Case Comments and Notes

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Chronique de Jurisprudence et Notes

The Reception Question and the Constitutional Crisis of the 1790's in New Brunswick

THE RECEPTION QUESTION

It was a matter of fundamental importance to the residents of every British colony to have a means of knowing, at the outset of the colony's existence, by which of the acts of the English Parliament their lives and fortunes were governed. Accordingly, for every colony there is necessarily a "reception" date for English statute law; *i.e.*, a date down to which all existing acts of the imperial Parliament are deemed to have been "received" in the colony, insofar as colonial circumstances allowed, and after which no enactment of the English Parliament is considered to extend to the colony, unless evincing an intention to the contrary.

A colony could establish its reception date by express legislative declaration, as has become the case in most Canadian jurisdictions, or it could leave the matter to the principles of the common law. If left at common law, then the fixing of a reception date might vary according to several factors, the chief of which are whether the colony was annexed to the Crown by discovery, conquest or settlement, and, if by settlement, then the date of such planting. There is, however, a contrary view: that all of England's North American colonies take the year 1660 as their reception date, irrespective of their period of actual colonization. Given the uncertainty that might arise regarding which of these interpretations is the better one it is undoubtedly the course of prudence to establish a reception date by legislative declaration. New Brunswick, however, has left the fixing of its reception date to the common law.

The colony and province of New Brunswick was created a government distinct from Nova Scotia on 18 June 1784. As none of the documents erecting the province and commissioning and instructing its first governor set down a reception point, and as the provincial General Assembly did not first meet until 1786, it was necessary for the province's interim lawmakers — the Governor-in-Council (who

included all of the judges of the Supreme Court) — to regulate the colony according to a reception date of their own choosing. The date settled on was 1660, the year of the restoration of Charles II to the thrones of Scotland and England.

Shortly after the date was chosen Governor Carleton provided his superiors with a confidential summary of the theoretical basis on which the decision to adopt 1660 had been made. The essential rationale was as follows: a colony's reception point was the date it came into existence, but North American colonies were deemed generally to have come into existence in 1660. After that date so many statutes expressly included the colonies within their ambit the presumption arose that, unless a post-Restoration statute mentioned the colonies, its operation was confined to the mother country.[1] This rather peculiar view is reflected in the judgment of Chipman J. in New Brunswick's earliest published reception case.

> I consider the true principle to be . . . that each colony at its settlement takes with it the common law and all the statute law applicable to its colonial condition. It may not be a clear point as to what period of time shall be deemed the time of the settlement of this colony. The period of the restoration of Charles 2, it is understood, was in practice adopted by the General Assembly of this Province at its first session, as the period anterior to which all acts of Parliament should be considered as extending, and the reason which has been given for this is that it was about that period that the plantations began to be specially mentioned in Acts of Parliament, and the inference therefore was that if any act after that period was intended to extend to the plantations, it would be so expressed.[2]

When the first General Assembly finally did convene it would have been a simple matter for the pro-Government majority formally to have adopted the 1660 date. Instead the legislators allowed reception policy to remain at common law. They proceeded to enact provincial statutes on the *assumption* that no act of the English/British Parliament subsequent to 1660 was binding on the inhabitants of the province (unless it so specified), but that assumption was an unspoken one. According to Thomas Carleton, "This adoption [of 1660] is . . . tacitly made by common consent of the legislature . . .".[3] Further light on the question of the extent to which New Brunswick's earliest legislators adverted their minds to adoption of the 1660 date is shed by the following remarks, authored in 1795 by an anonymous advocate of changing the reception date.

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[1]"General observations on the laws passed in the first Session of Assembly of the Province of New Brunswick", Carleton to Sydney, 12 June 1786: Public Record Office CO 188/3. In quotations from primary sources minor alterations in spelling and punctuation have been made to avoid confusion.

[2]*The King* v. *McLaughlin* (1830), 1 Allen (2d) 218, at 221-2 (N.B.S.C.).

[3]*Supra*, footnote 1.

> I have frequently . . . heard it alleged that one of our Judges gave an opinion in favour of the Restoration as the proper period to some Members of the [first] House of Assembly, and that one of them . . . took the liberty to express his doubts and dissatisfaction respecting the justness and propriety of that opinion. Had such a principle been adopted for rearing the whole fabric of our Colonial Law on, it ought to have been put upon Record: But there is nothing on Record to show that such a transaction ever took place.[4]

Whether there was the conscious but tacit accord among the three branches of the General Assembly that Governor Carleton suggests, or whether the 1660 date, if proposed in the form of legislation, would have become a matter of controversy in the House of Assembly[5], there is no doubt that it was upon this reception principle that the Supreme Court based its early decisions. It would have been surprising had it been otherwise as the four members of the Court, in their capacity as Executive Councillors, must have played a major role in advising Carleton to promote the 1660 date in the first place. More direct evidence of the Court's practical treatment of the reception question comes from the testimony of a propagandist writing in support of the reception *status quo:* ". . . the decisions of the Supreme Court have been made since the year 1786 [*sic:* the Court first sat in 1785] under the general admission that no Acts of Parliament passed subsequent to the Restoration should be construed as binding in the Province without 'express words shewing the intention of the *British Legislature* to be that they should' . . .".[6]

In both 1795 and 1796 a bill was introduced into the House of Assembly to advance the province's reception date from 1660 to 1750. These Declaratory Bills aroused one of the most vehement constitutional debates in New Brunswick history. In the heat of the propaganda war some opponants even asserted that the Bills, if passed, would amount to "a complete declaration of INDEPENDENCE".[7] Historians, too, have made extravagant claims concerning the nature and effect of the declaratory legislation. It is the purpose of this note to clarify the legislative history of the two proposals, to examine their significance as matters of constitutional law, and to suggest why proposals, apparently so modest, aroused such fanatical opposition.

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[4]"To the REVIEWER", *Saint John Gazette,* 8 January 1796.

[5]Given the dissatisfaction which the decision to adopt 1660 had aroused in the context of the first provincial election campaign it is unlikely that a proposal to ratify that reception date would have met unanimous enthusiasm in the lower House. See D. G. Bell, "A Note on the Reception of English Statutes in New Brunswick", (1979) 28 *U.N.B.L.J.* 195.

[6]Quoted in *supra,* footnote 4. The passage quoted within the excerpt is apparently meant to be from *Rex* v. *Vaughan* (1769), 4 Burr. 2500; 98 E.R. 311 (K.B.), *per* Lord Mansfield.

[7]Lyman to King, 15 April 1795: Public Record Office CO 188/6.

LEGAL CHARACTER OF THE DECLARATORY BILLS

It has generally been overlooked that there were two Declaratory Bills, each with a distinct legislative history. It is the earlier (1795) Bill which aroused most of the contemporary controversy and all of the historiographical romanticizing.

On 10 February 1795 the House of Assembly, apparently without division, authorized a select committee, all of whom were members of the Opposition faction (which controlled the lower House) to "bring in a bill declaratory of what acts of parliament are binding in this province".[8] Although the copy of the Bill eventually presented to the Assembly was inelegantly draughted and marred by the hasty interlineation of routine phrases, the committee appear to have given more than perfunctory attention to their duties for three days later they requested and received the House's authority to order the production of Chief Justice Ludlow's commission, as being necessary to their work.

The result was a Bill of eight sections, some with preambles, in the handwriting of the *de facto* leader of the Opposition faction, James Glenie.[9] Although the Journal of the House is laconic in its reporting it would seem that the Bill passed first and second readings without division, after which it was sent into Committee of the Whole. On 24 February the Committee reported its agreement with the Bill "with amendments", but on the day following it was returned to Committee, apparently for further amendments. When it finally re-emerged from Committee stage later on 25 February only the first two sections of the Declaratory Bill remained.

Although the Bill had been severely truncated in Committee, the pro-Government faction (which was a minority in the lower House) endeavoured to kill the rest by moving to postpone further consideration for three months. That motion was defeated by ten votes to fifteen. What remained of Glenie's proposal then proceeded uneventfully to third reading and was duly engrossed and sent up for consideration by the Legislative Council. The following is the text of that portion of the Declaratory Bill approved in the lower House.[10]

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[8]Manuscript Journal of the House of Assembly, Public Archives of New Brunswick (PANB) RG4 S-9.

[9]"I have copied the inclosed declaratory bill from the rough draft as drawn by Mr Glenie with all the obliterations and alterations as marked its progress, which were done by himself. The original is in the hands of the clerk of the house": Lyman to King, *supra*, footnote 4.

[10]The text of the Bill is taken from the copy sent up to the Council: PANB RG2 RS8 Executive (*sic*) Council Papers 1795.

A bill declaratory of what acts of Parliament
are binding in this Province.

Whereas it is greatly desirable to His Majesty's loyal and dutiful Subjects in his province of New Brunswick and highly conducive to their happiness and prosperity to know what laws they live under,

And Whereas they are extremely desirous of having the Constitution and Government of said province brought as near as their local circumstances will permit to that of the mother Country and of enjoying the benefit of all the laws of England and Acts of the British Parliament applicable to their colonial situation down to as late a period as the fundamental principles of constitutional Law will admit of their being construed as extending thereto,

And Whereas His Majesty's faithful Commons in Parliament did in the year one thousand seven hundred and fifty begin to give and grant to His late Majesty George the second of illustrious memory large sums of money to enable him to render that Territory or Tract of Country called Acadia or Nova Scotia, annexed to his Crown by the Treaty of Utrecht [1713], a British Settlement or Colony by transporting and maintaining Settlers there,

And Whereas that Colony, through his late Majesty's paternal care and attention and the bountiful generosity of his faithful Commons in Parliament assembled, did in the short period of eight years from that date reach such a degree of population and consequence as to make a Legislature of their own for colonial regulations expedient and necessary [1758],

And Whereas this province was then a part of Nova Scotia and continued so till the year one thousand seven hundred and eighty four,

I. Be it Declared and Enacted by the Lieutenant Governor, Council and Assembly and it is hereby Declared and Enacted by the authority of the same that all Acts of Parliament applicable to our colonial situation passed before the year of our Lord one thousand seven hundred and fifty shall henceforward be held, taken and construed as binding on all His Majesty's Subjects in this province;

And Whereas it has been laid down and adopted as a maxim of constitutional Law by the Learned Judges in England that no Act of Parliament made after a Colony is planted is construed to extend to it without express words shewing the intention of the Legislature to be that it should;

II. Be it further Declared and Enacted by the authority aforesaid that no act of Parliament made or passed since the beginning of the year of our Lord one thousand seven hundred and fifty shall be held, taken or construed as extending to this province without express words in the act itself shewing the intention of the British Legislature to be that it should, any Proceedings, Practice or Decisions to the contrary notwithstanding.

Had the portion of the 1795 Declaratory Bill approved in the House of Assembly become law it would have advanced New Brunswick's reception date from 1660 to 1750, thus greatly expanding the number of English statutes the province would be deemed to have inherited. The Bill's two surviving clauses enunciate the two complementary branches of any reception scheme: that the colony would thenceforth receive imperial statutes (except those inapplicable to its circumstances) down to the year 1750, but that statutes enacted thereafter would be law in New Brunswick only if they so provided.

[11]In fact, Nova Scotia seems always to have regarded 1758, the year its General Assembly first met, as its reception date. See E. G. Brown, "British Statutes in the Emergent Nations of North America: 1606-1949", (1963) 7 *Am. J. Legal Hist.* 95.

When a legislature decrees what its reception date will be it renders superfluous any inquiry whether the date thus fixed would have been supportable at common law; yet the lengthy preamble to the first section of the Bill is an attempt to give just such common law justification to the choice of 1795. Taken together the propositions advanced amount to an implied assertion that the rationale for the 1660 date is unsound, and that even at common law there is a better case to be made for 1750. Such an implied conclusion is grounded in the theory that the actual date of a colony's settlement is a factor of critical importance in arriving at a proper reception date. In developing that view the preamble effectively asserts three propositions:

> (1) that Nova Scotia became an English colony by settlement;
> (2) that Nova Scotia was settled in 1750 with the support of the imperial Government and ought, therefore, to take 1750 as its reception date; and
> (3) that New Brunswick ought to take the same common law reception date as Nova Scotia, of which it was formerly a part.

The third of these propositions is self-evident. The others raise issues, both as to the gordian complexity of Nova Scotia's colonial history and as to uncertainties in reception law jurisprudence, which are unnecessary to this discussion. Apart from noting that the authors of the Declaratory Bill erroneously dated the founding of Halifax at 1750 rather than 1749, it is sufficient to emphasize that the advocates of the 1750 date clearly dissented from the proposition that all American colonies are deemed, for the purposes of reception law, to have been settled in 1660.

When what remained of the Declaratory Bill reached the Legislative Council that august body, in which one of the judges of the Supreme Court was then present, unanimously postponed any consideration *sine die*. Thus the measure was effectively killed. The senators were, however, so agitated that on the back of the Council's copy of the Bill is entered the unusual intelligence that the Bill was "rejected instantly".[12] Even instant rejection was insufficient to manifest the full measure of the Council's abhorrance of the measure, for interfoliated with its manuscript Journal is the following modest proposal.

> Motion.
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> That the Curse of Emulphus be entered on the back, and that every part & paragraph thereof be applied (with all its power & energy) to the Contrivers, Aiders, & Abettors of this most damnable Bill, so far as the same may be applicable to their colonial Situation, and without any express words shewing the intention of the said Emulphus to be that it should.

The Legislative Council's hostility and indignation was, of course, directed at only those two clauses of the Declaratory Bill that came officially before it. Most historians have, however, overlooked this fact,

[12]Manuscript Journal of the Legislative Council, 26 February 1795: *supra*, footnote 10.

and analysed the political implications of the reception controversy on the assumption that it was the last six sections of the Bill, dropped almost as soon as they entered the House of Assembly, that aroused such horror. They have likewise assumed that these other six sections were, for their time, so radical as to make the reaction of the Government faction entirely comprehensible. Thus the great whig historian James Hannay had no doubt that:

> This bill [he meant all eight sections] was so far in advance of the times that it is surprising the House passed it, but the journals show that it was carred by a vote of 15 to 10. . . . The bill caused a decided sensation among the friends of the Governor. . . . Yet everything in that bill has been long since recognized as right and the constitution of every self-governing British Colony is based on the principles there set forth. . . . [I]t . . . stands in the records of the province as a proof that in James Glenie, New Brunswick had, more than a century ago, a reformer of a very advanced type whose enlightened views, although denounced at the time by a set of bigots, are now [1909] universally recognized as sound and necessary to the peace and well being of the country.[13]

Another of Glenie's admirers, also under the impression that all eight sections of the Declaratory Bill won approval in the lower House, has written that "The bill was indeed too radical for 1795, too reminiscent of the American Revolution". "The great wonder is not that it aroused so great a controversy but that it should ever have passed the Assembly at all."[14] A third historian, again proceeding in ignorance of the Bill's legislative history, writes:

> The intention was clear enough; to remove the common law basis of the prerogative rights of the executive and to establish thereby a "constitutional" government. It was therefore with some justification viewed as an attack upon the whole colonial system of government as it existed in New Brunswick. . . .[15]

Given these bold analyses of the 1795 Bill, based largely on a reading of the six deleted sections, it becomes a matter of some interest to examine these other clauses.[16]

> And Whereas it has been laid down as a maxim by the learned Judges in England "that Statutes which are positive Regulations of Police are not adapted to the circumstances of a new Colony, and are therefore no part of that Law of England which every Colony from Necessity is supposed to carry with them at their first Plantation"[17],

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[13]James Hannay, *History of New Brunswick* (Saint John, 1909), Vol. I at 246-7.

[14]G. F. G. Stanley, "James Glenie, A Study in Early Colonial Radicalism", (1942) 35 *Coll. N.S. Hist. Soc.* 145, at 162.

[15]S. D. Clark, *Movements of Political Protest in Canada* (Toronto: U. Toronto Press, 1959), at 162.

[16]No definitive text of these sections exists. I have pieced together this version from the draught found in the House of Assembly papers for 1795: PANB RS2 S-9. Versions not materially different will be found among the papers of the Legislative Council (*supra*, footnote 10) and in Lyman to King (*supra*, footnote 7).

[17]The passage in quotation marks is a slightly imperfect excerpt from *Rex* v. *Vaughan*, *supra*, footnote 6.

III. Be it further Declared & Enacted that no Acts of Parliament which are positive Regulations of Police shall be held, taken or construed as extending to this Province;

IV. And be it further Declared & Enacted by the Authority aforesaid that no Act of Parliament made or passed even before the Year of our L[or]d 1750 for the purpose of imposing Taxes or raising a Revenue or containing Regulations of Revenue or Finance shall be held, taken or construed as extending to this Province without express words in the Act itself shewing the Intention of the Legislature to be that it should;

And Whereas it has also been laid down as a Maxim by Judges in England that Regulations for the Maintenance of an established Clergy are not in Force in New Colonies,

V. Be it further Declared & Enacted by the Authority aforesaid that no Act of Parliament made or passed even before the Year of our L[or]d 1750 for the Maintenance or Support of an established Clergy shall be held, taken or construed as extending to this Province, being inapplicable to our Colonial Situation;

VI. And be it further Declared & Enacted by the Authority aforesaid that no Act of Parliament made or passed even before the Year of our L[or]d 1750 containing Regulations of Commerce, except the general Laws of Trade & Navagation, shall be held, taken or construed as extending to this Province without express Words in the Act itself shewing the Intention of the Legislature to be that it should;

VII. And be it further Declared and Enacted by the Authority aforesaid that no part of the canon Law nor any Act of Parliament regulating the Jurisdiction of spiritual Courts made or passed even before the Year of our L[or]d 1750 shall be held, taken or construed as extending to this Province, being totally inapplicable to our colonial Situation;

VIII. And be it further Declared & Enacted that neither the Act of Uniformity to the Church of England made & passed in the 13th Year of the Reign of her Majesty Queen Elizabeth of illustrious Memory nor any penal Statutes respecting Recusants & nonconformists except so far forth as they respect Supremacy & Allegiance shall not [*sic*] be held, taken or construed as extending to this Province, being inapplicable to our colonial Situation.

The notion that the effect of the Declaratory Bill would be a significant degree of colonial independence — that it was "too reminiscent of the American Revolution" — necessarily presupposes that the Bill challenged the supreme legislative authority of Parliament.[18] No reading of the Bill will support such an assumption. It does not attempt to carve out a sphere of paramount jurisdiction for the General Assembly, as had been argued in the former colonies. It does not attempt to exclude from operation in New Brunswick acts of Parliament which would otherwise have extended here at common law (although a seventh section may possibly have some such effect). The last six sections of the Declaratory Bill are merely an attempt to give definition to the principle that no English statute could extend to New Brunswick if unsuited to its circumstances by specifying, for greater certainty, certain kinds of enactments which were not suitable for reception: those creating quasi-criminal offences ("Regulations of Police"), revenue laws,

[18]Doubtless historians have been led to such a view by a too credulous acceptance of charges by opponents of the Bill such as Daniel Lyman (*supra*, footnote 7): "[E]ither it means nothing or . . . it goes to deny the Supremacy of the British Parliament over the Colonies".

laws for the support of the Anglican clergy, commercial regulations, canon law and laws respecting ecclesiastical courts, and laws placing disabilities on dissenters.

That such provisions were wholly attempts to codify existing common law fully appears from the commentary of Judge Blackstone, from whom the draughters of the 1795 Bill evidently drew their inspiration;

> Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force.[19]

J. E. Coté, the leading authority on Canadian reception law, supports the view that taxation and revenue statutes and quasi-criminal legislation were not among the enactments of the imperial Parliament received in the colonies. As regards English statutes imposing civil disabilities on dissenters he finds no case directly on point but comments, "One cannot for a moment imagine that any of these statutes would be held applicable. . .". Only in the area of ecclesiastical law (which included probate and matrimonial causes) does Coté think that certain aspects may have been received in the earlier English colonies.[20] But since both matters had already been dealt with in New Brunswick by specific legislative enactment it is doubtful whether a declaration that English law in the same field was unsuited to New Brunswick could have much, if any, practical effect. It will also be noted that Blackstone was of the opinion that English statutes respecting spiritual courts did not extend to the colonies. Perhaps the most reliable testimony on this head comes from Edward Winslow, the province's Surrogate-General: "There is . . . a Probate Court in every County, always open". . . . "[W]e have also a Court called the Court of Governor and Council having such other powers of the Ecclesiastical Courts in England as are necessary and applicable to the state of this Province."[21]

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[19] 1 *Bl. Comm.* 107.

[20] J. E. Coté, "The Reception of English Law" (1977) 15 *Alberta L. Rev.* 29, at 59-60, 77-81.

[21] [Edward Winslow], *Substance of the Debates, in the YOUNG ROBIN HOOD SOCIETY, On the evening of the 11th of December, 1795. Taken, by a Person present, in Short Hand, and Published at the Request of a Number of the King's faithful Subjects in New-Brunswic* (Saint John?, 1795) 11-12. This was a satirical response to Glenie's election pamphlet: see *infra*, footnote 34. The only known printed copy, in the Saint John Free Public Library, has an attribution to Winslow, apparently in the hand of Ward Chipman. As well, there is a manuscript version in Vol. 17 of the Winslow Papers, U.N.B. Archives, in Winslow's own hand. See also *An Act for regulating Marriage and Divorce*, S.N.B. 1791, c.5 s.V.

In sum, even allowing some potential under s.VII for alteration of what would otherwise obtain by common law, the Declaratory Bill of 1795 cannot reasonably be viewed as other than a simple attempt to extend to New Brunswick the benefit of English statutes passed between the Restoration and 1750. In this light it is certainly rather curious that the lower House approved the first two sections but forced the deletion of the others.[22] Possibly the last six section were struck from the Bill because they appeared to the non-lawyers in the Assembly as much bolder than they really were. Possibly they were dropped as a tactical measure, since they added little if anything to the effect achieved through the first two sections. Whatever the reason for the deletions, the unamended Declaratory Bill of 1795 was not, as a matter of constitutional law, a radical proposal. With or without the six omitted sections the Bill was not an early milestone on British North America's road to responsible government and Dominion status.

Following the 1795 legislative session Lieutenant-Governor Carleton dissolved the General Assembly in the hope of getting a less troublesome lower House. The election campaign that followed was a bitter one, and, judging from the surviving propaganda, the Declaratory Bill was a central issue. The campaign literature is an incongruous mixture of scurrilous personal abuse and constitutional debate of considerable erudition. The House of Assembly the election produced was even more solidly anti-Government than its predecessor.

When the new General Assembly gathered in 1796 one of Glenie's chief supporters came forward with a bill "to remove Doubts respecting the Period or Time down to which Acts of Parliament in which the Colonies or Plantations are not named, extend to, and are to be deemed a Part of the Laws of, this Province,"[23] *viz.:*

> Whereas Doubts have arisen whether any Acts of Parliament made and passed after the year One Thousand and Six Hundred and Sixty in which the Colonies or Plantations are not named, and which do not contain Words Shewing the Intention of the Legislature to be that they should extend to the Colonies, are to be construed to extend to and to be binding in this Province,
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> Be it Enacted by the Lieutenant Governor, Council and Assembly that all Acts of Parliament applicable to our Colonial and local Situation, made and passed at any Time before the Colony of Nova Scotia was planted by his Majesty's Subjects [1749], and a Civil Government and Constitution with Legislative Powers were given and established therein [1758] by his late Majesty King George the Second, then comprehending within the limits and Jurisdiction thereof the Country and Territory since erected into and constituted the Province of New Brunswick, shall and ought to be construed, deemed and taken to extend to and be binding in this Province and to be considered a constitutional Part of the Laws thereof.

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[22]"[A]fter some days attempting (by Mr Glenie and his friends) to carry it in the house he withdrew the . . . six clauses": Lyman to King, *supra*, footnote 7.

[23]PANB RG4 S-10 B-17.

It will be noted that the 1796 Bill, while reproducing the substance of the initial sections of its predecessor, omits all the others, as well as the lengthy preambulatory apology. This second Declaratory Bill also omits all reference to the (erroneous) 1750 date, apparently proposing 1758 in its stead. Probably the Opposition had learned that 1758 was the reception date observed in Nova Scotia itself.

Since the Opposition firmly controlled the House of Assembly and the Government, even more firmly, the Legislative Council, the 1796 Bill might well have repeated the history of its predecessor. Accordingly the Opposition shrewdly attempted to outmanouver the pro-Government forces by obviating the Council and taking their case directly to London. The lower House resolved by seventeen votes to six to transmit the bill and a statement of the conflicting common law reception theories to the Provincial Agent for submission to the Attorney- and Solicitor-General for their opinion.[24] The Opposition must have calculated that if the Law Officers found the Bill unobjectionable the Government forces would be estopped from opposing it. At the same time they pledged that should the Law Officers decide against their case they would consider the issue closed. The pro-Government faction in the lower House, fearing the consequences of such a reference, voted against it. In fact, however, the Opposition scheme failed. When the House's Committee of Correspondence finally persuaded the Provincial Agent to request the opinion, the Attorney-General absolutely refused, preferring to let the controversy be resolved in the normal course of litigation and appeal. He particularly feared that any opinion he might give would be used to embarrass the New Brunswick judges or to interfere with their discretion.[25]

POLITICAL CHARACTER OF THE DECLARATORY BILLS

It will be apparent from the foregoing analysis that the legal character of the Declaratory Bills was far from radical. Their essential feature was not to deny the supreme authority of Parliament to legislate for the colony but greatly to increase the number of imperial enactments operative within New Brunswick by advancing the province's reception date by nearly a century. Why then did the proposals arouse such bitter opposition?

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[24]*Supra*, footnote 8, S-10 5 March 1796.

[25]Knox to Committee, 3 July 1797: PANB RG2 RS8 Provincial Agent 1/1.

W. S. MacNutt, the only historian to appreciate the legislative history of the Declaratory Bills, was mistaken in attributing to the English Law Officers the view that the 1796 proposal would confer upon New Brunswick's judges a discretion so vast that they might, should they wish, dispense with the Magna Charta: *New Brunswick A History: 1784-1867* (Toronto: MacMillan, 1963) 107. That sentiment was the personal view of the Provincial Agent, the ultraconservative William Knox, who was not a lawyer. See Knox to Committee, 4 August 1796: *Saint John Gazette*, 10 February 1797.

In order to understand the political, as distinct from the legal, complexion of the Declaratory Bills it is necessary to realize that the decade commencing with the election of the second House of Assembly in 1792 was the most tumultuous in New Brunswick's political history. Although the origin of the long controversy between Government and Opposition factions is explicable in geographic, economic, and perhaps even ethnic terms, the principal issues became clothed in the rhetoric of eighteenth century constitutional debate. The propaganda war of the 1790's canvassed the metes and bounds of the colony's infant constitution; in the felicitous characterization of Edward Winslow, it was a process of "analyzing all the principles of Government, fixing the political Longitudes and Latitudes, and establishing the boundary line between prerogative and privilege".[26]

The contagion of political radicalism present everywhere in the North Atlantic world in the latter half of the eighteenth century left no government unchallenged, not even those in Britain's remaining North American colonies. Nowhere in British North America was the challenge to the governing elite more intense than in the overwhelmingly Loyalist colony of New Brunswick.

It has been usual to account for the crisis which crippled and very nearly halted the legislative process in New Brunswick in the 1790's by focusing attention on the role of the Opposition faction, which generally controlled the House of Assembly throughout the decade. The prime mover in the Opposition ranks was the brilliant, erratic James Glenie, one of the members from the predominantly pre-Loyalist riding of Sunbury.[27] A minor product of the Scottish Enlightenment, Glenie was characterized by one of his opponents in the lower House as

> of great mathematical abilities, and a member of the Royal Society; a man of turbulent and troublesome disposition, and remarkable for his opposition to commanding officers and governments. I believe [he is] a strong *democrat*, and one that would wish to overturn the *Church and State*.[28]

Elsewhere the same writer condemned him as a "most notoriously violent Democrat & Jacobin"[29] and wished to see his 1795 election pamphlet "burnt by the hands of the common hangman, and himself

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[26]Winslow to Sewall, 14 January 1797: W. O. Raymond, ed., *The Winslow Papers* (Saint John, 1901), at 710.

[27]The pre-Loyalists of Sunbury County were actively detested by the Loyalist elite not only for their vigorous brand of religious dissent but also because of their notorious gesture in voting to side with Massachusetts at the commencement of the Rebellion. In the height of the Declaratory Bill controversy Edward Winslow characterized the inhabitants of Sunbury in the following terms: "Dissenting from an established Religion and opposing an established Government, no matter whether it be monarchical or republican, are by them accounted indispensible duties. If by any accidental circumstances they have been betrayed into expressions of Loyalty, they have never failed to exhibit proofs of repentence"; see Winslow, *supra*, footnote 21, at 6.

[28]*Supra*, footnote 7.

[29]Lyman to Winslow, 7 September 1795: *supra*, footnote 26, at 420.

sent to Botany Bay. . .".[30] To Lieutenant-Governor Carleton Glenie was simply "that worthy son of Beliol".[31] While such comments give a rather misleading view of Glenie's political opinions they do vividly illustrate the depth of the fear he aroused in the governing elite. Glenie's faction challenged the Government on many fronts, the chief of which were the sittings of the Supreme Court, the payment of members of the lower House, the reception question, and the monetary jurisdiction of the local courts. While each of these issues can be construed so as to have a constitutional aspect, none is primarily a constitutional question, and it was not the purpose of the Opposition, in raising them, to wage constitutional war.

Of all the issues raised in the 1790's the one with the greatest potential for constitutional debate is the reception question, but that issue was brought forward by the Opposition as a practical one rather than as a constitutional crusade. As the Assembly's Committee of Correspondence explained to their Agent, their concern in sponsoring the declaratory legislation was to secure to New Brunswickers "as their Birth Right the Laws of England" as they stood in 1750 rather than 1660: "Colonies planted before or at the Period of the Restoration have not had the Benefit of the Improvements since made in English Jurisprudence".[32] Elsewhere an anonymous controversialist justified the attempt to fix a new reception date on the ground that the 1660 date

> robs this Province of all the beneficial Laws of England applicable to its situation, that were made during the space of ninety years, in which almost all the Statutes were passed that defined and established the principles of the Constitution and the liberties of the subject.[33]

The other reason sometimes advanced by those who advocated changing the reception date was to reduce the discretion of the Supreme Court. Thus Glenie himself declared and published to his constituents that the purpose of the 1795 Declaratory Bill was not only "to put you in possession of all the beneficial statutes of England and Great-Britain applicable to our colonial situation down to a much later period than the restoration", but also "to ascertain what Laws you live under [and] to remove even the power or possibility of capricious conduct from the Bench in regard at least to their operation by fixing constitutional limits

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[30]Lyman to Winslow, 5 October 1795: *supra*, footnote 26, at 421.

[31]Carleton to Winslow, 3 January 1805: *supra*, footnote 26, at 530.

[32]Committee to Knox, 10 February 1797: PANB RS2 RS8 Provincial Agent 1/8.

[33]"To the REVIEWER", *Saint John Gazette*, 8 January 1796.

for the Judges in giving their decisions".[34] Glenie was, however, probably wrong if he really thought that a Declaratory Bill of the kind he had sponsored would effectively reduce judicial discretion. Whether a statute is received in New Brunswick must always come down to a discretionary judgment whether the enactment was applicable to the colony's situation on 18 June 1784. As the House of Assembly's Committee of Correspondence assured the Provincial Agent in London, "We conceive that the Power of the Judges will remain fundamentally the same. . .". "[W]hatever may be the [reception] Period in Question they must decide, as they have heretofore decided, . . . whether a Statute . . . in which the Colonies are not named, be or be not . . . adapted to the Circumstances of the Colony. . . ."[35]

Although Glenie and his supporters may have been mistaken in their estimate of the probable effect of the declaratory legislation their motive in proposing it was clearly redress of what they regarded as a practical grievance; it was not to provoke a constitutional confrontation. That is true of all the great issues of the 1790's. It was, rather, the character and intensity of the Government party's response that transformed what would otherwise have been a simple political struggle into a debate of constitutional principles reminiscent of the propaganda wars of a generation earlier in Britain's former American colonies.

There are two keys to understanding the mentality that predisposed New Brunswick's governing elite to translate every manifestation of political dissent into an attempt to subvert the establishments of church and state. One is the peculiarly traumatic personal history shared by the dozen men (all but Carleton himself) who comprised the heart of the official party: the common experience of politicization, persecution, and exile as a result of the American Revolution. The creation of the almost purely Loyalist colony of New Brunswick, in which they received their patronage appointments, was their grand opportunity not merely to recoup their personal fortunes but also to vindicate those political

[34][James Glenie], *Substance of MR. GLENIE'S ADDRESS, To the Freeholders of the County of Sunbury, At the opening of the Poll on Tuesday the 1st of September instant: Explanatory of the Proceedings of the late House of Assembly, &c. &c. Taken by a Person present, in Short Hand, and Published at the particular Request of a large Majority of the Electors* (Saint John?, 1795) 11. The only known copy is in the Saint John Free Public Library.

The Judges of the Supreme Court, who held office only during pleasure and all of whom sat in both the Executive and Legislative Councils, were under political attack throughout the 1790's. There was perceived to be a reasonable apprehension of bias from men heavily involved in the political arena whose judicial tenure was so insecure. The Judges, is was charged, were, "much more dependent for their daily bread on the Ministers of the Crown than any menial Servant in the Province is on his Master": "To a FREEHOLDER of York County", *Saint John Gazette*, 21 August 1795.

Characteristically the friends of the Government returned the attack by suggesting that critics of the Court were of the same class as the revolutionaries in France: "How . . . can these attempts to villify and degrade the Supreme Court and render it contemptable in the eyes of the people be accounted for?". "Clearly upon one principle only — a wish to throw down distinctions, to poison the public mind, to awaken it to groundless jealousies and fears, and introduce into this yet happy Country all the dreadful anarchy and horrors that have already ruined one of the most polished nations in the world." See "The REVIEW No. V", *Royal Gazette*, 1 December 1795.

[35]*Supra*, footnote 32.

principles for which they had sacrificed everything. The New Brunswick experiment was their chance to prove to themselves and to their new republican neighbours that a British colony, managed on wholesome authoritarian principles, would flourish and become the envy of the American states. To this end the men appointed to rule the new colony set out to make New Brunswick's political constitution "the most Gentlemanlike one on earth".[36]

One consequence of this consciously conservative frame of reference was the view, strikingly apparent from the very inception of the colony, that all political dissent was illegitimate — an attempt to introduce discord into the Loyalist Elysium. An ultraconservative mentality is likewise reflected in the colony's earliest legislative enactments, such as the establishment of the Church of England and the suppression of the circulation of petitions directed at "alteration of matters established by law, redress of pretended grievances in Church or state, or other public concernments".[37] Another such positive attempt to mould the province in a tory cast was the decision to adopt 1660 as a reception date. Nova Scotians might take English statutes as of 1758, Upper Canadians might take them down to 1792, but New Brunswickers would receive them only as they had stood in 1660, before even such fundamental libertarian safeguards as the *Bill of Rights* had been enacted.

In addition to the hypersensitive conservative mentality induced by their personal misfortune in the American Revolution New Brunswick's governing elite partook of the general world view of those in political and religious establishments in the English-speaking world in the 1790's. They shared an apocalyptic vision that the entire civilized world was declining into anarchy as a result of the seditious ferment everywhere touched off by the French Revolution. While the rebellion in America might easily be rationalized as almost a fluke of fortune, the events in France raised the truly horrifying spectacle of social revolution and abolition of the Christian religion. The New Brunswick and Nova Scotia tory elite produced some strikingly powerful manifestations of this End of Civilization vision; two examples illustrate the *mentalité* of the whole class. The Honourable and Reverend Jonathan Odell, high priest of New Brunswick's religious and political establishments, chose the occasion of a Provincial General Fast to declaim in apocalyptic tones that "the fatal consequences with which all civilized nations are threatened at this awful moment have excited an alarm that was never known before".[38] One of the finest examples of the genre comes from the pen of R. J. Uniacke, Attorney-General of Nova Scotia.

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[36]Winslow to Chipman, 7 July 1783: *supra*, footnote 26, at 100.

[37]*An Act against Tumults and Disorders, upon pretense of preparing or presenting Public Petitions, or other Addresses to the Governor, or General Assembly*, S.N.B. 1786, c. 58.

[38]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.

> It has been our misfortune to live at a period during which every art has been used to destroy the principles of true religion and to subvert the rules of civil government. . . . It has been out lot to see those venerable principles, which our forefathers considered fixed as firmly as the pillars of the earth, shaken to their basis, and the fundamental rules of human happiness scoffed at and ridiculed in the publications of artful men, who have proved themselves the enemies of the human race. . . . To give the name of a revolution to the events which have sprung from those novel doctrines would be applying a term too feeble to comprehend the horrid and sanguinary actions of the apostles of liberty and equality. . . . I think I do not exaggerate when I say that those diabolical principles . . . have produced to the world more human wickedness, distress, and misery than any equal space of time has exhibited in the previous history of man.[39]

This desperate, pessimistic world view, reinforcing a pre-existing tendency to detest all political innovation, was the major factor responsible for the prolonged constitutional crisis of the 1790's, of which the reception question was far from the leading aspect. New Brunswick's governing elite was so truly reactionary that every political dispute was transformed in their minds into a challenge to the established constitutional order — themselves; and, as their record during the decade clearly shows, they fought every issue, large and small, with unflinching tenacity. Their opponents were always written off as democrats, jacobins, and subversives. Behind every proposal for change they saw a new American Revolution. In consequence, the debate provoked by the Declaratory Bills was out of all proportion to the modest character of the legislation itself. Indeed the Opposition regarded the reception question as so relatively unimportant that, having failed to gain imperial interposition, they dropped the declaratory proposals, and New Brunswick's reception date never again became a subject of political controversy.

D. G. BELL*

[39]R. J. Uniacke, ed., *The Statutes at Large . . . of Nova-Scotia* (Halifax, 1805), at v.

*B.A., M.A. (Queen's). LL.B. candidate, Faculty of Law, University of New Brunswick.