Articles

Slavery and the Judges of Loyalist New Brunswick

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Why did the judges of New Brunswick's Supreme Court twice (1800, 1805) uphold the lawfulness of Negro slavery when they might, without unconvenience, have abolished it? Why did they deliberately reject the impulse towards abolition that had triumphed throughout the rest of the North Atlantic world? This paper addresses these issues in the context of the general legal debate on slavery in Loyalist New Brunswick.

En 1800-1805, les juges de la Cour Suprême du Nouveau-Brunswick ont affirmé la legalité sur l'esclavage des noirs lorsqu'ils auraient pu sans inconvénient l'abolir. Pourquoi ont-ils intentionnellement rejetté l'abolition qui a triomphé à travers le reste du monde Nord-Atlantique. Dans un contexte général du débat légal, le papier s'adresse sur la question d'esclavage dans un Nouveau-Brunswick Loyaliste.

INTRODUCTION

On two occasions — in 1800 and in 1805-06 — the Loyalist judges of New Brunswick's Supreme Court were confronted with one of the most vexatious issues in the Western legal tradition: whether slavery was to be held lawful in the absence of express statutory establishment. On one side of the question was the weight of philosophical, religious and jurisprudential rationalization from earliest recorded time. On the other side was the eighteenth-century revolution in educated opinion that had already doomed the institution in neighbouring jurisdictions in British North America and the United States, and that would soon end

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the slave trade in the whole British Empire. It was thus entirely open to the New Brunswick Supreme Court to *"make[e] the law* for the occasion".[1] In choosing to uphold slavery when they might without inconvenience have chosen abolition, the judges deliberately rejected the trend of contemporary opinion throughout the North Atlantic world. Although this may have had little impact on the real condition of the province's slaves it does afford striking evidence of the deeply conservative mentality of New Brunswick's judges and, by extension, of the governing elite of which they were a central part.

The existence of Negro slavery during the early decades of New Brunswick's colonial life has long been well known. No aspect of the province's legal history has attracted greater attention.[2] The question has, however, generally been treated either as a sort of historical curiosity or as an unfortunate episode in the development of the province's Black community. This paper will present a new and broader reconstruction of the legal debate on slavery in New Brunswick. It will attempt to set the controversy against its proper historical background and suggest why, when they might have chosen abolition, the New Brunswick judges staunchly reaffirmed a social order in which slavery had a part.

THE ABOLITIONIST IMPULSE

Throughout most of Western history the legal and moral propriety of slavery was without serious question. It was an institution practised by the ancient Greeks and Romans, recognized in the Bible, approved by the leading classical and Christian writers, and sanctioned by the general usage of nations. Yet between the 1780's and the 1860's, first the slave trade and then slavery itself were abolished in the United Kingdom, United States, and British North America. Probably the chief cause of this revolution in sentiment among the influential classes in the North Atlantic world was the propagation of a theory of natural rights.

The list of luminaries whose work contraposes Negro slavery to the rights of man under nature reads like a roll call of the Enlightenment: Locke, Montesquieu, Hutcheson, Smith, Rousseau, Blackstone, the

[1]Chipman to Blowers, 27 February 1800: Public Archives of Canada (hereinafter P.A.C.) Lawrence Collection, M.G. 23 Dl, Vol. 6.

[2]J.W. Lawrence, *Foot-Prints; or Incidents in [the] History of New Brunswick* (Saint John, 1883), at 57-8; W. G. MacFarlane, *Fredericton History: Two Centuries of Romance, War, Privation and Struggle* (1893) (Non-Entity: Woodstock, 1981), at 52; W.O. Raymond, "The Negro in New Brunswick", (1893) 1 *Neith* 27 at 33; T.W. Smith, "The Slave in Canada", (1898) 10 *Coll. N.S. His. Soc.* 3 at 100-10; D.A. Jack, "The Loyalists and Slavery in New Brunswick" (1898) *Proc. Royal Soc. of Canada* Ser. II, Vol. IV 137; J.W. Lawrence, *The Judges of New Brunswick and their Times* (Saint John, 1907), at 71-6; J.A. Hannay, 1 *History of New Brunswick* (Saint John, 1909), at 221-23; P.A. Ryder, Ward Chipman, United Empire [*sic*] Loyalist (M.A. Thesis: U.N.B., 1958), at 67-9; W.S. MacNutt, *New Brunswick A History: 1784-1867* (MacMillan: Toronto, 1963), at 83; Robin Winks, *The Blacks in Canada* (McGill-Queen's: Montreal, 1971), at 107; W.A. Spray, *The Blacks in New Brunswick* (Brunswick: Fredericton, 1972), at 23-5.

authors of *L'Encyclopédie.*[3] Although historians generally point to John Locke's formulation of the first principles of civil society as the intellectual well-spring of much of the libertarian rhetoric of the era of the American and French revolutions, it was the work of Montesquieu and Blackstone which had the greater direct impact on the issue of slavery. Montesquieu himself was widely read among the influential, but the key to the widespread awareness of his theory that slavery was without justification in natural law was its wholesale reproduction in William Blackstone's *Commentaries on the Laws of England* (1765-69). While Blackstone's arguments on this head were neither original nor unequivocal he wrote in a 'general and pronounced anti-slavery tone" and incorporated Montesquieu's demolition of the traditional pro-slavery case in a widely-circulated work of the utmost respectability.[4] His identification of English law with the law of nature and his corresponding rejection of "pure and proper" slavery were unmistakable.

Blackstone's influence in the late eighteenth-century North Atlantic world can hardly be overemphasized, especially as regards North America. The *Commentaries* were more than the lawyer's *vade mecum;* more even than "an essential part of every Gentleman's library".[5] Their publication came at a time of intense constitutional debate in both Britain and her North American colonies, and Blackstone's treasury of common law principles was an essential tool in that debate. The influence of the *Commentaries* can be gauged from the fact that the demand was great enough to justify trans-Atlantic reprintings, so that the number of copies sold was comparable to the sale in Britain itself.[6]

Although the vogue of natural rights reasoning is the most perceptible factor in the rise of anti-slavery sentiment, students of the abolitionist impulse have linked the transformation of public opinion to several other intellectual currents in the late eighteenth- and early nineteenth-century world. In the economic sphere Adam Smith and his followers challenged the proposition that slavery was a necessary or uncommonly efficient way of extracting money from the plantation colonies.[7] In the religious sphere the abolitionist advocacy of the North American Quakers and the English Wesleyan Methodists is well known. The Wesleyan stance, in particular, can be viewed as just one

[3]Not all of the persons named were abolitionists, but their works were of notable service in the abolitionist cause.

[4]Roger Anstey, *The Atlantic Slave Trade and British Abolition* (Humanities: Atlantic Highlands, U.S.A., 1975), at 114-15. Anstey adds that, "Unoriginal though Blackstone's arguments were, they came over as compulsive conclusions from premises of pristine simplicity, whilst we must also remind ourselves of the obvious — that Blackstone was lecturing and writing in *English*".

[5]Edward Christian, "Advertisement" to the 15th edition (London, 1809) of the *Commentaries.*

[6]Gareth Jones, *The Sovereignty of the Law* (U. Toronto: Toronto, 1973), at xvii-viii.

[7]David Davis, *The Problem of Slavery in Western Culture* (Cornell U.P.: Ithaca, 1966), at 434-35.

manifestation of the growth of the rational, arminian concept of a God of love.

> It was the development of a philosophy of benevolence, of the idea that God pursued his object of stimulating happiness not by coersion but through freedom of will, of the idea of history as progressive, which made it possible to attack American slavery as unChristian, inhumane and ripe for change.[8]

The combined force of these currents in natural rights theorizing, in economic thought, and in religious outlook was such that by the last third of the eighteenth century the tide of public opinion was perceptibly running against slavery, and especially the slave trade. This was particularly true in Britain and the northern of her North American colonies, where slaves were relatively few and the organs of public opinion relatively advanced. In the formulation of the leading student of the British slave trade:

> [T]he context of received wisdom had so altered by the 1780's that educated men and the political nation, provided they had no direct interest in the slave system, would be likely to regard slavery and the slave trade as morally condemned, and as no longer philosophically defensible.[9]

Between 1780 and 1807 this altered public sentiment was reflected in legislative and judicial action against slavery in Britain herself and in many of her current and former North American colonies; but not in New Brunswick.

In Great Britain

The abolition of Negro slavery in 1833 has commonly been hailed as one of the noblest achievements in British history; and, when one recalls that Britain abolished slavery three decades earlier than many of the American States there is some basis for such a view. But the encomia still generally extended to the British record on slavery probably arise not so much from the ending of the slave trade in 1807 and the abolition of the institution itself in the 1830's as from the notion that slavery was never legally tolerated within the borders of the Mother Country herself, and that Lord Mansfield's celebrated decision in *Somerset* v. *Stewart* (1772)[10] put the matter beyond doubt. In a characteristic expression of this still widely-accepted misconception Reginald Coupland wrote that after Mansfield's decision "all slaves in England . . . were recognized as free men".[11]

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[8]Duncan MacLeod, *Slavery, Race, and the American Revolution* (Cambridge: New York, 1974), at 3.

[9]*Supra*, footnote 4, at 95.

[10](1772) Lofft 1; 98 E.R. 499.

[11]Reginald Coupland, *The British Anti-Slavery Movement* (London, 1933), at 55.

Viewed in strictly legal terms, however, *Somerset*'s case is only the most notable of a long series of highly contradictory English decisions which, although they contained many dicta useful to both sides in the broad slavery controversy, did little to weaken the master's legal claim to his Black. All that Lord Mansfield decided, as he himself carefully emphasized, was the narrow point that a slave, once in England, could not be forced to leave. But while he was careful to confine his ratio to the precise question before him, Mansfield did nonetheless cast grave doubt upon the general legality of the institution in obiter dicta that were later an important part of the case against slavery in New Brunswick.

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.[12]

That *Somerset*'s case did not abolish slavery in England is dramatically illustrated by the fact Lord Mansfield himself died a slave owner twenty-one years later.[13] Indeed, his decision in *Somerset* v. *Stewart* only fuelled the controversy, providing support both for those who defended slavery and for those who wished to strike it down. The case itself and the pamphlet literature which immediately sprang up around it did, however, serve to coalesce still further the anti-slavery lobby in Britain. In the 1780's a British Abolition Committee was established, which by the 1790's, was causing abolition bills annually to be introduced into Parliament.[14] Finally, in 1807, the anti-slavery forces won legislative abolition of the slave trade in the British Empire, and, three decades later, the progressive phaseout of slavery itself.

In the United States

The fact that the final abolition of slavery in the United States was not effected until the 1860's tends to obscure the fact that slavery was abolished or was being phased out of all of the Northern and Middle states by 1804, and in many cases, substantially earlier. One cause of this early flowering of anti-slavery sentiment was the fact that slavery as an economic form was relatively unimportant outside the South. The crucial factor, however, was probably the intellectual and moral climate created in the Northern colonies — especially New England — by years of politicizing revolutionary turmoil. In the long, transforming pamphlet

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[12]*Supra*, footnote 10, at 510. In *The Problem of Slavery in the Age of Revolution* (Cornell: Ithaca, 1975), at 476-77, David Davis argues that there is a significantly more accurate version of Mansfield's remarks; but, having been long ignored, it is irrelevant for the present purposes.

[13]F.O. Shyllon, *Black Slaves in Britain* (Oxford U.P.: London, 1974), at 234.

[14]*Supra*, footnote 4, at 273, 321.

campaign that preceded the outbreak of armed rebellion no argument was more frequently urged upon the American colonists than that submission to British impositions on their "liberties" would reduce them to a condition of "slavery". According to the most eminent student of the propaganda war:

> "Slavery" was a central concept in eighteenth-century political discourse. As the absolute political evil, it appears in every statement of political principle, in every discussion of constitutionalism or legal rights, in every exhortation to resistance.[15]

By classifying British policy as a conspiracy to reduce them to the status of slaves the colonists could invoke the law of "nature and nature's God" to justify overthrowing the existing regime.

While the American colonists feared becoming slaves to the British and justified their resistance to established authority in terms of their rights under nature, they were singularly unwilling to apply the same logic to the case of their Negro slaves. It is one of the sharpest ironies of the revolutionary era that Thomas Jefferson, who inserted in the Declaration of Independence the principle that "all men are created equal" with an inalienable right to "life, liberty & the pursuit of happiness", himself continued a slave owner for the rest of his life. Indeed, even the constitution of the new republic indirectly recognized two categories of Americans: free men and "all other persons".

Although the Patriots in general were not so consistent with their libertarian principles as to make abolition of slavery a matter of policy, many colonists did nonetheless feel the awful inconsistency of revolting against a "slavery" infinitely less harsh than that which they themselves were inflicting upon their brethren of colour. It was inevitable that they would make the revolutionary rhetoric of liberty serviceable in the abolitionist cause. Its effects were perceptible almost immediately. Vermont ended slavery by legislative act as early as 1777. In Massachusetts and New Hampshire the judges brought about the same result in the 1780's. All of the other colonies north of Virginia soon followed suit; the last to enact a form of legislative abolition were New York in 1799 and New Jersey in 1804.

The abolitionist breakthrough was, however, somewhat less dramatic than it might seem. In all but Massachusetts and New Hampshire slavery, when abolished, was ended only *in futuro.* All slaves born before the abolition date were to continue in service, in many cases for life.[16]

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[15]Bernard Bailyn, *The Ideological Origins of the American Revolution* (Harvard: Cambridge, 1967), at 232.

[16]The best treatment of this earlier phase of the U.S. abolition movement is Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (U. Chicago: Chicago, 1967).

In the Canadas and Nova Scotia

Of Britain's major North American colonies remaining after the Revolution the first to take action against slave-holding was Upper Canada. In 1793, the General Assembly enacted, not without considerable opposition, that thenceforth no more slaves could be introduced or created in the province. Like some of its neighbouring United States jurisdictions, however, Upper Canada condemned slaves already in the province to serve out their life in bondage. Indeed, the law copied some of the earlier American legislation which actually discouraged manumission by requiring that masters post security lest freed slaves become a public charge.[17]

In Lower Canada there was also a legislative attempt to phase out slavery in 1793, but the bill died on the Table. It was, rather, the firm judicial policy of James Monk, Chief Justice of the King's Bench in Montreal, which effectively doomed the institution in that colony. In cases in 1798, and, especially, in 1800, Monk denounced slavery and showed that he was determined to free every Black brought before him, if not on a technicality, than on an outright misconstruction of the law.

The pro-slavery forces counter-attacked by introducing into the Lower Canadian Assembly a gradualist abolition bill patterned after those in Upper Canada and many of the United States, which would have legalized the status of at least those slaves already held. But measures to this effect failed of passage in 1800, 1801, and 1803. Caught between judicial activism on the one hand and legislative intransigence on the other, slavery in Lower Canada withered away.[18]

It was Nova Scotia's judges, rather than its legislators, who took the active part in ending slavery, but the Supreme Court's record is considerably less forthright than that of its Lower Canadian counterpart. Chief Justice Sampson Salter Blowers, writing in 1800, noted that the question of Negro slavery had been "often agitated here in different ways" but that the courts had always taken care to circumvent the issue. Of the judicial policy of his predecessor, Sir Thomas Strange, Blowers wrote that he had "dexterously avoided an adjudication of the principal point; yet as he required the fullest proof of the Master's claim in point of fact, it was found generally very easy to succeed in favour of the Negro by taking some exception collateral to the general question, and therefore that course was taken".[19] The reason for the dissimulation was that Strange "wished rather to wear out the Claim gradually than to

[17]Winks, *supra*, footnote 2, at 96-98.

[18]*Ibid.*, at 100-02.

[19]Blowers to Chipman, 7 Jan. 1800: P.A.C., Lawrence Collection, M.G. 23 DI Ser. 1, Vol. 1

throw so much property, as it is called, into the air at once". Blowers himself was continuing that policy.[20]

Nova Scotia was the only one of the major British North American colonies to give a form of statutory recognition to slavery. A 1762 law for the regulation of inn-keepers restricted the amount of credit that might be extended to, inter alia, a "negro slave".[21] Blower's handling of this statute, albeit in a confidential letter rather than a published decision, is instructive. Such legislative recognition might have been viewed as precluding a challenge to the lawfulness of slavery as a principle. Yet to Blowers the passing reference to slaves in the inn-keepers law was "merely a description of a Class of people existing in the province" and not a "recognition of the Law of Slavery". He implied that this was the opinion of the generality of Nova Scotia's lawyers.[22]

The most notable of the province's slave cases arose when Colonel James DeLancey of Annapolis sued William Worden in trover for harbouring an escaped slave. Successful at trial, DeLancey's suit was overturned on appeal, and he died without an opportunity to take further action in the matter.[23] Nevertheless, one of DeLancey's lawyers, Joseph Aplin, did cause to be published the essence of his defense of the master's claim, complete with a supporting statement from the English Attorney-General, Sir Edward Law.[24] If one excepts Ward Chipman's unpublished 1805 Brief, Robin Winks is correct in styling Aplin's pamphlet "the most extensive legal defense of slavery ever offered in British North America".[25]

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[20]*Ibid.* Blowers wrote:

Since I have been Ch. Justice a black Woman was brought before me on Hab. Cs from the Jail at Annapolis. The return was defective and she was discharged; but as she was claimed as a Slave, I intimated that an action should be brought to try the right, and one was brought against the person who had received and hired the Wench. At the trial the pl. proved a purchase of the Negro in New York as a Slave, but as he could not prove that the Seller had a legal right so to dispose of her, I directed the Jury to find for the Defendt which they readily did. Though the question of Slavery was much agitated at the Bar, I did not think it necessary to give any opinion upon it.

[21]S.N.S. 1762 c.1.

[22]Blowers to Chipman, n.d. [1800]: *supra*, footnote 19. See also the 1803 opinion of R.J. Uniacke in Brian Cuthbertson, *The Old Attorney General: A Biography of Richard John Uniacke, 1753-1830* (Nimbus: Halifax, 1980) at 4.

[23]Smith, *supra*, footnote 2, at 110.

[24][Joseph Aplin], *Opinions of Several Gentlemen of the Law, on the Subject of Negro Servitude, in the Province of Nova-Scotia* (Saint John, 1802).

Although the pamphlet was published anonymously in New Brunswick it was likely Aplin who engineered its publication. The bulk of the opinion reproduced in the pamphlet is his, the Odell Papers in the New Brunswick Museum contain the draught of a cover letter from Aplin to Blowers in which he privately transmitted the substance of the pamphlet, referring to the possibility of publishing it outside the province (Aplin to Blowers, n.d. [1802] Slavery Ms. C.B.), and the only known printed copy is to be found as an enclosure in Aplin to King, 16 Nov. 1802: Public Record Office, C.O. 226/18. The Preface may be by Jonathan Odell.

[25]Winks, *supra*, footnote 2, at 106.

Such vigorous propagandizing by the friends of slavery came to nothing in the face of a court determined to free Negroes at every plausible opportunity. The legislature, too, was deaf to the masters' pleas. As early as 1787 a clause was inserted into a bill for the regulation of servants which would have had the effect of recognizing slavery; but, according to Chief Justice Blowers, it was "rejected by a great Majority on the ground that Slavery did not exist in the province and ought not to be mentioned . . ." [26] A move to recognize slavery under the guise of regulating it was similarly rejected in 1808.

Already in 1800 Blowers could write that the judicial policy of rejecting the masters' claim upon the slightest pretext had "so discouraged them, that a limited Service by Indenture has been very generally substituted by mutual consent".[27] The last sale of a slave in Nova Scotia is thought to have occurred in 1807. Four years later an Anglican minister reported to his English sponsors that slavery had ceased to exist in the colony.[28] While this is almost certainly an exaggeration, it does suggest that in the first decade of the nineteenth century slavery in Nova Scotia was on the verge of extinction.

THE SLAVE ISSUE IN NEW BRUNSWICK

Although slaves were held in what is now New Brunswick by both the pre-expulsion French and the pre-Loyalist English, it was not until the spring of 1783, with the arrival of the first fleet of loyal refugees and disbanding soldiers, that there was any considerable accession of Black settlers to the province. Many of them were free, having accepted the government's invitation to desert their rebel masters (slaves of Loyalists received no such invitation); but many of them came as slaves. Absolute and relative numbers are elusive both because contemporary statistics regarding the Loyalist migration are unreliable and because such numbers as do exist fail adequately to distinguish between white and Black servants and between free Negroes and slaves. It is probably safe to say there were not less than one thousand Blacks in early New Brunswick and at least one-half of these were slaves.[29]

Since Blacks in early New Brunswick were commonly mentioned in official and quasi-official documents with reference to their colour, they appear in the public records of the time as a highly visible minority; yet

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[26]Blowers to Chipman, *supra*, footnotes 19 and 22.

[27]*Ibid.*, footnote 19.

[28]Winks, *supra*, footnote 2, at 105, 107.

[29]The most reliable statistics are reproduced in E.C. Wright, *The Loyalists of New Brunswick* (The Author: Wolfville, 1955), at 247-49, but they are incomplete. The compilation from which come the statistics reproduced in J.W. Walker, *The Black Loyalists* (Dalhousie U.P.: New York, 1976), at 33, is unreliable.

references to them are so scattered and heterogeneous and the state of historical research so preliminary that it is impossible to give more than an impressionistic view of their early experience. It is, however, clear that even free Negroes were second class Loyalists. Doubtless this was due in part to the fact that many of them had become "Loyalists" merely to obtain their freedom and had made no contribution to the government cause;[30] but it must also have been due to the fact that the concept of a free Black was something of a novelty in the 1780's. Nova Scotia and New Brunswick had one of the earliest considerable communities of free Blacks in the North Atlantic world.

From the very commencement of their life in New Brunswick the loyal Blacks were the objects of official and social discrimination. In August 1783, for example, when four companies of Black refugees arrived at the month of the River St. John they were "placed at a little distance" from the white refugees.[31] In 1785, when the Governor-in-Council decreed the voting qualifications for the Colony's first election, they carefully emphasized that "the votes of Blacks are not to be admitted".[32] The charter of the City of Saint John, granted the same year, accorded the status of Freeman to only "American and European White inhabitants".[33] Such of the free Blacks who received grants of land were allotted smaller tracts than the whites, and in inferior locations.[34] This forced the majority of the non-slaves to become hired servants for their fellow refugees. Even here they were subjected to peculiar indignities. An 1811 visitor to New Brunswick remarked that "no white domestic would sit . . . at table if degraded by the society of a black".[35] Their dream of a life as free men in a new land having been thus disappointed it is unsurprising that in 1791-92 well over two hundred of the free Blacks quit the province for Sierre Leone.[36]

No statute even recognized or regulated the existence or continuance of slavery in New Brunswick after the province was erected in 1784. This was greatly to the slaves' advantage. It meant New Brunswick's slaves did not suffer some of the disabilities that had prevailed in the old colonies. They could, for example, (at least theoretically) give evidence in court; they could intermarry with whites;

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[30]This was Lieutenant-Governor Carleton's view: see Spray, *supra*, footnote 2, at 39.

[31]Tyng to Watson, 6 September 1783: Public Record Office, W.O. 60/331.

[32]Carleton to Sydney, 25 June 1785: Public Record Office, C.O. 188/2.

[33]Quoted in Spray, *supra*, footnote 2, at 34.

[34]*Ibid.*, at 31-2; Walker, *supra*, footnote 29, at 31.

[35]Howard Temperley, ed., *Gubbins' New Brunswick Journals* (King's Landing Corp.: Fredericton, 1980), at 26-27.

[36]*Supra*, footnote 29, at 124. Had the opportunity to leave been as accessible as for the Nova Scotian Blacks the number of departures would have been much higher.

they were protected by the same criminal law against murder or bodily harm. More importantly, the lack of legislative recognition meant the slaves' status was ambiguous. If the Nova Scotian judiciary was prepared to overturn slavery in the face of a 1762 local enactment explicitly recognizing it — if the Lower Canadian judges were prepared to turn their back on generations of local slave holding — then surely the New Brunswick judges, faced with neither of these impediments, would be prepared to do the same.

How often the judges of New Brunswick were confronted by a question touching the lawfulness of slavery is uncertain. Only the proceedings of 1799-1800 are discussed in the various published commentaries. To this may now be added the Richard Hopefield case (*R.* v. *Agnew*) of 1805-06. But beyond these a general search of the massive, chaotically-arranged Supreme Court archive for the period 1784 to 1815 has turned up nothing. Yet there undoubtedly were other cases, for Ward Chipman noted in 1799 that the slave question had already "from time to time been under judicial discussion" and, the following year, that "this has been a question agitated from the very origin of this Province". The essentially collateral nature of these early discussions is, however, confirmed by Chipman's further comment that the great question had "never yet received any final determination upon principle".[37] In 1800, in the course of his anti-slavery Brief, he provided the following overview of the early legal history of slavery in the province:

> That some masters have brought slaves here is true, and that the slaves have, in some instances, continued with their masters without disputing the right of their masters to their service, is also true. But it must also be admitted that the slaves have in many instances controverted this right, and have been manumitted, or indented themselves voluntarily to serve for a term of years upon condition of being discharged at the expiration of it.[38]

"The question", added Chipman, "is now for the first time brought forward for a legal decision in this Court." The proceeding was *R.* v. *Jones; R.* v. *Agnew.*

The driving force behind the 1800 test cases was not Chipman but his co-counsel in the abolitionist interest, Samuel Denny Street. Born, educated, and given his legal training in England, Street had been stationed in New Brunswick during the Revolutionary War in one of the colonial military units. After the peace he remained in the colony and, upon the organization of the courts in 1785, he was called to the bar. At the time of the 1799-1800 proceeding he was a prominent member of the Opposition faction in the House of Assembly. As such, he was a political friend of one of the defendants, Stair Agnew, and the political enemy of his co-counsel, Solicitor-General Ward Chipman.

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[37]Chipman to Blowers, 5 December 1799: *supra*, footnote 1; Jack, *supra*, footnote 2, at 182.

[38]Jack, *supra*, footnote 2, at 179-80.

That Street was the moving force behind the abolitionist legal agitation in New Brunswick is beyond doubt. It was he who procured the *habeas corpus* writs in both of New Brunswick's known slave trials. As well, the following passage from an 1805 letter by W.F. Odell is at least suggestive of Street's consistent identification with the anti-slavery cause.

> Street has sued out another habeas corpus for *James* Hopefield (a Brother I suppose of Dick) in the keeping of Dr. Clarke — so that I suppose we shall e'er long have half the negroes in the Province on Record.[39]

Of the events giving rise to the 1799-1800 proceedings little of substance is known. It is, however, worth emphasizing, because it has been so often misunderstood, that two distinct cases were involved. The one fully argued before the Court was *R.* v. *Jones,* over the "Black woman Ann otherwise called Nancy" whom Caleb Jones had brought with him from Maryland in 1785. The other case, *R.* v. *Agnew,* was over the slave Mary Morton, whom Stair Agnew had purchased from William Bailey. *R.* v. *Agnew* was commenced simultaneously with *R.* v. *Jones* but was not carried to trial once the result of the other proceeding became known.[40]

The writ of *habeas corpus* in the *Jones* case was issued on 17 July 1799 and the sufficiency of the return came to trial in mid February of the following year. Counsel in the case comprised a numerical majority of all the lawyers at the New Brunswick bar. Opposing Street and Chipman were Attorney-General Jonathan Bliss and four junior members of the bar, three of whom had articled with Chipman. It may be presumed that all of the counsel addressed the Court for Chipman noted soon after that, "[t]he cause was very fully argued and lasted two whole days", and the *Royal Gazette* reported that "[t]he question of Slavery upon general principles was discussed at great length, by Counsel on both sides . . .".[41] Chipman's massive anti-slavery Brief, produced for the occasion, survives, and it is known that Jonathan Bliss defended the right of the master with an argument divided into thirty-two heads of discussion.

The direct result of the case was that Chief Justice G. D. Ludlow and Judge Joshua Upham (a slave owner) supported the sufficiency of Jones' return alleging that slavery was lawful in the province. Judge Isaac Allen (a slave owner), who had allowed the *habeas corpus* writ to

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[39]Odell to Chipman, 12 Nov. 1805: P.A.C., Lawrence Collection, M.G. 23 D1 Vol. 3.

[40]The few documents relative to *R.* v. *Jones* and *R.* v. *Agnew* to escape the souvenir hunters will be found in the Supreme Court records, R.S. 42, for 1800 in the Provincial Archives of New Brunswick. The writ and the return for *R.* v. *Jones* are printed in Jack, *supra,* footnote 1, at 184-85, from contemporary copies made by Chipman and now in the U.N.B. Archives.

[41]*Supra,* footnote 1; *Royal Gazette,* 18 Feb. 1800.

issue, and Judge John Saunders were of the contrary opinion.[42] The Court being evenly divided, no judgment was entered and "Ann otherwise Nancy" was returned to captivity.[43]

The lawfulness of slavery in New Brunswick had not, however, been vindicated. The friends of slavery, evidently alarmed at the uncertain state of the law following *R.* v. *Jones,* counterattacked in the General Assembly. On 6 February 1801 Stair Agnew, one of the defendants in the proceedings of the year previous, rose in his place in the House of Assembly to introduce "A Bill relating to Negroes". Second reading, apparently without division, was granted on 12 February, and the Bill was sent into Committee-of-the-Whole. On the day following the Committee reported progress; but on 14 February Agnew withdrew his Bill altogether.[44]

Two versions of the Bill survive among the papers of the House of Assembly. Insofar as they agreed, both recited a 1790 Act of the British Parliament (30 Geo III c.27) allowing persons removing from the United States to the King's dominions to import their slaves, provided that masters were legally liable to support their slaves however acquired, and enacted that no conveyance or manumission of a Negro could dissolve this responsibility except it be registered.

Two aspects of these provisions are especially notable. One is the fact that the Bills are an ill-disguised attempt to give direct legislative recognition to the existence of slavery in New Brunswick, thereby undermining one of the most potent of the anti-slavery arguments urged before the Supreme Court in 1800. As such, the measure anticipates the similarly unsuccessful Nova Scotia Bill of 1808.[45] The second notable feature of these 1801 Bills is that they purport to be pursuant to the Imperial enactment of 1790, whereas their substantive provisions have only the most tangential relevance to it. The Act was invoked by the partisans of slavery to give the New Brunswick Bills a guise of legitimacy. That the Imperial law was being used as mere window-dressing is the more evident when one considers that it dealt with United States' citizens removing into the Empire after 1790,

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[42]Allen later freed his slaves as a result of the opinion he expressed at the trial. Saunders is not known to have held slaves in New Brunswick but he had owned many in pre-Revolutionary Virginia.

As a result of the trial Stair Agnew challenged Judge Allen to a duel, which the latter declined. It is commonly said that Street and J.M. Bliss, one of the junior counsel for the master, duelled as a result of the trial; but contemporary records show the Street-Bliss encounter to have taken place a month before the slave trial, arising from other legal proceedings. See David Jack, "An Affair of Honor" (1905) *Acadiensis* 173, at 176-77.

[43]As a result of the cloud on title raised by the discontinued *R. v. Agnew habeas corpus* proceeding Agnew reconveyed her to William Bailey, who freed her in return for fifteen years further service.

[44]*Journals of the House of Assembly,* 1801; Provincial Archives of New Brunswick, House of Assembly Papers R.G. 2, S14-B9, S14-B9.1.

[45]Winks, *supra,* footnote 2, at 106-07.

whereas the migration pattern affecting New Brunswick was entirely in the opposite direction.[46]

One of the draught Bills in the House of Assembly files would have gone considerably further. It declared that offspring of slaves would take their status from their mother (as under the *ius gentium*) rather than their father (as under villeinage), it set a penalty for harbouring escaped slaves, and it provided the master's right to his slave was exigible as personalty and not as realty. Finally, at the foot of this longer version of the Bill was a clause, to be inserted into the provision governing female descent, which would have freed every slave born in the province after the passing of the Act, upon his attaining a certain (but unspecified) age. This clause was evidently introduced after the earlier portions of the Bill had taken shape.

One would expect that the shorter was the version of the Bill that was first introduced and that, when it aroused great opposition, the further clauses were added, some favouring the master, but with the effect of abolishing slavery *in futuro*. The endorsements on the Bills, however, suggest the order of introduction was the reverse. Notwithstanding this ambiguity it is clear that by 1801 the tide of popular opinion in New Brunswick was so strongly set against slavery that Agnew, a member of the numerically dominant Opposition faction in the Lower House, could not induce his Assembly colleagues to recognize that the province's slaves were held lawfully.

The next development in the debate on slavery is a curious one. On 28 July 1801 the *Royal Gazette*, acting at the request of "A Constant Customer", reprinted the text of the Imperial act of 1790 together with an analysis by a "worthy and learned Judge". The thrust of the analysis was that the enactment amounted to "Legislative recognition" of the existence of slavery throughout the Empire, and that, in consequence, "[t]he slaves which the Loyalists took with them to their new settlement, were and are, to this moment, slaves".[47]

There is no direct evidence from the printed passage that the judge who authored the opinion was a New Brunswicker, but there is little doubt the sentiments were those of John Saunders. The Saunders Papers in the University of New Brunswick Archives contain an undated copy of the opinion in Saunders' handwriting, with such variations from the printed version as confirm that it formed the basis for what appeared in the *Royal Gazette* and not the reverse.[48] That Saunders should harbour

[46]See also Chipman's observation to the Court in *R.* v. *Jones*, reproduced in Jack, *supra*, footnote 2, at 184.

[47]The *Royal Gazette* had also reprinted the 1790 act, again at the request of a "Constant Customer", on 14 Jan. 1800, shortly before the *R.* v. *Jones; R.* v. *Agnew* cases were to be tried.

[48]Saunders Papers (Miscellaneous n.d. #7): U.N.B. Archives.

pro-slavery sentiments is not surprising. He came from Virginia and had petitioned the British Government for Loyalist compensation for the loss of, inter alia, twelve slaves stolen by the rebels. Yet Saunders is not known to have owned slaves in New Brunswick, and had been one of the judges who would have freed the Black in *R.* v. *Jones* a year earlier. Since there is no doubt that that case was argued squarely on principle and that one of the arguments in defense of slavery was based upon the act of 1790,[49] it is difficult to account for Saunders' conduct other than in terms of a genuine alteration in sentiment.

Apart from the publication in Saint John in 1802 of Joseph Aplin's pamphlet in defense of the masters' cause in Nova Scotia, the next known incident in the legal debate on slavery in New Brunswick does not occur until 1805. On 6 February of that year Samuel Denny Street appeared before Chief Justice Ludlow and two of his associates to move for a writ of *habeas corpus* to produce a body of Richard Hopefield Jr.[50] Since *Hopefield*'s case is hitherto entirely unknown and since the factual circumstances giving rise to it yield a rare insight into the conditions under which Blacks were held in early New Brunswick, the background of the case merits sketching in some detail.

Stacey (Patience), a Negro woman, was born about 1765 in the province of New York. At some point during the Revolution the master in whose house she was born sold her to Gabriel Fowler, and in 1783 she was evacuated to the River St. John as part of his household. Fowler conveyed the slave to his fellow Loyalist, Dr. Joseph Clarke, who, in turn, sold her to Phineas Lovitt. While with the Lovitts Patience entered into a marriage relationship, the formality of which is unclear, with Richard Hopefield, Sr., a free black.

While Stacey was carrying their second child she (as she subsequently deposed) was "sent by . . . Leavitt [*sic*] on board the Greyhound packet in order to be put on board a Brig lying off Partridge Island in which . . . she was to be taken to the West Indies and sold". Upon learning that his wife was about to be carried off, Richard Hopefield submitted his predicament to Governor Carleton and by his "order" Patience was "sent for on shore and re-delivered to her . . . Husband and told she was free and might go where she pleased within the King's dominions".[51]

Although Thomas Carleton, if he so acted, had exceeded his authority, Stacey Hopefield was suffered to live with her husband in

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[49]Chipman's anti-slavery Brief attempts to refute the argument: see Jack, *supra*, footnote 2, at 184.

[50]Crown Causes (*R.* v. *Agnew*): Provincial Archives of New Brunswick R.G. 5 R.S. 30B #2.

[51]Patience Hopefield's deposition, 2 July 1805: Provincial Archives of New Brunswick R.G.5 R.S.42: Supreme Court Records, 1805. Although chronology is somewhat difficult to establish, the events described must have occurred in late 1784 or early 1785.

Saint John "quietly and undisturbed and in the enjoyment of her liberty" for upwards of seven years. But about 1792, Dr. Clarke "came to town and seized on her by violence and carried her to Magerville [sic] . . . where he kept her upwards of two years and then (as she was informed) sold her to Mr. Joseph Hewlett of Queen's County".[52] Stacey Hopefield's sad history would doubtless have gone the way of most other accounts of the slave experience in early New Brunswick but for the fact that the slave in behalf of whom the 1805 *habeas corpus* was issued was the child with whom she had been pregnant at the time of her threatened abduction to the West Indies.

The formidable character to whom the writ was directed was Captain Stair Agnew, a leading member of James Glenie's Opposition faction in the House of Assembly. Agnew had been the defendent in the second *habeas corpus* application of 1799-1800, and had sponsored the attempt the following year to have slavery recognized by the General Assembly. At about the same time he had been indicted before the York County General Sessions of the Peace for "Cruel Treatment and abuse of two Negro Boys then his Servants".[53] Agnew caused the matter to be dropped by pledging in open Court to free them when they reached their twenty-first birthday. One of these boys was Richard Hopefield, Jr. When Agnew failed to keep his promise Street procured a *habeas corpus* in Hopefield's behalf. The facts of his parentage became the subject of several detailed depositions because Street evidently placed weight on the fact that the senior Hopefield had been a free man. The defense countered by attempting to show that Hopefield's parents had never been formally married, so that he had taken the status of his mother rather than of his (free) father.

Although the facts in the *Hopefield* case are uncommonly complete, the stages in its legal progress are obscure. The full range of proceedings lasted from at least 6 February 1805 to 7 February 1806, and involved one (possibly two) *habeas corpus* applications, the prosecution of Agnew for making a false return to the initial writ (in alleging that Hopefield's father was a slave), and a civil suit by Hopefield against Agnew for battery and false imprisonment. Street acted for the slave in all the proceedings, assisted on at least one occasion by Thomas Wetmore, who had appeared as a junior counsel for the master in 1800. Chipman, reversing his stance of five years earlier, represented Agnew throughout.

Hopefield's civil suit seems not to have proceeded beyond the Declaration (Statement of Claim) stage, probably because his claim for freedom had failed. Agnew's criminal prosecution for making a false

[52]She was still living with the Hewletts when her deposition was taken.

[53]Affidavits of Cornelius Thompson and John Coombs, *supra*, footnote 51; MacFarlane, *supra*, footnote 2, at 53.

return ended in acquittal, apparently because his false information had been tendered innocently. More importantly, Richard Hopefield's *habeas corpus* proceeding was unsuccessful. Although the minutes of the Supreme Court are both laconic and confusing it would seem the principal legal debate took place on 5 July 1805. The Court records for that day report a "full argument", although this may possibly have been on a procedural question connected with the case. In any event it is known that the broad principle of slavery was at some point debated, for Chipman produced a lengthy Brief in defense of the master's claim which survives among the records of the Court.

Only three members of the Supreme Court heard the proceedings: Ludlow, Allen, and Saunders. Had the last two adhered to the views they had espoused in 1800 the abolitionists would have carried the day; but Saunders had gone over to the other camp in 1801. The Court minutes are so terse that it is impossible to say with certainty what views the judges may individually have expressed in 1805. At one point, however, the entry for 5 July indicates a division of opinion on the bench — probably with Allen in the minority — and it is likely this was on the substantive question of slavery or abolition.

THE SIGNIFICANCE OF THE SLAVE ISSUE

Significance For The Slaves

Hopefield's case was undoubtedly a legal triumph for the slave-owning interests. They had received a clear legal verdict in favour of the continuance of Negro slavery, something they could not have won from the General Assembly or from the courts of any of the other major British North American colonies. Of the four judges on the New Brunswick Supreme Court only one was an abolitionist. Faced with such a court it is not surprising that no subsequent slave cases can be found.[54]

There is evidence that slavery continued to exist in the province as late as 1816, when the last advertisement for a slave appeared in the *Royal Gazette;* and doubtless slaves were held for some time thereafter. It is true that in 1822 the New Brunswick government reported that there were no slaves in the province,[55] but this cannot mean more than that there were no notorious instances where the Black's status as a slave was perfectly unambiguous. Indeed, it is difficult to believe there were not still some theoretical slaves in New Brunswick at the time of the Imperial emancipation in the 1830's, although none are known. The situation was probably the same in Nova Scotia and Lower Canada, notwithstanding judicial policy to the contrary.

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[54]I can find no evidence that Street's *habeas corpus* on behalf of Richard Hopewell's brother, James, as reported by Odell (*supra,* footnote 52), ever proceeded further.

[55]New Brunswick Blue Book, 1822, at 37: Public Record Office, C.O. 193/5, quoted in Spray, *supra,* footnote 2, at 27.

But while scattered instances of legal slavery may have persisted in New Brunswick for a generation after *Hopefield,* any practical effects of legal slavery probably withered away, even in the face of the 1805 decision to the contrary. By the first decade of the nineteenth century educated opinion was so decidedly against slave-holding in the Northern States, in the adjoining colonies of British North America, and in the Mother Country herself that a master's claim would be effectively untenable before the community at large. The apparently vigorous assertion of the master's rights in New Brunswick ought not to mask the fact that only two men, Stair Agnew and Caleb Jones, account for almost all of the public manifestations of slave-owning after 1800. Both were notoriously pugnacious and erratic; they were not the kind of men to bow to public opinion but to defy it. Apart from their activities there is little evidence of the continuance of slave-holding in nineteenth-century New Brunswick. Jones' slave advertisement of 1816 ought to be contrasted with the "Negro's Soliloquy" that had appeared in the *New Brunswick Courier* on 1 April 1815. Locally composed, it represented the poetical lament of a southern Black longing for his African home. Conspicuously absent was any hint that Negro slavery existed by the law of the province in which the "Soliloquy" appeared.

Thus, notwithstanding the fate of the slavery issue before the Supreme Court, it would probably be a mistake to suppose that New Brunswick public opinion on the issue differed significantly from that in the neighboring jurisdictions, or that slave owning was significantly more widespread. Should a New Brunswick slave have demanded his freedom there would have been little reason for someone other than a character like Agnew or Jones to have incurred the social stigma that would have been consequent on a refusal. A slave, once manumitted, would have had little economic option but to remain in the service of his former owner.[56] Freedom would mean so little to the real relationship between the master and his servant/slave that it is likely few slaves would have been denied it in exchange for a pledge of service; and, conversely, it is not unlikely that some slaves never did ask for their freedom, and thereby became technically subject to the Imperial act of 1833.

Significance For The Judges and Their Class

If ending slavery would not have greatly embarrassed the masters then why did Judges Ludlow, Upham, and Saunders resist what they knew was the trend of events throughout the North Atlantic world? Invited to follow their brother judges in Nova Scotia, Lower Canada, and Massachusetts in a gradualist abolition programme, they elected to resist the intellectual current of their time. They chose to confirm New

[56]See Winks, *supra,* footnote 2, at 108, 110; Spray, *supra,* footnote 2, at 33-35; Walker, *supra,* footnote 29, at 57, 122-23.

Brunswick in a social hierarchy which had at its base a class of humans treated as chattels. They did so not accidentally or incidentally but deliberately and explicitly, after elaborate argument involving most of the provincial bar. It is evident that something peculiar to their experience disposed them to value the masters' right to property more highly than the Negroes' right to freedom.

One early historian suggested that the response of the British North American judges to the slave issue could usefully be analyzed with reference to their respective colonial origins: that judges (like Monk and Blowers) from Massachusetts and other New England colonies tended to be abolitionists, whereas those (like Ludlow) from New York and the other Middle Colonies tended to sympathize with the claims of the master.[57] In the case of New Brunswick's judges, however, this approach yields nothing: the abolitionist Isaac Allen was from New Jersey and the anti-abolitionist Joshua Upham was from Massachusetts.[58] I do, however, think a plausible, if speculative, case can be made linking the judges' indifference to the claims of liberty to their peculiar experience as members of New Brunswick's Loyalist governing elite.

The colony of New Brunswick was carved out of Nova Scotia in 1784 as an asylum for loyal exiles from the American Revolution. The typical Loyalist — those who came to New Brunswick were generally farmers and tradesmen from New Jersey, New York, and Connecticut — did not differ significantly in political principles from the typical Patriot.[59] Indeed, the great majority of Loyalists quietly made their peace with the new order. But for those who were compelled by the fortune of war or geography to make their loyalty conspicuous a quiet submission was precluded and exile was the only recourse. As one scholar has succinctly expressed it, the great majority of New Brunswick Loyalists "came because they could not stay".[60] That their intellectual baggage included political principles and techniques which, apart from republicanism, differed little from those of the Patriots is made dramatically plain by the tempestuous politics of early Saint John and by the province's constitutional crisis of the 1790's.[61] I do not think, therefore,

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[57]Smith, *supra*, footnote 2, at 102-103.

[58]Robin Winks, who has surveyed the legal course of the slave issue in British North America as a whole, discounts colonial origin as a key to explaining judicial response to the slavery issue: *supra*, footnote 2, at 110.

[59]Kenneth McRae, "The Structure of Canadian History", in Louis Hartz, ed., *The Founding of New Societies* (Harcourt, Brace: New York, 1964) 219-74, at 234-35; David V.J. Bell, "The Loyalist Tradition in Canada", in John Bumsted, ed., *Canadian History Before Confederation: Essays and Interpretations* (Irwin-Dorsey: Georgetown, Ont., 1972) 211-29, at 213-14.

[60]George Rawlyk, "The Federalist-Loyalist Alliance in New Brunswick 1784-1815" (1977), 28 *Humanities Association Review* 142, at 142.

[61]See MacNutt, *supra*, footnote 2, at 53-63, 94-117, and D.G. Bell "The Reception Question and the Constitutional Crisis of the 1790's in New Brunswick", (1980) 29 *U.N.B.L.J.* 157.

that one can take the view that the Supreme Court's response to the slave issue was merely typical of a fundamentally conservative consensus in New Brunswick society. Indeed, Ward Chipman asserted in 1800 that the general provincial opinion was against its "admission or toleration".[62]

The men on the Supreme Court were not, however, typical New Brunswick Loyalists. One element in the judges' matrix of experience distinguishing them from the ordinary is the fact that they had all occupied positions of wealth and prominence in the old colonies. They were men who, because of their public standing, had been called upon to articulate an opinion on America's controversy with Britain, and they had consciously chosen empire over independence. All had served the Government in a position of military command, ensuring that they would not be allowed to co-exist with the triumphant Patriots. With mounting rage and sinking hearts they had watched the British bungle the long war and, even more unaccountably, lose the peace negotiations as well. In 1783 all were exiled from the old colonies, leaving behind their property, their heritage, almost their whole world. They faced ruination of their fortunes and careers and, perhaps even more importantly, a dramatic dislocation in the social hierarchy. The very name Winslow or Ludlow or Saunders would command deference and access to the highest circles in Massachusetts or New York or Virginia, but it would command nothing for an exile in the Mother Country. Men born to play a large role on a small provincial stage faced the chilling prospect of obscurity. One can sense the anguish with which Ward Chipman (himself a future judge) wrote from London that he "had rather move in a reputable and respectable line in that Country [New Brunswick] with a competent subsistance, than with the same income, support the mortification of seeing in obscurity millions insulting me with their wealth in this Country [England]".[63]

To such men their patronage appointment in the newly-erected colony of New Brunswick came as a godsend. It represented more than just the salvation of their careers and fortunes. It meant their former position in the colonial elite was restored — indeed improved. In a revealing expression of a sentiment probably typical of his class Edward Winslow (another future judge) exulted at his arrival in the new city of Saint John that he had immediately regained his proper place in the social hierarchy.

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[62]Jack, *supra*, footnote 2, at 1980.

[63]Chipman to Sewall, 9 July 1784: Sewall Papers, Public Archives of Canada.

This aspect of the psychology of New Brunswick's early governing elite is also noted by Ann Condon in "'The Envy of the American States': The Settlement of the Loyalists in New Brunswick: Goals and Achievements" (Ph.D. thesis: Harvard University, 1975) at 291:

> The original Loyalist leaders . . . were intensely proud, self-conscious men. Although born in an apparently safe, secure world, where the path to distinction was illuminated by a series of well placed markers, their lives had in fact been characterized by flux, by a series of abrupt reversals and successes, over which they themselves had little control.

> [I] have adopted a style that would astonish you. There's not a man from this quarter that presumes to solicit from head Quarters without my recommendation that I have effected some business for meritorious characters which has afforded me vast pleasure.[64]

One of the most ambitious attempts to replicate the former degree of gentility was that of Judge John Saunders, who amassed a vast New Brunswick estate, amounting to some twelve thousand acres, aptly named "The Barony".[65]

Of all the Loyalists appointed to the New Brunswick governing elite in the 1780's the most fortunate were the judges. Theirs were among the few salaries borne by the Imperial treasury. More importantly, they were given key positions in the government as well as the judiciary. All were appointed to the Legislative Council, in which capacity they could initiate bills and amend or reject those sent up from the House of Assembly. They were likewise members of the Executive Council and as such advised the Lieutenant-Governor on the exercise of the royal prerogatives. The judges were thus at the very centre of the power structure, in the enviable position of interpreting the statues which they as legislators had helped frame.

In addition to the restoration of their economic and social status the New Brunswick experiment afforded the Loyalist elite an opportunity to vindicate — to the world and to themselves — the wisdom of the imperial system for which they had been martyrs. Eschewing the institutional laxity and indulgence of dissent that had led to the downfall of the old American empire, they determined to make the constitution of their new colony, in the words of a future judge, "the most gentlemanlike one on earth".[66] Administered on firm, monarchical, authoritarian lines New Brunswick would quickly become the "envy of the American states".[67] To this end they entrenched legal, educational and religious establishments framed to reflect and reinforce an hierarchical social and political order.

If the concept of New Brunswick as political as well as personal vindication is one key to an understanding of the social attitudes of New Brunswick's governing elite another is the threatened collapse of their dreams in the 1790's. Externally the attack was from the rise of democratic and atheistic discourse inspired by the French Revolution. Even in remote, obscure New Brunswick there was a Burkean outpouring of religious and civil jeremiads against the intellectual

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[64]Winslow to Chipman, in William Raymond, ed., *The Winslow Papers* (1901) (Gregg: Boston, 1972), at 98.

[65]Isabel Hill, *Some Loyalists and Others* (The Author: Fredericton, 1977), at 123.

[66]*Supra*, footnote 64, at 100.

[67]*Ibid.*, at 193.

currents of the times.[68] According to one pillar of the governing elite, the principles of the French Revolution had "excited an alarm that was never known before".[69]

This assault on the vitals of the established order was thought to have its local parallel in the growth of an Opposition faction, numerically a majority in the House of Assembly in the 1790's. The Opposition was captained by the brilliant, erratic James Glenie. The Government faction deeply feared his challenge to their otherwise absolute sway. With revealing hyperbole one member of the elite denounced Glenie as a "most notoriously violent Democrat and Jacobin", "one that would wish to overturn the *Church and State*".[70] Throughout the 1790's and early 1800's the ruthless warfare of Government and Opposition factions nearly brought the legislative process to a halt. Most of the Opposition's grievances centred on the judicial system — the province's reception date for English statutes, the monetary jurisdiction of the Supreme Court, the locus of Supreme Court sittings, and the political role of the judges. At the height of the controversy the judges were denounced as being "much more dependent for their daily bread on the Minister of the Crown than any menial Servant in the Province is on his Master".[71]

To the impact of these political and ideological influences on the collective *mentalité* of the judges and their class, one must add the consciousness, general by the end of the eighteenth century, that the New Brunswick social experiment had failed. The sense of hierarchy which the elite had dreamed of instilling in their new society had been frustrated by economic stagnation and the levelling effect of the frontier. It was soon obvious that, far from becoming the flourishing "envy" of the revolted colonies, the Loyalist elysium was "sinking into a sort of lethargy".[72] Unable to provide their sons with a gentleman's education or a patronage office, those members of the elite who could afford it were forced to send them abroad. Those of the younger generation who were not so fortunate faced the prospect of becoming

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[68]Some examples are given in Sidney Wise, "Sermon Literature and Canadian Intellectual History", in Bumsted, *supra*, footnote 59, 254, at 258-64.

[69]Jonathan Odell, "Reflexions on the importance of Religion as a Support to the Civil Authority, and of national virtue as a means of national defense. [A sermon preached at] Christ-Church, Fredericton, Friday 26th June 1795, being the day appointed by Proclamation for a General Fast": N.B. Museum, Odell Papers, Packet 15.

[70]Lyman to Winslow, *supra*, footnote 64, at 420; Lyman to King, 15 April 1795: Public Record Office C.O. 188/6.

[71]"To a Freeholder of York County", The Review No. V, *Royal Gazette*, 21 August 1795.

Predictably, their friends responded that such attempts to "villify and degrade" the Supreme Court and "render it contemptible" were motivated by "a wish to throw down distinction, to poison the public mind, to awaken it to groundless jealousies and fears, and to introduce . . . all the dreadful anarchy and horrors" that had already ruined France: "The Review No. V", *Royal Gazette*, 1 December 1795.

[72]Winslow to Sewall, *supra*, footnote 64, at 709.

merchants or farmers, leading one observer to note sadly that "the present rising generation are certainly inferior to their parents in every respect that relates to manners and good society".[73] New Brunswick was a country in which the yeoman farmer might greatly prosper by the sweat of his brow; but a gentleman, dependent for his ease upon a small pool of highly-priced wage labour, faced gradual ruin. The failure of the hierarchical dream had a conspicuous symbol in John Saunders' "Barony", into which the judge had sunk thousands of pounds. Unable to attract a tenantry in a country where free land was abundant, his mansion house soon stood "in the midst of a wilderness of his own creation, without a neighbour or a practicable road, and his cleared lands . . . growing again up into forest".[74]

A generation after 1783 Saunders and the small governing circle of which he was a part faced the unhappy realization that New Brunswick could not support a graduated hierarchy of classes. After the first generation, those with superior pretensions were distinguished from the herd only by their access to crumbs of imperial and local patronage. Consequently, it was complained, "the poor are not educated to respect the rich as in Europe". "On the contrary, the wealthy who are ambitious vie with their competitors in servility to the vulgar. No man is bred up to esteem anything but what conduces to gain".[75] The typical New Brunswicker was simply "adverse to subordination", and, given the province's simple economic base, the attitude was irresistible.

By the early years of the nineteenth century, when the judges of New Brunswick were called upon to retain or abolish Negro slavery, the feeling was general that their larger social vision of a model colony in a new British Empire was gravely imperiled. The contagion of the French Revolution threatened their world from without, and a powerful Opposition faction made their life miserable within the colony. Equally alarming was the prospect, quite discernable by 1800, that the Loyalist settlers of New Brunswick would not attend the Established Church, vote for Government candidates, tenant great estates, or reverence their betters. Against such a threatening background the decision of three members of the colony's aging Supreme Court to affirm a society with Negroes at its legal as well as its social base can plausibly be viewed as a statement in symbolic terms. It solemnly reiterated the old notion that God had appointed some to be great and some to be low; and in a society like that of New Brunswick in which the position of the great was precarious, it may have been with considerable gratification that three of the judges ensured, as a matter of law, that the province's Negroes would continue to be very low indeed. Others might be infatuated by the

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[73] *Supra*, footnote 35, at 27.

[74] *Ibid., at 5.*

[75] *Ibid.*, at 55-56.

seductive principles that were undermining the very pillars of the North Atlantic civilization, but the New Brunswick judges would seize the opportunity to protest against the intellectual current of the times.

Had these same men held their positions in a more pluralistic and sophisticated context like that of Massachusetts or Nova Scotia or Lower Canada they might well have found it politic to hold for abolition. Had New Brunswick's social experiment shown greater signs of success it would have been correspondingly less tempting to make a symbolic point with the Negroes. But situated in an obscure colony at a time when general attention was directed to the Empire's struggle with Napoleon, the judges were free to obey their more basic social instincts with self-confidence. Paradoxically then, while the gesture of retaining slavery against the tide of abolitionism says little about the practical condition of the province's Blacks, it yields a revealing insight into the collective conscience of New Brunswick's governing elite a generation after the Loyalist experiment had begun.

APPENDIX I

Ludlow's Pro-Slavery Rationale

The following summary of Chief Justice Ludlow's decision in favour of the rights of the masters is taken from Ward Chipman's letter to S.S. Blowers of 27 February 1800 (*supra*, footnote 1). Only a small portion is printed in Jack, *supra*, footnote 2, at 150.

Our Chief Justice is very strenuous in support of the Masters right as being founded in immemorial usage and custom in all parts of America ever since its discovery. He contends that customs in all Countries are the foundations of laws and [that from it they] acquire their force; that there was a system of laws in every British Colony regulating Slavery under the idea of its existance independently of those laws, and that there never was a law in any of the Colonies directly establishing it; that Negroes when first imported into the Plantations were considered as Villeins in Gross, and were afterwards by [illeg.] local laws in some of the Colonies made regardant; that the legal presumption in the Colonies was always against the Negro, unless he could shew a manumission; that in Carolina by their original Charter framed by the great Locke the importation of Slaves was prohibited, but that after a short experiment they were obliged to give it up, after which slaves were imported there without any positive law to authorize it; that this Custom is so universal that the Courts are bound to take notice of it. That this being the established universal Custom in the Colonies, and as such having acquired the force of law; [that] at the time Nova Scotia was settled Proclamations were issued to encourage Settlers to be there

from the older Colonies, inconsequence of which these Settlers carried with them their Slaves, which they have continued to hold, without any legal decision against their right; That the several Acts of Parliament, and the Courts in England in their adjudications recognize Slavery as being established and made lawful by the universal custom in America; that as all the acts of the Colonial Assemblies are sent home for the approbation of the Crown, it must have been known in England that there was no law directly establishing it; that the Judges therefore never could have held slavery as lawful in the Colonies if they had not recognized it as legally established by universal usage and Custom independently of Colonial Acts of Assembly, and he relied much upon the Stat. 7&8 W3 C22 s9 as implied recognition of the usages and customs in the Colonies as having the force of law, if not repugnant to the provisions of Acts of Parliament relating to the Colonies. This as nearly as I can recollect was the general train and scope of his reasoning. It is predicated altogether upon the hypothesis that no law was ever made in any of the Colonies directly establishing Slavery. How this fact is I know not nor shall I undertake in a letter to discuss this reasoning, altho' I confess it appears to me to be subject to many insuperable objections and rather *making the law* for the occasion than founding it upon any good authority.

APPENDIX II

The Legal Debate

Introduction

It would be a mistake to pass over the actual arguments employed in the slave debate, and in the paragraphs that follow they are sketched in summary form. They warrant at least a passing notice if for no other reason than that, apart from Joseph Aplin's 1802 pamphlet, they are the only known surviving literature of their kind in British North America. In that sense, the New Brunswick productions necessarily have a certain representative value to the legal historiography of early Canada. This literature is also worthy of consideration because it illustrates how lawyers in the New Brunswick community coped intellectually with one of the most fundamental issues any advocate could face. Although composed under the handicap of limited library resources and primarily as aids to the memory rather than finished productions for the public eye, the legal briefs do give an insight into the intellectual and literary tools brought to New Brunswick by those who laid the province's legal foundation.[76]

Since Ward Chipman authored the great bulk of the surviving literature on slavery in New Brunswick his legal formation is of some interest.[77] Born in 1748, the son of one of Massachusetts' most eminent lawyers, Chipman stood a respectable sixth in the social hierarchy of his class at Harvard. After a brief

[76]For example, in the course of preparing his anti-slavery Brief Chipman told Blowers, "With respect to the question at large we are very deficient here in any treatises upon it, having no public library and but indifferent private ones and those very much scattered": *supra*, footnote 37. Chipman's principal sources were Blackstone, Montesquieu, Coke, and the reported cases.

[77]Although Chipman was one of the leading figures in early New Brunswick history and left an extensive personal correspondence, he lacks a respectable biography. The best overviews of his career are P.A. Ryder, "Ward Chipman Sr.: An Early New Brunswick Judge" (1959), 12 *U.N.B.L.J.* 65 and the sketch in 17 *Sibley's Harvard Graduates* (Mass. His. Soc.: Boston, 1975) 369.

experience at teaching he studied law in the office of his patron, the Massachusetts Attorney- and Advocate-General, Jonathan Sewall. (It is interesting to note that Sewall had acted unsuccessfully as counsel to the slave in one of that Colony's early notable trials of the issue.[78]) Although Chipman has left no substantial account of his legal education, his chance remark that the time he had spent in pursuing a particular civil law treatise was "little better than thrown away, for not an idea remained upon my mind"[79] is reminiscent of the comment of his contemporary, John Adams, whose legal study consisted of "Old Roman Lawyers and Dutch Commentators".[80] Such remarks indicate how philosophical in orientation a legal education in the late eighteenth century might be, an education which would equip a man like Chipman to come to grips with an issue as profound as slavery.

Chipman's early career prospects were blighted just as he became professionally qualified when revolutionary turmoil closed the Massachusetts courts. His open support of the cause of government made his continuence in Massachusetts impractical, and when the British Army evacuated Boston he accompanied them into exile. Setting down in New York, Chipman managed to combine military service with some private legal practice. In 1784, with the war lost and so many thousands of loyal exiles planted in what became the new colony of New Brunswick, Chipman's services and ability were recognized, if not rewarded, with the unremunerative office of Solicitor-General.

Between 1784 and his appointment to the Bench in 1809 Chipman was intimately connected with the leading political and legal causes of the day. Throughout the 1790's he was prominent amongst the embattled Government faction in their long constitutional war against James Glenie, Samuel Denny Street, Stair Agnew, and their Opposition faction. It is, therefore, somewhat ironic that he should have joined forces with Street in the *habeas corpus* proceedings of 1799-1800.

Chipman's supposed opposition to slavery is generally cited as one of the chief glories of his career. He himself boldly characterized his position as that of a "Volunteer for the rights of human nature".[81] David Jack, introducing the published version of the anti-slavery Brief, portrayed his role as:

> [N]either expecting nor receiving remuneration, and simply and solely as a labour of love, [he] undertook to devote all his knowledge and mental energies to help to obtain liberty for the slave Nancy [sic] Morton, and faithfully fulfilled his undertaking . . . .
>
> It is most probably safe to state that the burden of preparation for argument on behalf of the slave rested on Mr. Chipman's shoulders, although Mr. Samuel Denny Street was his associate counsel . . .[82]

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[78]See John Adams' minutes of the argument in *Newport* v. *Billing* (1768), reproduced in L.K. Wroth and H.B. Zobel, eds., 2 *Legal Papers of John Adams* (Harvard U.P.: Cambridge, 1965), at 55-57.

[79]Chipman to Sewall, 2 May 1790: P.A.C., Sewall Papers M.G.23 GII 10 vol. 3.

[80]Quoted in G.W. Gawalt, "Massachusetts Legal Education in Transition" (1967) 17 *Am. J. Legal His.* 27, at 31. Adams' principal was James Putnam, one of the first judges of the New Brunswick Supreme Court.

[81]*Supra*, footnote 37.

[82]Jack, *supra*, footnote 2, at 146-47. See also *Sibley*, *supra*, footnote, 77, at 378, Winks, *supra*, footnote 2, at 108, and Spray, *supra*, footnote 2 at 23.

Such adulation rings rather hollowly against the fact that five years later Chipman appeared in opposition to "the rights of human nature" in *Hopefield's* case. It is conceivable he took a role in the proceedings of 1800 as a means to bring himself to the attention of the Imperial authorities, to whom he was looking for a judicial appointment. Yet it is likely Chipman's role in joining with his political enemy Street in the labourious and unremunerative *habeas corpus* applications was actuated by humanitarian if not abolitionist sentiments.

Jack was also mistaken in supposing Chipman's role was the major one on behalf of the slave. It was Street who initiated the proceedings, with Chipman apparently joining some months later when he commenced a correspondence on the subject with Chief Justice Blowers of Nova Scotia. Chipman may indeed have carried the major part of the argument in Court but there is no evidence of this, apart from the fact his Brief has survived and Street's has not. That Chipman had the junior role in the abolitionist cause is also suggested by the fact that, shortly after the 1800 trial, he wrote that he had been given to understand the cause would be recommenced through a false imprisonment action.[83] Had he been the prime mover in the business he would have known personally. That Chipman's committment to the abolitionist cause proved less than whole-hearted, is not, of course, to his discredit; it is emphasized merely to rectify a widely-held misconception.[84]

No one who reads Chipman's private correspondence or his chance surviving poetical effusions or his one known political pamphlet can doubt that his was an intelligence of a high order. As is the case with others of his circle like Edward Winslow and Jonathan Odell, the depth of his intelligence and accomplishments become evident only on those few occasions when events in the small New Brunswick community called forth the refinements acquired in the more genteel world of the Old colonies. The problems presented by the slave issue were one such occasion.

One cannot approach Chipman's two Briefs of Argument expecting to find either polished treatises or impassioned polemics. The constraints of the occasion and the medium and the scarcity of library resources precluded any such production. But judged as legal arguments within the context of the time and place, they are not only intellectually respectable within the conventions of the issue they address, but, more importantly, they give strong indications of original thought. What appear at first impression to be two Briefs constructed from a long series of quotations linked by a few strands of editorial commentary on closer inspection are seen to feature arguments tailored to the slave issue directly as it touched New Brunswick — arguments which, by their very nature, demanded a high degree of ingenuity.

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[83]*Supra*, footnote 1.

[84]There is an interesting parallel in the fact that the eminent barrister John Dunning, counsel for the master in *Somerset's* case, had earlier appeared in behalf of a slave: *supra*, footnote 14, at 64, and that Attorney-General Bliss, counsel to the master in the 1800 proceedings, had earned his Harvard M.A. by preparing an argument that "The Offspring of Slave are not Born Slaves": see 15 *Sibley* (1970), *supra*, footnote 77, at 355.

The Case For The Master

The extant literature illustrating the defense of slavery as formulated by New Brunswick's early lawyers and jurists consists of three documents: Chief Justice Ludlow's judgment in *R.* v. *Jones* as précised by Ward Chipman, Judge Saunders' 1801 commentary on the Imperial statute of 1790, and Chipman's 1805 Brief in *R.* v. *Agnew*.[85] The case for the masters summarized hereunder observes the pattern of presentation in Chipman's Brief, introducing material from the other sources where appropriate.

Both of Chipman's Briefs open conventionally, as if their author thought he was obliged to pay his respects to the traditional intellectual and moral issues raised by the great question before he moved on to those which he had devised to fit the particular case of New Brunswick. In the case of his Brief in defense of slavery Chipman commenced with a series of fifteen quotations from the Old Testament and six from the New. He read them to the Court to demonstrate

> that the sacred scriptures of the old and new testament authorize the Slave trade; that under the law, the slave trade is in a manner commanded by God Almighty and under the Gospel dispensation the holding in slavery [of those] purchased as Slaves is not only mentioned by our blessed Saviour and his Apostles without censure or disapprobation, but rules are given by Saint Peter and St. Paul how slaves ought to demean themselves to their masters.[86]

The content of the argument is predictable. It is an attempt to forestall the inevitable argument that slavery is contrary to fundamental law by showing that the institution was accepted by the founders of the Jewish and Christian religions. In this regard Chipman shrewdly drew support from Scottish liberal philosopher John Millar's anti-slavery treatise on *The Origin of the Distinction of Ranks* (1771) to emphasize that Christianity and slavery had co-existed from earliest times.

Chipman continued his work of undermining the general abolitionist premise that slavery was repugnant to all basic law by showing that slavery "of a particular nature" was part of the ancient Common Law of England. Relying extensively on Blackstone's account of the evolution of English villeinage Chipman pronounced it a form of "slavery of the most degraded nature", and argued that, although it had fallen into desuetude, it had not been abolished. Edward Christian, he noted, had found a case on the subject decided as recently as 1618. Even Lord Mansfield in *Somerset's* case had accepted the Lord Chancellor's assertion in *Pearne* v. *Lisle* (1749)[87] that villeins might be extinct but the law of villeinage remained. The implication was that Negro slaves brought *into England* from the colonies would be recognized as such to the extent of the ancient regime of villeinage.

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[85]There is a sixteen-page fragment of a pro-slavery argument among the Aplin materials (*supra*, footnote 24) at the New Brunswick Museum. The production is anonymous and undated, although some of the leaves are watermarked 1798. Internal evidence suggests the document was prepared for use in oral argument in a Nova Scotia court. The argumentation is conventional.

[86]Unless otherwise noted all quotations are from the unpaginated Brief among the Supreme Court Records for 1802 at the Provincial Archives of New Brunswick R.G.5 R.S.42.

[87]2 Eden 126; 28 E.R. 844.

In neutralizing the argument as to the supposed libertarian effect of *Somerset*'s case on the status of slavery in England, Chipman had only to point to Lord Mansfield's own emphasis that his decision was confined to the bare facts before him, *viz.*, whether a master could force a slave to leave England, and that it did not pass upon the broad issue of the master's claim to his slave's services. In upholding the slave's right to remain in England Mansfield had merely been reaffirming the ancient principle of villeinage that the lord could neither kill his villein nor carry him out of the realm. The result, concluded Chipman, was that a relatively severe form of slavery had indeed existed "even in the free air and soil of England; that it is expressly sanctioned by the divine law, and recognized without censure or reproof by our Saviour and his Apostles". "It . . . still remains a part of the Common law of England, if there were subjects upon whom it could operate."

When Chipman presented his case that the Common Law comprehended a very severe form of slavery his purpose was merely to counter the notion that there was something about slavery that was essentially abhorrent to English law. Its purpose was certainly not to argue that slaves were held in the colonies pursuant to the law of villeinage, a proposition which he was to deny vigorously in the final stage of his presentation. A second use served by a review of the law of villeinage was to lay the basis for a useful parallel between the English version of slavery, which derived from English common law and which continued to exist until expressly abolished, and the system of slavery as practised in the American colonies, which had also arisen without positive statutory establishment and which (he would argue) continued in America until such time as it was statutorily prohibited.

That such colonial customs not found in the Mother Country could lawfully exist had been impliedly recognized by Parliament in a 1696 enactment striking down any such customs which were repugnant to English laws touching the colonies.[88] "It is obvious from this", asserted Chipman, "that the laws of England contemplate the legal existence of all such usages and customs in the Colonies as are not here declared void and that they recognize such customs as having the force of or being a part of the Common Law of the Plantations." The practice of enslaving Negroes was one such custom; nowhere established by positive law, at least at the beginning of the colonies, it was everywhere practised.

This notion, that slavery in New Brunswick derived its legitimacy from "immemorial usage and custom in all parts of America ever since its discovery" which need not be derived from the law of the metropole, had been the basis for Chief Justice Ludlow's pro-slavery opinion in 1800.[89] At that time Chipman had dismissed it as "rather fanciful"[90], "subject to many insuperable objections and rather *making the law* for the occasion, than founding it upon any good authority".[91] He now proceeded to make it the cornerstone of his case.

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[88](1696) 7&8 WIII c22 s.9.

[89]*Supra*, Appendix I.

[90]*Supra*, footnote 37.

[91]*Supra*, footnote 1.

Chipman's most important evidence that slavery as practised in New Brunswick had indeed been "established by custom" in the American colonies was the fact that so many acts of the Imperial parliament and similar measures had "recognized and legalized" this usage. In the charter of the Royal African Company (1661), for example, Negroes were expressly made an object of its commerce, a right extended to all British subjects by an act of Parliament in 1750.[92] If Negroes might be traded, did that not pre-suppose they might also be owned by their American purchasers? By an act of 1732 slaves were expressly made exigible under the writ of *fieri facias* and other forms of execution for their master's debts.[93] Did not such a provision recognize and confirm the necessarily pre-existent lawful[illegible] of slave-owning in the colonies? (Here Chipman overlooked the fac[illegible] provision affecting slaves had been expressly repealed nine years earlier.[9][illegible] More directly touching New Brunswick's situation was the law of 1790 allow[illegible] immigrants removing into the King's North American dominions from th[illegible]nited States to import their "negroes, household furniture, utensils", etc., free [illegible] duty provided the same not be disposed of for twelve months thereafter. Here, then, was a law of recent date directed specially at the remaining [illegible]es in North America unquestionably assuming Blacks were susceptible to [illegible]nership and sale. This was the provision that had apparently caused Judge Saunders to change his mind in 1801. By the very fact that it allo[illegible] Loyalists to import their slaves, he wrote, "[I]t acknowledges those negros when brought in to be what they were before, Slaves, because by forbidding them to be sold within the first year, it tacitly permits the sale of them after that period: but in what country can a negro be sold but in one in which Slavery is allowed by law?"[96]

Chipman did not claim that any of these acts of Parliament "established" slavery in the colonies. The essence of his argument is that they merely "recognized" and "confirmed" and "sanctioned" and "contemplated" a pre-existing usage. In none of the present or former colonies could he find an ancient law actually creating the condition of slavery. All enactments touching the subject, like that of Nova Scotia, proceeded on the plain assumption that slavery already existed. Nevertheless, although no law had ever formally instituted slavery, had there ever been a doubt it was lawful? To declare it did not legally exist in New Brunswick was tantamount to denying its legality in any of the British colonies; it was to contradict the basic assumption from which so many schemes of legislation had proceeded. "Why should we", Chipman rhetorically demanded,

> at this day set outselves up as wiser than all the generations of mankind who have gone before us? as wiser than the maker of Heaven & earth who ordained & established the conditions among mankind . . . ?

For the Supreme Court of New Brunswick to deprive the owners of so much property acquired pursuant to Common and statute law

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[92](1750) 23 GeoII c.31 (Imp.).

[93](1732) 5 GeoII c.7 (Imp.).

[94](1796) 37 GeoIII c.119 (Imp.).

[95](1790) 30 GeoIII c.27 (Imp.).

[96]*Supra*, footnote 48.

> would be in effect to repeal the Acts of Parliament made in this behalf, to violate the faith of the British Government pledged to every loyal inhabitant of this Country and to trample under foot the most sacred tenures by which any property can be held or claimed in this Province.

This rhetorical flourish, one of the few such passages in the Brief, closed the general part of Chipman's presentation. His one remaining argument, sketched at some length, dealt with the rule of inheritance given expression by the civil law maxim *partus sequitur ventrem* as it applied to slavery in New Brunswick. Such an argument was made necessary by the fact that Richard Hopefield's mother had been a slave but his father had been free. Although the point itself is not an important one for present purposes, the argument by which Chipman sought to establish the result he desired — that Hopefield took the status of his (slave) mother — is of note. Because English villeins derived their status from their father Chipman was forced to make explicit what he had earlier only implied: that not only did colonial slavery not depend for its lawfulness on common law villeinage but also that the two were "altogether different". "To apply, therefore, the maxims of the Common Law of England to a case not only not contemplated by that law but depending upon a foundation and principles utterly incompatible with that law would be the extreme absurdity." It was the *ius gentium*, he argued, which governed the basic principles of slavery in the American colonies, and the *ius gentium* as expounded by Pufendorf and other learned writers provided that slave issue took their status from their mother.[97]

Chipman's Brief for the masters, which appears at first to be dominated by lengthy extracts from the work of others, presents on closer examination the development of what may well be a novel line of argument on a difficult subject. Its thesis was that American slavery was part of a colonial common law; and, while the germ of this idea clearly originated with Ludlow in 1799 rather than Chipman in 1805, it was the latter who had occasion to develop it. While it is impossible to say this was an argument unique to New Brunswick, it is notable that Chipman could cite no English case in which it had been advanced.[98] Conceivably it might have been used in some of the pre-Revolutionary slave cases of which Ludlow or Chipman would have heard, but it would not have been reported. Certainly, judging from Chipman's incredulous reaction when he heard it in 1800, it was something of a novelty.[99] And, according to Chief Justice Blowers of Nova Scotia, "No Lawyer with us ever talked of the Common Law of the Colonies as distinguished from that of England nor would our late Chief Justice Strange, I think, have countenanced a position of the kind".[100] Nor did Joseph Aplin in his well-argued pamphlet of 1802 adopt the position which he must have known Ludlow had expounded in the 1800 New Brunswick proceedings. Indeed, he used the various imperial statutes not as Ludlow and Chipman did — to show recognition of a pre-existing state of slavery — but as support for the quite different proposition that these enactments had actually

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[97]Colonial New York had established the principle by statute (Zilversmit, *supra*, footnote 16, at 13). The other northern colonies had apparently observed, but not legislated, the civil law principle.

[98]Such a position was, however, taken by Lord Stowell in *R.* v. *Allen (The Slave Grace)* (1827) 2 St. Tr. (N.S.) 273, at 298-99 (Adm.). He, however, assumed, rather than argued, that the basis of colonial slavery was colonial custom, and cited no case in support.

[99]See *supra*, at footnotes 90 and 91.

[100]Blowers to Chipman, n.d. (1800): *supra*, footnote 19.

established slavery in the colonies.[101] In sum, then, the defense of slavery as formulated in early New Brunswick may be significant to Canadian legal historiography not merely because it survives, not merely because it addresses one of the grandest of all legal questions, but also because it developed a fresh line of argument in defense of slavery, one uniquely consonant with New Brunswick's colonial situation.

The Case For The Slave

The surviving literature presenting the abolitionist argument as developed in New Brunswick is less substantial than that supporting the masters' case. It consists of only Chipman's Brief prepared for the *R.* v. *Jones; R.* v. *Agnew* proceedings of 1800.[102] Like its counterpart of five years later the Brief is a lengthy series of quotations from largely predictable sources.[103] But it is less successful than the later presentation in incorporating them into an overall argument that gives the impression its compiler is fully in control. It is only when he turns to considerations directly relevant to New Brunswick that Chipman argues with conviction. Elsewhere he presents all the "right" arguments, but in a largely mechanical way.

Chipman commences his case by reciting the Montesquieu-Blackstone response to the traditional attempts to give slavery a foundation in natural law. He also follows Montesquieu in rebutting the more vulgar defenses for slavery. Surprisingly, he does little to undercut the inevitable counter-argument — that slavery is countenanced by Holy Scripture. He addresses the question only with a short passage from Charles Molloy's *De Jure Maritimo* (1676) to the effect that slavery in Christendom was now obsolete.[104] Given the explicit recognition of slavery in the Bible he evidently thought this the best approach that could be taken.

Just as the "traffic in human flesh" could not be founded on natural law, so it could not be justified as a matter of policy, Chipman urged. John Millar had shown not only that slavery was inefficient as an economic system but also that it corrupted the dispositions of the masters and the morals of the whole society where it was introduced. Even if Black slavery might be justified on grounds of avarice in the West Indian colonies, it would be folly for the judges of New Brunswick to legitimate "a practice so derogatory to every principle of law and justice".[105]

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[101]*Supra*, footnote 24, at 8, 10-11.

[102]To this one might add the view Chipman attributed to Judge Allen ("strenuously insists that it is beyond the power of human laws to establish or justify": *supra*, footnote 50) and the sentiments attributed, probably inexactly, to Allen and Saunders by the *Royal Gazette* of 18 February 1800 ("that the Law upon that subject is the same here as in England and therefore that Slavery is not recognized by the Laws of this Province").

[103]An exception to this generalization may be Chipman's extensive reliance on the 1771 edition of *Millar on Ranks*. Of this work, C.D. Rice has written: "[i]t had no colonial edition, and there is at present no indication that it had any substantial impact outside Britain": *The Rise and Fall of Black Slavery* (Macmillan: London, 1975), at 173.

[104]Jack, *supra*, footnote 2, at 157.

[105]*Ibid*, at 158.

Chipman's review of the law of slavery as it was currently declared in England brought him to the long line of conflicting authorities of which *Somerset* v. *Stewart* was the most notable. Chipman sought to give Lord Mansfield's judgment the broad, abolitionist reading to which some of the dicta left it open.[106] But while it is understandable that a lawyer at a colonial bar would rehearse the English cases on the law of slavery, these authorities really had little relevance to Chipman's overall argument. Like his earlier canvass of natural law and public policy considerations, it seems to be material introduced not because Chipman thought it would have a direct bearing on the outcome of the case but only because it was an exercise expected of an opponent of slavery on such an occasion.

Chipman's case for the slave would stand or fall largely on his ability to convince the Court that even though slavery might be said to be lawful in the other North American colonies, it was not lawful in New Brunswick. To do so he would have to overcome the adverse implication of the several British statutes which seemed to recognize the existence of slavery in the colonies. This Chipman attempted to do by resorting to the rather subtle argument that the acts of Parliament in question did not actually institute slavery in the colonies; they merely recognized its existence in those "plantations in which it was [already] established".[107] The act of 1790 for opening the slave trade to all the King's subjects, for example, "did not establish the condition, but supposes it to exist by the provision of their [the colonies'] municipal laws".[108] Chipman neatly circumvented the force of the 1790 provision for the bringing of U.S. slaves into British North America by pointing to the requirement that any such importation could be made only under licence from the local governor, which provision might be "fairly considered as being inserted with a view to guard against any difficulty that might arise from bringing Negroes into a Province where slavery was not sanctioned by law".[109] This is disingenuous but at least a resourceful attempt to overcome a key statutory hurdle. "What can be more contrary to reason and to every principle of justice", Chipman demanded,

> than to make the Acts of Parliament in the present instance operate to establish and inflict so severe a condition and penalty as slavery, in any part of the dominions where no such condition existed, when the words can be so fairly construed to extend to those plantations only, where slavery was established by law, and where the nature of the climate and of its products was thought to render the use of slaves unnecessary?[110]

"No Act of Assembly", Chipman reminded the Court, "has ever passed in this Province in the smallest degree recognizing any such custom or condition as slavery."[111]

Chipman reinforced this analysis by reference to the case of Nova Scotia,

[106]For the development of the abolitionist interpretation of *Somerset* ("neo-*Somerset*") in the American courts see William Wiecek, "*Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World" (1974) 42 *U. Chic. L.R.* 86, at 118 *et seq.*

[107]Jack, *supra*, footnote 2, at 174.

[108]*Ibid.*, at 175.

[109]*Ibid.*, at 176.

[110]*Ibid.*, at 184.

[111]*Ibid.*, at 180.

from which New Brunswick had recently been severed, and certain of whose laws and customs, it might have been argued, New Brunswick had inherited. In attempting to gain ground by trumpeting the supposed fact that Nova Scotia, also, had never given legal recognition to the practise of slavery, Chipman was deliberately misleading the Court. He was well aware of the 1762 law regulating the extension of credit to slaves, but he suppressed it, evidently successfully.[112] He might with equal effect and greater rectitude have cited the New Brunswick declaratory act of 1791, which had determined the operation of all Nova Scotia laws.[113]

If slavery could not be considered as established in New Brunswick by virtue of either Imperial or local statute, then could it be said to be lawful by the Common Law of England or the common custom of the American colonies? This latter point, Chipman knew, held particular attraction for Chief Justice Ludlow.

The short answer on both counts was the same, and was given eloquent expression by Lord Mansfield's dicta in *Somerset.*

> "Now, this custom of American slavery", says Lord Mansfield, "is of such a nature that is is incapable of being introduced on any reasons, moral or political. It is so odious that nothing can be suffered to support it but positive law." And, I may add, it is such an usurpation upon the natural rights of mankind that no human laws can justify or support it.[114]

This was a potent argument. In addition to its respectability as a result of its incorporation in *Somerset*'s case, it had formed an essential basis of one of the leading Massachusetts decisions tending to the abolition of slavery.[115] And even if so odious a practise could be elevated to the status of law through customary usage, this particular custom certainly could not pass the common law test of existence since time immemorial.

Chipman's presentation on behalf of the slave, like his effort for the masters five years later, arrests the reader's attention only when it deals with the great question as it relates specifically to New Brunswick. In both cases all of the other points are dutifully raised, and none are argued in a manner that seems poor; but it was obviously the practical application of the slave issue to the situation of New Brunswick in particular that most engaged Chipman's interest. If, in the end, his Brief for the masters appears the more impressive of the two, it is probably because its argument respecting the lawfulness of slavery in the province is more complex and elaborated at correspondingly greater length.

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[112]*Supra,* footnote 1. Chipman confessed to Blowers that:

> The principal difficulty on that [the master's] side seemed to be that not finding any Act of Assembly of your Province recognizing the condition of Slavery there. Had the Counsel stumbled upon your Act passed in 1762 . . . the conclusiveness of the reasoning upon their principles would have been considered as demonstrated. In searching your laws upon this occasion I found this clause, but carefully avoided mentioning it.

[113]S.N.B. 1791 c.2.

[114]Jack, *supra,* footnote 2, at 181.

[115]*Caldwell* v. *Jennison* (1783): see J.D. Cushing, "The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the 'Quock Walker Case' " (1961) 5 *Am. J. Legal His.* 118, at 133. See also Blowers' opinion *supra,* at footnote 22.

In all of the American colonies slavery existed before there were any municipal laws on the subject. When such laws were enacted they generally did not formally establish slavery; they merely regulated it on the assumption that it already had lawful existence. Because New Brunswick had neither sort of statute this distinction was not important to Chipman's case.