismissed by the colonial executive, in marked contrast to the American experience, where in many states judicial tenure was perilous indeed, with or without the complication of moving to elected judiciaries.<sup>182</sup> When good behaviour appointments were debated in Nova Scotia, the fiercest opponents of the change were the judges themselves. Perhaps because of developments in the post-revolutionary United States, but perhaps also because of the events of the 1790s, they feared above all else their fates being decided by politically motivated elected representatives and were much happier trusting the crown and its representatives. Chief Justice Brenton Halliburton, who succeeded his maternal uncle James Brenton on the court, expressed his horror at his fate being decided by the "traders and lawyers" who occupied so many of the Assembly seats, and were men "who must continually be brought into collision with the judges" over litigation and who could not be trusted to put aside their "feelings of personal dislike."<sup>183</sup>

As for the principals, all enjoyed productive careers thereafter. Deschamps and Brenton stayed in office, until 1801 and 1806 respectively, and both died in office. Their chief was Strange until 1797, when Blowers was elevated to the chief justiceship. Barclay became speaker in the new Assembly and a valuable ally of the new loyalist Lieutenant-Governor Wentworth, who recommended him to be the British boundary commissioner in the dispute with the US over the New Brunswick-Maine border. Perhaps more surprisingly, Sterns also flourished, albeit for only short time. He did achieve reinstatement at the bar in 1790, albeit

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181. *An Act to Render the Judges of the King's Bench in this Province Independent of the Crown*, SUC 1834, 4 Will IV, c 2; *An Act to render the Judges of the Courts of King's Bench, in that part of this Province heretofore Lower Canada, independent of the Crown* 1843 (PC), 7 Vict, c 15; *An Act to Render the Judges of the Supreme Court...Independent of the Crown, and to Provide for their Removal*, SNS 1848, 11 Vict, c 21. See generally Jim Phillips, "Judicial Independence in British North America" (Paper delivered at the American Society of Legal History conference, November 2011).

182. See Kermit L Hall, "The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860" (1983) 45 *The Historian* 337; John Phillip Reid, *Legislating the Courts: Judicial Dependence in Early National New Hampshire* (DeKalb, Ill: Northern Illinois University Press, 2008); Irving R Kaufman, "The Essence of Judicial Independence" (1980) 80 *Colum L Rev* 671.

183. Brenton Halliburton, "Observations on ... *An Act to render the Judges of the Supreme Court... Independent of the Crown*" (22 March 1848) in *Journal and Proceedings of her Majesty's Legislative Council, of the Province of Nova Scotia* (1848) Appendix 29, 101 at 102.

by apologizing to Council and court, actions which pained him very considerably, and resumed practice.<sup>184</sup> By 1792 enough was forgotten that Strange recommended him as “respectable” and a good candidate either for attorney general or a seat on the NSSC bench.<sup>185</sup> He was elected an MHA for Halifax County in 1793, and finally joined the colonial elite in 1797 as solicitor-general. He died a year later. His premature death was likely in part the result of a remarkable event—a street fight with attorney-general Uniacke, in which Sterns received a severe beating! Ironically, and as remarkably, Blowers, recently appointed chief justice, challenged Uniacke to a duel over his treatment of Sterns, but a magistrate intervened and the two were ordered to desist.<sup>186</sup>

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184. For an account of his negotiations with Strange over this see Strange to Under Secretary of State Scrope Bernard (25 August 1790), CO 217, vol 62 at 274-283; Council Minutes (22 July 1790), RG 1, vol 213, p 191.

185. Strange's Memorandum, *supra* note 14 at 353-355.

186. For this story see BC Cuthbertson, “Richard John Uniacke” in *DCB*, *supra* note 2.