

The Fight for Bourgeois Law in Halifax, Nova Scotia, 1749-1753

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In the new colony of Halifax, merchants and other members of the colonial bourgeois desired a legal order that would support their commercial needs, not impede their activities, and that included members of their class. In a series of legal disputes between 1749 and 1753 the bourgeois fought for their interests in front of and against the colony's government. In each case, the merchants and their allies lost the specific legal dispute but secured changes in the legal regime that better met their expectations.

Dans la nouvelle colonie de Halifax, les marchands et d'autres membres de la bourgeoisie coloniale ont voulu avoir un ordre juridique qui irait dans le sens de leurs besoins commerciaux, sans entraver leurs activités, et qui inclurait des membres de leur classe. Dans une série de litiges survenus entre 1749 et 1753, les bourgeois ont lutté pour leurs intérêts devant le gouvernement de la colonie et contre celui-ci. Dans chaque cas, les marchands et leurs alliés ont perdu leur cause en justice, mais ils ont obtenu des changements dans le régime juridique qui répondaient mieux à leurs attentes.

IN EARLY SUMMER 1749, Colonel Edward Cornwallis led a convoy of 14 ships and 2,576 people to Chebucto Harbor, the site of Nova Scotia's new capital, Halifax. Although many in the original convoy left, those who stayed were joined by others from the American colonies as well as England and Europe. The 1752 census found 4,248 people in the town and its suburbs.¹ Halifax would not be just a military outpost against the French, but a fully functioning town and suburb, with farms nearby, a large number of artisans, and seafarers to take up fishing. The settlers also included several who sought their fortunes as merchants and traders.

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1 J. M. Bumsted, "The Cultural Landscape of Early Canada" in Bernard Bailyn and Phil D. Morgan, eds., *Strangers within the Realm: Cultural Margins of the First British Empire* (Chapel Hill: University of North Carolina Press, 1991), p. 375; Judith Fingard, Janet Guildford, and David Sutherland, *Halifax: the First 250 Years* (Halifax: Formac Press, 1999), pp. 6 and 18; Thomas B. Aikins, *History of Halifax City* (Halifax, 1895), pp. 48, 69, and 246-261.

The political and economic history of eighteenth- and nineteenth-century Halifax and Nova Scotia has been dominated by the story of Halifax's merchants. Although ex-soldiers, ex-navy sailors, craftspeople, labourers, fishers, and farmers comprised the vast majority of Halifax's population, and Acadians (up to 1755) and Mi'kmaq dominated colonial Nova Scotia's population, the struggle between the bourgeois and the governing elite determined control of the colony. This battle simmered throughout the colony's eighteenth-century history, and historians have focused on the fight over establishing the assembly in the late 1750s and responses to the American Revolution in the 1770s.² The struggle between merchants and government is at the core of some of J. B. Brebner's and Thomas Raddall's most read works about Halifax and Nova Scotia published in the mid-twentieth century.³ In the decades since, the theme has been taken up by successive historians, including W. S. MacNutt, David Sutherland, and Patricia Rogers. In their *Concise History of Business in Canada*, Peter Baskerville and Graham D. Taylor go so far as to characterize Nova Scotia in the latter part of the eighteenth and throughout the nineteenth century as a "merchantocracy."⁴ Even Julian Gwyn, who is sceptical of the merchant power thesis, has addressed merchants in some depth.⁵ Much of the story told so far has focused on the merchants' political activity. This article is the first serious analysis of the merchants' earliest legal struggles.

Halifax's colonial bourgeois⁶ were primarily merchants and traders who earned their sometimes quite substantial living from trading goods into, out of,

- 2 See J. B. Brebner, *The Neutral Yankees of Nova Scotia* (New York: Columbia University Press, 1937; repr. Toronto: McClelland & Stewart, 1969), chap. 1-4; Barry Cahill, "The Treason of the Merchants: Dissent and Repression in Halifax in the Era of the American Revolution," *Acadiensis*, vol. 26, no. 1 (Autumn 1996), pp. 52-70.
- 3 For Brebner, see *The Neutral Yankees of Nova Scotia*. For Raddall, see both his history, *Halifax, Warden of the North* (Toronto: McClelland & Stewart, 1948), and his novel, *Roger Sudden* (Toronto: McClelland & Stewart, 1944). For a discussion of Raddall and Brebner in creating Nova Scotia's past, see Ian McKay and Robin Bates, *In the Province of History: The Making of the Public Past in Twentieth-Century Nova Scotia* (Montreal and Kingston: McGill-Queen's University Press, 2010), pp. 44-45, 221-224.
- 4 W. S. MacNutt, *The Atlantic Provinces: The Emergence of Colonial Society, 1712-1857* (Toronto: McClelland & Stewart, 1965); David Sutherland, "Halifax Merchants and the Pursuit of Development, 1783-1850," *Canadian Historical Review*, vol. 59, no. 1 (1978), pp. 1-17, and "The Merchants of Halifax, 1815-1850: A Commercial Class in Pursuit of Metropolitan Status" (doctoral dissertation, University of Toronto, 1975); Patricia Rogers, "Rebels' Property: Smuggling and Imperial [Dis]loyalty in the Anglo-American Atlantic," *Journal of Early American History*, vol 2, no. 2 (2012), pp. 32-67, and "'Unprincipled Men Who Are One Day British Subjects and the Next Citizens of the United States': The Nova Scotian Merchant Community and Colonial Identity Formation, c. 1780-1820" (doctoral dissertation, Michigan State University, 2001); Graham D. Taylor and Peter A. Baskerville, *A Concise History of Business in Canada* (Toronto: Oxford University Press, 1994), pp. 109-114.
- 5 Julian Gwyn, *Excessive Expectations: Maritime Commerce & the Economic Development of Nova Scotia, 1740-1870* (Montreal and Kingston: McGill-Queen's University Press, 1998), pp. 4-6 and throughout, as well as "Capitalists, Merchants and Manufacturers in Early Nova Scotia, 1769-1791: The Tangled Affairs of John Avery, James Creighton, John Albro, and Joseph Fairbanks" in Margaret Conrad, ed., *Intimate Relations: Family and Community in Planter Nova Scotia, 1759-1800* (Fredericton: Acadiensis Press, 1995), and "'A Slave to Business all my Life.' Joshua Mauger ca. 1712-1788, the Man and the Myth," *Journal of the Royal Nova Scotia Historical Society*, vol. 7 (2004), pp. 38-62.
- 6 My use of the term bourgeois is influenced by Franco Moretti, *The Bourgeois: Between History and Literature* (New York and London: Verso Press, 2013), especially pp. 1-17. For a history of the trans-Atlantic bourgeois of the eighteenth century, see David Hancock, *Citizens of the World: London Merchants and the Integration of the British Atlantic Community, 1735-1785* (Cambridge: Cambridge University Press, 1997). There is some affinity between at least people like Joshua Mauger, Thomas Saul, and Malachy

and about Halifax. Connected to commercial elites in other parts of the British Americas and in Britain, they were much wealthier than the majority of Halifax's population. Consider two of the core characters in this article: Joshua Mauger arrived in Halifax in 1749, a 24-year-old from Jersey, most recently victualler to the navy at the captured Louisbourg. He kept his contract with the Navy in Halifax and in 1751 established the colony's first distillery, protected by a tariff on any imported spirits except from Britain or the British West Indies. Over his first decade of Halifax, Mauger came to be one of the colony's largest land and ship owners, with partial or full ownership of 27 vessels.⁷ Ephraim Cook, master of one of the ships in the original convoy and later a merchant, had personal property (including a slave) that sold for more than £3,700 at auction in 1755.⁸ By contrast, sailors in Halifax commanded salaries of only as much as £3 or £3 10s a month, labourers on monthly contracts received £2 5s, and carpenters claimed 4s a day to make shingles (an equivalent of £5 4s a month).⁹

The bourgeois were separate from the original governing elite made up of the governor and his subordinates. These men included people like Charles Morris, James Monk, and Otis Little, who all came to Halifax from or via Massachusetts and made their living mainly by taking several government posts simultaneously. For example, in the early 1750s, Morris was chief surveyor of the colony and Monk his assistant, both were justices of the peace, and Morris was registrar of the Court of Vice Admiralty, later replaced by Monk. The merchants profited from government largesse and contracts, too: Mauger's early fortunes came from his monopolies in supplying the navy and in distilling, but the merchants and traders for the most part did not at first sit on the governor's council or otherwise assume an official role in government.

The law offered an early point of conflict as Ephraim Cook, Joshua Mauger, and other colonial bourgeois faced off against the governors, Charles Morris, James Monk, and others charged with establishing the colonial state. In the years immediately following the founding of Halifax as the new capital of Nova Scotia, the legal authority of the governor, the courts, and the bench faced significant pressure. Seemingly minor disputes over property, trade, and reputation became intense conflicts over the colony's law and authority. The law was a necessary ground for the battle because the colonial bourgeois made great use of the courts and desired a legal system that understood and responded to their practices and needs. The rules and structures of the common law and English statutory law already, in 1749, served them well, but the bourgeois desired a system that was open to local innovations that even better met their needs. In a handful of conflicts

Salter and the twentieth-century Canadian bourgeoisie analysed in Don Nerbas, *Dominion of Capital: The Politics of Big Business and the Crisis of the Canadian Bourgeoisie, 1914-1947* (Toronto: University of Toronto Press, 2013).

7 Donald F. Chard, "Mauger, Joshua" in *Dictionary of Canadian Biography*, vol. 4, ed. Frances G. Halpenny (Toronto: University of Toronto Press, 1974), pp. 403-405.

8 Nova Scotia Archives and Records Management [hereafter NSARM], RG 37 (hx) vol. 2 #85, *Janssen v. Cook*.

9 For sailors: NSARM RG 37 (hx) vol. 1 #87, *Chellis v. Power*; and vol. 2 #86, *Haggerty v. Power*. For labourer: NSARM RG 39 "c" (hx) vol. 2 #26a, *Wright v. Haislop*. For carpenter: NSARM RG 39 "c" (hx) vol. 3 #70c, *Brckett v. Cowie*.

with the governing elite in and outside of courtrooms between 1749 and 1753, the Halifax bourgeoisie forced a variety of concessions that made law in Halifax a bourgeois law. An analysis of these disputes illuminates the class nature of law and the contingency of legal authority in new colonies in the British empire and the early modern Atlantic world.¹⁰

No particular law or legal system is a necessary prerequisite for commerce, but some laws and systems can be more bourgeois than others. The conflicts here tracked and helped lead the establishment of courts, the change in legal rules and law enforcement practices, and the composition of the bench. In established societies, even colonial ones, the making of bourgeois law can take a great deal of time.¹¹ In a newly colonial moment, when no state or practice of law is firmly established, the changes can be more rapid, the conflicts between bourgeois and state officials more blatant, and the resultant limits on the state's relative autonomy more public and significant. The bourgeois victories described here did not fully subordinate government officials of the colony, but they revealed the extent to which those officials were prepared to take direction. They made it more possible for the merchantocracy to establish itself than may have happened elsewhere, even in the colonial world.

All of these disputes occurred when the bench, the bar, and the law-making governor and council included no one who had any extensive legal education or experience before arriving in the colony. Legal rule by amateurs was not, however, exceptional for colonies in the British Empire in the eighteenth century. Nor, in many ways, was it particularly unique for established colonies or England itself: the magistracy was overwhelmingly untrained in law, although its members sat alone, in pairs, or in Quarter Sessions in England or in County and Inferior Courts in the colonies.¹²

This article describes and analyses three moments in Halifax's legal history. It opens with the first civil dispute, which led to the founding of the colony's County Court (which in turn became its Inferior Court of Common Pleas). It then shifts to a challenge of judicial authority and colonial law enforcement policy in

10 The discussion today is still shaped in large part by the arguments about class, law, and economy spurred by Douglas Hay, "Property, Authority and the Criminal Law" in Douglas Hay, Peter Linebaugh, John Rule, E. P. Thompson, and Cal Winslow, eds., *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (London: Allan Lane, 1975), pp. 17-64; Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge MA: Harvard University Press, 1977); and G. R. Rudin and David Sugarman, eds., *Law, Economy and Society, 1750-1914: Essays in the History of English Law* (London: Professional Books, 1984). The Canadian legal history debate on these topics can be traced in the work of Paul Craven, Judy Fudge, R. C. B. Risk, and Eric Tucker, among others. The particularities of colonial situations are addressed in Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge, UK: Cambridge University Press, 2002).

11 Two classic examples of this narrative are Horwitz, *The Transformation of American Law*, and P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

12 For a good brief introduction to colonial governance that bears similarities to the Nova Scotian experience, see Mary Sarah Bilder, "English Settlement and Local Governance" in Michael Grossberg and Christopher Tomlins, eds., *The Cambridge History of Law in America, Vol. 1: Early America (1580-1815)* (New York: Cambridge University Press, 2008), pp. 79-103. Paul Craven describes in detail local rule by justices of the peace for nineteenth-century New Brunswick in *Petty Justice: Low Law and the Sessions System in Charlotte County, New Brunswick, 1785-1867* (Toronto: University of Toronto Press for the Osgoode Society, 2014), pp. 323-457.

the colony's court of Vice Admiralty. The largest part recounts the events of the "Justices' Affair" of 1752. The disputes did not create the merchant-bourgeois predominance in Halifax. Rather, the disputes show how quickly that class came together to assert its interests and how receptive the government was to acquiesce, even when the governor, his council, and the judges claimed they were not. The governing elites' acquiescence helped to ensure that the bench and law enforcement better reflected bourgeois power and interests in the colony. These disputes did not, in the end, create one law for the rich and one for the poor, but a common law for everyone that met bourgeois needs and expectations.¹³

Ephraim Cook and Establishing Civil Justice in Halifax

Halifax's Chebucto Harbor is naturally large, even at its narrowest points, and eighteenth-century ships were small by modern standards. Even so, ships could float into each other, even while anchored. One night in early September 1749, Elijah Davis's sloop slipped its mooring and floated toward Ephraim Cook's *Baltimore*. Sailors called out warnings, but the ships' bowsprits crossed each other. When bowsprits crossed they could get seriously entangled and damage sails and rigging, pivoting the ships into each other and with each collision seriously injuring their hulls, sails, and crew. Everyone on board the ships wanted them separated as soon as possible. Both crews tried desperately to push the ships apart with poles and untangle the rigging. Into the mess ran the mate of the *Baltimore*, carrying an axe and commanding that Davis's ship push back and away. When it could not, he began to hack at Davis's bowsprit. Crew from that sloop called at him to stop, but he swung away, chopping through rope and wood. With the bowsprit cut off, the ships drifted apart, but the *Baltimore's* mate had seriously damaged Davis's schooner.

On September 6, 1749, Davis went to Governor Cornwallis's ship *Beaufort* to ask the governor and his appointed council of twelve men for redress for the damage to his schooner. Although Governor Cornwallis had instructions to establish courts following the Virginian example, little had been accomplished by September.¹⁴ Cornwallis had also delayed in relocating the Vice Admiralty court from Annapolis Royal to Halifax.¹⁵ Without courts, the governor and his council would have to suffice for justice to be served. Davis was the first person to ask the governor and council to resolve a legal dispute for damage. They did not relish taking on the task and asked Davis and Cook each to appoint an arbitrator who would, in turn, appoint a third. Cook and Davis agreed and accepted that

13 This article is about the struggle for bourgeois law; the content of the law in practice is analysed in James Muir, *Law, Debt, and Merchant Power: The Civil Courts of 18th Century Halifax* (Toronto: University of Toronto Press for the Osgoode Society, 2016).

14 On July 18, 1749, he had issued a commission naming four Justices of the Peace, and at the end of August they sat as a general court, hearing a murder trial among other things, but they did not take any civil jurisdiction (NSARM RG 1 vol. 186, p. 5 and 15). See also Jim Phillips, "The Criminal Trial in Nova Scotia, 1749-1815" in G. Blain Baker and Jim Phillips, eds., *Essays in the History of Canadian Law Volume Eight – In Honour of R. C. B. Risk* (Toronto: University of Toronto Press for the Osgoode Society, 1999), pp. 471-472.

15 Arthur J. Stone, "The Vice Admiralty Court in Colonial Nova Scotia," *Dalhousie Law Journal*, vol. 17 (1994), pp. 364, 368.

the arbitrators' decision would be final. Cook and Davis appointed two ship-masters, Captains Nevin and Forester, and they appointed Captain John Rous, naval commander at Halifax, as the third. Rous wrote an award finding some fault on both sides and demanding each master to pay for the other ship's damages, leaving Cook owing the balance to Davis of £14 18s 6d.¹⁶

Cornwallis accepted the decision, and on September 20 he had an order drawn up requiring Cook to pay Davis. He affixed his seal to the order and gave it to a courier to deliver to Cook and the *Baltimore*. Aboard ship, the courier gave Cook the order, asking for repayment or, failing that, the order itself, to return to Cornwallis unfulfilled. Cook declared he had no intention of paying it or returning the order to the governor's messenger. The courier's return empty-handed incensed Cornwallis. Order in the colony relied on everyone respecting the governor's authority in these early weeks of the settlement. Other normal state and non-state structures of authority, like the courts or patron-client relationships, were either embryonic or non-existent. At the same time the colonists feared both the Mi'kmaq and the French, and they had to ensure sufficient shelter for themselves, their livestock, and food stores before the fast approaching winter. A clear line of authority from the governor down, with respect for the governor's commands and for his men, would ensure the building and security of the colony.

Cook was not simply a common seaman or person of the lower orders. Master of his ship, he came to Halifax with the intention of establishing himself in the colony. He was not appointed to council, but counted councillors like John Salusbury, Register and Receiver of his Majesty's Rents, among his friends. If a man of some stature refused to acknowledge the governor's commands, he visibly questioned the whole structure of authority in the colony, possibly even undermining it.

Cornwallis would have none of Cook's insubordination. Nor would the council: Salusbury recorded in his journal, "Cook a fool but the stream very much against him." Cornwallis immediately summoned Cook to the *Beaufort*. Cook claimed that the owner of the *Baltimore* (Cook's unnamed employer) would compensate Cook only if he or the *Baltimore* were legally held or seized, in effect asserting that Cornwallis and the council had not acted as a legitimate legal decision-making body. The governor satisfied Cook's needs, issuing a warrant to the Provost Marshal to execute the order against Cook and a second order that banned Cook from going ashore until he apologized in writing and asked the governor for his pardon.¹⁷ Cook realized the seriousness of the new order, if not of his actions. Returning to the *Beaufort*, he begged the governor's apology and presented a letter of promise to pay the award.¹⁸

16 The damages to Cook's ship Rous reported were: "timberhead 10s, Stancheon and Rail 15s, Driven Boom 5s, Coller of the Mizon Sail & Ratlings 7/6, Boat 10s"; the damages to Davis's schooner were: "jib stay [£]1 10s, Bowsprit: shrouds [£]2 Horses 5s Downhalls 10s Bowsprit [£]1, Vessels being detain'd Eight days [£]12" (NSARM RG 1 vol. 163, pp. 14, 15).

17 John Salusbury, *Expeditions of Honour*, Ronald Rompkey ed. (Montreal and Kingston: McGill-Queen's University Press, 2011), p. 66. See also the council's minutes, NSARM RG 1 vol. 186, mfm 15287, p. 21, September 20, 1749.

18 NSARM RG 1 vol. 186, pp. 26, 27, 29. A year later, on August 29, 1750, the governor reported to the

The Davis-Cook conflict was the first instance of a civil dispute brought before the governor and council, underscoring the necessity of establishing a civil court structure to match the colony's criminal General Court. In December the council devised a court system modelled somewhat after the Laws of Virginia, which included two levels of common law courts: a County and General Court. The Country Court's bench would be made up of the Justices of the Peace sitting together, while the General Court's bench would be the governor and council.¹⁹ In 1752 the civil side of the County Court was rechristened the Inferior Court of Common Pleas while the criminal side became the Quarter Sessions, following New England naming practices. The civil side of the courts would have been established at some point, and Davis's complaint to Cornwallis might have encouraged the governor and council to act more quickly. Cook's resistance to the governor's order, however, made the courts immediately necessary.

Thomas Power, the Merchants, and Vice Admiralty's Authority

A little more than a year later, on Wednesday, December 5, 1750, navy Captain John Rous brought information to the court of Vice Admiralty alleging that merchant and fisher Thomas Power's sloop *Catherine* had landed a variety of goods of foreign manufacture, including brandy and wine, in contravention of the Navigation Acts. Benjamin Green, Vice Admiralty judge and member of the governor's council, issued an order to arrest the *Catherine*, which was affixed to the mainmast of Power's sloop. The trial began at 3 p.m. on December 7 in the house of Vice Admiralty Registrar and Justice of the Peace Charles Morris. Power and any others concerned were expected to attend.²⁰

The first day of the trial progressed much like other Vice Admiralty trials for breaches of the Navigation Acts. Several witnesses described Power's summer activities. The *Catherine* and another ship he owned, the *Francis*, had sailed from Halifax in March 1750 to fish on the Grand Banks. In August both vessels put in at Louisbourg. After leaving Louisbourg, the two ships met in a bay along the Cape Breton coast. Power transferred from the *Francis* to the *Catherine* "[cherry] Brandy, seven loafs of sugar a large scure box ... and some Quantity of Silk and Worsted stockings," along with additional goods taken on at Louisbourg. John Owen, master of the *Francis*, claimed that only a seventh of the Louisbourg brandy remained on the *Francis*, implying that all of the other Louisbourg goods were meant for trade rather than consumption.

The *Francis* separated from the *Catherine* on the fishing bank and eventually sailed north because of weather to St. Peter's Bay in Newfoundland for

council that Cook had still not paid Davis the damages awarded. The council ordered "that proper Methods be taken to oblige him to pay the Sum awarded without Delay." The governor ordered the Provost Marshal once again to seek the funds and, if Cook refused, to distrain a sufficient amount of Cook's "goods" to cover the award if he refused to pay on the spot. Whether this was successful or not is unrecorded (NSARM RG 1 vol. 186, p. 75). A case with very similar facts and again involving Cook as defendant was brought to the court of Vice Admiralty in February 1750. Cook lost again (*Cook v. Cook*, NSARM RG 1 vol. 491, pp.18-30).

¹⁹ NSARM RG 1 vol. 186, pp. 30-40; NSARM RG 37 (hx) vol. A.

²⁰ NSARM RG 1 vol. 491, pp. 158-164, *R. v. Power*.

reprovisioning. It returned to Halifax sometime after Power and the *Catherine*. Members of the *Catherine*'s crew testified that they had consumed some of the goods taken from the *Francis*, but said that they took ashore some of the brandy, wine, and sugar when the *Catherine* returned to Halifax in September.

Although they were not at war in 1750, tensions between the French and English remained high. Many fishing vessels from Halifax put in to Louisbourg, causing suspicion of smuggling. Reprovisioning there was acceptable under the Navigation Acts, but only if the goods purchased in Louisbourg were consumed on board the ship and before anchoring in Halifax or elsewhere in British territory.²¹

The trial resumed on Saturday afternoon and took an unusual tack. Joshua Mauger appeared before the court desiring to present a letter addressed to Judge Green from the merchants of Halifax in support of and written at the request of Power. Mauger's letter was an indictment of the colonial government and the enforcement of imperial statutes. The letter and Mauger's presentation cast merchants, fishers, and others who invested in trade and production as the true builders of the colony. Allied against them were their servants²² and the colony's government. Power's prosecution seemed to demonstrate that the security of bourgeois investments and activities was not of great enough concern to the colony's courts. To the merchants' minds, justice required the law of the colony to change.

Mauger set out several specific grievances.²³ First, he complained about the use of informants. Rous had learned of Power's trip into Louisbourg and the liquor from loose talk among common sailors. To allow the chief naval officer to make arrests based on such information put all owners of vessels "at the Will and Pleasure of Drunken Idle fishermen or Sailors." The idea that merchants and other bourgeois should be threatened by vexatious court actions launched by or based on information from their subordinates was anathema.

Second, Mauger questioned the timing of the arrest: for merchants to be able to invest and expand their activity in the colony, they needed to know their investments were secure. In this case, the *Catherine* had been arrested more than two months after it had returned to Halifax. If Power lost the trial, the ship would be auctioned and the proceeds split between the government and the informer. Mauger asserted:

no Person will be safe in purchasing vessells in this Settlement, as the property cannot be made good to him, whilst it is in the Power of the Captains of his Majesty's Ships to take Cognizance of past Offences.... I am almost Confident that every Vessel belonging to America have more or Less Clandestinely rund Goods or Merchandise for their Own Use.

21 On the enforcement of Navigation Acts in other parts of British North America, see David R. Owen and Michael C. Tolley, *Courts of Admiralty in Colonial America, the Maryland Experience, 1634-1776* (Durham, NC: Carolina Academic Press, 1995), pp. 102-103, 133-136, and 101-136 generally.

22 At the same time as the Vice Admiralty suit, Power was being sued in the Inferior Court of Common Pleas by John Owen and other members of the *Francis*'s crew for their share of the summer's catch. See NSARM RG 37 (hx) vol. 1 # 85, 86, 87, 88, *Owen v. Power, Hagarty v. Power, Chellis v. Power, Oakes v. Power, and Power v. Owen*.

23 The letter is transcribed in the Vice Admiralty record book (*R. v. Power*).

Rather, the colonial government and Vice Admiralty should “[a]ssist the Poor [meaning the bourgeois] rather than distress them” and encourage investment rather than add to the investor’s uncertainties. One way to do so would be to secure merchants’ property regardless of a previous owner’s infractions. Mauger’s premise was inapplicable to Power’s case, however: Power was, and remained, owner of the *Catherine* and faced losing his property for his own alleged misdeeds.

Mauger then offered a new interpretation of the facts of Power’s case, defending Power’s actions on the grounds of good economy and bad crews. Power went to Louisbourg, not with the intention of illegal trade, but because he needed to reprovision his schooners. Until that point, Mauger contends, the catches of both the *Francis* and the *Catherine* had been poor “owing to ill success and in some Measure to the ill behaviour of the Crew of the *Francis*.” Louisbourg was much closer to the fishing grounds than Halifax, and Power did not wish to expend more resources than necessary on a time-consuming and unproductive provisioning run. Once in Louisbourg, not only did Power provision the ships with brandy and wine, but with bread and meat (not previously introduced into evidence). The volume of provisions, including the alcohol, amounted to no more than would be expected to provision two schooners with a total complement of sixteen men. His actions were not those of a wily smuggler but a good businessman, concerned to earn as high a return as possible on his investment. He acted not to cheat the Imperial government but out of necessity.

To account for why so much of the brandy remained on the *Catherine*, Mauger explained that the crew of the *Francis* “made bad use of Liquor and thereby neglected their Duty.” Power intended the two schooners to fish together, and he would pass alcohol (and other provisions) over to the *Francis* as required. The two vessels separated on the Banks, however, leaving Power with 18 gallons of spirits, as well as wine and sugar, when the *Catherine* returned to port. He carried these ashore “in Order to secure it from the Crew of the Vessel who would probably have had of it if it had been left on board.”

Mauger then addressed whether entering Louisbourg to trade should be assumed a breach of the Acts. He argued that a man, “under Necessity of pursuing his Lawfull business for a livelihood for himself and Family,” should be given leeway. In provisioning his vessels it was better to trade, even with a foreign nation, than to steal his necessities (a fair enough point, perhaps, but the Navigation Acts did not advocate stealing over trade). In fact, Mauger stated, this sort of trading was “lawfully allowed to be done in all Parts of the known World.”

In closing, Mauger appealed directly to Green and more broadly to the governor and Green’s fellow councillors. He complimented Green on the good principles and leniency that he had so far demonstrated in his tenure. Mauger then prayed Green

and all other Gentlemen who are in the Legislature of this Infant Colony will prove Fathers to the Poor Inhabitants who all greatly stand in need of Favours or at least Indulgences and not to suffer any of them to be oppressed by evil minded men who

(as the vulgar saying is in our Mother Country[)] care not who sinks if they can but swim.

To be clear as to who the evil-minded men were, Mauger then described the crew of the *Francis*, “who have not caught fish enough in the whole Season to pay their Wages and now are so Vile as to Strike at the Root in Order to Compleat the Poor oppressed Man by their Malicious and badly grounded Informations and making mountains of mole Hills.”²⁴ This conclusion returned to the class politics that Mauger used to open his address. The merchants of Halifax, like Power and himself, were “Poor Inhabitants” striving to make a better colony. They faced off against “evil minded” sailors and other labourers who acted selfishly on their own greed to the detriment of both the merchants and the new colony.

Mauger’s appeal left Otis Little, advocate general of the court prosecutor of Thomas Power, unmoved. The case, Little argued, was simple and proven. Power had imported goods illegally into the colony. Nothing else was material.

When Benjamin Green issued his decree the following Monday, he began by acknowledging Power’s defence that he had gone to Louisbourg not to deceive but for necessities. Similarly, he recognized the feelings behind the merchants’ plea not to prosecute “inconsiderable and inadvertent” breaches of the Navigation Acts. But Green was troubled. Ruling in favour of Power (and Mauger) was not a favourable policy for the colony

if any one then every one of the Fishing Vessels belonging to this Place may with Impunity upon the Plea of Necessity either fictitious or if real perhaps owing to negligence or misconduct make Lewisburg the Magasine and Market from whence to furnish themselves ... and the Merchant here may shut up his storehouses whilst french Brandy can be purchased cheaper then [*sic*] English rum[.]

Green’s solution was to refrain from deciding. Green ordered Power to give a bond with two sureties to satisfy a ruling of the court to be made within twelve months. In the meantime, Green declared he would seek guidance from the Board of Trade and the High Court of Admiralty in England. I have found no record of an eventual ruling.²⁵

Judge Green and other colonial officials found themselves caught between local interests on the one side and imperial expectations and orders on the other. Faced with a challenge from an organized merchant community that was presented by one of the most prominent of that group, Green and the naval officers backed down. Enforcement of the Navigation Acts tapered off in the months that followed. Of the 15 prosecutions for illegal trade in Halifax’s Vice Admiralty courts prior to 1766, five came from 1749-1750 and three more from 1751-1752; the remaining seven came after the fall of Louisbourg in 1757 and never more than two a year.

²⁴ *R. v. Power*.

²⁵ The High Court of Admiralty had no jurisdiction over the Navigation Acts. Instead, all cases in England were to be tried at a court of record in Westminster, by practice the Court of Exchequer. As a reference, this case would have gone to the Board of Trade whose members may have referred it elsewhere as they saw necessary. See Owen and Tolley, *Courts of Admiralty*, p. 106.

Not only did the intensity decline after Power's trial; the focus changed as well. After 1750, *only two* prosecutions under the Navigation Acts included Haligonians among the defendants, while they were the defendants in all five of the 1749-1750 trials. After Mauger's intervention in Power's case, enforcement of the Navigation Acts was dedicated to smugglers from away.

Mauger did not act simply out of concern for Power or even the merchant community as a whole. Mauger, along with many of both the English and New England merchants and officials settled in Halifax, had been among those occupying Louisbourg between 1745 and 1749. When the British returned Louisbourg to the French, the British authorities gave the vacating occupiers time to dispose of their property there and remove all of their possessions. Mauger appears to have used this loophole in the otherwise strict trading regulations to import wine, rum, and other goods from Louisbourg in 1750 and 1751. In November of 1751, James Monk, acting on the governor's orders, searched several of Mauger's warehouses in Halifax and impounded French rum. Mauger argued that when he closed accounts in Louisbourg in 1749 he was forced to grant a great deal of credit and that even in 1751 he could only be paid back in goods like rum and molasses. The court of Vice Admiralty accepted his argument and allowed him to keep the seized goods.²⁶ Mauger's defence of Power was part of a long fight with Halifax's government over trade law and policy. It was a fight Governor Cornwallis was unable to win. W. A. B. Douglas concludes that Cornwallis's "inability either to impress Mauger with the majesty of the law or to establish any principle against smuggling is mute evidence of the hopelessness of the cause which attempted to combat the practice."²⁷

The Power case made a good platform for Mauger. If Power's explanation was to be believed (and Little's witnesses did not contest it), then Power's illegal goods had been brought to Halifax because of a combination of problems with his fishing expedition and not with the intention to smuggle. Having not consumed the goods at sea, he could either order them destroyed or hope to make some use of them in Halifax despite the trade ban. Power's situation provided a sympathetic example of the problems the trade laws posed to legitimate bourgeois in the colony. In his defence of Power, Mauger could attack law enforcement policy directly and argue that the colony's governing elite in the navy, on the bench, and in the governor's circle did not have the colony's best interests in mind. It appears to have convinced them to change their practice, even if Green would not publicly acknowledge a change by finding for Power.

Ephraim Cook and Contempt of Court

In the next moment of major conflict between the bourgeoisie and the government over the practice of law, once again Ephraim Cook was at the centre of the dispute at first, though Mauger led the bourgeois agitators in the end. Ephraim Cook

26 Donald F. Chard, "Mauger, Joshua," in *DCB*, vol. 4, p. 526; see also A. A. Mackenzie, "Zouberbuhler, Sebastian," in *DCB*, vol. 4, p. 780.

27 W. A. B. Douglas, "Halifax as an Element of Sea Power 1749-1766" (MA thesis, Dalhousie University, 1966), p. 48.

became one of the leading men in the colony. Legal documents referred to Cook as both merchant and esquire; someone who engaged in trade of significant value beyond the colony had the status of a colonial gentleman. Despite his conflict with the governor in the fall of 1749, Cornwallis appointed him a justice of the peace in 1750. His tenure as a justice of the peace ended in a fight with his fellow justices and the governor's council in the summer of 1752 and led the Halifax judiciary into the greatest bourgeois and popular challenge to its authority in this period, the Justices' Affair.

As a justice, Cook could hear some matters summarily and could attend as one of the justices who made up the bench at the Inferior Court of Common Pleas (originally the County Court) and the Quarter Sessions. On July 9, 1752, William Steele, a member of the governor's council, along with most of the justices of the peace for Halifax in a petition to the council accused Cook of defaming and assaulting Steele and demeaning and arguing with his fellow justices. The council ordered a hearing for July 13. Cook refused to attend, claiming illness.²⁸ After questioning his physician, the council decided Cook could attend and found him in contempt. It ordered a second hearing on the petitions for July 17,²⁹ which Cook attended.

Steele accused Cook of calling him "a fool a scoundrel a blackguard and villain" and threatening him with a stick. Cook countered that Steele owed him money, but Steele produced a receipt showing the debt had already been paid. In response, Cook called Steele, in front of the council "a dirty fellow." While the defamation and assault were proved, the council was unprepared to act as the General Court on this matter, even though it was Steele's prerogative to ask them to do so. Rather, they declared that Cook was "liable to a prosecution at Common Law ... for his abuse and Insults to Mr Steele" and left it to Steele to sue or prosecute Cook.³⁰

The council also addressed the complaints about Cook's behaviour as a justice, determining that Cook had "behaved in a very indecent and unjustifiable manner towards [the other justices] ... by taxing them with illegal practices and saying openly in the face of the Country that they were incapable of determining points of law." They recommended that Cook be "severely reprimanded ... [and] be removed from the Commission of a Justice of the Inferior Court and Justice of the Peace."³¹

Finally, the council ordered Cook "to be committed to his Majesty's Goal [*sic*] until further order of the council" for skipping the first hearing and acting contemptuous at the second.³² After a night in jail, Cook wrote to the council to apologize. Later that morning he promised the council in person that he would make a public apology to Steele the following Monday. The council discharged Cook.

28 NSARM RG 1 vol. 209, p. 163.

29 *Ibid.*, pp. 164-165.

30 NSARM RG 1 vol. 209, pp. 167-168. All references to the second hearing are to these pages of the Council minutes.

31 *Ibid.*

32 *Ibid.*

The same day Governor Cornwallis issued a new general commission of the justices of the peace. William Bourne now joined Charles Morris, James Monk, John Dupont, Joseph Scott, and Robert Ewer. Ephraim Cook was left off the commission, which meant he was no longer a justice.³³ Whether or not Cook understood that being left off the commission was sufficient to remove him, he maintained to some at least that he was still a justice under the older commission. When presented with an action against fisher John Grace, Cook committed him to jail prior to trial.

At the December Quarter Sessions, Otis Little, this time in his role as the King's Attorney in Halifax, prosecuted Cook for impersonating a justice of the peace and illegally imprisoning Grace. David Lloyd, lawyer and clerk of the Inferior Court and Quarter Sessions, represented Cook. At trial, Cook decried the proceedings and verbally abused the justices. In response they found him in contempt and had him jailed again. The trial continued after Cook's removal from the court, and the jury found for Grace, awarding him only £5 instead of the demanded £290 in damages. Following the jury's verdict, Lloyd moved to arrest the judgment, arguing that it was contrary to the law (the details of his argument were not recorded). The justices considered the motion, found it insufficient, and passed judgment against Cook for the £5 and costs of £1 17s 5d.³⁴

The next morning the justices met in conference to decide Cook's punishment for the contempt of court, including Lloyd in the conference. At first some justices suggested fining Cook up to £500 for contempt; in the end they settled for a fine of only £20 with a £500 surety for good behaviour for one year. Lloyd later asserted that during the conference he argued that Cook had "full[y] complied with the Recognizances given the [*sic*] overnight for his appearing and readiness to make concessions," and so should not be subject to the surety. To this, Justice James Monk replied "in a great passion that he knew Lloyd would find some dirty quibble to get his client off."³⁵

It appeared to several in Halifax that Cook's fate at the hands of the justices was just one more example of the justices' over-reaching their authority. Other incidents had led to a building frustration with the justices on the part of merchants and others in the colonial capital.³⁶

In September 1752, just weeks before he intended to leave Halifax for good, the merchant Francis Martin sued Joseph Fairbanks for defamation at the Inferior Court.³⁷ The jury awarded Martin only £5 in damages, much less than the £500 he demanded. Martin sought leave to appeal the decision to the General Court. The

33 NSARM RG 1 vol. 209, pp. 171-173. See also Ronald Rompkey, "Introduction" in Salusbury, *Expeditions of Honour*, pp. 47-48. Norma Landau notes for England in the eighteenth century, the "usual method of removing a justice was simply omission of the justice's name from the commission on its renewal." See Landau, *The Justices of the Peace, 1679-1760* (Berkeley: University of California Press, 1984), p. 126. See also Craven, *Petty Justice*, pp. 193-199.

34 NSARM RG 1 vol. 209, pp. 262-263, 270, 290; RG 37 a2, pp. 245-250; Salusbury, *Expeditions of Honour*, p. 129.

35 NSARM RG 1 vol. 209, p. 270.

36 Another example is Henry Sibley's case: NSARM RG 1 vol. 209, p. 270.

37 There were seven actions between Fairbanks and Martin tried at the inferior court; see NSARM RG 37 A2, pp. 183-184, 186, 194-205, 260-264, 295-303.

justices denied him his motion. He petitioned the council, which ruled he could sue Fairbanks again at the December Inferior Court. An appeal to the General Court would have been heard in October, so re-trial at the Inferior Court delayed his leaving two more months. Martin held the justices responsible.³⁸

Before Guy Fawkes Day in November 1752, Governor Hopson³⁹ outlawed parading and the carrying or burning of effigies to celebrate the holiday.⁴⁰ Despite the ban, several townspeople made effigies and paraded. Blacksmith James Brennock, among others, got into a fight with the paraders. Following the melee, only Brennock and his allies were charged with rioting and tried at the December Quarter Sessions. At trial, their counsel argued that his clients were only responding to a riot led by the prosecutors, who were acting in direct contravention of the governor's orders. He attempted to cross-examine the plaintiffs' witnesses in an effort to have them admit to breaching the governor's proclamation. He tried to call witnesses to provide evidence of the plaintiffs' behaviour on Guy Fawkes Day, including some witnesses who had not been present at the melee. The justices refused to allow the defence lawyer to present any of these arguments, questioning, or evidence.⁴¹

Cook's case would be the kindling to a fire fuelled by many complaints, but someone else would have to set it all ablaze: intentionally or not, David Lloyd, Cook's lawyer and clerk of the court, played this role.

The Justices' Affair

At the beginning of the day's sitting of the Quarter Sessions on December 27, 1752, Lloyd presented the court with a written account of the treatment he had received from the justices. Lloyd claimed he had shown fidelity to the court until this point, "more ... than on all circumstances considered could be Ever Expected from him." In exchange he had been poorly treated. As clerk for three years, he had been paid a total of £25, not enough to cover his "pen ink and paper or his bare attendance in Court." Lloyd had complained about his pay seven weeks earlier, without success. He hinted of suffering several other abuses at the hands of the justices, writing:

[In Halifax,] detraction and scandal so much prevails where Integrity honesty or a good name are not always allowed to be props of Office.... [It was thus] not prudent to submit his Character to the discussion of his Enemies, Judging it more proper to stop staff in hand until he hears who would accuse him or until he knows whether he is not to be gratified for his service before he proceeds further in the business of

38 NSARM RG 37 A2, *Martin v. Fairbanks*; RG 1 vol. 209, pp. 212, 268-269.

39 Peregrine Hopson replaced Edward Cornwallis as governor in the late summer of 1752.

40 On state disapproval of Guy Fawkes celebrations in England by mid-century, see James McConnel, "Remembering the 1605 Gunpowder Plot in Ireland, 1605-1920," *Journal of British Studies*, vol. 50 (October 2011), p. 873. On the limitations on its celebration in New England in the eighteenth century, see James Sharpe, *Remember Remember: A Cultural History of Guy Fawkes Day* (Cambridge, MA: Harvard University Press, 2005), pp. 141-145.

41 NSARM RG 1 vol. 209, pp. 269-270, 286-289.

the Sessions. For that his office has been attached with great trouble little profit and at this time less reputation.⁴²

After reading his complaints out loud, Lloyd presented the court with a copy, sent another copy to the governor and council, and withdrew his services as clerk.

Justices Morris, Monk, Dupont, and Bourne submitted a defence to the council two days later. They argued that Lloyd's declaration of his previous fidelity effectively asserted that the justices' recent behaviour had become "so particularly base or unlawfull [*sic*] as to absolve him from his fidelity." The justices protested that Lloyd had libelled them *and* the governor and council, as the only other officers of Nova Scotia. The justices were particularly insulted by the fact that Lloyd had sent his complaint to the council, because this action implied that the justices would not take his complaints seriously or present them fairly to the governor and council (who set the court fees charged to litigants that paid the clerk). They argued that Lloyd was using his memorial and strike to continue to fight Cook's case through other means. According to the justices, by making his memorial so soon after the final judgment in the case, Lloyd intended to "further inflame" the people of the colony and "to render the authority of the same court contemptable."⁴³

Inflame Lloyd did. On the same day the justices replied, the governor and council received a memorial supporting Lloyd and questioning the conduct of the justices in the cases of Cook, Martin, and Brennock, among others. Led by Joshua Mauger, the fourteen subscribers to this memorial included some of the other leading merchants in the colony like Edmund Crawley, John Webb, and Sebastian Zouerbuhler. Others signatories were less prominent, like Mauger's clerk Isaac Deschamps. Of the fourteen subscribers, all but William Nesbitt, attorney and one-time secretary to the governor, and perhaps Isaac Scott (about whom I can find nothing) were merchants or otherwise directly involved in trade in and out of the colony.

In their memorial, they claimed to have "perceived much irregularity and ... partiality in the proceedings of the Inferior Court of Judicature lately held." The subscribers asked the council to hold a public hearing into the court's conduct "for the discovery of truths which may tend to the publick Good of the province, and to the redress of such Grievances as we labour under."⁴⁴ The citizens' memorial left Councillor John Salusbury unimpressed, seeing it as just a continuation of Cook's complaints: "Cook makes a party – and impeaches the Justices.... Wonderful that the people should be of Cook's party, and yet all of them despise the Man."⁴⁵ Regardless of whether or not they shared Salusbury's opinion, the governor and rest of the council decided to hold a hearing into the matter on January 3, 1753.

That morning Mauger and the others presented a second memorial. This one was more detailed, laying out in nine articles a general criticism of the justices,

42 NSARM RG 1 vol. 209, pp. 260-263.

43 *Ibid.*, pp. 260-261.

44 *Ibid.*, p. 264.

45 Salusbury, *Expeditions of Honour*, p. 129.

specific complaints relating to Martin's, Brennock's, and Cook's cases, and (in the last article) a criticism of the King's Attorney Otis Little. The second memorial had 46 subscribers, self-identified as "the Merchants Traders and Principal Inhabitants of the Town of Halifax" and including all but Isaac Scott of the original memorial. Fourteen of these memorialists at some point called themselves merchants. Ten more were called traders, retailers, or truckmen and so engaged in commercial activity of some sort, although in terms of status and property only the traders were likely bourgeois. In addition to Nesbitt, the attorney Daniel Wood signed the second memorial. A number of artisans also signed the second memorial, including a blacksmith, two butchers, and three carpenters. Francis Martin signed both memorials, but Ephraim Cook, David Lloyd, and James Brennock did not, even though the second memorial relied on their experiences (Cook's clerk Cyrus Jannin did sign). The memorialists were clearly drawn from among the business elite of the community, with further signatories from the colony's professionals. Not all the memorialists were bourgeois, but the voice in the document came from that class in the colony. Subsequently the council minutes referred to the memorialists as "the inhabitants," differentiating them from the officers of the court, but also (perhaps unintentionally) implying a broad popular support for their position among Haligonians.

While the memorialists claimed to write on behalf of all Halifax, they did not have universal support. On January 9, 1753, "Sundry Merchants and other Inhabitants of the Town of Halifax" presented a counter-petition supporting the justices.⁴⁶ The names and number of subscribers to this counter-petition are not recorded, and it seems to have not been given much consideration in the subsequent hearings.

Four of the five justices entered a lengthy reply to the memorials. They began by asserting that, considering the "Dignity of their offices," they should not be required to reply to such a public but essentially extra-legal device as the inhabitants' memorial. They questioned the presumption of the memorialists to denote themselves "Merchants and principal Inhabitants," as they were "but by far the inferior Part in number and Consequence" of the total inhabitants of the colony. Fearing that, by their silence, "some designing Persons might possibly have construed to the said Justices disadvantage," the justices nevertheless responded to each of the inhabitants' complaints.

Of the four responding justices, Charles Morris, James Monk, and John Duport relied on government appointments for their livelihood, each having several appointments in the colonial state at the time. The fifth justice, Robert Ewer, was unique on the bench in December 1752 for making his living as a trader and merchant (in partnership with John Webb, one of the memorialists).⁴⁷ Ewer's name never appears listed in the justices' replies; in fact his name does

⁴⁶ NSARM RG 1 vol. 209, p. 277.

⁴⁷ Phyllis R. Blakeley, "Monk, James," in *DCB*, vol. 3; Akins, *Selections from the public documents of the province of Nova Scotia* (Halifax: Charles Annand, 1869), p. 293, and *History of Halifax*, p. 10. The justices' attorney Otis Little was born in Massachusetts, although from 1746 until 1749 he had been in London, advocating the colonization of Nova Scotia. After arriving in Halifax, Little relied on government commissions as well (J. M. Bumsted, "Little, Otis," *DCB*, vol. 3, p. 404).

not appear in the records of the Justices' Affair until February 28, when he was recommissioned.⁴⁸ Until he was removed from the commission, Cook had been the other representative of the bourgeois among the justices. Ewer was also the only one of the five justices in December 1752 that I can positively identify as coming to Halifax directly from England (as part of Cornwallis's original convoy).

Between January 10 and February 1 the council met 17 times to hear the evidence.⁴⁹ The council then made its rulings over four sittings. On February 19, 20, and 23 it issued rulings on the "Law and authorities," while on March 1, 1753, it issued its final ruling. The justices and Little responded to each of the articles in their written reply. The legal arguments in the affair turned on whether the source of the common law and legal practice in Halifax was England or Massachusetts. Yet the affair was about deeper strains in the community rather than the place of origin of settlers or their ideas of law.⁵⁰ It served as cover for a conflict between the leaders of the colony's merchants and the people in public office. The Justices' Affair, like Power's prosecution for illegal trading, draws attention to the position and legal expectations of Halifax's merchant class and the willingness of the colony's government to meet these expectations. The bourgeois' memorials and justices' reply forced the governor and council to address the quality of law available in the colony.

The broad first article of the second memorial has received the most attention from scholars.⁵¹ It was a critique of the justices' apparent reliance on Massachusetts law, rules, and practices:

[G]reat countenance and encouragement hath been frequently given by the said Judges to introduce the Laws and practice of the Massachusetts into the Court of Common pleas in this province which Laws however good and beneficial they may be to the Inhabitants of the Massachusetts yet we conceive are injurious and detrimental to numbers of people in this Colony.... [these practices] influence the minds of such Jurymen who have been bred under the Massachusetts Law and tend to divide the minds of the people who we Conceive are to be governed by the Laws and practices of England and this Province Only.

The justices replied: "the Laws of the Massachusetts have never been by them at any Time given in Charge to the Jury, or made use of on any decision whatsoever as a Rule to determining the Cause of Proceedings in the said Court." They then called into question the legal knowledge of the inhabitants and asserted the importance of English common law in all of the North American colonies:

48 See Donald F. Chard, "Mauger, Joshua"; Lois Kernaghan, "Nesbitt, William"; and A. A. Mackenzie, "Zouberbuhler, Sebastian," all in *DCB*, vol. 4, pp. 525-529, 581-582, 780-781.

49 None of it is recorded in the council minutes nor discussed in other sources I could find about the Affair.

50 See Salusbury, *Expeditions of Honour*, p. 129. See more generally Brebner, *The Neutral Yankees*, pp. 15-17, for a discussion of conflicts between settlers from England and North America in Halifax's early years.

51 The longest discussion of it can be found in Barry Cahill, "'How Far English Laws Are In Force Here': Nova Scotia's First Century of Reception Law Jurisprudence," *University of New Brunswick Law Journal*, vol. 42 (1993), pp. 115-116. See, by contrary example, MacNutt's description in *The Atlantic Provinces: the courts' "justices, unlearned but persistent, strove to enforce New England precedents, usually at the expense of those who came from elsewhere"* (p. 55). Here MacNutt accepts the memorialists' position completely and is wrong.

“[T]he Libellers are utterly ignorant of the Rules and Practices of the Courts in New England for that in most points they are exactly Conformable to the Practice of his Majesty’s Courts at Westminster and the Common Law of England is in Force there as well as in all His Majesty’s Plantations in America.” Neither side was completely correct in its assertions.

Monk and Morris had lived in Massachusetts prior to coming to Halifax, although Monk was born and raised in England. I cannot determine John Duport’s or William Bourne’s origins.

As the subsequent articles demonstrated, the memorialists seemed to have had little accurate knowledge as to which laws, rules, and practices were North American, and which English, in origin. The justices’ assertion of the congruence of the rules and practices of New England and Westminster is generally accurate. Yet there were several specific differences, and in some cases, such as in appeals, Nova Scotia followed New England practice that was distinct from England.⁵²

Some evidence suggests that the memorialists may have been oppressed by the courts. In 1752, the signatories to the second memorial disproportionately had their actions abated or dismissed by the justices.⁵³ Abatements and dismissals occurred when errors in law made by the plaintiff ended an action without trial. Although abatements and dismissals did not form part of the memorialists’ argument, the successful use of these procedures against their actions might have added to the sense that the justices were aligned against them. The inhabitants did not necessarily want English legal rules enforced instead of any Massachusetts (or other New England) legal rules imported to Halifax. They wanted the justices to enforce legal rules that would help the memorialists’ own cause. By smearing the legal decisions against them as contrary to English law and following that of New England, the memorialists were attacking Morris and Monk in particular without directly asserting that they were partial against the bourgeois and their allies.

The second article focussed on Francis Martin’s case and alleged that the justices compelled Martin to postpone his plans to leave the colony. The justices asserted that they were following the council’s rules for appeals, which stated “that no appeal from the County court to the General Court be granted for any sum less then [*sic*] five pound.”⁵⁴ Despite the memorialists’ first article denouncing New England law, Martin’s expectation that he could appeal at all relied more on North American practices than English ones. English practice required the use of the writs of certiorari or error to receive a re-hearing of a case, and both

52 For a discussion of differences between Massachusetts and England, see, for example, William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, MA: Harvard University Press, 1975) pp. 8-10, 30; on Connecticut and England, see Bruce Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 1987), pp. 86, 127-128. This issue is taken up several times in William E. Nelson, *The Common Law in America*, vols. 1 and 2 (New York: Oxford University Press, 2008 and 2013).

53 The memorialists were plaintiffs 83 times in 1752, accounting for 14 per cent of the 595 actions that year. Of these, 35 actions were abated in 1752, eight times (23 per cent) when one of the memorialists was a plaintiff; 23 actions were dismissed, five times (22 per cent) when one of the memorialists was a plaintiff. Memorialist defendants only successfully abated one action, and no actions against them were dismissed.

54 NSARM RG 1 vol. 209, p. 234; the rule was adopted by the governor and council on December 13, 1749 (NSARM RG 37 hx vol. A).

turned on demonstrating problems with justices' actions in law. In the American colonies, appeals were effectively new trials on the matter when one party felt the ruling was wrong. If anything, the inhabitants wanted to see more, not less, Massachusetts influence on the law insofar as it offered them easy rights to appeal to a higher court.⁵⁵

Article three dealt with the Brennock riot prosecution and is an example of the memorialists essentially asking for a new, local set of rules. The inhabitants maintained that, by refusing to allow Brennock and his co-defendants to cross-examine the prosecutor's evidence or present their own witnesses, the justices had been unfair and ensured conviction. The justices claimed that they allowed all defendant examinations of the prosecution up to the point where the defendants attempted to compel the prosecution's witnesses to "accuse themselves," which "they had lawfull authority for refusing." As for the defendants' own evidence, a counter-accusation of prosecutor criminal behaviour was not a sufficient defence.⁵⁶ It is possible that the justices showed partiality in applying the rules more strictly to Brennock than in other cases, but their refusal to accept counter-accusation as a defence seems consistent with acceptable English practice. Finally, those witnesses not present at the riot may, by the mid-1700s, have been considered hearsay witnesses.⁵⁷

The next four articles in the inhabitants' memorial all dealt with Cook's trial and imprisonment in December. First, they maintained that, following Cook's imprisonment for contempt of court, the trial continued without a defence, which, they asserted, led to his conviction. Second, the inhabitants claimed the private proceedings for determining Cook's punishment for contempt were "high and Arbitrary proceedings of the said Justices [and] are a great and notorious violation of the rights and liberties of the King's subjects and have an apparent tendency to discredit and ruin this Colony and are therefore great grievances." Third, the inhabitants accused Morris and Monk of convincing attorney Little to feign an illness to delay Cook's trial, inserting names of their choosing at the top of the list of jurors for the trial, browbeating Lloyd, and refusing to hear his motions. Fourth, in declaring during the trial Cook's commission as JP "invalid and not good," Morris was accused of derogating a commission granted by the king via the

55 See Mary Sarah Bilder, "The Origin of Appeal in America," *Hastings Law Journal*, vol. 48 (1996-1997), pp. 924-927, 943-946.

56 J. M. Beattie, *Crime and the Courts in England 1660-1800* (Princeton: Princeton University Press, 1986) pp. 346-352, 359-360.

57 For a contemporary discussion of hearsay, see Geoffrey Gilbert, *The Law of Evidence [...]* (Dublin: Sarah Cotter, 1754), p. 107. According to John Langbein, hearsay witnesses were allowed when their testimony "supplemented sworn testimony," but John Beattie has suggested that "by the middle of the [eighteenth] century judges more commonly prevented its being given at all." See John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003), p. 238; Beattie, *Crime and the Courts*, p. 364. In writing of the seventeenth century trial, J. H. Baker suggests that "hearsay evidence was often admitted." See Baker, *An Introduction to English Legal History, Fourth Edition* (London: Butterworths LexisNexis, 2002) p. 510. See also Stephen Landsman, "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England," *Cornell Law Review*, vol. 75 (1990), pp. 564-572; Frederick W. J. Koch, "The Hearsay Rule's True *Raison d'Être*: Its Implications for the New Principled Approach to Admitting Hearsay Evidence," *Ottawa Law Review*, vol. 37, no. 2 (2005/2006), pp. 249-289.

governor and interfering with the governor's royal prerogative.⁵⁸ These actions, in the words of the memorial, were "glaring stains of Ingratitude and disrespect to the Conduct and memory of our said late Worthy Governor."⁵⁹

The justices defended themselves on every count. Cook's removal and imprisonment was necessary: "the Behaviour of the said Cook during the course of the said Tryal was abusive, and he was guilty of such Insolence to the Court, and used the Justices with such Contempt that it was impossible to proceed on the tryal whilst he was present." In any case, Lloyd continued to defend Cook, "without once intimating that the Cause would suffer by Mr Cook's Absence or ever moving that it might be postponed." They continued that, once Cook had been found in contempt of court, they had a "right" to "private Consultations in order to deliberate and resolve ... in such manner as they Judge consistent with Law and the nature of the offence," and that their decisions were announced in court. Further, the justices criticized Lloyd's "Great Breach of Trust" in revealing the content of the discussion. The justices were correct that they could meet in camera to determine punishment, but their meeting had amounted to a hearing with arguments made by Lloyd at least, and such hearings were usually public.

The justices replied to the specific criticisms made of Morris and Monk by attacking the memorialists. Was it the justices or their accusers, the justices asked, who "have been the disturbers of the Peace of this Colony ... have laboured to pervert the minds of the people from Obedience to his Government and Authority"?⁶⁰ Their remark may have had rhetorical value, but it did not amount to a refutation.

The eighth article in the memorial continued the specific criticism of Morris, accusing him of declaring William Bourn a justice of the quorum before the governor had done so.⁶¹ A justice of the quorum had to be present for the Inferior Court or Quarter Sessions to sit at trial. The justices, with some sarcasm, replied that this was an event dreamed up "by their Extreme faithful Clerk to disturb the public peace and cause Difficulties without any real cause." If the justices took it upon themselves to include Bourne in the quorum when his commission did not, then the justices could have forced the governor to do something he had not intended to do just to maintain the impression of coherent governance. If, as they maintained, the most they could have done was include him in the quorum prematurely but in compliance with the governor's wishes, then the matter was less serious.⁶²

In their final article, the memorialists turned their attention to King's Attorney Otis Little. They claimed he was frequently tardy or absent from court, resulting in long continuances and "a great loss and hurt to numbers of working people and

58 NSARM RG 1 vol. 209, pp. 271-272. During Cook's prosecution, Little apparently argued that Cornwallis had no right to grant a commission to Cook in the first place. Morris and Monk allowed the argument.

59 NSARM RG 1 vol. 209, pp. 272-273.

60 *Ibid.*, p. 297.

61 *Ibid.*, p. 273.

62 *Ibid.*, p. 298.

other Inhabitants.”⁶³ The reply did not attempt to explain Little’s conduct. Instead, it criticized the critics, particularly the other lawyers:

[The justices] are not conscious of delaying the Court Voluntarily but that some of them from their employment as Justices were often assigned to give attention thereto out of Court[.] Others have been sometimes prevented by their private avocations[.] And they have shown no distinction between Mr Little and the other Attorneys unless in the King’s Causes. That the principal occasion of business being delayed has proceeded from too much lenity shown to the Parties who have either not been prepared with their Witnesses And other proofs in session or from want of Knowledge and Experience in the Law in some of the attorneys who have protracted and unnecessarily lengthened out their debates.⁶⁴

The justices’ defence of Little follows the tone of the rest of their reply: restating their dedication and legal knowledge and blaming the memorialists for any problems in the administration of justice. The legal arguments presented by the inhabitants were weak and often wrong, as the justices pointed out. However, the contemptuous tone of the justices probably did nothing to assure the memorialists or, more importantly, people watching the affair that the administration of the courts was just.

The Council’s Ruling and the Fall-out

The council found completely for the justices, ruling that the inhabitants had not proven any of the articles of the memorial. The council declared that Halifax legal practice conformed to English law and was free of Massachusetts influences. Francis Martin had failed to explain his position to the justices, and so they had done as necessary and applied the available law and practice. The justices’ explanations for the Brennock case were accepted. The council determined there was sufficient ground for Cook’s imprisonment for contempt; the irregularity in determining Cook’s punishment and bond for his December contempt was its leniency and not the *in camera* proceeding. The council went so far as to note that some legal references made by the inhabitants’ lawyer were “falsly quoted, not found, misapplied or not material.” For the remaining complaints about Morris, Monk, and Little, the council either accepted the justices’ defences or asserted that no matter of complaint had been clearly established or proven.⁶⁵

In its ruling, the council was critical of the colony’s bar as a whole. The council asserted that no lawyers had been browbeaten by the bench in the past. They urged the judges to “never suffer any Lawyer to insult or trifle with their Authority.” They warned the attorneys that any lawyer who abused the judiciary would be treated severely in the future.⁶⁶ The council thus underlined the power and authority of the justices over the attorneys in the court room.

⁶³ *Ibid.*, p. 273.

⁶⁴ *Ibid.*, p. 298.

⁶⁵ *Ibid.*, n.p. (between pp. 308 and 390), February 19, 20, and 23, 1753; March 1, 1753.

⁶⁶ NSARM RG 1 vol. 209, pp. 389-392.

Following Mauger's division of the colony's people in his intervention in the Power case, in their ruling the council characterized the inhabitants as coming from two groups:

[A]mong the Complainants [are] several gentlemen whose property and extensive dealings in this colony may naturally give them very real concern and interest in the Conduct of the Court of Law and Justice and from whose good behavior we have reason to think have no intentions but what as are upright and no views but from the Prosperity of the Settlement and to the Remonstrances from such men our Ears will always be open.

The second group of people among the memorialists were

of a very different sort, some whom we can scarcely suppose to have been able to have formed the least Judgment of the matter lately Exhibited[,] some who have scarce any Connection with this place, and some others who we cannot but think would have been more properly Employed in the pursuit of their own occupations and we can never suppose that the latter became Concerned through the influence of the former we fear it too much occasioned by an inattention to their own affairs, a thing so fatally precedent in this Town and which never fails to be the source of much publick disturbance, much private calamity.⁶⁷

The council refrained from identifying which memorialists they classified in each group. Nevertheless, the council did affirm that some people in Halifax had (and deserved to have) a greater influence than others. The dividing line between the two is class. The former were wealthy, industrious, and concerned for the colony: the very colonial bourgeois led by Mauger. The latter were the transient or idle who were incapable, unconnected to the colony, or of marginal economic power, all of whom were far from taking leading roles in the affair. It was appropriate for the colony's bourgeois to be concerned with the practice of justice in the colony; for others, such complaints were not acceptable. The thrust of the inhabitants' memorial was the partiality of justice available in Halifax. By dividing the memorialists into groups worthy and unworthy, members of the council replicated partiality even as they denied its existence. The council did not go so far as to state that justice was only for those who deserved it. Nonetheless, those colonists with greater status were certainly identified as being more deserving than others.

Despite the ruling, the ultimate victory of the memorialists became clear as the governor with his council addressed the composition of the colony's bench. First, on February 28, before the council issued its final ruling, the governor expanded the size of the bench by declaring that all members of council, men named in the General Commission, and those appointed to be in charge of the settlements at Annapolis Royal, Chignecto, Minas, and Pisiqid were to be deemed to be justices of the peace. Then, on March 6, just five days after the final ruling on the affair, the governor recommissioned Charles Morris, James Monk, John Dupont, Robert Ewer, and William Bourne as justices of peace and judges of quorum, underlining

⁶⁷ *Ibid.*, p. 390-391.

his faith in them. At the same time, however, Joseph Scott and Sebastian Zouberbuhler were appointed as both justices of the peace and judges of quorum while John Crawley, James Creighton, and Joseph Gerrish were appointed justices of the peace.⁶⁸

Zouberbuhler had signed both memorials, while Crawley was likely brother to Edmund Crawley, another signatory of both.⁶⁹ Gerrish and Zouberbuhler were merchants and leading members of the colony's bourgeois, while Crawley appears to have been involved in trade with his signatory brother. Of the new appointees Crawley came from England, as, it appears, did Creighton and Scott.⁷⁰ Gerrish and Zouberbuhler seem to have come via New England.⁷¹

Thus, of the ten justices sitting in Halifax as of March of 1753, three or four were merchants and three were either memorialists or closely connected to them. Reflecting the claimed division between England and New England, four justices were either born in or had lived in New England; four likely came directly from England. The memorialists now had more allies or men with similar backgrounds on the enlarged bench than before, diluting the influence or importance of Morris and Monk. In summary proceedings, plaintiffs could choose to go to a justice aligned to them politically. At Quarter Sessions and in the Inferior Court of Common Pleas, all the justices who attended comprised the bench. By doubling the number of commissioned justices the governor may have deprived the old justices of a consistent majority. Morris, Monk, and the other justices of late 1752 won on the face of the council's ruling, but their reward was to be joined on the bench by men associated with their accusers.

The individuals involved won and lost too. Within a little more than a year, both Monk and Little were forced to defend themselves again. Thomas Power was imprisoned for unrelated acts sometime in 1752. While Power was in prison, Monk played a role in a scheme to get Power's wife to sell the family's property. The council found him "very unworthy [of] the character a Magistrate ought to support," although he was allowed to keep his commission. Otis Little was accused of demanding £10 from Power's wife (£5 in advance, with £5 to be paid after the trial), presumably to ensure acquittal. On April 3, 1753, the council held hearings again and ruled the case was "as fully proved as the nature of the case would admit." Little's commissions as Advocate General of the Vice Admiralty and King's Attorney were revoked, and he was forbidden to represent litigants in the General Court (soon to be the Supreme Court) except in direct appeals from the Inferior Court of Common Pleas. In 1754, Little left the colony for the West Indies and died soon after. William Nesbitt, signatory of both memorials in the Justices' Affair, replaced Little in his appointments.⁷² Morris fared better,

68 *Ibid.*, pp. 392-393.

69 NSARM MG 100, vol. 127, no. 24, E. A. Crawley, "An Early Halifax Naval Family."

70 Joseph Scott may be the same as John Scutt, appointed to the bench in March 1752. Scutt/Scott did not participate in the December 1752 sessions. Akins, for example, assumed Scutt and Scott to be the same; see *History of Halifax*, p. 32.

71 Crawley, "An Early Halifax Naval Family"; Akins, *History of Halifax*, p. 160, and *Selections from the public documents*, pp. 729, 737; Gwyn, "Capitalists, Merchants and Manufacturers," pp. 192-195.

72 Bumsted, "Little, Otis"; John Doull, "The First Five Attorney-Generals of Nova Scotia," *Collections of*

continuing as chief surveyor as well as justice, sitting on the governor's council, and in the 1760s being made an associate justice of the supreme court. In the late 1750s, Morris managed to have Monk removed from the commission of justices of the peace and replaced by Morris's son as assistant surveyor general. Monk continued on in the colony, but now practised law privately.⁷³

On the merchants' side, Power disappears from the record soon after Little's removal from office. In 1754 a creditor from London and several local creditors sued Cook into oblivion, and he disappeared from the colony. Mauger remained in the colony until 1760, when he moved to England and eventually took up a seat in the House of Commons. His business continued in Halifax, however, and his clerk (and fellow memorialist in 1752) Isaac Deschamps eventually became a local leader in his own right and was appointed associate judge of the Supreme Court in 1770.

A revealing coda to the affair is found in Governor Charles Lawrence's proclamation of January 11, 1759, aimed at attracting emigrants from New England to the recently cleared Acadian lands. At one point the proclamation read "The Government of Nova Scotia is constituted like those of the neighboring colonies.... The Courts of Justice are also constituted in like manner with those of the Massachusetts, Connecticut and other Northern colonies." Brebner described this passage as "distinctly disingenuous inasmuch as Lawrence and Belcher had fought hard to keep the government of Nova Scotia unlike that of New England" by delaying calling an elected assembly.⁷⁴ Brebner's description may be apt. However, only six years after the Justices' Affair, the colony's governor was describing its courts as similar to those of New England. This turn-about was not so much a vindication of the memorialists' claims as it was exemplary of how the terms of the complaint were mutable depending on the circumstances. The sources of the law were not as important as the effects of the law as enforced.

Conclusion

The merchant-bourgeois had won. By rejecting Governor Cornwallis's authority in legal disputes, Ephraim Cook put pressure on the governor and council to establish a regular court system. In the flashpoints of Thomas Power's trial for illegal trading and the Justices' Affair, Joshua Mauger and the merchant community had asserted their interests in the practice and enforcement of law in the colony: in both cases the initial rulings did not seem to favour the merchants' position, but the fall-out made their interests and themselves a larger part of the law in practice. The disputes described here were about power in the colony, and the merchants aggressively established their power as both a group to be considered in governing and as players in the government of the colony. They expected several things of the law and received them: they wanted regular courts, they wanted the

the Nova Scotia Historical Society, vol. 46 (1925), pp. 35-36; Lois Kernaghan, "Nesbitt, William," *DCB*, vol. 4, p. 581.

73 Phyllis R. Blakeley, "Monk, James" and "Morris, Charles," *DCB*, vol. IV, John Bartlett Brebner, *New England's Outpost: Acadia before the Conquest of Canada* (New York: Columbia University press, 1927), pp. 245-247.

74 Brebner, *Neutral Yankees of Nova Scotia*, p. 22.

government to consider their interests in its policy of law enforcement, and they wanted the bench to have merchants or their allies on it. Although the governor and council supported the justices in the Justices' Affair, they did not wish to do so at the expense of completely alienating the colonial merchant elite; after all, "to the Remonstrances from such men our Ears will always be open."

Mauger wanted a law that understood the needs of merchants and respected those needs. Cook may not have been as articulate in his needs, but he too resisted the imposition of legal authority that he did not recognize. Power was to Mauger, and probably to others, just one more victim of the zealous anti-business government. However, if the colonial state continued to make victims of people like Power or Cook, Mauger contended, the entire colony would fail. Its future, to his mind, lay in its merchant bourgeois. In these struggles Mauger and the other bourgeois essentially demanded a bourgeois law. Bourgeois law in Halifax was a civil law that favoured creditor-plaintiffs (as the merchants often were), that limited defendant practices like abatement (which almost disappeared after 1752), and that made collection against property easy. Such practices were not always against the interests of others in the colony: in a community with little hard currency, labourers, artisans, farmers, retailers, and tavern-keepers all had to extend credit. The merchants were not simply fighting for their supremacy over everyone else. They already had that economic power: this struggle was to ensure that they would not be hurt by the practice of law in the colony. They won, laying the legal foundation of the Maritime merchantocracy.