

# Courts and Business Activity in Late 19th Century New Brunswick: A View from the Case Files\*

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## Courts and Business Activity in Late 19th Century New Brunswick: A View from the Case Files\*

"IT SEEMES [SIC] STRANGE," wrote Dalhousie businessman Thomas Kenny to his colleague John Young of Tracadie in 1879, "that after ten years dealing that you should place my account in a Lawyer's hands for collection. I never feed [sic] a Lawyer in my life and I don't want to do it now."<sup>1</sup> Kenny clearly resented being brought before the law by Young. He did not want to go to court. And he had reason to be reluctant, since not only did he have every chance of losing, but, in that event, he would also be required to pay the costs incurred by the plaintiff. These were, indeed, the very reasons why Young would choose to launch a legal action. The courts offered him a means of collecting an outstanding debt. Yet his decision to go to court was probably not one he took lightly. In this particular case, it led to the severing of a long-standing business association. The relationship between business activity, litigation and the courts was complex in nature, influenced by both the business and judicial environments. This article explores one aspect of this relationship. Through an examination of the actions of John Young and others, it seeks to shed light on the role played by the courts in daily or routine business activity in the latter part of the 19th century, and to further our understanding of the dynamics of business relations during the period.

Business and legal historians alike have paid little attention to the daily interaction between business and the courts in the Canadian context. Business history has traditionally been viewed within the framework of the staples thesis and only in the last few decades has it emerged as a full-blown field in Canadian historiography.<sup>2</sup> Many areas of the field remain largely unexplored and the judicial dimension of business activity is one of these.<sup>3</sup> Recent syntheses by Bliss and by

\* The author would like to thank Wendy Johnston and the anonymous readers of the journal for the useful comments on a first version of this paper.

1 Thomas Kenny to John Young, 9 October, 1879, *Young vs. Kenny*, 1879, Gloucester County Court Records, RG 6, RS 432, A, Case files, Box 1809-1886, Provincial Archives of New Brunswick.

2 For recent appraisals of the field, see Graham Taylor, "Writing About Business", in John Schultz, ed., *Writing About Canada - A Handbook for Modern Canadian History* (Scarborough, 1990), pp. 121-43 and Michael Bliss, "Canadian Business History at the Crossroads", *Business Quarterly* (1992).

3 It remains, according to Ben Forster, "an undeveloped area". See Ben Forster, "Business and Economic History", in Doug Owram, ed., *Canadian History: A Reader's Guide - Volume 2: Confederation to Present* (Toronto, 1994), p. 146.

Taylor and Baskerville barely touch on the subject.<sup>4</sup> One reason for this neglect is that business historians have not devoted much attention to themes that lead to an examination of the law. For example, management strategies or distribution and retailing, two aspects of business activity that are likely to involve legal issues, have not attracted much interest among Canadian business historians.<sup>5</sup> Most legal historians, following the model established by J. Willard Hurst, have focused on the broader question of the relationship between law and the economy.<sup>6</sup> Thus, for example, in his pioneering work, R.C.B. Risk, in the best Hurstian tradition, tried to measure the impact of legal developments on the economy.<sup>7</sup> This is also the main focus of most of the essays in the multi-volume series *Essays in the History of Canadian Law*, including those in the volume that deals specifically with lawyers and business activity.<sup>8</sup> Yet topics like freedom of contract or nuisance jurisprudence were not among the routine concerns of most business people at the end of the 19th century. Rather more important to them were questions surrounding such issues as inventory management, relations with suppliers and clients and accounting procedures. The same thing can be said about the courts. Their routine business very rarely involved major cases that would eventually contribute to the wealth of jurisprudence, but, rather, consisted almost entirely of fairly simple cases about debts, property or personal matters. Historians William Wylie and Evelyn Kolish have shown, sometimes incidentally, the interplay between business activity and the courts at this daily, routine level in the 19th century.<sup>9</sup> Nevertheless, the portrait that emerges from their work remains sketchy. They do not specifically discuss the extent to which the common-law courts were used at a routine level by the business community, nor how they contributed to the pursuit of daily business interests. The role of common-law courts in business matters at the daily and routine level needs to be examined more closely for what it can reveal of the

4 See Graham D. Taylor and Peter A. Baskerville, *A Concise History of Business in Canada* (Toronto, 1994) and Michael Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto, 1987).

5 Taylor, "Writing About Business", p. 132; Forster, "Business", pp. 144-7. The field is starting to generate activity. See, for example, Sylvie Taschereau's work on independent grocers' use of credit as part of a business strategy. Sylvie Taschereau, "L'arme favorite de l'épicière indépendante : Éléments d'une histoire sociale du crédit (Montréal, 1920-1940)", *Journal of the Canadian Historical Association - Revue de la Société historique du Canada*, 4 (1993), pp. 265-92.

6 See J. Willard Hurst, *Law and Economic Growth: The Legal History of the Wisconsin Lumber Industry* (Cambridge, MA, 1964).

7 See, for example, R.C.B. Risk, "The Law and the Economy in Mid-Nineteenth-Century Ontario", *University of Toronto Law Journal*, 27 (1977), pp. 403-38.

8 See Carol Wilton, ed., *Essays in the History of Canadian Law - Vol. IV: Beyond the Law: Lawyers and Business in Canada, 1830 to 1930* (Toronto, 1990).

9 William N.T. Wylie, "Arbitrers of Commerce, Instruments of Power: A Study of the Civil Courts in the Midland District, Upper Canada, 1789-1812", Ph.D. thesis, Queen's University, 1980; Evelyn Kolish, "Some Aspects of Civil Litigation in Lower Canada, 1785-1825: Towards the Use of Court Records for Canadian Social History", *Canadian Historical Review*, LXX, 3 (1989), pp. 337-65.

workings of the business world, and of the function of the courts in society.

This article focuses on business people, debts, civil suits and the common-law courts in Gloucester County, New Brunswick, during the final decades of the 19th century. It deals with three dimensions of the relationship between the courts and business activity: the role that common-law courts played in business activities, the way in which the courts carried out that role, and the way in which the courts' role evolved during the final decades of the 19th century. This study aims to demonstrate that common-law courts were indeed a fixture of the business environment during the period, but that their role consisted mainly of dealing with minor debt-collection cases. Furthermore, it suggests that this function appears to have been on the wane by the last decade of the century. Sources dictated the choice of Gloucester County. Both Circuit and County Court files are accessible for the closing decades of the 19th century, which is not the case for most counties in New Brunswick. To be sure, Gloucester was not representative of the province as a whole at the end of the century. It was peopled mostly with Acadians.<sup>10</sup> In addition, the population increased more rapidly there than in New Brunswick as a whole, from 18,810 inhabitants in 1871 to 27,936 in 1901.<sup>11</sup> Moreover, in contrast to the urban centres of Saint John and Moncton, industrialization had barely touched its economy.<sup>12</sup> Yet the regional differences should not be over-emphasized. Business people probably operated in a similar manner, be it in Gloucester or in Saint John. And common-law courts should have served primarily the same purpose regardless of their location. What can be learned from the Gloucester case is of value. At the very least, the findings point to the need for further investigation of the relationship between business and the courts.

Gloucester's business community was small and, for almost two decades, did not expand. The *Mercantile Agency's Reference Books* listed about 100 businesses and business people in the county during the 1870s and early 1880s. This number climbed to approximately 120 at the turn of the decade, reached almost 150 in 1895 and more than 165 in 1899.<sup>13</sup> The local business community was mainly composed of non-Acadians. Acadian participation was nevertheless on the rise as the century drew to a close. It increased from approximately 16 per cent in the 1870s and early 1880s to more than 40 per cent in the 1890s.

Business activity in the county revolved mainly around fishing, forestry and retailing. Agriculture, although it employed the major part of the workforce, was

10 Sixty-five per cent of the population was of French origin according to the 1871 census. This proportion rose to 80 per cent by 1901. See Canada, Department of Agriculture, *Census of Canada, 1871*, vol. I, table III and *Ibid.*, 1901, vol. I, table XI.

11 Gloucester's population increased by 49 per cent between 1871 and 1901, New Brunswick's by 16 per cent. See Canada, Department of Agriculture, *Census of Canada, 1871*, vol. I, table I and *Ibid.*, 1901, vol. I, table VII.

12 On the local economy, see Donald J. Savoie and Maurice Beaudin, *La lutte pour le développement : Le cas du Nord-Est* (Sillery and Moncton, 1988), pp. 21-43.

13 See *The Mercantile Agency Reference Book (and Key) for the Dominion of Canada*, Montréal, Dun, Wiman & Co., July 1873; *Ibid.*, July 1877; *Ibid.*, July 1882; *Ibid.*, July 1887; *Ibid.*, July 1890; *Ibid.*, July 1895; *Ibid.*, July 1899.

practised mostly on a non-commercial and sometimes part-time basis.<sup>14</sup> Fishing was the predominant sector of the local economy. Gloucester's fishing industry accounted for 18 per cent of the provincial output in 1881 and 26 per cent in 1901.<sup>15</sup> It was dominated by large concerns such as Charles Robin & Co. or William Fruing & Co. Both these companies dealt in cod, the staple of the local economy.<sup>16</sup> This industry appeared to be healthy during the final decades of the 19th century, as the quantity of fish brought to shore more than tripled between 1881 and 1901.<sup>17</sup> Data on the forest industry is sparse, but it also played an important role in the local economy. Many farmers, and even fishermen, depended on it for seasonal and supplemental employment. One entrepreneur, Kennedy F. Burns, through a succession of companies, Burns, Adams & Co., K.F. Burns & Co., Saint Lawrence Lumber Co., was the forest industry's driving force for much of the late 19th century.<sup>18</sup> In comparison to the fishing and forest industries, the retail sector was limited in scope. There were only a few large merchants, most of whom operated from Bathurst, the County seat. Overall, Gloucester's business activity and its business community thus resembles what one could find in most rural regions of the country during the same period: a resource-based economy and a small indigenous business community, mainly geared towards the local market.

Data for the study were drawn from the records of two locally active common-law courts. The Circuit Court was a court of general jurisdiction.<sup>19</sup> All controversies within the bounds of legal limits and remedies could be brought before it, regardless of the disputed amount or the damages sought. Moreover, it was the only court that had jurisdiction in eviction cases. The Circuit Court judges were drawn from among the members of the Supreme Court of New Brunswick. Each year, a new judge was assigned to the Gloucester Circuit. Until 1894 Circuit Courts held audience once a year, and thereafter twice a year. The other common-law court examined, the Gloucester County Court, had limited jurisdiction in the following

14 Nicolas Landry, "L'exploitation agricole à Caraquet : Étude basée sur le recensement de 1861", *Acadiensis*, XX, 2 (Spring 1991), pp. 145-57.

15 See Canada, Parlement, *Documents de la session* (1882), no 5, "Quatorzième rapport annuel du ministère de la Marine et des Pêcheries...1881", app. B, pp. 72-3; *Ibid.* (1902), no 21, "Trente-quatrième rapport annuel du ministère de la Marine et des Pêcheries, 1901", app. A, pp. 127-9. On the fisheries in one part of the County, see Nicolas Landry, *Les pêches dans la péninsule acadienne, 1850-1900* (Moncton, 1994).

16 See Nicolas Landry, "La pêche de la morue dans la Péninsule acadienne au XIXe siècle", *La Société historique acadienne. Les Cahiers*, 20, 1 (janvier-mars 1989), pp. 4-40; Rosemary E. Ommer, "The Truck System in Gaspé, 1822-1877", *Acadiensis*, XIX, 1 (Autumn 1989), pp. 91-114.

17 Rapport annuel du ministère des Pêcheries (1881), app. O, pp. 134-5; *Ibid.* (1901), app. A, pp. 127-9.

18 On Burns and the region's forest industry in general, see Raymond Léger, "L'industrie du bois dans la Péninsule acadienne (Nouveau-Brunswick) de 1875 à 1900", *Revue d'histoire de la Société historique Nicolas-Denys*, XVI, 2 (mai-août 1988), pp. 1-88.

19 *Consolidated Statutes of New Brunswick* (1877), c. 22. See also J.A. Clarence Smith, Jean Kerby, *Le droit privé au Canada : Études comparatives* (Ottawa, 1987), pp. 100-1, 105-6, 108-9, 113, 116-7.

areas: contract law, where the sum demanded did not exceed \$200; tort law, within a \$100 limit; and in any actions on bail bonds, whatever the penalty or the amount sought.<sup>20</sup> These pecuniary limits were doubled in 1882. The County Court was also headed by a professional judge, who held court three times a year, in March, July and November. Circuit Court records yielded 162 cases between 1873 and 1899; County Court archives, 797 cases. Unfortunately, each series has its shortcomings. For the Circuit Court, the fact that there is no locally generated plaintiffs' book led to an underestimation of the number of cases, since the documents used, declarations and judgment books, do not account for every case brought before the court. For the County Court, the lack of a judgment book hinders the reconstruction of cases, thereby limiting analysis of the results.<sup>21</sup>

Gloucester common-law courts frequently dealt with business-related matters. The type of disputes processed by the Circuit and County courts attest to this (see Table One). Debt and contract cases accounted for more than half of the 145 documented cases heard by the Circuit Court between 1873 and 1899. Property matters — a nonjudicial category encompassing actions of eviction, conversion, replevin, trespass — followed in importance, comprising 40 per cent of documented cases.<sup>22</sup> Personal matters — assault, injury to reputation, false arrest, malicious prosecution — were the least important aspect of the court's activity, comprising less than six per cent of documented cases. The domination of debt and contract cases was even greater in the County Court. They made up 92 per cent of the 407 recorded cases heard before the Court between 1873 and 1890, the only period for which documentation allows such an analysis. Property and personal actions accounted respectively for four per cent and one per cent. Pecuniary matters thus clearly constituted a significant proportion of the disputes processed in the Circuit Court, and an even greater proportion of those processed in County Court — even if one takes into account the shortcomings that the categories used may have. Neither court appears to have had a broad social function during the last decades of the 19th century. As in the case of their counterparts in other places, the jurisdiction of these courts was narrow, at least in practice, dealing mostly with that limited

20 *Statutes of New Brunswick* (SNB), 30 Vict. (1867), c. 10, s. 8 and *Ibid.*, 45 Vict. (1882), c. 9.

21 All documents are located at the New Brunswick Provincial Archives [PANB]. For the Circuit Court, the references are: Supreme Court Records: Original Jurisdiction, RG 5, RS 42, series "de" [declarations] et "z" [unbroken bundles], 1873-1899; Supreme Court Records: Judgment Rolls, RG 5, RS 51, B/5-7, Indices, 1873-1899. For the County Court, see: Gloucester County Court Records, RG 6, RS 432, A, Case files, 1873-1899 (largely incomplete between 1890 and 1899); B/1, Plaintiffs' Book, 1873-1899; B/2, Defendants' Book, 1873-1899 and B/3, County Court Register, 1879-1899.

22 This classification was chosen rather the traditional one (debts/contracts, property, torts) because it is more revealing of the social function of courts. See Robert A. Silverman, *Law and Urban Growth: Civil Litigation in the Boston Trial Courts, 1880-1900* (Princeton, 1981), pp. 157-8. These categories are not watertight. As one anonymous reader pointed out quite correctly, replevin cases may not always merely be about property, but could also arise against a contractual background, if, for example, a major chattel had been conveyed to the defendant by a conditional sale or on hire purchase. This being said, the classification used does provide a general idea of the litigation pattern.

aspect of societal relationships that revolved around pecuniary matters.<sup>23</sup>

**Table One**  
**Category and type of disputes in the Circuit and County Courts of Gloucester, 1873-1899**

	Circuit N (%)	County N (%)
Debts	79 (54.5)	375 (92.1)
- <i>sum due (unknown nature)</i>	10	12
- <i>account, negotiable instrument</i>	61	331
- <i>salary and fees</i>	1	18
- <i>other/unknown</i>	7	14
Property	58 (40.0)	18 (4.4)
Persons	8 (5.5)	4 (1.0)
Other	0 (0.0)	10 (2.5)
Sub-total (Documented cases)	145 (100)	407 (100)
Unknown (Un-documented cases)	17	390
Total	162	797

Source: See note 21.

Although debt and contract cases do not necessarily stem from business activity *per se*, a great many did. It was, for example, an unpaid account that brought John Noonan and Peter Murray to the County Court courtroom in 1877. Noonan alleged that Murray owed him \$163.00 for blankets, cotton, flour, tea, boots, salt, tobacco and other merchandise he had sold to the defendant. The Court settled the issue in Noonan's favour in the same year, awarding him the amount sought and his

23 See Wayne V. McIntosh, "150 Years of Litigation and Dispute Settlement: A Court Tale", *Law and Society Review*, 15, 3-4 (1980-81), p. 829; Silverman, *Law and Urban Growth*, p. 62; Kolish, "Some Aspects", p. 351.

costs.<sup>24</sup> Overall, business-related disputes stemming from unsettled accounts or dishonoured bills of exchange and promissory notes accounted for about three quarters of the docket in the debt/contract category in the Circuit Court, and almost nine tenths in the County Court. Other types of debt/contract cases were of marginal significance. Salary, rent, board, contract and other disputes accounted for only a small fraction of cases. Both courts then, to varying degrees, were closely associated with business activities. The County Court, in particular, clearly specialized in debt collection. It was rarely called upon to intervene outside the business realm, to deal with private conflicts, family or social matters. Not unlike common-law courts in Britain between 1740 and 1840 or English County Courts during the same period, the Gloucester County Court served mainly as a debt-collecting instrument.<sup>25</sup>

The commercial and financial vocation of the two courts is further attested to by the fact that most users came from the business world (see Table Two).<sup>26</sup> In the Circuit Court, between 1873 and 1899, at least 101 cases originated with the business sector — merchants, banks and companies. That number represents 62 per cent of all cases, or 77 per cent of the cases in which the user's profile is known (N=131). Individuals with no business connections, professionals and organizations such as municipal councils or school boards accounted, in that order, for the remainder. The same pattern holds true in the County Court. Business litigants were responsible for 65 per cent of all cases brought before the court during the period 1873 to 1899. Furthermore, they made up 80 per cent of documented cases. Not surprisingly, merchants, banks and companies initiated most debt and contract cases in both courts. They did so in 94 per cent and 87 per cent of documented cases in the Circuit and County courts respectively. It is clear, then, that business litigants were, by and large, the main users of the common-law courts in Gloucester County.

24 *Noonan vs. Murray*, 1877, RG 6, RS 432, A, box 1877-1878, PANB.

25 Or as D. Sugarman and G.R. Rubin put it, "mere debt-collecting offices". See D. Sugarman and G.R. Rubin, "Towards a New History of Law and Material Society in England, 1750-1914", in Sugarman and Rubin, eds., *Law, Economy and Society: Essays in the History of English Law, 1750-1914* (Abingdon, U.K., 1984), p. 46. See also Clinton W. Francis, "Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840", *Northwestern University Law Review*, 80, 4 (1986), pp. 807-955, particularly at p. 810.

26 Court documents in civil suits do not contain a wealth of information on litigants. The plaintiffs' profiles were established through the linkage of the available data with 1871, 1881 and 1891 census manuscript schedules, and various business directories and credit-rating books. References for credit-rating books are given in note 13. The following directories were used: *Lovell's Canadian Directory for 1871* (Montréal, 1871); *McAlpine's New Brunswick Directory for 1889-1896* (Saint John, 1889-1896); *McAlpine's New Brunswick Directory for 1903* (Saint John, 1903).



**Table Two**  
**Profile of the plaintiffs in the Circuit and County Courts, 1873-1899**

	Circuit		County	
	All Cases N (%)	Debt Cases N (%)	All Cases N (%)	Debt Cases N (%)
Businesses and business people	101 (77.1)	59 (93.7)	516 (80.4)	280 (86.7)
- <i>merchants-retail</i>	50	31	229	122
- <i>merchants-wholesale</i>	14	11	127	78
- <i>merchants-unknown</i>	3	0	74	40
- <i>financial institutions</i>	6	3	17	11
- <i>fish companies</i>	17	6	28	18
- <i>forest companies</i>	10	8	32	7
- <i>manufacturers</i>	1	0	9	4
Individuals	28 (21.4)	4 (6.3)	95 (14.8)	31 (9.6)
Professionals	0 (0.0)	0 (0.0)	24 ( 3.7)	10 (3.1)
Other	2 (1.5)	0 (0.0)	7 ( 1.1)	2 (0.6)
Sub-total	131 (100)	63 (100)	642 (100)	323 (100)
Unknown	31	16	155	52
Total	162	79	797	375

Source: See note 21.

Business litigants as a group were not homogeneous.<sup>27</sup> Types, sizes and spheres

27 Personal characteristics — age, sex, ethnic origin — of individual business persons were left out of the following analysis, since they are not central in explaining business usage of the courts. Furthermore, the available data does not allow effective discrimination between individual and corporate litigants. At first glance, a good number of actions appear to have involved two or three individual plaintiffs. Yet in most cases these plaintiffs probably did not act as individuals. They

of activity varied. Most of them came from the commercial sector, and were engaged in either retail or wholesale activities. This was the case for almost two thirds of the business docket in the Circuit Court and four fifths in the County Court. Even this sub-group was not homogeneous. One can find among commercial litigants owners of small local concerns, such as storekeepers William Thériault or Charles Boss, both before the County Court in 1876, larger store owners like Kennedy F. Burns, who appeared three times in the same court the year before, or even large businesses, such as Whitehead & Turner's or Tester & Co.'s wholesaling concerns, both plaintiffs in the County Court in 1885.<sup>28</sup> Retailers initiated twice as many cases as wholesalers in both courts. An overwhelming number of cases were brought by ordinary general store owners, trying to recoup payment for merchandise sold. But considered together, retailers and wholesalers stand out as the driving force of litigation in Gloucester's common-law courts. Judicial activity from outside the commercial sector came primarily from resource companies. Such companies accounted for approximately one quarter of the business docket in the County Court and more than one tenth in the Circuit Court. Forest and fish companies were equally represented in the County Court, with the latter prevailing in the Circuit Court. A small percentage of the judicial activity generated by the business sector came from financial institutions, in this case banks, notably the Merchants' Bank of Halifax. Finally, manufacturing companies accounted for a few cases in each court.

It would stand to reason that Gloucester-based courts should have attracted mainly Gloucester-based litigants. This was the case in the Circuit Court, where 77 out of 91 documented business-initiated cases came from Gloucester-based plaintiffs.<sup>29</sup> Outside influence was stronger in the County Court. Businesses based outside Gloucester litigated almost one third of the cases in that court. These plaintiffs came in equal numbers from other parts of New Brunswick, either Saint John or adjacent Northumberland County, and the rest of Canada, primarily Montreal and Quebec City. In 1889, for example, the Court heard complaints from wholesale grocer C.H. Bostwick & Co. of Saint John and wholesale grocers Whitehead & Turner of Quebec City.<sup>30</sup> Individual litigants, in contrast, were

were simply members of a partnership or directors of a company. One may note, though, that Acadian business people accounted for, respectively, 14 per cent and 16 per cent of the cases introduced by the local business community in the Circuit and County courts. On Acadian judicial activity, see Jacques Paul Couturier, "Perception et pratique de la justice dans la société acadienne, 1870-1900", in Jacques Paul Couturier and Phyllis E. LeBlanc, eds., *Économie et société en Acadie, 1850-1950* (Moncton, 1996), pp. 43-75.

28 *Thériault v. Doiron*, 1876, RG 6, RS 432, A, box 1876-1877, PANB; *Ibid.*, *Boss v. Loane*, 1876; *Ibid.*, *Burns v. Ahern*, 1875, box 1875-76; *Ibid.*, *Burns v. Campbell, Wilson*, 1875; *Ibid.*, *Burns v. Comfort*, 1875; *Ibid.*, *Whitehead, Turner v. Kerr*, 1885; *Ibid.*, *Tester, Montgomery v. Getchell*, 1885, box 1884-1886.

29 Included in the tally of Gloucester based litigants are the fishery concerns Charles Robin & Co. and William Fruing & Co., since both had permanent posts in the County, even if their headquarters were in Jersey, England. Banks, on the other hand, were not counted, since it could not be established whether or not the dispute originated from a local business transaction.

30 *Botswick, Botswick v. Lejeune*, 1889, RG 6, RS 432, A, box 1886-1889, PANB; *Ibid.*, *Turner v. Burke*, 1889.

almost all based in Gloucester. Not surprisingly, there is a link between the location and the type of business activity. Outside plaintiffs were mostly wholesalers. Locally generated litigation came from all other sectors except manufacturing. There is also a connection between these two characteristics and the size of the litigating business parties. Larger concerns, so defined in terms of available capital, tended to come from outside Gloucester. Twenty-four suits were initiated in the Circuit Court by litigants whose capital was valued by the credit rating firm Dun & Wiman at more than \$50,000.<sup>31</sup> Yet only 14 of the 24 were initiated by litigants who operated in part from Gloucester, 13 of them from the Charles Robin & Co. On the other hand, 26 of the 27 litigants capitalized at less than \$5,000 were based in Gloucester. The same pattern holds true in the County Court. At the top end, only 20 cases out of the 96 originating with companies valued at more than \$50,000 came from Gloucester-based operations. At the lower end, 127 of the 131 suits brought forward by litigants whose capital was assessed at less than \$5,000 came from local companies or business persons.

Business litigants as a group were also not homogeneous in the way in which they used the courts. Some business people resorted to the court only once or twice during the whole period under study. Others could be called frequent plaintiffs. The latter were most likely to make use of the County Court. There, 12 business litigants were collectively responsible for 24 per cent of all cases. One businessman, Samuel Bishop, was, by himself, responsible for a total of 29 cases. On the other hand, only two plaintiffs resorted to the Circuit Court more than five times between 1873 and 1899. It is not immediately obvious, however, whether some business litigants actually had more reason to resort to the courts as part of their business dealings than did others, or if they were simply prepared to look to the law for resolution at an earlier stage than were the majority of their counterparts. Whatever their line of business or the size of their concerns, the business litigants all chose to use the services of a lawyer to originate their court actions. There were only a few lawyers established in the county — three in 1871, four in 1882 and six in 1891<sup>32</sup> — and they handled most of the cases that were initiated in both common-law courts.

The data on business-related litigation project a two-sided picture. In broad terms, Gloucester's common-law courts appear to have catered primarily to the needs of locally based, small and medium size retailers, and locally based fish and forest companies. But both common-law courts also served a quite different clientele, made up of medium and large business concerns, generally wholesalers, operating from outside the County. Each type of client asked the courts to intervene at a different level. The locally-based businesses used them as a tool in the consumer credit system, primarily to collect outstanding debts incurred by local residents when buying food, clothing or other goods. The medium and large business concerns from outside the county made use of the courts to resolve disputes

31 See note 13.

32 See the "Roll of Barristers and Attorneys", in *Barnes' New Brunswick Almanack* (Saint John, 1871 and 1882), and in *McMillan's Agricultural and Nautical Almanac* (Saint John, 1891).

associated with commercial credit. Business people, just like consumers, were not always able to pay for merchandise they received from wholesalers in Saint John, Quebec City or Montreal. Thus the need for wholesalers to come before the Gloucester County Court to demand that the debtors honour their debts. Yet, in the end, both clienteles were looking to the courts to perform the same task: to recover money they felt was owed to them. And this the courts generally did.

In an article on English common-law courts between 1740 and 1840, Clinton W. Francis has singled out three features that account for the attractiveness of these courts to creditors: a predictable jury outcome, a loser-pays-all-costs rule, and a system of pre-trial and post-trial process enforced by arrest and imprisonment.<sup>33</sup> All three of these features are to be found in the Gloucester common-law courts. The last two characteristics stem from the fact that New Brunswick was part of the English common-law world and that the procedure was either the same as in England or closely modelled on it.<sup>34</sup> Losers did have to pay the other party's legal costs in both Circuit and County courts, so costs then should not have been a factor in the decision to litigate. Defendants also could be arrested and held on bail at the beginning of the judicial process, through the issuance of a writ of attachment. Even though they could no longer be jailed for debts *per se* after 1874,<sup>35</sup> other coercive means were available. Upon final judgment, the court could order, for example, that the defendant's goods and chattels be seized by the sheriff and auctioned.<sup>36</sup> Only the remaining characteristic of English common-law courts, predictability of judgment, cannot be taken for granted in Gloucester County courts, given the discrepancy in business environments. This is the one aspect that needs to be further explored, since therein lies the cornerstone of the efficiency of common-law courts in the debt collection field. Few business people or businesses would engage in litigation if the odds were not in their favour.

From a plaintiff's point of view, both the Circuit and the County Courts were reliable debt-collecting instruments. Almost all debt cases introduced resulted in victory for plaintiffs (see Table Three). This predictable outcome held true in 97 per cent of documented business cases in the Circuit Court and in 99 per cent in the County Court. Other types of litigants fared just as well. Clearly the judicial process overwhelmingly favoured plaintiffs.<sup>37</sup> No outside variables, such as the presence of a defence attorney, the ethnic origin of the defendant or the nature of the

33 Francis, "Practice", p. 811.

34 See J.M. Chisholm, "The Laws of Nova Scotia and New Brunswick", in J.C. Hopkins, ed., *Canada. An Encyclopaedia of the Country, Vol. II* (Toronto, 1898), pp. 411-15. Civil procedure in the Circuit Court is described in SNB, 36 Vict.(1873), ch. 31 and CSNB, 1877, ch. 37; in the County Court, in SNB, 30 Vict.(1867), ch. 10 and CSNB, 1877, ch. 51.

35 See 37 Vict. (1874), c. VII. See also D.E. Thomson, "Insolvency Legislation in Canada", in J.C. Hopkins, ed., *Canada. An Encyclopaedia of the Country, Vol. VI* (Toronto, 1900), pp. 353-7.

36 Available data does not allow verification of whether or not judgments were indeed satisfied, nor can it measure the proportion that were satisfied through seizure and public sale of the debtor's goods.

37 See Francis, "Practice", p. 824 or McIntosh, "150 Years", pp. 435-41, who paints a similar picture.

dispute, appears to have had any influence on the outcome.<sup>38</sup> Plaintiffs, simply because they were plaintiffs, had, at the onset, every chance of winning. That explains why many delinquent debtors, like Thomas Kenny, did not want to be brought before a judge. Defendants were almost bound to lose, and therefore would be obliged to pay not only the amount owed, but also the costs of the plaintiff.

**Table Three**  
**Issue and disposition of debt cases in the Circuit and County court, 1873-1899**

Issue	Circuit		County	
	All plaintiffs N (%)	Business plaintiffs N (%)	All plaintiffs N (%)	Business plaintiffs N (%)
Plaintiff	47 (97.9)	35 (97.2)	251 (99.2)	187 (98.9)
Defendant	1 (2.1)	1 (2.8)	2 (0.8)	2 (1.1)
Sub-total	48 (100)	36 (100)	253 (100)	189 (100)
Unknown	31	23	122	91
Total	79	59	375	280
<b>Case disposition</b>				
Decision	n.a.	n.a.	14 (6.0)	8 (4.6)
No appearance	n.a.	n.a.	112 (47.7)	83 (47.7)
Confession	n.a.	n.a.	57 (24.3)	40 (23.0)
Interlocutory judgment	n.a.	n.a.	49 (20.9)	40 (23.0)
Non-suit	n.a.	n.a.	3 (1.3)	3 (1.7)
Sub-total	n.a.	n.a.	235 (100)	174 (100)
Unknown	n.a.	n.a.	140	106
Total	n.a.	n.a.	375	280

Source: See note 21.

38 For a similar appraisal, see Silverman, *Law and Urban Growth*, p. 15.

Whether a case was contested or not does not appear to have influenced the outcome. Data on case disposition is only available for the County Court. Each of the 14 contested debt cases, eight of these being business cases, was adjudicated in favour of the plaintiff. That few defendants even presented a defence is not surprising, given the plaintiffs' high rate of success. The 14 contested cases account for just six per cent of all documented cases. Furthermore, the total proportion of contested cases may, in fact, have been even smaller. Many cases classified as undocumented, meaning that the case files did not exist or were incomplete, could have simply been dropped by the plaintiff, leaving no paper trail.<sup>39</sup> A visit by a sheriff, bearing a writ of summons or *capias*, was, in some instances, probably enough to convince a delinquent debtor to make arrangements with his creditor, thereby ending the judicial process.<sup>40</sup> If this were the case, it is possible that as few as four per cent of all cases were actually contested. The nature of the evidence in debt-related cases accounts for both the high rate of success of plaintiffs and the small number of contested cases. Most were based on evidence that was difficult to refute, a note of hand signed by the defendant, a ledger entry showing purchases made by a fellow merchant or a consumer, etc. Defendants in debt cases had few means of defence.<sup>41</sup>

Few paths remained open to a defendant who chose not to contest the action taken against him. He could decide not to show up at all, or appear in court and enter a confession of judgment, or yet again try to obtain an out of court settlement before the trial. Most defendants chose the first option. Almost half of those brought before the court for outstanding debts by either business plaintiffs or individual plaintiffs did not appear in the County Court. Furthermore, the 49 interlocutory judgments issued by that court can probably be placed in the same category. Confessions of judgment proved the second most commonly selected option. One out of four defendants in business suits followed the example of Jacques Fournier who, in 1899, confessed judgment to the plaintiff. Fournier acknowledged being indebted to plaintiff Albina Poirier and promised to pay the amount due, \$87.41, and the costs, \$17.55.<sup>42</sup> The last option, out of court settlement, is rarely documented in the County Court records, yet newspaper court reports do mention such settlements from time to time. In 1897, for example, *Le Courrier des Provinces Maritimes* reported that many cases on the docket were settled out of court, by "entendement entre les parties en litiges".<sup>43</sup> Such was the

39 Francis notes that 80 per cent of all cases between 1823 and 1827 in the courts he studied were interrupted before final judgment. See Francis, "Practice", p. 825.

40 To wit a letter in the local paper, *Le Courrier des Provinces Maritimes*, commending sheriff Laman R. Doucet on his efforts "pour régler autant que possible les poursuites légales sans en appeler aux tribunaux civils, ce qui épargnait aux individus du comté bien des dépenses inutiles et parfois assez considérables". *Le Courrier des Provinces Maritimes* [Bathurst], 11 May, 1893.

41 Francis, "Practice", pp. 811-6, 822.

42 *Poirier v. Fournier*, 1899, RG 6, RS 432, A, Box 1889-1899, PANB.

43 *Le Courrier des Provinces Maritimes*, 4 March, 1897. See also *Ibid.*, 16 September, 1886; 5 September, 1889; 14 September, 1893; 10 September, 1896; 11 May, 1899 and 7 September, 1899.

case with storekeeper John Chalmers, being sued by wholesale merchant J.H. Botterell of Quebec City. After being summoned to appear in court, Chalmers appealed to Botterell to stay proceedings and to allow him more time to repay his debt: "Could you let me have a little more time as I have been pressed so hard for money this winter and I can't collect nor sell my stock to my advantage to rase [sic] money".<sup>44</sup> This evidence reinforces the view that common-law courts, in this case the County Court, were not necessarily the scene of implacable disputes between plaintiffs and defendants, both manipulated by unscrupulous lawyers rivalling one another in shrewdness and science to win their cases. On the contrary, common-law courts appear to have been the scene of routine activity, quasi-administrative in nature. Many defendants did not even bother to appear before the court. This conduct is not unique to the Gloucester court; it was also common in other jurisdictions during the same period.<sup>45</sup>

All these factors contributed to the reliability of the courts as debt-collecting instruments, and probably enticed some creditors to put an account into a lawyer's hands for collection. Still, the transformation of a simple settlement of an outstanding account into a judicial dispute was not something that happened automatically. Nor was this a normal, or routine, action taken in business dealings. A case in point is the dispute between John Young and Thomas Kenny. Through the correspondence of Kenny, this case offers a rare glimpse into the process leading to litigation.<sup>46</sup> The two, Young in Tracadie and Kenny in Dalhousie, had been doing business together since the end of the 1860s. Young sold skins and bark to Kenny; the latter, in return, sold Young moccasins and boots. The dispute arose at the beginning of 1879, when Kenny, who was closing his business in Dalhousie, sent Young a statement of account, requesting the same in return.<sup>47</sup> Unfortunately Kenny did not agree with Young's account statement when he received it. He wrote to inform him of this in May: "I received your account some time ago entirely differing from mine". He then asked Young to send him another copy, claiming to have "mislaide" the first one, and enjoining him to act promptly, since he "should like to have the matter fixed of [sic]".<sup>48</sup> Yet in September, the matter remained unresolved. After another letter from Kenny, still contesting the validity of his statement of account,<sup>49</sup> the Tracadie merchant finally responded. Young wrote that he did not recognize the validity of Kenny's claims. Kenny fired back immediately: "Your favor of the 17th came to hand. I have looked over my books and cannot find where I owe you 118.62. [I]f you would be kind enough to go back to 1875 when you owe me Jun. 10 60 cts and take from

44 John Chalmers to J.H. Botterell, 16 March, 1885, *Botterell vs. Chalmers*, 1885, RG 6, RS 432, A, Box 1884-1886, PANB.

45 See Stephen Daniels, "Continuity and Change in Patterns of Case Handling: A Case Study of Two Rural Counties", *Law and Society Review*, 19, 3 (1985), pp. 394-404.

46 See *Young v. Kenny*, 1879, RG 6, RS 432, A, Box 1809-1886, PANB.

47 Thomas Kenny to John Young, 11 January, 1877, *Ibid.*

48 31 May, 1879, *Ibid.*

49 11 September, 1879, *Ibid.*

that to 1878 and you will see you are greatly in error".<sup>50</sup> Nevertheless, on 2 October 1879, before receiving Kenny's reply, Young wrote to lawyer L.J. Tweedie, mandating him to secure payment of the account: "You will find [ ... ] inclosed an a/c against T.F. Kenny M.P.P. which [account] please collect for me".<sup>51</sup> The dispute thus entered a new phase. After an exchange of letters that had gone on for eight months, Young had made a decision that would lead him to sue Kenny. The latter reacted promptly and vigorously upon learning, on 6 October, that the account had been placed in a lawyer's hands. He wrote Young claiming that he never took such measures in his own business dealings. He went on: "I will not pay an account that I cannot see that I owe. [I]f you can shew me that I owe you I am willing to pay you. I dont [*sic*] want Law but if I am draged [*sic*] into it I will only have to defend myself".<sup>52</sup> The trial was held in March 1880, but no trace is left as to who won the case.

The *Young vs. Kenny* file shows that the transformation of a dispute over an unsettled account into a court case did not happen instantaneously and occurred only after the normal channels had failed. Like other creditors, John Young had to weigh many factors before deciding to go to court. Certainly, the courts offered a predictable mechanism for securing judgment against a debtor. Yet litigation had its drawbacks. Even for victorious plaintiffs, the costs were often high, and not only in time and paperwork. The plaintiff also had to cover the legal costs if a defendant could not pay. Nor was the process as straightforward as business people may have wished it to be. Processing time in business-initiated debt cases proved longest in the Circuit Court. About 166 days usually passed between the date the declaration was prepared and the date judgment was rendered, either interlocutory or final. Forty per cent of the cases were processed within three to twelve months, and roughly half within one to three months. The County Court acted more quickly, probably because it sat more frequently than the Circuit Court. On average, 91 days passed between the filing of the introductory writ and the completion of the case. But more than a third of the cases were settled less than a month after the filing of the writ. Another third ended between the 30th and the 90th day, and only a few lasted more than a year. In the end, though, even if both courts responded as rapidly as possible, given the constraints imposed by the civil procedure and the relative infrequency of sittings, the court system could probably not be fast enough for business litigants. Furthermore, litigation may have cast a negative cloud over the plaintiff. Recourse to the courts ran counter to the contemporary perception that courts and civil litigation were to be avoided in a successful business practice.<sup>53</sup> A businessman who resorted to litigation too quickly or too often might frighten prospective clients or upset current ones, driving them to

<sup>50</sup> 1 October, 1879, *Ibid.*

<sup>51</sup> John Young to L.J. Tweedie, 2 October, 1879, *Ibid.*

<sup>52</sup> Kenny to Young, 9 October, 1879, *Ibid.*

<sup>53</sup> See J.E. Hansford, *The Business Guide; or, Safe Methods of Business* (Toronto, 1892); also Couturier, "Perception et pratique", pp. 53-7 and Greg Marquis, "Anti-Lawyer Sentiment in Mid-Victorian New Brunswick", *UNB Law Journal / Revue de droit U.N.-B.*, XXXVI (1987), pp. 163-74.



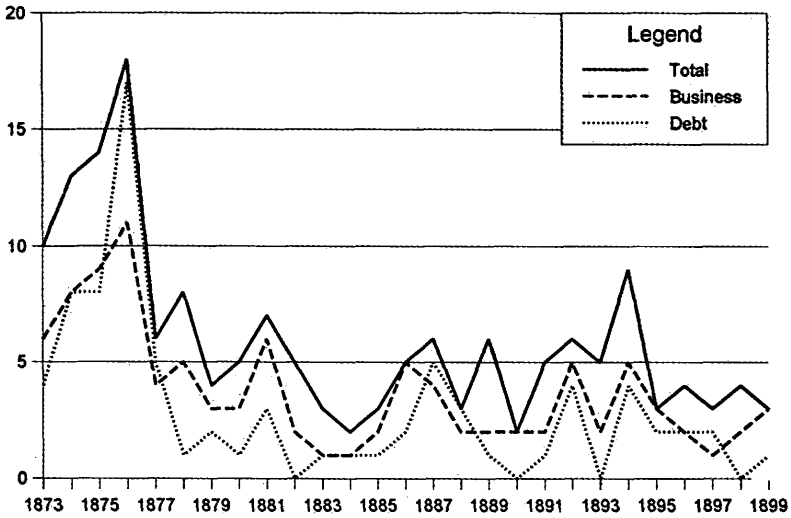
do business with competitors. Finally, litigation could mean the end of a business relationship, even a long standing one. It signalled a breach of confidence between the parties, and mutual trust, as Stewart Macauley has noted in his oft cited essay, is a vital element in a business relationship.<sup>54</sup> Defendants were probably less likely to do business with the same supplier. For example, even if Thomas Kenny had remained in business, he probably would have ended or reduced his dealings with John Young. Certainly, the letters he sent to Young imply an irreparable breach of trust.

All of this may explain why most members of the Gloucester business community — around 90 per cent in any given year in the 1870s and 1880s, and even more than that afterwards — avoided the courts. It may also explain why those who did use the courts seemed to turn away from them to some extent as the century came to an end. The drop in business litigation was steepest in the County Court. There, after a high of over 40 business cases in 1877, the number of such cases fell into the 30s and 20s, finally settling below 20 after 1886 (see Figure One). Two hundred and ninety-two cases were on the business docket between 1873 and 1881, 132 between 1882 and 1890, and 92 from 1891 to 1899. Overall litigation followed the same pattern. There were respectively 438, 203 and 156 cases in the three periods examined. In terms of percentages, the number of business cases declined by 121 per cent between the 1870s and the 1880s, and another 44 per cent between the 1880s and the 1890s. By comparison, the total number of cases declined by 116 per cent between the first and second periods, and by 30 per cent between the second and the last one. Judicial activity can be shown to have declined even further if one takes population growth into account. Per capita judicial activity decreased from 2.4 cases per 1000 inhabitants in the 1870s to 1 in the 1880s and 0.7 in the 1890s. The same patterns prevail in the Circuit Court, the only difference being that the decline is less significant (See Figure Two). Overall, 85 cases were on the court's docket between 1873 and 1881, 35 between 1882 and 1890 and 42 between 1891 and 1899. Business litigation accounted respectively for 55, 21 and 25 cases in each period. Again, a more pronounced decline occurred in the business docket than in the overall docket. The number of cases dropped by 162 per cent in the former and by 143 per cent in the latter between the first and second periods. Both gained in the same proportion between the second and third periods. Per capita, judicial activity declined significantly, then levelled off. There were 0.5 cases per thousand inhabitants in the 1870s, 0.2 in the 1880s and 0.2 in the 1890s.<sup>55</sup>

54 See Stewart Macauley, "Non-Contractual Relations in Business: A Preliminary Study", *American Sociological Review*, 28 (1963), pp. 56-67.

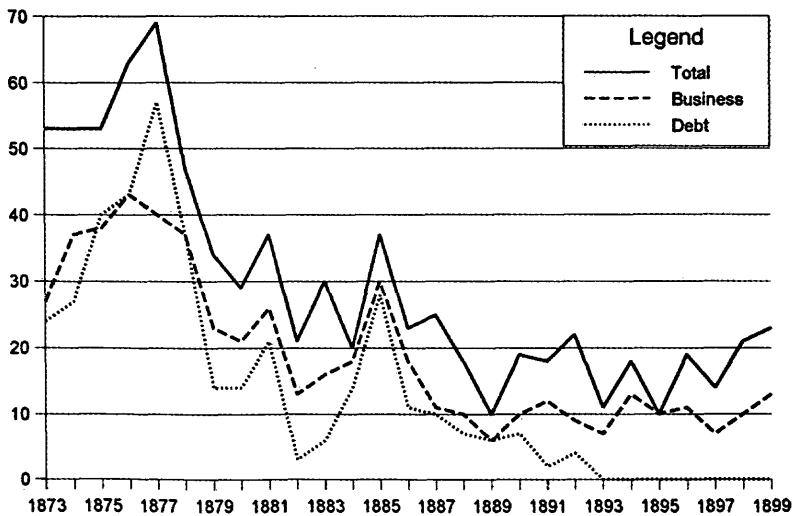
55 The fate of Gloucester's common-law courts does not appear to be unique. cursory research in the records of other county courts has revealed a similar decline in judicial activity. In the Charlotte County Court, for example, an average of 48 actions (high: 57; low: 41) were introduced each year between 1870 and 1875. Yet in the late 1880s and in the 1890s, the number of cases averaged 26 annually (high: 44; low: 13). See Case files, 1870-1875, Charlotte County Court Records, RG 6, RS 431, A, PANB and Plaintiffs' Book, 1887-1964, B3/1-3, *Ibid*.

**Figure One**  
**Number of Cases in the Circuit Court, 1873-1899**



Source: See note 21.

**Figure Two**  
**Number of Cases in the County Court, 1873-1899**



Source: See note 21.

Changes in the make-up of the court system may offer one explanation as to why the number of cases fell in both the Circuit and the County courts. The establishment of the County Courts in 1867 had probably taken away some business from the circuit courts. Similarly, the creation of small claims courts — the parish civil courts — in 1876 may have diverted part of the lower-end business of the County Court, thus explaining why the latter experienced a sharp decline in activity at the end of the 1870s. Yet these changes do not account for either the continued decline or the stagnation in judicial activity in Gloucester's common-law courts after the 1870s. One has to look elsewhere — notably to the business environment. Changes in the business environment in the last decades of the 19th century may have contributed to lessen the work load of common-law courts. Even if the courts were used by the business community as a kind of debt-collection agency, and even if they proved to be a predictable tool in this respect, this does not mean that business people would not have done without them if they could. The main problem with the use of a court-based system to manage credit operations was that it was repressive in nature. Courts intervened after the fact. They did not contribute to the elimination of the causes of the disputes, which could range from economic conditions to the maliciousness of the debtor. What were needed were not necessarily other ways of recovering bad debts, but means to reduce the chance of incurring bad debts.

Those means were starting to appear in northeastern New Brunswick towards the end of the century. For one thing, banks extended their reach to remote regions of the country, thus guaranteeing better circulation of paper money and offering better financing and payment facilities.<sup>56</sup> Although there were no banks in Gloucester County until the end of the century, branches were established in various communities in neighbouring counties. From just one in 1871, the number increased to five in 1889 and eight in 1903, including one in Bathurst.<sup>57</sup> In addition, in the second half of the century, a more reliable credit reporting system gradually covered all of North America, even remote regions of New Brunswick.<sup>58</sup> Credit rating agencies like R.G. Dun published credit rating books that allowed the business community to manage commercial credit in a more efficient way, in particular regarding new or distant clients, thereby reducing the number of defaulting debtors attributable to a lack of information. Over time, these guides became more exhaustive. Dun's guide, for example, contained twice as many entries in 1880 as it had in 1870. These changes in the business environment point

56 See Douglas McCalla, *The Upper Canada Trade 1834-1872: A Study of the Buchanans' Business* (Toronto, 1979), pp. 110-12 for an illustration of the impact of the development of a banking network on commercial enterprises during the 1860s and 1870s.

57 Data gathered through various business directories. See note 26. On the regional growth of one bank, the Bank of Nova Scotia, which opened three branches in northern New Brunswick between 1880 and 1883, see James Frost, "The 'Nationalization' of the Bank of Nova Scotia, 1880-1910", *Acadiensis*, XII, 1 (Autumn 1982), p. 7.

58 See James H. Madison, "The Evolution of Credit Reporting Agencies in Nineteenth Century America", *Business History Review*, 48, 2 (1974), pp. 164-86 and Daniel Hickey, "Statistiques sur les faillites au 19e siècle : Problèmes et sources pour Moncton", *Revue de l'Université de Moncton*, 19, 2-3 (1986), pp. 124-5 and note 21.

to the fact that the infrastructure of the commercial and financial systems became more stable as the century drew to a close. This process of "systemic stabilisation", as Robert A. Kagan called it in a study of debt-collection in the United States at the beginning of the 20th century,<sup>59</sup> in turn helped to alleviate some problems that contributed to generate judicial activity in the business community. The systemic stabilization process does seem to offer a consistent explanation of the evolution of litigation levels in common-law courts during the last decades of the 19th century. Changes in the financial and commercial environments could have led to transformations in the judicial and legal spheres, and probably account for the downward evolution of litigation trends. Nevertheless, the evidence is only coincidental and needs to be linked to other components of the business and commercial systems. It also needs to be compared to the records of less stable communities, those experiencing major changes from a commercial or industrial point of view.

Legal history leads to business history, which in turns leads back to legal history, as this study has shown. The two processes — the judicial process and the business process — were closely linked at the end of the 19th century. Common-law courts played an important role in business activities, not only in dealing with major issues which had broad implications, but also, as this paper has tried to show, in dealing with minor matters, such as outstanding accounts. In fact, these courts generally reflected the routine activity of the business world. It was therefore inevitable that a changing business environment would also lead to changes in the role of the courts. These changes were apparently well underway by the final decades of the 19th century.

<sup>59</sup> Robert A. Kagan, "The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts", *Law and Society Review*, 18, 3 (1984), pp. 364-5. Cf. also Francis, "Practice", p. 824 and Robert A. Kagan, *et al.*, "The Business of State Supreme Courts, 1870-1970", *Stanford Law Review*, 30 (1977-78), p. 138.