

### III

## Newfoundland's Early Laws and Legal Institutions: From Fishing Admirals to the Supreme Court of Judicature in 1791–92

---

CHRISTOPHER ENGLISH

RESEARCH ON THE ORIGINS of the legal institutions and culture of Newfoundland is in its earliest stages. A century separated the classic study by John Reeves (1793) from that of his spiritual successor D.W. Prowse (1895). Another passed before the history of the law in Newfoundland attracted sustained academic or professional attention. What follows is offered as work in progress, an overview of the developments in statute law and the royal prerogative which provided the historical context for the introduction of the first acts of judicature in 1791 and 1792. From them the present *Judicature Act*, court system, procedures and officers have evolved.<sup>1</sup> The modest material, demographic, institutional and experiential base upon which the statutory initiatives of the late eighteenth century were erected was reflected in Great Britain's decision to make these arrangements annually renewable to 1809. Only in retrospect has it been possible to argue that these statutory initiatives marked a step along the way to colonial status (1825), then representative (1832) and responsible (1855) governments.<sup>2</sup>

The law under discussion here emanated from imperial policy makers in London. It comprised prerogative writ (the crown speaking through the privy council) and

---

<sup>1</sup> John Reeves, *History of the Government of the Island of Newfoundland* (London: J. Sewell, 1793); D.W. Prowse, *History of Newfoundland from the English, Colonial and Foreign Office Records* (London: Macmillan, 1895); Ralph Greenlee Lounsbury, *The British Fishery at Newfoundland, 1634–1763* (Hamden: Archon, 1969); Patrick O'Flaherty, "The Seeds of Reform: Newfoundland, 1800–1818" (1988) 23 *Journal of Canadian Studies*; "Government in Newfoundland before 1832: the Context of Reform" (1988) 84 *Newfoundland Quarterly* 25. Among eight of O'Flaherty's relevant *Dictionary of Canadian Biography* [hereinafter DCB] entries, several are noted below. Sean Thomas Cadigan, "Economic and Social Relations of Production on the Northeast Coast of Newfoundland, with Special Reference to Conception Bay, 1785–1855" (Ph.D. thesis, Memorial University of Newfoundland, 1991). Key contributions by Keith Mathews between 1968 and 1984 are noted below. A preliminary and wider commentary on this topic appeared in my "The Development of the Newfoundland Legal System to 1815" (1990) 20 *Acadiensis* 89. I am grateful for the suggestions offered by Philip Girard, Christopher Curran and Jean Guthrie at various stages of this research.

<sup>2</sup> (1791) 31 *George III*, c. 29; (1792) 32 *George III*, c. 46.; and (1809) 49 *George III*, c. 27. All statutes cited below are imperial. On the continuity and adaptation of the acts, Newfoundland Law Reform Commission, *Legislative History of the Judicature Act, 1791–1988* (St John's: NLRC, 1989). The story of the emergence and functioning of an informal customary system for maintaining social peace and resolving disputes must, like the régimes of Aboriginal and of English criminal laws, be deferred to another time.

statute (the crown speaking through parliament). Together they defined Great Britain's role and rule in Newfoundland: a migratory and seasonal fishery carried on predominantly from the English west country in which the economic interests of private entrepreneurs complemented the economic, strategic, diplomatic and defence priorities of the British crown. Both government and commercial interests viewed the Island and Labrador as an appendage to the coastal and Grand Banks fishery, useful only for shore-based facilities from which to harvest a staple crop. Policy makers ignored the interests and representations of the small but growing settled population in Newfoundland: 3,000 residents of European origin in 1689, 7,000 in 1750, and 17,000 in 1793, of whom 3,000 were in the capital, St. John's.<sup>3</sup> Permanent settlement was officially discouraged as strongly in the 1790s as it had been when statutorily prohibited a century before, in 1699.<sup>4</sup> But it had persisted during the eighteenth century, giving rise to an *ad hoc* legal régime which mixed royal declaration with local custom. In its time it sufficed. However, in 1787 it was judicially declared to contravene the statutory régime which had regulated the fishery since 1699. The *Judicature Acts* of 1791 and 1792 addressed the contradiction with official recognition that increased settlement, produced by the transition from a migratory to a Newfoundland-based fishery, demanded a new judicial régime.

## I. Rule by the Fishing Admirals

From the earliest days of renewed European contact with Newfoundland in the late fifteenth century, England treated the Island and the Labrador coast differently from her other overseas holdings. Whatever the merits of the rival claims for John Cabot's landfall, whether Bonavista Bay or Cape Breton, the merchants of Bristol and the English west country had quietly exploited the fishery for some years before 1497. Even in a pre-mercantilist age the value of the fish staple, for domestic consumption in Britain and for export to Catholic Europe, was appreciated. Athwart the main path of communications between Europe and North America before 1800, the Island was a pawn, subject to great power rivalry and war. England claimed it, France powerfully contested it, and Spain had used the Island for fishing from the earliest days. A highly efficient sixteenth-century Basque whaling industry has been documented by archaeologists at Red Bay on the Strait of Belle Isle.

Royal charters granted to private individuals, Sir Humphrey Gilbert in 1583, Sir George Calvert, Lord Baltimore in 1623, and Sir David Kirke in 1637, or to joint stock companies, The London and Bristol Company, represented by Sir John Guy in 1610, and the Western Company of Adventurers in 1634, 1660 and 1676 were duplicated at that period in other parts of the empire. But when they failed through a combination of under-capitalisation, ill-prepared and inadequately supplied settlers, isolation and an unforgiving climate, the succeeding system of crown colonies,

<sup>3</sup> Great Britain, Colonial Office, 194/21, 23, 49, 64, 70, 80, 81, Office of the Colonial Secretary, "Abstract of Census and Return for the Several Electoral Districts of Newfoundland": Maritime History Archives, Memorial University of Newfoundland [MHA].

<sup>4</sup> (1699) 10 & 11 William III, c. 25 [*King William's Act*]; (1775) 15 George III, c. 31 [*Palliser's Act*].

as in Virginia or the West Indies by 1660, was not applied in Newfoundland. Instead, vacillation, procrastination and indecision prevailed for two centuries, to 1699.<sup>5</sup>

Newfoundland's separate status from that of other British crown colonies of the time was necessitated, in imperial eyes, by the continuing importance of the fishery and the insecurity of England's local control. While the Spanish had deferred by the mid-seventeenth century, France was only gradually contained by the Treaties of Utrecht (1713) and Paris (1763). When international treaties included Newfoundland, the primacy of imperial concerns was apparent. By article thirteen of Utrecht, France retained the right to fish and to dry its catch on the French Shore, a huge stretch of coastline from Cape Bonavista to Cape Riche, until 1783. By the Treaty of Versailles in that year "in order to prevent the quarrels which have hitherto arisen between ... England and France," the French Shore was defined as running from Cape St. John to Cape Race. And so it remained to 1904. Newfoundland would be won or lost on the battlefields of Europe and on the high seas, and according to the degree that she served England's interest. Migratory and seasonal, the fishery demanded neither governmental expenditure nor governance. It offered a lucrative staple crop, providing employment to thousands of seamen and fishermen, and profits to those who supplied them with ships, gear, and food. As a "nursery for seamen" it served as a training ground for men who might be enrolled or impressed into the nation's defence in wartime.<sup>6</sup>

Against these priorities the English government deemed settlement extraneous, expensive and compromising. Some people remained in isolated coves after the failure of the proprietary colonies, and thereafter at the end of each fishing season; but they were vulnerable to the arbitrary rule of fishing admirals in the summer, official indifference, the vagaries of European war and peacemaking, a fluctuating fishery and the ever-present assault of cold, fog and wind in a land largely barren of agricultural potential. The population grew slowly when it grew at all. Settlement was not only discouraged; it was difficult and, by 1699, illegal.

The legal régime during the two centuries of sustained European contact down to 1792 emanated from the power assigned by charter and prerogative writ to private and corporate entrepreneurs.<sup>7</sup> By convention the first fishing captain to arrive in

<sup>5</sup> The indispensable study of official policy and the migratory fishery remains Keith Matthews, "A History of the West of England-Newfoundland Fishery" (D.Phil. thesis, Oxford University, 1968). For the charters and amending instruments: Keith Matthews, *Collection and Commentary on the Constitutional Laws of Seventeenth Century Newfoundland* (St John's: Maritime History Group, 1975), and his *Lectures on the History of Newfoundland, 1500-1830* (St. John's: Breakwater, 1988).

<sup>6</sup> By Utrecht, *inter alia*, the French surrendered their settlement at Placentia "and whatever other places ... [are] in French possession." By Paris, France lost Cape Breton and recovered St Pierre and Miquelon, and the British undertook to remove their own fixed settlements on the French Shore. All treaties, including the two at Paris in 1814 and 1815, affirmed the strictly commercial rights of the French on the Shore. F. F. Thompson, *The French Shore Problem in Newfoundland: An Imperial Study* (Toronto: University of Toronto Press, 1961), Appendix 1 at 191-92.

<sup>7</sup> The 1615 instructions issued to Captain Richard Whitbourne by the Court of Admiralty to impanel juries, make inquiry on oath, and regulate abuses in the fishery are oft-quoted and as quickly passed over, because he attempted to do so during that one season and only in the north-eastern harbour of Trinity. Richard Whitbourne, "A Discourse and Discovery of Newfoundland (1620)" in Gillian T. Cell, ed., *Newfoundland Discovered: English Attempts at Colonisation, 1610-1630* (London: Hakluyt Society, 1982) at 101-207.

Newfoundland from a British port each season became fishing “admiral,” with power to allocate fishing berths and shore stations and to maintain law and order in his particular cove or stretch of coast. Guidelines issued in 1633 by the Court of Star Chamber (a royal juridical council made up of privy councillors, common law judges, select parliamentary peers and crown lawyers) provided for the protection of fishing facilities; for the preservation of forests for fuel, boat building and the construction of fishing stages (raised tidewater premises and outbuildings) and flakes (elevated drying platforms); and for the safeguarding of public morality by suppressing taverns and mandating Sunday observance. The jurisdiction of the fishing admirals was limited only by the requirement that those accused of the capital crimes of murder, or theft over 40 shillings, be brought to England for trial, accompanied by two witnesses. Few witnesses were willing to lose a fishing season travelling at their own expense to see justice done in England; and capital crimes (“reserved cases”) may have been settled by way of rough justice of the masthead variety, though the evidence here is anecdotal or the product of editorialising. Judge Prowse, Newfoundland born and resident, presentist in outlook and values, and a nationalist and unsparing critic of the régime of the fishing admirals, pictured one

... clothed, not in the dignity of office, not in the flowing judicial robes, not in the simple and sober black of the police magistrate, but in his ordinary blue flushing jacket and trousers ... besmirched with pitch, tar and fish slime .... The sacred temple of law and equity was a fish store [waterfront outbuilding], the judicial seat an inverted butter firkin. Justice was freely dispensed to the suitor who paid the most for it ....

Sometimes, alas! the dignity of the Bench was diminished by the sudden fall of the Court prostrate on the floor, overcome by the ... effects of new rum and spruce beer.<sup>8</sup>

Prowse’s vignette is undocumented, although he had access to previously unresearched archives. It is now exposed as apocryphal. A high Victorian lawyer and judge, he echoed the claim of his respected English contemporary, A. V. Dicey, that English statute and high judicial decisions were the purest emanations of law. Such assumptions, that a system of law which is immutable and independent of custom, social values or public policies, are no longer widely shared.<sup>9</sup>

By 1660 captains were forbidden to transport passengers to Newfoundland. Neither colony nor settled plantation, Newfoundland comprised “a great English ship moored near the Banks during her fishing season, for the convenience of the English fishermen ... and expected to return to England when the season was over.” “Additional Rules” in 1671 limited the fishery to British subjects and reaffirmed its migratory and seasonal nature by prohibiting ships from leaving England before 1 March. Each captain had to post a £100 bond with the mayor of a west country town as surety against carrying any but seamen or fishermen. No one was to over-winter and one in five of the crew had to be a “Greene Man,” a seaman of not more than one year’s experience. An annual renewal of personnel would expand the available pool of skilled sailors and reaffirm the importance of Newfoundland as a nursery for

<sup>8</sup> Prowse, *supra* note 1 at 226.

<sup>9</sup> H.W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985).

seamen and a source of fish, the twin imperial interests which sustained the migratory fishery. West of England calls for a seasonal governor in 1675 were repulsed by a privy council report:

... besides the charge of forts, and a governor, which the fish trade could not support, it was needless to have any such defence against foreigners, the coast being defended in winter by the ice, and in summer by the resort of the King's subjects, so that unless there were proper reasons for a colony, there could be none for a governor.

Furthermore, settlers would likely trade with New England, whence they were already "furnished with French wine and brandy and Madeira wines, in exchange for ... fish." Newfoundland as a colony would only follow New England "to the loss of many of the advantages which, by the present method of things, are yet enjoyed by the mother country."<sup>10</sup>

The increased attention paid Newfoundland in the late seventeenth century was not a response to the fact of settlement, legally prohibited in 1675, informally permitted two years later, and thereafter ignored. Rather, a wealthy, powerful, popular and assertive France seemed poised to push her interests in the New World against a less powerful England weakened by her civil war, Jacobitism and constitutional revolution in 1688. Although France retained a presence on Newfoundland's south coast and a fort at Placentia, her ambitions lay in Europe. Louis XIV never shared his minister Colbert's enthusiasm for developing a closed colonial and commercial system, from which all but the mother country would be excluded. But the French threat was credited in London. The result was an uneasy compromise. Permanent settlement was inconsistent with a migratory fishery. Because of her almost constant war with France between 1689 and 1713, Britain could not prevent it. The treasury was exhausted but decrees dating back a century prohibited taxing the fishery. Britain could not afford to leave, surrendering an international fishery and its markets to France. The solution was to hold the ring, ignore settlement and reaffirm the *status quo* in statutory form.

## II. King William's Act, 1699: Framework for the Rule of Law

The statute 10 & 11 William III, c. 25 provided the determining juridical régime for Newfoundland through the eighteenth century. For John Reeves in 1793, legal adviser to the Board of Trade, author of the report which gave rise to the *Judicature Act* of 1791, chief judge seasonally based on the Island in 1791 and 1792, and Newfoundland's first and still influential legal historian, the *Act* of 1699 was a disappointment and a missed opportunity.<sup>11</sup> It was "little more than an enactment of

<sup>10</sup> The ship metaphor was coined by William Knox, formerly an under-secretary of state in the Home Office, responsible for the colonies between 1782 and 1801: in Great Britain, Parliament, *Reports from the Committee on the State of the Trade to Newfoundland*, severally reported in March, April and June 1793, vol. X (1793) at 413. Reeves, *supra* note 1 at 14–20. The "Additional Rules" are in Matthews, *Collection*, *supra* note 5 at 151–7.

<sup>11</sup> Reeves, *supra* note 1 *passim*; Peter Neary, "John Reeves" 6 DCB at 636–7. On the dominant interpretative framework within which historians and commentators, taking their cue from Reeves, placed Newfoundland history down to the 1960's, see Keith Matthews, "Historical Fence Building: A Critique of Newfoundland Historiography" (1978) 74 Newfoundland Quarterly 21. Prowse, *supra* note 1 at 225, lamented: "At this distance ... we cannot understand how any intelligent minister could have propounded such a Bill; but William's Government was notoriously corrupt. It is only through

the rules, regulations and constitution that has mostly prevailed there for some time.”<sup>12</sup> That was what it was intended to be, as is evident in five themes which distinguished the *Act*.

First, this “[A]ct to encourage the trade of Newfoundland” codified sporadic pronouncements of the royal prerogative as applied by chartered companies and fishing admirals over the preceding century. Proclaiming the freedom of all British subjects to trade, fish, erect facilities for processing the catch and repairing boats and gear on shore, it reiterated long-standing prohibitions against destroying shore facilities (s. 1), over-wintering (s. 3), and rinding trees or firing woods except for necessary fuel, ship repairs and construction (s. 12). It repeated the requirement of 1633 that every fifth crewman be a “green man” (s. 10) and further stipulated that each ship carry “two fresh men [who had made no more than one previous voyage] in six” (s. 9). Reaffirmed were Lord’s day observance, prohibitions against the sale of alcohol (s. 16) and the taxing of fish (s. 17), and the authority of fishing admirals to allocate fishing grounds and inshore facilities (s. 4) and to settle local disputes (s. 15).

Second, three provisions signalled a new legal role for the crown in the fishery. The authority of fishing admirals was no longer absolute: an appeal from their decisions now lay to the captain in charge of the naval station (s. 15). This complemented the provision that “for the more speedy and effectual punishment of ... offenses, ... robberies, murders, felonies” and other capital crimes would [now] be tried by courts of oyer and terminer in any English county (s. 13). Finally, “in order to preserve peace and good government amongst the seamen and fishermen,” the fishing admirals were responsible for enforcing the *Act* (s. 14). This gave them a police power for which they were accountable. Each was to keep a seasonal journal of the ships, stages and seamen in his harbour and forward it to the Privy Council upon returning to England. Since s. 14 made no mention of merchants or “Western Adventurers”, terms employed in the charters of the seventeenth century, they presumably fell outside the *Act*’s ambit and would continue to resort to English courts for redress.

Third, the *Act* recognised the existence, though not the legality, of settlement. Those shore premises which since 1685 had been detained to private use, as distinguished from a use consequent upon pursuit of the fishery, should be given up (s. 5). The intent appears to have been to delineate who had use of what premises, because captains had taken to leaving a crewman to over-winter in order to claim the best premises in the following season. The cut-off date of 1685 implicitly recognised the validity of non-fishery uses of the land which predated that year and had been uninterrupted thereafter. “Use” intended no title to property. By s. 6 no shore premises could be occupied until all demands of the fishery had been satisfied. Once this condition had been met, however, there would presumably remain no bar to private individuals settling on the land. At last, the *Act* recognised that those who

---

the strong influence of Devonshire [the English west country merchants] and bribery that we can explain ... such a measure.”

<sup>12</sup> Reeves, *supra* note 1 at 31.

had taken up or built premises since 1685 which were not claimed by the fishery "may peaceably and quietly enjoy same ... without disturbance" (s. 7).

Once permanent settlement had been recognised, could some provision for future governance be far behind? This assumption underlay later commentators' criticisms of the *Act*, with the benefit of hindsight. Like most policy makers the men of 1699 had their eyes on the past. They might recognise settlement but they need not sanction it. The failure to project into the future the implications of this compromise was of a piece with the *Act's* failure to stipulate penalties for infringing the *Act*: for example, the appropriation of vacant fish flakes for fuel during the winter, rinding trees (for bark upon which to dry wet fish on the flakes), and indiscriminately cutting timber. Two years later a Board of Trade official on a tour of inspection warned from St. John's of the prospect that "there would not be a stick left fit for the use of the fishery within five or six miles of that, or other harbours."

Fourth, merchants or adventurers seemed immune from the enforcement provisions of sections 14 and 15, because only masters, fishermen, seamen and settlers were enumerated. Commentators inclined to the interest-group conspiracy theory have found this significant. But in 1699 few, if any, merchants were seasonally resident, unlike 1791 when Reeves visited. If the *Act's* intent was to consolidate and rationalise, then not surprisingly it was to apply only to those who might be expected to partake, as in the past, of a seasonal and migratory fishery in which decisions continued to be made, and financial strings pulled, from England.

Finally, 10 & 11 William III, c.25 was distinctive because for the first time it regulated the Newfoundland fishery by way of statute. Why this form of legislative enactment was preferred is unclear. Statute assumed no greater legal weight or permanence than did the royal prerogative, expressed in an executive order-in-council when issued under the authority of the great seal. The crown, as the executive arm of government, was as bound by provisions of prerogative writ as by statute.<sup>13</sup> Perhaps the choice of statute reflected the enhanced power assumed by parliament as a result of the constitutional confrontation with executive authority, which brought it victory over the monarchy in the Civil War (1643–49), confirmed in the common law by the Restoration Settlement (1660) and the so-called Glorious Revolution (1688). Was this statutory restatement of the importance of the Newfoundland fishery, and of the continuing ban on permanent settlement, an earnest of the continuing influence of west country merchants who had dominated the migratory fishery for two centuries? Did it reflect parliament's concern for imperial trade and commerce in an increasingly mercantilist age? If such was the case, parliament was more concerned to enunciate imperial policy than to enforce it. In 1699 England was only at the half way point in a generation of warfare against Louis XIV's attempts to dominate Western Europe and the New World. France's holdings stretched beyond New France west to the Great Lakes, east to Cape Breton, and south to Louisiana and the islands of the Caribbean. A statutory declaration of the historic and continuing priority which England attached to control of the Newfoundland fishery was a public, visible and unambivalent statement. The regulation of the fishery, settlement

---

<sup>13</sup> Reeves, *supra* note 1 at 35; *Campbell v. Hall* (1774), 1 Cowper 204, 98 English Reports 1045.

and, if need be, local governance, could be left to the traditional *ad hoc* responses of prerogative writ.

Whether or not this was the intention, so it transpired. The failure of *King William's Act* to stipulate penalties, and the fact of year-round settlement, led the Board of Trade, established as a government ministry in 1696 to oversee colonial trade and governance, to consider according sea captains a land command in 1708, with policing and judicial powers to hear and settle disputes. By 1711 the inhabitants of St. John's were making provision to police the town by meeting in "assemblies [which] were somewhat anomalous, a kind of legislative judic[iary], and executive, all blended into one." Increasingly, requests for clarification of s. 7 of 1699 were made, and it was conceded that it gave an estate for life, but never fee simple.<sup>14</sup> Meanwhile Britain's victory in the long series of French wars brought the transfer of Placentia from French control by the Treaty of Utrecht in 1713.

The imperial response to these realities lay not in statutory reform but in the issuance of prerogative writs by the king in council. Again, it is unclear why this means was preferred. Was it intended to fill the gap opened by the absence of a judicial administration during the winter? Did it offer an *ad hoc* means for the resolution of private disputes in tort or contract? Perhaps it was a means of testing possible changes to the statutory régime without drawing the scrutiny of parliament. Was it intended to deny a ready target to critical west country merchants who wished neither settlement nor governance in their economic domain? Was it a response to the widely claimed, but less often substantiated, harshness and variability of justice dispensed by the fishing admirals? All remain possible; none have yet been documented.

The possibility remains that we may be posing a series of questions which were not asked by contemporaries. Harry Arthurs has argued that the primacy of statute and judge-made law was a construct of the late nineteenth century, owing much to the advocacy of commentators like Dicey. The widely-held assumption that "the rule of law ... posits that everyone is subject to the same law, law that is enacted by parliament and authoritatively expounded ... by the superior courts" is of relatively recent vintage. Outside the legal profession it may still not be widely held: "people may wish to order their lives by a system of law that judges neither created nor countenanced."<sup>15</sup> Where, in short, we perceive anomaly, or even contradiction, contemporaries may only have discerned an alternative, parallel, historically sanctioned way of making law. For whatever reason, the Board of Trade proceeded hesitantly and pragmatically in enforcing the *Act* of 1699. Further, the Board proceeded to win a series of orders-in-council from the Privy Council, of which it was, in effect, an adjunct. These resulted in the emergence of a practical, informal, indigenous legal system which effectively met Newfoundland's local needs during the eighteenth century. But they were illegal to the extent that they were incompatible with *King William's Act* of 1699, reaffirmed in 1775 and 1786, which, as noted above, provided for only a seasonal exercise of judicial authority in Newfoundland. The

---

<sup>14</sup> Reeves, *supra* note 1 at 35, 53, 55–63.

<sup>15</sup> Arthurs, *supra* note 9 at x, ix.



successful challenge to a year-round jurisdiction, exercised in the magistrate's and surrogate's courts in Newfoundland, by Richard Hutchings before the Devonshire court of quarter sessions at Exeter in 1787, severely compromised the local judicial system.<sup>16</sup> It made more urgent the need for reform which led to the *Judicature Act* of 1791.

### III. Ignoring Statute: The Eighteenth-Century Local Régime

Research on the customary legal régime of the eighteenth century is in its earliest stages. Indigenous and informal, it appears to have evolved on a pragmatic basis as year-round settlement increased: over 3,000 in 1728; double that by mid-century; 16,000 by 1764, and 20,000 by 1800.<sup>17</sup> Its institutions, practices and ideology remain to be limned; but only in the late eighteenth century did they impinge upon the statutory régime of 1699, which had continued for a century to enshrine imperial priorities, formality, resistance to change and a refusal to factor in local realities.

Official recognition came in 1729 that judicial arrangements were needed to facilitate the seasonal jurisdiction of fishing admirals and out-of-season settlement. Designated first governor on station for the fishing seasons of 1729 and 1730, Captain Henry Osborn appointed sixteen justices of the peace and thirteen constables to eleven centres in six districts along the east coast of the Island from Placentia north to Bonavista. At the same time he delegated power to subordinate naval officers to act as surrogates. The public trappings of criminal justice arrived with the construction of stocks, whipping posts and a prison in St. John's. These initiatives were followed in 1750 by a court of oyer and terminer separate from the sessional courts, sitting by way of crown prerogative to hear and determine treasons, felonies and misdemeanours while the governor was in residence. By this time a naval officer was in place in St. John's (1739) to suppress smuggling. A court of vice-admiralty had been established in 1737 and a custom's house followed in 1763.

By the late eighteenth century a judicial system was in place, based on magistrates sitting in sessional courts and hearing civil actions and minor criminal cases year round. The governor's surrogates sat with them during the fishing season. Together they dispensed speedy, summary and inexpensive justice in the outports. The system appears to have been accessible, resorted to by the people and, in the absence of lawyers and judges with legal training, informal. Capital offences were the exclusive domain of oyer and terminer; only here would a jury be convoked. The usual penalty was fine or forfeiture. These were preferred for several common-sensical reasons: most outports lacked facilities for incarceration; where these existed, they were confined, cold, barren and uncomfortable. Since the costs of imprisonment were charged to the successful plaintiff, he too would opt for a fine, especially after 1788 when he was required to split the fine with the crown.<sup>18</sup> Likewise a sheriff had to absorb the prison charges when the successful plaintiff did not; one keeper over

---

<sup>16</sup> (1775) 15 George III, c. 31; (1786) 26 George III, c. 26. The relevant judicial records are cited in Keith Matthews, "Richard Hutchings" 5 DCB at 443-44.

<sup>17</sup> "Abstract of Census", *supra* note 3.

<sup>18</sup> (1788) 28 George III, c. 35, s. 1.

fifteen years found himself £900 out of pocket. Finally, the community itself had reason to endorse fines, provided that the guilty could pay. In the event that he was unable to meet court costs, the local magistrate maintained a census list of all residents from which he could assess each master two pence for each of his servants. If that was insufficient, the charge could be apportioned among the local masters, a sort of municipal poll tax. Court costs, at least down to the *Act* of 1788, were the sole means of financing the justice system. After judges and sheriffs had been paid, few resources were available for capital expenditure. A new court house and gaol in St. John's in 1786 would have cost £1,080. It was not built.

An essential ingredient of popular support was that justice was seen to be done. Whatever the legal skills of the parties, unrepresented by counsel, due process appears to have been followed. This was important in the court of oyer and terminer, which had sole jurisdiction over capital crimes. Two or three weeks before its annual sitting in St. John's, the governor named five to seven "commissioners" as judges. They heard cases in September or October, at the end of the fishing season and immediately prior to the governor's departure for home. Trials lasted up to two days and the docket rarely exceeded two cases. A grand jury of twenty-four men handed down indictments and examined witnesses for discovery. The resulting record was signed by a justice of the peace or several respectable citizens. The testimony of unavailable witnesses was entered by signed depositions, though whether this included absence for any cause other than death is unclear. These preliminary hearings excluded hearsay evidence. The parties submitted pleadings to the court and either the grand jury returned a true bill or the accused was freed.

At trial a petty jury of twelve was sworn, for which members of the grand jury were ineligible. It questioned witnesses and withdrew under the care of a bailiff sworn "to keep them without meat, drink, candle or lodging or suffer any person to speak unto them" until they had agreed on a verdict. The foreman announced it, the courtroom was cleared, the commissioners deliberated, and the court reconvened and pronounced sentence. The governor might recommend a pardon or a reprieve to London. Again it is unclear if he had entire discretion or whether the court had a role in so recommending. Recommendations to the Privy Council adverted to the qualities of character and citizenship of the guilty. Liberal use of the governor's discretion, in light of the wide incidence of capital offences and delays involved in an overseas reference, may explain why London deferred to the governor's views in almost all cases.<sup>19</sup> Only a third of capital sentences were carried out. The whole appears a neat, internally coherent and functional scheme in which the actors were familiar: adjudicator, jurors, bailiff, sheriff, plaintiff, witnesses and accused. The notable absentees to a modern eye were crown prosecutor and defence counsel, but the system functioned satisfactorily without them.

The Board of Trade, largely responsible for the initiatives which led to a formally resident legal régime, argued, as in recommending the establishment of oyer and

<sup>19</sup> G. Deir, "A Study of Capital Crimes in Newfoundland, 1750-1800" (MHA, n.d.) 8. Detailed studies of how the legal system functioned await archival research. Initial surveys have been confined to a few senior undergraduate essays at Memorial University, supervised by the late Keith Matthews, which concentrated on criminal cases.

terminer in 1738, that to proceed by prerogative writ did not infringe the statute of 1699. While the strategy served as a useful reminder that statute was not assumed at the time to be superior to the royal prerogative, the claim could finesse neither the powers granted in 1699 exclusively to fishing admirals to try cases at first instance nor the statute's requirements that capital cases be tried in England. The Board argued that it was simply providing for the resolution of complaints in the non-fishing season. But in practice the jurisdiction of fishing admirals, acting as governor's surrogates, clashed with that of resident magistrates. Despite the provision in 1699 for "long user" of non-fishing premises, the setting up of institutions which might rival the jurisdiction of fishing admirals begged a challenge by an aggrieved litigant, as signalled by Hutchings in 1787 at the Exeter Quarter Sessions. Statute was to prevail over executive discretion, at least where the two were at odds. That such was the intent, and would continue to be good law, was reaffirmed by *Palliser's Act* in 1775.

#### IV. Continuity of Statute: Palliser's Act, 1775

Named after and credited to former governor (1764–1768) and naval officer Sir Hugh Palliser, 15 George III, c. 31 assumed that the provisions of 1699 remained viable, for its title proclaimed it "An Act for the encouragement of the fisheries carried on from Great Britain and for securing the return of the fishermen ... at the end of the fishing season." The twin bases of English policy in Newfoundland were unchanged: its fishery provided "the best nurseries for able and experienced seamen, always ready to man the [R]oyal [N]avy when occasions require," and remained exclusively British, seasonal and migratory (s. 1). An elaborate system of bounties was introduced (s. 1) and extended to the whaling industry (s. 3). To prevent overwintering, masters were to keep back the value of a return passage up to 40 shillings (s. 13), and to pay over only half of a man's wages in cash. The remainder was payable in "money, or in good bills of exchange ... either in Great Britain or Ireland" (s. 14). The right to dry fish on land was reserved to British subjects arriving from Europe (s. 1), which evidently excluded settlers entirely from the fishery.

The *Act* also extended the protection offered seamen and their wages in 1699. Provided he did not over-winter, each was to have a written contract (s. 14). His wages established the foremost lien on "all the fish and oil ... taken ... by ... persons ... who ... employ ... seamen and fishermen" (s. 16). In return, the men were to fulfil their side of the contract. Anyone absent without leave or neglectful of his work would forfeit two days' pay for every day missed. Five days' absence comprised desertion and resulted in forfeiture of the season's wages except for the passage home (s. 17). He might then be arrested, tried and, if guilty, publicly whipped and deported.

Finally, the *Act* differed from its predecessor in recognising modifications made by way of prerogative writs since 1729. Whereas *King William's Act* had stipulated a police and judicial power exercised by fishing admirals alone, with appeal to the naval commander, that régime was supplanted. Arrest warrants now issued from the governor or his surrogates, the court of vice-admiralty or the justices of the peace. And those same courts had sole jurisdiction to enforce the *Act*. Only the courts of session were excluded from enforcing the provision of s. 17 concerning seamen absent without leave. All disputes over wages and infractions of s. 17 were to be settled locally by the magistrates or vice-admiralty. By s. 34 an appeal lay from the Newfoundland courts to the High Court of Admiralty or to the Privy Council.

Presumably, since they were not mentioned, disputes in contract or tort not involving masters or seamen and fishermen, remained, as implied by *King William's Act*, with English county courts. On the analogy of oyer and terminer, itself the product of prerogative writ and not mentioned in the *Act*, and in light of the recognition of four sources for local judicial authority, one might argue that matters not falling within the 1699 statute now fell to local courts. The *Act* was exclusively concerned with the fishery; judicial issues not within its ambit presumably remained undisturbed. Thus, while *Palliser's Act* reiterated the value and imperial rationale underlying a migratory seasonal fishery, it statutorily recognised the legality of the four courts of civil jurisdiction which had emerged since 1729, as far as they limited themselves to hearing matters arising from the fishery, as stipulated by the *Act*. Later statutes simply refined that of 1775 with regard to bounties (s. 1), the jurisdiction of vice-admiralty court (s. 18), penalties for unauthorised absence (s. 17), and desertion and non-compliance with court orders;<sup>20</sup> or they took into account changes to the empire as a result of the United States' independence.<sup>21</sup>

For the liberal progressive school the *Act* of 1775 was exasperating, the product of either wilful blindness or capitulation once again to a west country lobby determined to deny Newfoundlanders their rightful destiny. Reeves, sixteen years after the *Act*, reported that it was "submitted to with silent discontent." Prowse attributed the *Act* to Palliser's "one great fault—beyond his own circumscribed vision he could see no horizon; he had no faith, no hope, no future for the Colony, ... his one idea that it remain a fishing colony and nursery for seamen."<sup>22</sup> Assessed in its contemporary context the *Act* appears suited to the times. English ministries clearly did not envision colonial status for Newfoundland and were determined to ensure the primacy of imperial interests by uncompromising enforcement of their navigation acts. They understandably stressed the nursery for seamen in the aftermath of the Seven Years War (1756–1763) fought in Europe, North America, the Caribbean and India, and on the eve of another which would pit England against the Thirteen Colonies and France (1776–1783). Statutory reaffirmation of the migratory nature of the fishery restated English policy since 1699. If *Palliser's Act* failed to recognise changes which were transforming the fishery to a settled one, it is also clear that the process was not yet accomplished. The local population was neither permanent nor large enough, at perhaps 16,000, to sustain it. If the *Act* disappointed

---

<sup>20</sup> (1786) 26 George III, c. 26 extended bounties, and removed vice-admiralty jurisdiction to hear disputes on seamen's wages "because of the unfavourable impressions ... made respecting the practice ... in that court." (Reeves, *supra* note 1 at 156). It stiffened the penalties against seamen for unwarranted absences, to five days' wages for each day absent (s. 6), and provided for the arrest of those deserting to the employ of foreign states (s. 12). Deportation or, if the offender was neither English nor Irish, imprisonment for up to twelve years might follow (s. 13). And (1789) 29 George III, c. 53 added further regulations for the whale fishery.

<sup>21</sup> (1788) 28 George III, c. 35 updated the provisions of the Treaty of Utrecht (1713) and Paris (1763) to take account of the Treaty of Versailles (1783). The provisions respecting France are noted *supra* at note 6. By article three the United States' traditional fishing rights on the Banks off the Island's coast, in the Gulf of St. Lawrence and off Labrador, were confirmed but she could not land or dry fish on the Island. She might do so on the Labrador coast until such time as the area was settled, when it would be necessary to have the agreement of the local settlers. Thompson, *supra* note 6 at 193.

<sup>22</sup> Reeves, *supra* note 1 at 136; Prowse, *supra* note 1 at 319.

local inhabitants, which is not at all certain, their disappointment would have been tempered by a recognition that imperial interests, as ever, would predominate. With the statutory régime confined to regulating the fishery, the administration of justice among a growing permanent population fell to the governor acting under instructions issued through prerogative writs. Courts of session in 1729, oyer and terminer in 1750, customs officers and vice-admiralty by the 1770's, provided for a non-statutory legal régime which met local needs. To the extent that they were sanctioned under the governor's powers issued under the great seal, or by instructions "bearing the signet and sign-manual of the King," they were legal as long as they were not challenged as infringing, as they undoubtedly did, the jurisdiction of the fishing admirals mandated by statute.

Summary justice sufficed for relatively simple cases involving seamen and fishermen, masters and settlers. But the migratory fishery was expiring. After 1783 it was increasingly Newfoundland-based, and west country firms were widely represented. The residence of merchants, whose dealings were "many-sided, complex and involved very large sums of money," made it only a matter of time before someone would challenge the jurisdiction of the courts. Richard Hutchings' successful appeal to Exeter of a fine levied by a Newfoundland magistrate in 1787, and confirmed on appeal by the governor's surrogate, caused havoc. Magistrates had been unenthusiastic about hearing such cases for at least a decade, since the same issue had arisen in 1782 without being pursued to a judicial decision. They had continued to sit as a convenience to the trade and to satisfy the governor, but "did it negligently, rather consulting the inclinations of the parties, and proceeding as arbitrators, not as judges, in such causes as they undertook to try." The law officers of the crown in London ruled that neither the governor nor his surrogates could hear the cases. Between 1788 and 1791 over 1,200 writs for debt collection were issued and the parties grew desperate for quick and enforceable decisions. Only oyer and terminer continued to function, and its criminal jurisdiction did little or nothing to alleviate the glut of civil cases. Governor Elliot's encouragement of the court of vice-admiralty to hear civil cases was coolly received, though the court did consent to act as arbitrator upon agreement of the parties. By the time his successor, Governor Milbanke, arrived in 1789 the situation was desperate: the fishery was down, bankruptcies rampant and contested debts could not be collected. On the advice of Aaron Graham, secretary to four governors between 1779 and 1791, Milbanke interpreted his instructions to permit him in this emergency to create a court of common pleas, adding to it a criminal jurisdiction. It was to be staffed by three judges, and litigants could elect trial by jury. The merchants opposed it, and advisers to the crown ruled it illegal.<sup>23</sup>

Nevertheless the new court limped along, staffed by Graham, customs inspectors and naval personnel, while the governor dispensed his "advice" to the parties, a

---

<sup>23</sup> Graham may have been an English lawyer. He returned to England in 1791 and was a persuasive witness in the parliamentary committee hearings which led to the *Judicature Act*, 1792. Calvin Evans, "Aaron Graham" 5 DCB 361. See also *State of the Trade to Newfoundland*, *supra* note 10, for Graham's testimony, vol. X at 433. On Governor Mark Milbanke see Frederic F. Thompson, 5 DCB 595.

holdover of the judicial function exercised by his office earlier in the century. Policy makers had to act, however reluctantly. The statutory system had been undermined by legal arrangements now ruled illegal and was faced with a population increase fuelled by Irish immigration, the decline of the migratory fishery, and the emergence of the seal fishery, as well as by changes in imperial policy and diplomacy. Still in accordance with governmental policy which opposed settlement, the Board of Trade accepted the attorney-general's proposal that prerogative writ be employed to create a "Court of Civil Judicature" in which an English judge and two assessors appointed by the governor would hear cases during the fishing season. Even this was ruled unconstitutional by the Lord Chancellor. Stalemate and commercial chaos prevailed.<sup>24</sup>

## V. The Judicature Acts of 1791 and 1792: Framework for the Future

We may look back on the statutory initiatives of 1791 and 1792 as watersheds marking the emergence of a judicial régime which is the basis for the system of judicature today. However, contemporaries were notably subdued. Locally, the fallout from *R v. Hutchings* demanded haste, but caution ruled at Westminster. The new *Act* (31 George III, c. 29) establishing a court of civil jurisdiction would take effect in June 1791 for one year and until the conclusion of the next parliamentary session. Recognising that the acts of 1775 and 1786 in their

provisions ... for the administration of justice in civil cases, are insufficient, and [that] it is highly expedient that a court of civil jurisdiction, having cognizance of all pleas of debt, account, contracts respecting personal property, and all trespasses against the person, goods or chattels, should be established ... for a limited time,

the *Act* of 1791 created a court "with full power and authority to hear and determine" such pleas (s. 1). In a further variation on preceding proposals, the court comprised a presiding judge and two assessors, one of whom would hear cases with the "chief judge" (s. 1). Since it had "all such powers as by the law of England are incident and belonging to a court of record" (s. 1), the question of how English law would mesh with Newfoundland practice was bound to arise.

Actions would be brought in writing and summons issued for causes under £5. Arrest, with "attachment of [the accused's] goods and debts, or of his effects in the hands of any person" (s. 2) might be employed for causes over £5. The court could execute judgment and award costs by way of "levy and sale of the goods and chattels, or arrest of the person" (s. 2). In cases over £100 notice of appeal, accompanied by a surety filed within 14 days, would stay execution pending appeal to the Privy Council (s. 3). By s. 4, during the governor's residence disputes over seamen's wages were reserved for the new court. The final clause of this brief act required actions to be brought within two years (s. 6). Here was no grand initiative. The *Act* was specifically restricted (s. 1) to amending 15 George III, c. 31, s. 18 *Palliser's Act*, 1775 which had given jurisdiction over seamen's wages to the courts of session and vice-admiralty. And yet the aim of the court (s. 1) seemed to extend further. The main

<sup>24</sup> Mathews, *supra* note 5 at 555–87. He overlooks (1791) 31 George III, c. 29.

lines of *Palliser's* and *King William's Acts* would evidently remain in place. The weight accorded to inherited law and policy by the official mind was not lightly to be discarded.

As a gauge of continuity the first chief judge was John Reeves, legal adviser to the Board of Trade. However, the two months he spent on the Island in 1791 convinced him that the new *Act* was inadequate. The new court was the sole civil court during the fishing season and it had no criminal jurisdiction. For whatever reason he seems to have overlooked oyer and terminer. Complaints had surfaced about the venality of the sheriff and the choice of a naval officer and Graham as assessors. Finally, the court could not deal with the flood of petitions consequent upon bankruptcies totalling £170,000, or with outstanding writs to a total of £25,000 from St. John's alone. Forty per cent of the actions were now between merchants. Only a fraction of the cases were heard that year.<sup>25</sup> Reeves' *Report* of December 1791 set the scene for an amended *Act* the following year. He urged continuity rather than change in the new bill, accompanied by a "regulating" bill to tighten up enforcement of *Palliser's Act*. However, the two may have been incompatible because the second was not proceeded with and has disappeared.<sup>26</sup>

The *Act* of 1792 was doubly important. It markedly expanded the *Act* of 1791 and accelerated the trend towards reconciling statute with eighteenth-century practice. To the civil jurisdiction of the now "Supreme Court" was added a criminal one, "with full power and authority to hold plea of all crimes and misdemeanours ... in the same manner as ... [in] England" (s. 1). In recognition of the force of local circumstances and conditions, the court's jurisdiction would be exercised "according to the law of England, so far as the same can be applied to suits and complaints arising in the islands" (s. 1). Thereby was initiated two centuries of debate on precisely what English law had been received into Newfoundland, an issue examined below. The powers, salaries and discretion to appoint officers and staff under the *Act* of 1791 remained unchanged (s. 3). A second bow to local practice lay in the governor's power, on the advice of the chief justice (the term now employed), "to institute courts of civil jurisdiction ... called surrogate courts ... as occasion shall require" (s. 2).

A third statutory innovation, reaching back to oyer and terminer, extended to civil litigants the right to request a jury trial in cases over £10. The chief justice would summon twenty-four citizens from which to draw a jury of twelve. If a jury could not be formed the governor or his surrogates could appoint "two proper persons to be assessors" to sit with the chief justice or surrogate judge (s. 4). Appeals from the surrogate courts on judgment over £40 lay to the Supreme Court, upon a surety for double the award being registered with the surrogate court within two days of judgment. Appeals lay from the Supreme Court to the Privy Council on awards over £100 on the same terms as in 1791.

<sup>25</sup> John Reeves, (1791) "Report on the Judicature of Newfoundland", Public Record Office (London), BT 1/8, copy in MHA. Matthews, *supra* note 5 at 567.

<sup>26</sup> Matthews, *supra* note 5 at 752-3. If the bill was faithful to the principles of *Palliser's Act* in reaffirming the importance of a migratory fishery and in discouraging permanent and non-fishery related settlement, it would clearly be incompatible with the *Judicature Act* of 1792.

For the first time the law made clear provision for the settlement of debts. In the event of insolvency “the goods, debts, and credits of any person shall be attached”. If restitution was not made voluntarily the court, after a hearing, could so order out of the proceeds of sale. Distribution would be on a rateable basis among the creditors (s. 6), except for the seamen’s and fishermen’s traditional first lien “for wages [which] become due in the current season” (s. 7). Next in line came “creditor[s] for supplies furnished in the current season”. In this case the key qualifying phrase “for the fishery” did not occur, and its omission became the subject of considerable litigation in the years after 1815. Chief Justice Francis Forbes<sup>27</sup> held it to be implied in light of the third priority claimant: “and lastly, the said creditors for supplies furnished in the then current season and all other creditors whatever”. The 1791 *Act*’s provision for shutting off claims was refined. If an insolvent made full disclosure, with the court’s consent and that of “one half in number and value of ... [the] creditors,” a certificate would bar further claims (s. 8). Any action which arose before 1 August 1792 had to be brought within six years; otherwise the limitation period narrowed to six months.

The supreme and surrogate courts would exercise exclusive civil jurisdiction, “any law, custom or usage, to the contrary notwithstanding.” Admiralty’s traditional jurisdiction over “maritime causes ... and causes on the revenue” remained, but it was barred from hearing actions on seamen’s wages (s. 12). Claims under 40 shillings in tort or contract for wages would be heard before sessional courts of two justices of the peace, neither of whom could be customs officers. They exercised a summary jurisdiction intended to deal with the payment of debts within a year of the cause of action arising. The court could award costs and execute by attachment. Presumably its decision was final. The chief justice oversaw the sheriff and the procedures, rules and fees of all four levels of court<sup>28</sup> with an eye to “expediting matters with the most convenience and least expense to the parties” (s. 14). All courts could grant summary execution for fees and costs (s. 15), which remained the sole source of revenue to run the judicial system. In keeping with the *Act*’s intentions to rationalise and expedite the delivery of justice, plaintiffs were on notice to mount a good cause of action. If judgment issued for the defendant, or if the plaintiff was non-suited or discontinued his action after the defendant had filed an appearance, the defendant recovered triple costs without prejudice to any other legal remedy (s. 16).

A remarkable feature was the court’s jurisdiction over both law and equity. The chief justice had sole jurisdiction over intestacy and probate (s. 10). Why these powers should have been combined in one court a century before they were in England remains unaddressed and unresolved in the literature. Perhaps a desire for efficient and speedy justice in light of the logjam created by the decision in *Hutchings* was a factor. Reeves’ circuit in 1791 undoubtedly made him aware of the small population and modest resources of the Island. Were two courts feasible where none had been before, especially when accompanied by the courts of session and of vice-admiralty, to which was to be added the governor’s surrogates? There remains

<sup>27</sup> *Luke Doyle’s Servants v. Receiver of the Voyage*, (1821) 1 Newfoundland Law Reports 263.

<sup>28</sup> The Board of Trade issued “A Table of Fees of the Newfoundland Court” in 1792, prorated in accordance with the value of the action pursued: PRO (London), BT 1/2, copy in MHA.



the possibility that Reeves, the scholar, had come to recognise the desirability of uniting the two traditionally separate jurisdictions.<sup>29</sup> In any case, Reeves put his personal stamp on the system of courts and on the statutes of judicature. His successors over a century and a half were sometimes to wish that he had offered guidance on the form of law which the courts and system were to invoke.

## VI. The Reception of Law in Newfoundland

Law came to Newfoundland as a "settled" possession of England by three means. First, as noted above, all Englishmen carried with them as their birthright the common law: "Let an Englishman go where he will, he carries as much of the law and liberty with him, as the nature of things will bear." Second, reference has been made to the royal prerogative which seasonally and, after 1818, permanently resident governors exercised by means of their commissions and instructions. This means, too, was unremarkable in an era preceding the sovereign's grant of power to local inhabitants to establish a legislature (1832), at which point William IV voluntarily divested himself of the power to legislate for the local inhabitants. It was at this point, as well, that imperial statutes ceased to apply *ex proprio vigore* in Newfoundland unless they specifically made reference to the Island or its dependencies. The contentious issue in the matter of reception was the transference of English statute: how much of the English parliament's domestic legislation was operative in Newfoundland? Clearly it would be of little utility to equip local justices of the peace with the standard manuals for their colleagues in the English shires and expect them to follow them slavishly, for example to enforce provisions of the Waltham "Black" Acts which contributed to the popular stereotype of the "Bloody Code" of the eighteenth century. One would have walked, or sailed, a long way before finding peasants poaching deer or salmon from the estates of absentee landlords, capital crimes so entertainingly analysed by a recent generation of historians of eighteenth-century England, inspired by E.P. Thompson.

The answer came in the common-sensical view that as much of the law of England would be received as was relevant to local needs and circumstances. The statute of 1791 which established

a court of Civil Jurisdiction, with full power and authority to hear and determine, in a summary way, all Pleas of Debt, Account, Contracts respecting personal Property, and all Trespasses committed against the Person or Goods and Chattels was to be "a Court of Record ... [with] all such Powers as by the Law of England are incident and belonging to a Court of Record.

The mandate of the successor "Supreme Court of Judicature" in 1792, noted above, extended a criminal and civil jurisdiction "according to the Laws of England, as far as the same can be applied." What was being extended to Newfoundland was not the "Law of England," including its statutes, but a jurisdiction to apply such law in the light of local needs.

---

<sup>29</sup> John Reeves, *History of the English Law from the Time of the Saxons to the End of the Reign of William and Mary*, 4 vols. (New York: A.M. Kelley, 1969) and *The Law of Shipping and Navigation from the Time of Edward III to the End of Year 1806* (London: W. Clarke and Sons, 1807).

In the two centuries since these first two enactments, judges and the few commentators who have wrestled with the problem have sometimes failed to recognise the distinction between jurisdiction and law, between power and policy. The difference seems apparent on the face of the statute of 1792, thereafter renewed annually until 1809 when it was made perpetual, and reiterated in the succeeding *Judicature Act* of 1824:

The Supreme Court ... shall be a Court of Record, and shall have all civil and criminal jurisdiction whatever ... as fully and amply ... as His Majesty's Courts of King's Bench, Common Pleas, Exchequer and High Court of Chancery.

The three circuit courts set up by that same Act would, with three exceptions, exercise the same jurisdiction "according to the rules and course of the law of England, as far as the situation and circumstances of the said colony will permit."<sup>30</sup>

It is curious that despite the statutory grant of "all civil and criminal jurisdiction whatever" the courts often restricted their jurisdiction to that of the courts cited in the *Judicature Acts*. Those of 1792, 1809 and 1824 did not cite an ecclesiastical jurisdiction, and the colony after 1832 was denied any power to legislate on divorce. Lawyers until 1948 seemed to have considered matrimonial causes *ultra vires* the court. For a century and a half the Supreme Court denied itself jurisdiction over judicial separation and maintenance, the issue at stake in the *Hounsell* case (1948). Nor was the court in 1792 or 1824 given a specific power in admiralty, although it could hear suits "brought ... in breach or violation of any law relating to the trade or revenue of the British colonies or plantations in America [a traditional jurisdiction of vice-admiralty] ... according to the course of proceeding in similar cases in the Courts of Vice-Admiralty." Appeals to the High Court of Admiralty or to the king in council would follow the same rules. A failure to distinguish jurisdiction from policy led to a voluntary abnegation of admiralty jurisdiction by the Supreme Court in our own day, despite a series of mid-nineteenth century local decisions.

Similarly, much heat was generated over the question of whether the English law of real property was received into Newfoundland, especially after the first legislature decided that for purposes of inheritance all property would be treated as chattels real. Jurisdiction, Archibald wisely noted in 1847, meant "the power or authority to

---

<sup>30</sup> For references to reception in Newfoundland within a Canadian context see Elizabeth Gaspar Brown, "British Statutes in the Emergent Nations of North America: 1606-1949" (1963) *American Journal of Legal History* 95, although on several points she must be used with care, and J. E. Côté, "The Reception of English Law" (1977) 15 *Alberta Law Review* 29. A recent helpful survey to 1824 is Christopher Curran, "Introduction: the Judicature Act: a History of the Early Acts" in *supra* note 2 at 1; E.M. Archibald, *Digest of the Laws of Newfoundland* (St. John's: Henry Winton, 1847) is still very enlightening and has been relied upon in late twentieth-century judicial decisions. For "Mr. West's opinion on the Admiralty Jurisdiction in the Plantations" 20 June 1720, George Chalmers, ed., *Opinions of Eminent Lawyers on Various Points of English Jurisprudence* (Burlington: C. Goodrich, 1858) 511; *Campbell v. Hall* (1774) 9 E.R. 848; (1772) 9 George I, c. 22 [*Waltham Black Act*]; (1791) 31 George III, c. 29, s. 1; (1792) 32 George III, c. 46, s. 1; (1809) 49 George III, c. 27; (1824) 5 George IV, c. 67, ss. 1, 10; Archibald, *supra* at 40; and Newfoundland, "Royal Instructions" 1 *Consolidated Statutes*, 1916, 3rd series (St. John's: Robinson, 1919), Lord Goderich to Sir Thomas Cochrane, 27 July 1832, Appendix, xxxiii at xxxiv. "English statute law enacted prior [to 1832] was applicable to Newfoundland"; *Buyers Furniture v. Barney's Sales and Transport* (1983), 43 Newfoundland and Prince Edward Island Reports at 160.

minister and execute the law, without reference, in particular, to what law shall be administered." He defined the Supreme Court's jurisdiction as including the common law, equity (i.e., probate and administration), and admiralty. The law would be applied to the facts to hand; the law embodied in a given statute might be applicable without necessarily being in force. It would be unwise to accept *Yonge v. Blaikie* (1822) as resolving more than the question of whether the English revenue laws were in force in Newfoundland. It found that they were not, without restricting the historical requirement that a liquor licence be issued by a magistrate. The case was celebrated because Chief Justice Forbes declared that "the colonial courts date the discontinuance of English statute law ... from the institution of a local legislature in the colony," an early contribution to imperial jurisprudence. But the case did not stand for the proposition that English statutes were, or were not, received into Newfoundland. Settlers carried with them English law and the courts had the jurisdiction to apply it. But English statutes were not necessarily received: English law would apply in light of local circumstances and needs which were bound to change over time.<sup>31</sup>

Read in this light the *Judicature Act* of 1792 encouraged an expansionary approach by judges willing to limit the Supreme Court's jurisdiction only by the extent to which English law could be locally applied. However, the *Act* had also been prescriptive in defining the bases for the appeal of civil judgments. Thus, an appeal lay from surrogate's court to the Supreme Court on judgments over £40 (s. 5). Did this mean that no appeal lay on judgments under that sum? The issue was judicially decided in *Clift v. Holdsworth* (1819). Chief Justice Forbes ruled that the Supreme Court did indeed exercise an appeal jurisdiction on judgments under £40, whatever the provisions of the statute, because free-born Englishmen in Newfoundland must have access to the benefits of the common law. One of those was the availability of a final court of appeal wherein the law would be defined. Despite protests by the governor and law officers of the crown in London, the decision stood.

In like manner, just what elements of English criminal law would be applied in Newfoundland was left to judicial decision and, after 1832, the will of the legislature. In 1837 the legislature by 1 Victoria, c. 4 adopted English criminal law and, unless the legislature provided otherwise, all future amendments thereto after the passage of twelve months. It did so without controversy, despite bitter sectarianism which had contributed to legislative gridlock on a range of issues: a revenue bill, roads, the *Education Act* of 1836, and supply. Only ten of 32 bills passed by the Legislative Assembly were forwarded by the Legislative Council to London for confirmation. The Act of 1837 was perpetuated in successive *Judicature Acts* down to 1949 when

<sup>31</sup> Archibald, *supra* note 30 at 45, 37–8; *Hounsell v. Hounsell* (1948), 47 Nfld. & P.E.I.R. 108; *Bow Valley Husky (Bermuda) Ltd. et al v. Saint John Shipbuilding Ltd. et al (no.3)* (1992), 97 Nfld. & P.E.I.R. 217 at 223 (C.A.), revg. *Cull v. Rose* (1981), 37 Nfld. & P.E.I.R. 476. S.N. 1834; 4 William IV, c. 18 [*The Chattels Real Act*]. *Walbank Amr. v. Ellis* (1853), 3 Nfld. L.R. 400 holding that the entire English law of real property had been received into Newfoundland; and *Yonge v. Blaikie* (1822) in R.A. Tucker, ed., *Select Cases of Newfoundland, 1817–1828* (Toronto: Carswell, 1979) 310. In the late twentieth century the court finally returned to the expansive reading of the court's jurisdiction advocated by Forbes and Archibald. "[The Supreme Court's jurisdiction] is sufficiently ample for it to dispose of all matters which come before it and which the Court is not specifically forbidden to consider": *Burey v. Burey* (1966), 51 Maritime Provinces Reports 256 at 258.

it was finally repealed as part of Newfoundland coming under the provisions of the Canadian Criminal Code. The *Act* may seem curious in retrospect, a gauge of the depth of loyalty to an English heritage and an English model. It could not be locally adopted before the establishment of a local legislature. But no previous request had gone to England for an imperial statute which would accomplish this. The *Act* made specific reference to the fact that "the Penal Code and Criminal Laws of England have lately undergone very considerable revisions and improvements." From a Newfoundland perspective an end to the most egregious provisions of the Black Act and, perhaps, repeal of benefit of clergy in 1828, brought English criminal law more in line with local practice. Newfoundlanders had applied English law "as far as the situation and circumstances of the said colony will permit." They were far from accepting or applying that law in its entirety.<sup>32</sup>

## VII. A Cautious Beginning to the System of Judicature

In their caution Forbes' successors for a century and a half were at least true to that of the *Judicature Act's* original framers at Westminster, in providing for an annual renewal of the *Act* until 1809 when, slightly amended, it was made permanent.<sup>33</sup> Evidently London monitored carefully the progress of the new régime. Reeves' report on his second season in Newfoundland in 1792 sought a solution to the problem of how to assure the independence of outport magistrates. The local merchant was all-powerful. The doctor was usually on a retainer from him. Who else was available? Five Anglican clergymen resided on the island, most of them representatives of the Society for the Propagation of the Gospel. Reeves suggested that their £70 *per annum* salaries be supplemented by £100 to assure their independence. In a revealing aside he noted that without such independent justices "15 George III, [c. 31] [*Palliser's Act*] will remain a dead letter, as it hitherto has been." Here was the mind-set of policy-makers and those called upon to put it in practice. The line of continuity stretched from 1792 back through 1791, itself a revision of 1775, which in turn drew its inspiration and policy priorities from 1699.

There were other indications of a pragmatic *ad hoc* response fashioned to serve traditional aims. To avoid the inconvenience of going to parliament on every issue, Reeves recommended continued use of the royal prerogative through proclamations by the governor. Although he noted that questions might be raised about this procedure in light of the statutory régime, he had upheld the governor in a recent case involving the killing of sea birds. And although in 1791 he had recommended a public fund and legislature to complement a *Judicature Act*, he now felt the second

<sup>32</sup> *Clift v. Holdsworth* (1819) in *Select Cases*, *supra* note 31 at 189. Gertrude E. Gunn, *The Political History of Newfoundland, 1832-1864* (Toronto: University of Toronto Press, 1966); and see 1 Victoria, c. 4, later *Consolidated Statutes of Newfoundland*, 3rd series, c. 95, rep. 14 George VI (Canada), 1950 Schedule.

<sup>33</sup> (1809) 49 George III, c. 27. The amendments provided: (1) that the civil jurisdiction of the courts be extended to causes of action arising in Great Britain or Ireland; (2) that either party to a civil action over 40s. could demand a jury trial; and (3) that the chief justice decide the mix of English law and Newfoundland judicial custom prescribed by s. 1 of the *Judicature Act*. In this form the *Act* was reissued as part of the royal charter which bestowed colonial status on Newfoundland in 1825, 5 George IV, c. 67.

could be dropped because the population was not ready for representative institutions.<sup>34</sup>

The statutory initiatives of 1791 and 1792 were not written in stone. Until 1809 they were on a form of probation. The chief justice was required to be a permanent resident only in 1798, and the governor remained a seasonal visitor until 1818. Those named chief justice in the early years of the new experiment were, in terms of their legal skills, lesser men than Reeves. None were legally trained. On the other hand, they were men of experience in Newfoundland, if only seasonally, and schooled in the realities of life there. D'Ewes Coke, Reeves' successor, was a surgeon who owed his position as collector of customs to the patronage of his employer, Benjamin Lester of Poole, the wealthiest merchant in the Newfoundland trade. He resigned in 1798 rather than become a year-round resident. His successor, Richard Routh, characterised as "an inveterate place-seeker," followed the same route with the same support, and was no more keen to exercise his responsibilities on anything but a seasonal basis. He drowned while absent from his post without permission, on his way to England in 1801. Jonathan Ogden, surgeon, former magistrate and chief surrogate judge, was sworn in 1802. Incapacitated by a stroke two years later, he in turn was succeeded by his chief surrogate. Thomas Tremlett, like many others, had been bankrupted by the economic downturn of the late 1780s in the aftermath of the American war. Of the three charges—incompetence, partiality and venality—which the local merchants laid against him in 1809, his biographers acquit him only of the last. However, there were contemporaries who praised his legal acumen and the Privy Council's Committee for Trade found no legal grounds upon which to remove him. A political solution came in 1813: Tremlett would change places with Caesar Colclough, the equally unpopular chief justice of Prince Edward Island. The first justice since Reeves to be a qualified barrister, Colclough was never happy in St. John's. He was prey to financial worries, fears of sectarian violence, deteriorating health, and a heavy workload occasioned by population increase, the postwar economic recession, and the fact that almost all who appeared before him were lay pleaders.<sup>35</sup> Like Tremlett, the deficiencies with which contemporaries charged him in carrying out his duties were as much personal as professional. Legal training was no guarantee of good judging. Prowse said of Tremlett that "his ignorance of law and practice was a great bar to his success" in Prince Edward Island but noted that he "possessed the highest qualities of a judge—independence and impartiality." By contrast, Colclough "was a mere tool of the governor's." Although the judges after Reeves were unwilling to live on the Island, they seemed to have met the requirements of the time, an achievement in light of the impermanent nature of the legal régime and the challenges posed by war and unprecedented immigration in the generation after 1791. The appointment of Francis Forbes in 1816 brought a chief

---

<sup>34</sup> John Reeves, "Second Report on the Judicature of Newfoundland (1792)", in the PRO (London): BT, 1/8, copy in MHA.

<sup>35</sup> Neary, "John Reeves" *supra* note 11; Keith Matthews, "Richard Routh" 5 DCB 725. J.M. Bumsted and Keith Matthews, "Thomas Tremlett" 6 DCB 784-5; J.M. Bumsted, "Caesar Colclough" 6 DCB 160-64. Prowse, *supra* note 1 at 391-2; Patrick O'Flaherty, "Sir Francis Forbes" 7 DCB 301. C.H. Currey, *Sir Francis Forbes* (Sydney: Angus and Robertson, 1968)

justice who combined knowledge of the law with common sense. This initiated the emergence of a systematic body of jurisprudence suited to the realities of life in Newfoundland and Labrador

The late eighteenth century marked a watershed in Newfoundland's legal development, but it is unclear what factors contributed most forcefully. Clearly there was no intent to dismantle the statutory régime which regulated the fishery as an imperial interest. The population was increasing, to roughly 17,000 in 1793, and the *Hutchings* judgment in 1787 had rendered *ultra vires* the jurisdiction of the courts of session when it overlapped that of the governor and his surrogates during the fishing season. As in the 1770s with regard to the Thirteen Colonies, so in the 1790s with regard to France, England batted down the hatches in preparation for war, which became a reality from 1793. If Britain was not actually retreating from empire, she seemed inclined to put her colonial affairs in statutory order. From an imperial perspective the Act of 1791 may have complemented the *Constitution Act* of 1791 which established the Upper and Lower Canadas.

Finally, changes in the fishery mandated reform. Largely unnoticed, the fishery from mid-century had been internally transformed from a migratory and seasonal to a settled and year-round enterprise. The Revolutionary and Napoleonic Wars brought an era of prosperity, though not all shared in it. Despite the post-1815 economic slump, there could be no going back. Exports of fish grew to 400,000 quintals [112 lbs. per quintal] in 1800, 800,000 in 1810, and a million in 1815, by which time the population, fuelled by Irish immigration after 1798 and by Europe's demand for fish, had increased to 38,000. Fifteen thousand immigrants arrived in the two seasons of 1814–15. Ten years later the population stood at 55,000. Settlement expanded beyond its historic centres on the Avalon Peninsula and in Conception and Trinity Bays, to Placentia and Fortune Bays on the south coast. By 1810 over 1000 sea-going ships were resident. In 1814 a common fisherman could earn a seasonal wage of £70, undreamt of before. By 1794 seals offered a supplementary source of income, 40,000 being taken by ships from Conception Bay in that year. A decade later, 160,000 pelts were being exported, with 1500 men in 150 vessels sailing annually to "the Front" off Labrador. Logging and shipbuilding offered the prospect of helping to sustain the population in a year-round economy.<sup>36</sup>

By War's end in 1815 the critical mass of population necessary to sustain permanent settlement had been surpassed. Wartime governors capitulated to popular demand and the crying need for food by making available eighty acres on the "higher levels" above St. John's for agriculture.<sup>37</sup> The first municipal institutions were in place: two schools in 1804, a postal service in 1805, a newspaper, the *Royal Gazette* in 1806, which had been joined by three more by 1820, philanthropic societies (a *Society for the Improvement of the Poor* in St. John's in 1803 and the *Benevolent*

<sup>36</sup> Matthews, *supra* note 5 at 599, 592, 598, 594; Shannon Ryan "Fishery to Colony: A Newfoundland Watershed, 1793–1815" in P.A. Buckner and David Frank, eds., *Atlantic Canada before Confederation* (Fredericton: Acadiensis Press, 1990) at 138.

<sup>37</sup> This was, in effect, legitimated in retrospect in 1811 by "An Act for taking away the public use of certain Ships Rooms by which it shall be lawful for the same to be granted, lent and possessed as private property ... anything in [10 & 11 William III, c. 25] notwithstanding" (51 George III c. 45, s. 1). Prowse, *supra* note 1 at 386, noted that the result was the issuance of 30-year leases.

*Irish Society* in 1806), and a hospital in 1811. The first part-time special pleaders who would provide the nucleus of the bar of the Supreme Court in 1826 had appeared, and before 1815 at least two trained lawyers, James Simms and William Dawe,<sup>38</sup> were in practice.

Newfoundlanders were still precariously situated and a long way from being masters in their own houses. The peace of 1815 reaffirmed French treaty rights. In 1818 an Anglo-American convention permitted American fishing from Ramea on the south coast west and north to the tip of the Northern Peninsula, along the coast of Labrador and through the Gulf to the Magdalen Islands. A continuing refusal by Britain to help fund the costs of governing Newfoundland before and after the grant of representative government in 1832 was a severe disability. But after 1815 there was no gainsaying, either at St. John's or at Westminster, that Newfoundland was a *de facto* colony. The essentials of the *Judicature Act* of 1809 were folded into a new Act in 1824, which was intended as a step towards colonial status the following year and representative government in 1832.<sup>39</sup>

Settlement demanded governance and the putting in place of institutional structures. In that process the leadership assumed by the legal community would be significant, for the law was in place, embracing institutions, personnel, substance, process and ideology. The product of statute, prerogative writ and customary practice over three centuries, it was, as far as one can tell, popularly supported. In the generation after 1815, when so much in the basic structure and institutions of politics, the economy, education, health and municipal government had to be decided, the law, legal culture and the legal community offered a context and a means for orderly reform.

## VIII. Future Directions

The purpose, context and procedures of law would, of course, continue to evolve. A generation which saw an end to the first British Empire after 1776 and emergence of the French Revolution's principles of *liberté, égalité, and fraternité* after 1789, jointly contributed to a new definition of the individual and of one's relationship to the crown. This would demand imperial recognition of enhanced local powers by which a settled population could shape its own future. The ancient struggle for legislative predominance by parliament over the royal prerogative in England was confirmed in Newfoundland by the primacy of statute in 1787. The framing of successive statutory initiatives in 1791 and 1792 issued in a Supreme Court of Judicature, whose jurisdiction embraced law, both civil and criminal, and equity. Common pleas,oyer and terminer, the governor's judicial power under the great seal, whether exercised personally or by naval surrogates, gave way, like the jurisdiction of the fishing admirals which had preceded them, to a statutory régime in which the

---

<sup>38</sup> David Davis, "James Simms" 9 DCB 507-8. Diane Janes "William Dawe" in J.R. Smallwood, ed., *Encyclopedia of Newfoundland and Labrador* (St. John's: Newfoundland Book Publishers, 1981) vol. I, 600.

<sup>39</sup> (1809) 49 George III, c. 27; (1824) 5 George IV, c. 67; (1825) *Royal Charter for Establishing the Supreme and Circuit Courts of Newfoundland*, in *Legislative History*, *supra* note 2 at 39-46; (1832) 23 William IV, c. 78.

origins of our contemporary legal institutions and procedures are clearly visible. The path between then and now was not pre-ordained; nor is it clear at this point what course, tangents or *cul-de-sacs* remained after 1792, and remain to be explored.

Statute prevailed, but it was statute tailored to accommodate the realities of the eighteenth-century's *ad hoc* provisions. To that extent the past had been appropriated by a new generation as a precondition of self-knowledge and further progress. Statute without ideology, consensus, resources, institutions and goals would be a hollow shell, and could not be imposed from outside or above. If the revolutionary era which closed the eighteenth century also offered a new beginning into the nineteenth, it was clear that the products of the indigenous, popular legal system had deep roots in the popular mind and in legal practice. Other realities of local life would exert an influence: cultural isolation; an unforgiving climate; widely scattered small coastal outshores; a dearth of educational facilities and opportunities; a small, often transient professional class largely concentrated in the capital; and, for the moment, indefinite legal status—neither seasonal fishing station nor colony. The norms and procedures of familiar legal practice, despite the imperial judicial pronouncement of 1787, would remain popular. Ignorant, if not outrightly disdainful, of the provisions of statute after 1699, the settled population was likely to approach the new judicial régime with attitudes anchored in the shared historical experience of a local and accessible system of justices of the peace and of oyer and terminer, which required no professionally trained judges or lawyers. Private ways of resolving disputes by informal means, of which we are at present largely ignorant, were bound to continue. We do not know for how long, and in what form, the vestiges of a non-statutory approach to law prevailed.

These are elementary questions. But despite some illustrious predecessors—Reeves, Archibald and Prowse—legal historians of Newfoundland are very much a first generation in 1995. The vineyards in which they toil have not extended beyond the early nineteenth century. Imperial and local imperatives which brought colonial status, a professional judiciary and bar, circuit courts, rules and procedures of the Supreme Court (1825), and a Law Society (1832) are, as yet, vaguely glimpsed. Representative (1832) and responsible (1855) governments necessitated centralised bureaucracies and budgetary priorities which influenced the provision and availability of legal services. We are a long way from assessing the values and practices of a formal legal system when we are uninformed, for example, about the time and manner of the emergence and organisation of the Department of Justice.<sup>40</sup> The challenge to researchers is to clothe the customary and statutory rule of law, its practitioners and the people they were intended to serve, with a human face by reconstructing practice and procedure, goals and ideology, values and institutions, personality and context. It is an exciting prospect.

---

<sup>40</sup> By 1902 there was a Department of Justice; but the Provincial Archives of Newfoundland and Labrador's revised *Inventory of the Government Records Collection* (St John's, 1988), five years after the appearance of its first edition, repaired an important gap by repatriating the Colony's defence archives to their original home in the formally titled Department of Justice (Justice and Defence). The mandate, organisation and function of this hybrid department remain unexamined.