Loyalty on Trial

The Case of Bayard v. Singleton
in the Superior Court of North Carolina
1787

A Study Guide to accompany a dramatization of the case on videocassette

Loyalty on Trial

was produced by the UNC School of Law on the occasion of its Sesquicentennial celebration in 1995.

The 27-minute video is a re-enactment of Bayard v. Singleton, 1787, a historic case in North Carolina judicial history which was a precursor to Marbury v. Madison, the 1803 U.S. Supreme Court decision establishing judicial review.

Bayard v. Singleton involved confiscation of the property of a wealthy landowner, Samuel Cornell, who left his property before the conclusion of the Revolutionary War. After the war, Mr. Cornell’s daughter, Elizabeth Bayard, returned to claim the land from the state. She was denied ownership and told by the legislature that she had no right to a jury trial to settle the case. She petitioned the Superior Court, called then the Court of Conference, which nullified the legislature’s ruling and granted her the right to a trial, guaranteed under the state’s Constitution.

The video, which was produced by Video Dialog Inc. of Chapel Hill, is available for purchase from the School of Law.
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The Case of Bayard v. Singleton

in the Superior Court of North Carolina

1787
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Cover Photo Credits

Large cover photo (on front and back, also appears on page 10): Court of Conference judges who heard the case of Bayard v. Singleton in 1787 (L to R): Samuel Spencer, Samuel Ashe and John Williams.

Back cover photos: (Top) Mrs. Elizabeth Bayard was represented by James Iredell (L) and William Richardson Davie (R). Iredell served on the U.S. Supreme Court from 1791-1799, and Davie served as Governor of North Carolina in 1798-99 and is credited as the “Father” of the University of North Carolina.
   (Bottom) Spyers Singleton was represented by Abner Nash (L) and Alfred Moore (R). Nash served as the first speaker of the North Carolina House and as Governor in 1780-81, and Moore served on the U.S. Supreme Court from 1799-1804.

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INTRODUCTION

This is the real story of Bayard v. Singleton, a legal case which arose in the years immediately following the American Revolution and helped shape the kind of government we would have not just in North Carolina but in the new United States of America.

The story is compelling for two reasons. The first is that it involves some of the greatest characters in North Carolina history—James Iredell, a future U.S. Supreme Court justice; Samuel Cornell, whose vast wealth built the Royal Palace at New Bern; Abner Nash, the Revolutionary War leader who drove the last royal governor out of the Palace; William Richardson Davie, known as the “Father” of the University of North Carolina; and Samuel Ashe, the judge whose decision in Bayard made legal history.

The second reason is that behind the dry facts of the Bayard case were the momentous issues and passions of a turbulent time. What did it mean to be a “citizen” in the newly independent (and somewhat chaotic) state of North Carolina? Was “loyalty” required? What would happen to the many citizens—the Tories, or “Loyalists”—who had remained loyal to the English Crown during the Revolution? Could they own property? What “rights” did they have? And who would protect them? The state legislature, representing the people? Or three judges, representing ... what?

Should the legislature, or the courts, be the final arbiters of “the law?”

When the Revolution started, Samuel Cornell, probably the richest man in North Carolina, stood with the King. He first fled to England, then returned with the King’s troops to his family’s home in New York. The North Carolina General Assembly confiscated his land, thousands of acres, and his house. Tory property was being sold off to help finance the war. Spyers Singleton, a New Bern merchant who supplied the revolutionary troops, bought Cornell’s house.

Now, with the war over, Cornell’s daughter, Mrs. Elizabeth Bayard, has come back from New York to reclaim her family’s property. She files a lawsuit against Singleton, and she insists that the 1776 North Carolina Constitution gives her the absolute right to a jury trial of her claim. The General Assembly then enacts a law ordering the state’s judges to dismiss all such “vexatious” lawsuits over confiscated property without a trial.
Quickly, the sides form. Some think North Carolina has violated the Cornell family’s property rights, and is continuing to do so by denying them a trial. Others think that in a republican democracy, the people’s representatives should decide public issues—and they have, in Singleton’s favor!

Besides its local courts, North Carolina has just three judges, Ashe, Sam Spencer, and John Williams, who “ride circuit” to the seven Superior Courts. All three were avid revolutionaries. They were appointed by the General Assembly. It is expected they will follow the Assembly’s wishes and dismiss the Bayard lawsuit.

But finally, they do not. In a famous ruling, Judge Ashe tells the General Assembly that it has exceeded its powers by ordering the judges to dismiss property claims when the Constitution guarantees they will be heard. The Assembly’s law is unconstitutional, and must fall!

The Bayard case was decided in 1787, just as the United States Constitution was being written. It was not until 1803, in the landmark case of Marbury v. Madison, that the United States Supreme Court asserted its right to declare a law enacted by Congress unconstitutional.

Marbury was highly controversial even then. In 1787, the Bayard ruling rocked North Carolina. But it helped to create a system of self-government in America, not of men, but of laws.

Some Key Objectives of the Program

To illustrate the fundamental importance of property rights to Americans, both before and after the Revolution.

To portray the tensions that existed after the Revolution between “republicans” loyal to an independent North Carolina and “Tories” loyal to England and King George III.

To compare the competing theories that legislatures should be the final decision-makers about the constitutionality of a law, and that judges should be—that government is based on the consent of the governed, and also limited by individual liberties and property rights.

To dramatize the uncertain situation in North Carolina caused by the collapse of the royal/colonial government and its institutions.

To dramatize the critical role leadership played in overcoming the uncertainties and putting North Carolina on a sound footing after the Revolution.
CAST OF CHARACTERS

For Bayard

**Mrs. Elizabeth Cornell Bayard:** She was about 21 at the time, one of five daughters of Samuel Cornell. Cornell, born in New York, owned several estates and businesses in North Carolina, and was considered one of its richest citizens, if not the richest. He served in various Royal Governors' "Councils" before the Revolution, and (though apparently not trained in the law) was Chief Justice of the Royal Courts at the time of the Revolution.

**William Richardson Davie:** Born in England in 1756, he was a Revolutionary War hero in North Carolina, and a leading Federalist thereafter. He served as Governor in 1798-99. Davie is officially called the "Father" of the University of North Carolina, because it was his legislation that created the university in 1789. He was also influential in picking the site in Chapel Hill, writing the original curriculum, and choosing the first professors.

**James Iredell:** Born in England in 1751, he was related to the McCulloh's, who received a vast grant of land in North Carolina from the King in 1729. Iredell served the King as a tax collector in Edenton, but supported the Revolution, and had already served (briefly) as a Superior Court Judge and State Attorney General. Later, he would lead the North Carolina Federalists fighting for ratification of the U.S. Constitution, and be named by President Washington to the United States Supreme Court, where he served from 1791 to 1799. Iredell's voluminous correspondence, much of which survives, is an important part of the documentary record of the period.

**Samuel Johnston:** Nephew of a Royal Governor, Johnston himself served as North Carolina Governor in 1787-89. He was Iredell's mentor in Edenton, where he was the leading attorney and the most prominent of the "conservative" supporters of the Revolution—those who backed independence but also tolerance for Tory sympathizers who stayed neutral. He was later a leading North Carolina Federalist, and chaired the state Convention which ratified the federal Constitution. Johnston, along with Davie, filed the original lawsuits (there were 27 in all) against North Carolina for Mrs. Bayard and her sisters.
Spyers Singleton: A New Bern merchant of far humbler origins than Cornell, he made his mark during the Revolution procuring supplies for the American troops. He was elected to local office in Craven County, and served in the North Carolina General Assembly in 1784-85. He and his partners were running the Palace in New Bern as a boarding house, under a state commission, at the time of the case.

Abner Nash: Though married to the widow of a Royal Governor, Arthur Dobbs, Nash was considered a “radical” in the Revolutionary cause, a rabid foe of all Tories. He led the local militia that harassed the last Royal Governor, Josiah Martin, out of the New Bern Palace in 1775. Thereafter, he served as the first Speaker of the North Carolina House, and as Governor in 1780-81. He was back in the House at the time of the case.

Alfred Moore: The son of a Royal Judge in North Carolina, Moore joined the Continental Army and rose to Captain during the War. He then studied the law, and was State Attorney General at this time. Later, he served as a state Superior Court Judge, and in 1799, he replaced Iredell on the U.S. Supreme Court, serving until 1804.

The Judges

Samuel Ashe: He was from an old Cape Fear family that one Royal Governor called “the republican junta.” Though the Ashes were loyal to the King until the outbreak of the war, they had led the fight in North Carolina against the Stamp Act, and consistently argued the rights of the colonists against royal usurpation’s. Ashe was the first Speaker of the North Carolina Senate after the Revolution, then was named a Superior Court Judge. He was on the bench from 1777 to 1795, when he was elected Governor at the age of 70. He served as Governor until 1798. He was one of the founding trustees of the University of North Carolina, and was still serving in that capacity in 1805. He died in 1813.

Samuel Spencer: Educated at Princeton, Spencer came to North Carolina with an appointment from the King as Clerk of Court in Anson County. He was a Colonel in the King’s militia, but supported the
Revolutionary cause, and like Ashe, was one of the first three Superior Court judges appointed by the North Carolina General Assembly in 1777. Spencer later was leading Anti-Federalist opponent of the U.S. Constitution, arguing that it created a dangerous government “too distant from the people.”

**John Williams:** Williams was related to a Royal Judge, Richard Henderson. The prominence of his family is suggested by the name of his home town, Williamsborough. Williams himself was apparently not a lawyer, but he was named to the Superior Court after Iredell, the third of the original appointees along with Ashe and Spencer, had resigned. Prior to that, Williams was representing North Carolina in the Continental Congress.

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**The Lawyers**

**Archibald Maclaine:** Offered the chance to replace Iredell on the Superior Court in 1778, Maclaine declined, and the seat went to Williams. Thereafter, Maclaine represented many Tory clients in property disputes, and he was one of the leading “conservative” critics of the judges on grounds that they were prejudiced against his clients and (in Williams’ case, especially), shaky on the law. Maclaine was a leading Federalist proponent of the U.S. Constitution, and had a reputation for a sharp tongue in debate and in writing. It shows up frequently in letters to Iredell, many of which survive.

**John Hay:** He was the bitterest critic of the judges, and for at least three years, he tried to get the General Assembly either to impeach them or to create a new Court of Appeals that would supersede them. It was common to speak of Hay, Maclaine, and a few others as “the lawyers,” who were out to get “the judges.” Hay’s politics were similar to Maclaine’s: he was a “conservative” revolutionary, who backed independence but disliked the “radicals” treatment of wealthy Tory sympathizers who, nonetheless, had done nothing to help the British. The conservatives, however, were a small minority of the General Assembly during this period.
THE STORY

(All of the facts contained in the program are drawn from the documentary records of the period; these records are also the basis for much of the dialogue)

Scene 1: Wilmington NC, 1785

Francis Brice and Daniel McNeil, “notorious” for their Tory sympathies and thought to have assisted the British in the war, have just come back to Wilmington. They are arrested and hauled into the Superior Court. Judge Ashe pronounces sentence: a light fine, but a huge bail that will be returned only if they leave North Carolina. Several lawyers in the courtroom, including James Iredell and William R. Davie, object that “banishment” of this kind “goes too far,” and violates the Tories’ rights.

Scene 2: The University of North Carolina, 1805

An instructor and his students are preparing for their examinations by the university trustees. They expect questions on the 1787 case of Bayard v. Singleton, which also involved Tory rights, because Judge Ashe, who decided it, is one of the trustees. Another trustee is William R. Davie, “Father of the University.” Both Davie and Ashe have since served as Governor of North Carolina. The instructor recalls the case ....

Scene 3: Davie’s law office, Halifax, 1785

Mrs. Elizabeth Cornell Bayard, daughter of the wealthy Tory Samuel Cornell, has come to North Carolina from her new home in New York. Cornell’s vast North Carolina estates, including the family home in New Bern, have been seized by the North Carolina General Assembly, which is selling them to pay war debts.

Mrs. Bayard says her father gave the house and properties to her, and her sisters, and shows Davie the deeds. But the State has sold the house to Spyers Singleton, a local merchant who once worked for Cornell. Mrs. Bayard says her family was not disloyal to North Carolina, but merely “stood aside” during the war; therefore, the State had no right to take their property, and must now be forced to return it. (At one point, however, she refers to North Carolina as “a province.” She wants Davie to represent her in court.
Davie agrees with her that the "law" is on her side. But he doubts that the judges in North Carolina will enforce it against the will of the General Assembly, which is controlled by the "radical" revolutionaries, who distrust all the former Tories. He agrees with her that many Tories have been treated unfairly, he says, which puts him "out of favor" as a lawyer, even though he remains popular as a Revolutionary War hero.

Davie suggests retaining for their side James Iredell, a top lawyer who is "tolerated" by the judges, even though he, too, thinks that many of the seizures of Tory property were unlawful.

**Scene 4: At the Cornell/Singleton house in New Bern, May 1786**

Spyers Singleton, now living in the Cornell family house, confers with his lawyer, Abner Nash, who has just arrived by horseback for the upcoming Superior Court session in New Bern.

Nash was a militia leader, and served as Governor of North Carolina, during the Revolution. He is famous, in fact, for leading the troops who ran the last royal governor out of the Royal Governor's Palace in New Bern. The Palace was a symbol to ordinary North Carolinians of the excesses of the King's colonial governments. It was built using money loaned by Samuel Cornell, but repaying Cornell required a host of taxes and fees to be paid by the people. Ironically, now that the State has seized the Palace, it can't sell it, nor can it afford to keep it up. The State is operating it as a boarding house, and the official proprietor is none other than Spyers Singleton.

Nash is now a member of the General Assembly, a leader of the "radicals," and he has good news for Singleton. The General Assembly has enacted his (Nash's) legislation, which orders the Superior Court judges to dismiss lawsuits like those filed by Mrs. Bayard, seeking the return of property confiscated by the State and already sold.

Singleton also has good news. As the judges have arrived at the Palace, where they are boarding during the court session, he's had a chance to speak with Judge Spencer. Spencer said his job is to uphold the law, not make the law. This implies that Spencer will not question the General Assembly's legislation.

Nash notes that Judge Williams always votes with Judge Ashe, and Ashe's hatred for the Tories is well known, as the Brice-McNeil case recently demonstrates. So Nash and Singleton are confident.
Scene 5: At a New Bern lodging establishment, the same night

With the New Bern court session pending, all the leading lawyers have arrived in town, and they are lodging together (all but Nash, who is Singleton’s guest) in this modest boarding house. They would prefer the Palace, but it’s in such bad shape, only three rooms still have unbroken glass in the windows, and the three judges have taken them!

Present at dinner are Davie, Iredell, and Archibald Maclaine, “conservatives” who favor Mrs. Bayard’s lawsuit and think little of Singleton. In fact, they joke about Singleton’s attempt to retain Iredell and Maclaine, just so they won’t be able to represent Mrs. Bayard. Iredell has returned Singleton’s “fee,” and will join Davie on Mrs. Bayard’s side. Maclaine says he will return the unsolicited fee, also, even though that will leave him with no formal role in the case. The trio also joke about their conflicts with Judges Ashe, Spencer and Williams, whom they disdain as not learned about the law.

Also present is Alfred Moore, a lawyer who also serves as the State’s Attorney General. Since a state law (Nash’s bill) is at issue in the Bayard case, Moore will defend it against Davie’s and Iredell’s attack.

All of these men are friends. They can laugh together about the decrepit state of the Palace and the worthless local currency (dollars! not English pounds). They are worried that the western part of the State is virtually without government of any kind. But they have very different views of what to do about it.

Moore is something of a radical. He believes North Carolina can, and must, rebuild from the war’s ravages without England’s help. But the others believe that North Carolina’s argument was with the King, and Parliament, not with the English people themselves—after all, the English are their relatives. And without England, they argue, North Carolina will have no markets for her goods.

Iredell says its time to patch up differences with people like the Cornells. The first step must be to return their properties, he says. And Iredell gives a preview of the argument he will make to the judges: the confiscations were unconstitutional. It’s not a new term for these lawyers, but Iredell’s meaning is far from clear, because under English law, Parliament itself was the sole arbiter of the constitutionality of its laws, not judges.
Scene 6: A cemetery adjoining
the New Bern courthouse

Judges Ashe and Williams are reflecting on the costs of the Revolution in lives, and on the purposes for which Americans fought and died. Ashe, in particular, is worried about the chaotic state of affairs in the western part of North Carolina (where a secession movement is underway), and about the ability of the now-independent states to govern themselves.

Williams raises the subject of the Bayard case. He notes that the new General Assembly law is clear—they must dismiss the suit, and Mrs. Bayard should take her appeal to the legislature itself. Ashe seems to agree, and adds cryptically that the legislature has been known to grant Tory claims. "They do their duty, we do ours," he says.

Scene 7: New Bern courthouse

As soon as court is called to session, Nash is on his feet with a motion that Mrs. Bayard's lawsuit be dismissed, because of the new law. Ashe interrupts to say that he's never seen the law, because the printer never sent him a copy. But Moore, for the State, has a copy, and he says the law is clear that Nash's motion must be granted.

Now Davie is up, arguing that the new law is in conflict with the state Constitution, Article I, Section 14, which guarantees jury trials to decide property disputes. The judges must so rule, he says.

Nash, however, says the Constitution is clear that the General Assembly, not the judges, decides constitutional questions. That's because they are elected, and the judges are not. If they are wrong, the people will replace them, he says—that's the theory of republican government.

Judges Williams and Spencer seem about to agree with Nash. But Iredell pushes the constitutional argument one step farther. Yes, the General Assembly's enactment is law. But the Constitution is also law—higher law. The Constitution limits the powers of government, and the General Assembly cannot ignore those limits, nor can the judges. In a conflict, the judges must enforce the higher law.

Suddenly, Ashe announces that he is not feeling well, hasn't slept, and wants to postpone consideration of this case until his head clears. He proposes taking Nash's motion "under advice"—postponing the decision, in other words—and under his influence, the other judges quickly agree. Court is adjourned.
Scene 8: (Continued, outside the courthouse)

Nash understands the significance of the delay: Ashe intends to let Mrs. Bayard’s case proceed, despite the General Assembly. The two men served on the small committee which wrote the North Carolina Constitution as the Revolution was beginning. But they don’t agree now on what it demands. “Old friend,” Nash says, judges overruling the legislature “is not the form of government we adopted.” But Ashe says that the Constitution makes each branch of government independent, and the judges must do their duty as they see it.

Ashe adds that the General Assembly can always remove him from the bench if they wish. In fact, John Hay, a pro-Tory lawyer and General Assembly member upset over the “banishment” verdict against Brice and McNeil, has been compiling complaints about the judges in hopes of getting them impeached. Hay’s efforts have come to nothing so far. But Nash now warns Ashe that his refusal to enforce the General Assembly’s law may give the impeachment idea new force among the radicals.

Scene 9: New Bern courthouse, May 1787

The General Assembly has met again since the last court session here. And it has again legislated against Tory lawsuits. But it has not impeached the judges (in fact, it passed a resolution praising their work). Nor have the lawyers settled the case in the intervening period.

So, Judge Ashe pronounces the Court’s decision. The judges have tried to avoid declaring the General Assembly’s law invalid, he says, but since the legislators refuse to change it, they leave the judges no choice.

Mrs. Bayard enjoys all the rights of a citizen, Ashe declares. She doesn’t live in North Carolina, but she does live in New York, and under the Articles of Confederation, a citizen of one of the 13 states enjoys all the “privileges and immunities” of the other states. She has made a property claim. The North Carolina Constitution guarantees that property claims will be decided by jury trials.

If the General Assembly can take her land without a trial, Ashe says, it might just as easily take her life without a trial. It might decide not to go out of office when its term ends, and to cancel elections.

The whole point of a Constitution, Ashe says, is that the people delegate a limited authority to government, and no more. As God said to the waters,
so far shall ye go, and no farther. So the people said to their legislature, Ashe concludes. The court agrees to dismiss Nash’s motion, and sets the Bayard case for trial.

Scene 10:
The University of North Carolina, 1805

Did Mrs. Bayard get her house back? the students want to know. No, says their teacher, she didn’t. The jury decided that, since Samuel Cornell had left North Carolina and was in England at the time of the Revolution, and he had not returned before the General Assembly confiscated his land, he was not actually a citizen of one of the United States at the time, but of England. So the confiscation was legal. Thus, while his daughter now enjoyed the right to a trial as a citizen of the United States in 1787, Cornell had not enjoyed the right to deed his property to her in 1777, because by then the property had been taken legitimately by the State.

So the Bayard case changed nothing? one student asks. No, the instructor disagrees, it changed everything by making clear that in our constitutional system, the powers of government are limited, and even “the people” cannot strip an unpopular person of his or her fundamental rights.
BACKGROUND ON BAYARD

**Property Rights.** They were fundamental under the system of English law, and remember, all of the characters in *Bayard* were either born in England or the descendants of English families. It was thought that ownership of property gave a person a stake in society, and a reason to uphold the laws of the society. Commonly, property ownership was a prerequisite to voting—under the 1776 North Carolina Constitution, “all freeman resident 12 months” could vote for the state House of Commons, but only the owners of 50 acres or more could vote for the state Senate.

**Politics.** All of the characters in *Bayard* except Spyers Singleton had played leading roles in the government of North Carolina under the King, and most were descended from prominent families who came to North Carolina with huge land grants from the English Crown. The Ashes, Cornell, the Moores, the Johnstons, had all been people and families the English kings counted on to settle and run North Carolina for them.

**Republicans** were those who broke with the Crown to make North Carolina an independent state, or republic (or, who wanted to make the United States an independent republic). Ashe was an early republican leader. By the time of the Revolution, so were most of the characters in *Bayard*.

**Tories, or Loyalists,** as they preferred to be called, remained loyal to the King. Some worked with, or even fought with, the British. But most simply sat out the war, refusing to help the revolutionaries but not helping the British, either. Best estimates are that about one-third of North Carolina’s people were Tories.

**Conservatives** were those republicans who, after the war, favored making peace with the Tories who’d remained neutral in deed, if not in philosophy. This meant restoring Tory rights and, in many cases, restoring property the North Carolina government had seized from them.

**Radicals** were those republicans who, after the war, remained distrustful of all Tories. They feared the English would come back, and Tory sympathizers would help them overthrow the new republican governments in the states. The radicals opposed giving property back to the Tories if the government had already sold it to someone else.

**Judges.** Much of the work of the King’s colonial governments (including the collection of many taxes and fees) was done through the courts, and all of the court officers were appointed by the King (recommended, of course, by the leading families of the colonies). So ordinary people came to dislike
judges. Thus, the argument that judges were arbitrary, and unrepresentative of the people, was a compelling one to most North Carolinians after the Revolution.

The Regulation Movement. Throughout the Piedmont region of North Carolina around 1770, many people joined in protest against the arbitrary regulations and taxes imposed on them by the King's government, usually through the county courts. The protesters were known as Regulators. Most were peaceful, but some were not, and in a few cases, judges and lawyers were beaten up. Samuel Spencer, Clerk of the Anson County Court, and John Williams, a lawyer related to Judge Richard Henderson of the King's Superior Court, both got knocked around in Regulator uprisings.

Tryon's Palace. One of the Regulators' biggest gripes was the special tax imposed on them by the Royal Governor Tryon to pay for a new Governor's Palace in New Bern. Actually, the tax money was used to repay Samuel Cornell, who had loaned money to the Governor for it. The Palace went up in 1766-70. Abner Nash led a local "Committee of Safety" in New Bern that ran the last Royal Governor, Josiah Martin, out of the Palace in May, 1775.

After the Revolution, North Carolina owned the Palace, but it was expensive to keep up. The State tried to sell it, but there were no buyers. So it commissioned Spyers Singleton and two of his partners to run it as a boarding house. Their main customers were judges and lawyers when court was in session in New Bern. By 1786, the Palace was described as in bad shape, looted by intruders. But in 1791, it played host to a ball attended by President Washington, so apparently the North Carolina government had restored it.

The North Carolina Constitution of 1776. Ashe, and Nash, were members of a small committee of drafters. The Constitution put almost all government authority in the hands of the General Assembly—the people's representatives. The Governor had little power.

The Superior Court. The Constitution created no state appeals court, as such. It called for Superior Court judges to travel the state hearing cases involving major crimes or significant sums of money; appeals would be heard by two judges, or three.

Initially, there were only three Superior Court judges for the whole state. They heard cases in Edenton, Halifax, New Bern, Wilmington, Hillsborough, Salisbury, and later, Morgan (Morganton). In 1784, the General Assembly appointed a fourth judge to travel to the new Davidson County (now, East Tennessee) court, but at least initially it seems, the judge was afraid to go because of unsettled conditions "out west."
The State Capital. Like the Superior Court, it traveled. In 1784, the General Assembly met in Hillsborough. In 1785, it met in New Bern. In 1786, it met in Fayetteville. Only in 1788 was the decision made to create a permanent, new capital city in Wake County.

Confiscation Acts. With the outbreak of the Revolution, North Carolina demanded that its citizens sign oaths of allegiance to the new republican government. Former officials of the King's government were the obvious first targets.

The first Confiscation Act of the General Assembly became law in 1777. Under it, those who refused to swear loyalty to the State were stripped of their legal rights, and given 30 days to sell their property, after which it was subject to seizure.

Subsequent confiscation acts were passed nearly every year by the General Assembly. Often, they named the people whose land was to be taken. Samuel Cornell was one such “named” person. Later, when the General Assembly passed a pardon law in 1783, it disqualified Cornell and other “named” Tories from its provisions.

The confiscation laws often threatened, but did not result in, confiscation. Apparently, the State held back in many cases where the loyalty of a person was in doubt—and much property was owned by Tories who lived somewhere else. So land might be “seized,” but not sold, giving the owner a chance to return and reclaim it by signing a loyalty oath.

The Peace Treaty. The Treaty of Paris, signed in 1782, ended the war between Great Britain and the United States. It called for Americans to repay debts to British citizens, for an end to confiscation of property from British citizens and American “Loyalists,” and for the return of property taken from Loyalists who had not actually fought with or assisted the British. But under the Articles of Confederation, Congress in approving the Treaty could not bind the 13 states to it—the states were sovereign, and treated the Treaty's provisions only as recommendations. North Carolina reserved to itself the right to keep or return confiscated properties, based on the judgment of the legislature.

North Carolina in 1785. The state's population was about 350,000, including slaves. About half the adult white males owned slaves, most of them one or two. There was just one real road in North Carolina, the “post road” maintained by the Continental Congress. It ran from Edenton to New Bern to Wilmington.
Money. In short, there wasn't very much money. North Carolina issued paper "dollars" in 1781, but they were not backed by specie or taxes and quickly depreciated. Another round of paper currency issued in 1783 was backed by a property tax and called "pounds" to distinguish it from the worthless "dollars."

Crop prices were depressed, in part because English markets were now closed to North Carolina, so money was especially tough to come by for farmers, making it difficult for them to pay any sort of taxes at all.

The West. The part of North Carolina "over the mountains" (now Tennessee) was very thinly populated, and virtually ungoverned by the new State. In 1784, western settlers tried to organize a new State of Franklin, named after Ben Franklin, and they petitioned Congress to admit Franklin to the United States. Land in the west comprised a good part of North Carolina's "wealth," so naturally its leaders were concerned not to lose it.

Politics. In the General Assembly, the "radicals" held solid majorities in both houses, with "conservatives" in the minority. There were no formal parties as yet. The two factions were drawn from the same, elite group of North Carolina families. They just disagreed on how to run the new State government, and especially on how to treat real and suspected Tories.
THE CASE OF BAYARD V. SINGLETON

Mrs. Bayard and her four sisters actually filed 28 lawsuits against people who had bought land and other property, including slaves, that the State had confiscated from their father, Sam Cornell. Bayard v. Singleton was one of them.

Spyers Singleton had leased the Cornell family house in New Bern from Cornell when Cornell left for England at the end of 1775. In an earlier case, Singleton seems to have tried to stop the State from taking the house (it’s not clear how hard Singleton was trying, however), and Iredell, as State Attorney General, defended confiscation of the house as legal because Cornell was an “alien.”

The Bayard v. Singleton lawsuit was the first one decided by the North Carolina Superior Court, after which the other 27 suits were reported “withdrawn.”

Bayard and Judicial Review

Judicial review—the idea that courts can strike down acts of legislatures as contrary to the constitutional scheme of government—is an American invention. It was not the practice in England, where Parliament judged the propriety of its own acts. It is not spelled out in the American Constitution, either—most experts think the Framers left the subject open because some favored judicial review, and some did not.

In Marbury v. Madison, 5 U.S. 13, decided in 1803, Chief Justice John Marshall argued with such force that the American constitutional system required judicial review that his judgment was never thereafter overturned. Marbury struck down an Act of Congress as in conflict with Article III of the federal Constitution. It was the first time the U.S. Supreme Court had exercised that power. It did not do so again until the Dred Scott decision in 1857, when the Court said that the Constitution gave Congress no power to bar slavery from the territories.

The Marbury decision does not cite the Bayard case as precedent. But since Alfred Moore, the North Carolina Attorney General who argued against Mrs. Bayard, was serving on the Supreme Court with Marshall at the time, it is a certainty that Bayard was known to Marshall and the other justices (their decision was unanimous).
Was Bayard v. Singleton the first time an American court asserted the right of judicial review?

Perhaps. North Carolina Supreme Court Justice Willis Whichard, who is writing a doctoral dissertation on James Iredell, says North Carolina historians who make that claim "probably exaggerate." The Supreme Court of Virginia may have struck down an act of that state’s legislature as early as 1782, Whichard says.

However, reports of that case, and other contenders, are unclear. Court decisions customarily were oral; court reporters were scarce.

Bayard was clearly reported. Judge Ashe’s ruling for the Court on Nash’s motion, and the Court’s ruling as to Sam Cornell’s status that determined the outcome of Mrs. Bayard’s trial, both were set down in some detail by a court reporter named Martin. They can be read in the North Carolina Supreme Court reports at 1 N.C. 5 (1787).

Thus, the legal scholar Leonard Levy referred in 1988 to Bayard v. Singleton as “the first reported state case in which a judicial tribunal held a legislative enactment unconstitutional,” according to Justice Whichard. (Levy, Original Intent and the Framers’ Constitution)

BIBLIOGRAPHY

Bayard v. Singleton is reported at 1 N.C. (Martin) 5 (1787), in the North Carolina Supreme Court reports. In 1 N.C. at pp. 835-876, there appears a detailed history of the early North Carolina court systems written in 1889 by lawyer and UNC President Kemp Battle.

North Carolina's State Records include many relevant documents of the period, including the various confiscation acts. Volume XVIII, at pp. 136-143, 421-425, and 476-483, detail the charges made against "the judges" by John Hay and others who sought their impeachment, along with Judge Ashe's written reply, and the reports of the legislative committee which investigated the charges. Details of the Brice-McNeil case come from this source and from James Iredell's correspondence.

Iredell's correspondence was voluminous. It was compiled in 1857 by Griffith J. McRee, and reprinted in 1947 as McRee, G. J., Life and Correspondence of James Iredell, New York: Peter Smith.

The Bayard case is covered in excellent detail in a doctoral dissertation by J. Charles Waldrup, James Iredell and the Practice of Law in Revolutionary Era North Carolina, written in 1985 and available at the UNC Library, Southern Historical Collection.

The producers would also like to thank North Carolina Supreme Court Justice Willis Whichard for permission to consult his dissertation-in-progress, a biography of Iredell, which is an outstanding guide to the lifestyles of lawyers and judges "riding circuit" in the late 18th century.

About the Royal Palace, see Dill, Alonzo Thomas, Governor Tryon and His Palace, Chapel Hill: UNC Press, 1955. The Palace symbolized royal wrongdoing to the North Carolina republicans, and its story mirrors the political fight that surrounded Bayard.

The following end notes appear at the end of the video:

*Bayard v. Singleton* in 1787 is the first reported case in which an American court voided an act of the legislature as unconstitutional.

In 1803, sixteen years after the decision in *Bayard v. Singleton*, the United States Supreme Court, in *Marbury v. Madison* declared an act of Congress unconstitutional for the first time.

*Marbury v. Madison* was authored by Chief Justice John Marshall. Alfred Moore, one of Singleton’s attorneys, was a member of the US Supreme Court at the time of *Marbury v. Madison*.

Between the time of *Bayard v. Singleton* and Alfred Moore’s appointment to the United States Supreme Court, James Iredell, who represented Mrs. Bayard, served on the US Supreme Court. Alfred Moore and James Iredell are the only North Carolinians to serve on the US Supreme Court, and both appeared in *Bayard v. Singleton*.

Following 18 years of service on the North Carolina Superior Court, Samuel Ashe was elected Governor of North Carolina in 1795. He served 3 consecutive one-year terms and was President of the Board of Trustees of The University of North Carolina during that time.

In 1789, William Richardson Davie, known as the father of The University of North Carolina, sponsored a Bill creating the University as the nation’s first public university. Davie succeeded Ashe as the Governor of North Carolina in 1798, and later served as a US District Judge.

In addition to Davie, other founding Trustees of The University of North Carolina who appeared in *Bayard v. Singleton* include: Samuel Ashe, Alfred Moore, John Hay, Samuel Spencer, James Iredell, Samuel Johnston, Archibald Maclaine, and John Williams.