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CHRISTOPHER ENGLISH

# The Development of the Newfoundland Legal System to 1815

“It is because the law matters that we have bothered with this story at all.”

E.P. Thompson<sup>1</sup>

LAW COMPRISED A CENTRALLY IMPORTANT ASPECT of the first three centuries of European contact with Newfoundland. Embracing common law, statute and prerogative writ, as well as custom, procedure, institutions, personnel, sanctions and ideology, it emerged in response to, sometimes as an amalgam of, imperial policy and indigenous practice. The law defined the parameters of Great Britain's experience 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 policy priorities of the British Crown. Both parties viewed the Island as an appendage to the coastal and Grand Banks fishery, useful only for shore-based facilities from which to service a staple crop. Permanent settlement was proscribed as strongly in the 1790s as it had been when statutorily enshrined a century before in 1699.<sup>2</sup> Yet, despite the injunctions of the law, and the challenges posed by the ineluctable realities of climate, geography and topography, there were those who persisted in overwintering. Hesitant, hidden, fluctuating but tenacious, settlement ignored, where it bothered to notice, the fact of its illegality.

Grudgingly, without surrendering the principle of prohibition, imperial policy makers acquiesced. Imperial policy demanded English control of Newfoundland. But neither official endorsement, nor parliamentary recognition, nor financial support, nor a system of governance followed. Instead, the royal prerogative was exercised to issue writs which, seemingly *ad hoc*, conceded the fact, but not the legality, of settlement. They were justified as being not inconsistent with the overriding provisions of statute.<sup>3</sup> While the systems of statute and prerogative writ coexisted, the tension between them was a feature of British

1 E.P. Thompson, *Whigs and Hunters* (London, 1975), p. 268.

2 10/11 William III c.25 [1699].

3 *Ibid.*, and 15 Geo. III c. 31 [Palliser's Act, 1775].

policy in Newfoundland during the 18th century. When it surfaced in a legal challenge in 1787, statute prevailed. However, the efficacy of the customary, pragmatic, indigenous and, for its time, successful informal system could not be ignored. It survived to influence the evolution of statutory law from 1791.

Scattered communities comprising 15,000 souls existed in Newfoundland by 1787 (see Table I), but they did not present to official eyes an immovable *fait*

*Table 1: POPULATION GROWTH, 1689-1845*

DATE	NEWFOUNDLAND	ST. JOHN'S
1689	3000	—
1728	3000	—
1750	7000	—
1764	16000	—
1780	15000	—
1793-4	17000	3000
1800	20000	—
1810	25000	—
1815	38500	12000
1825	55500	14000
1830	58000	15000
1836	75000	19000
1845	96000	25000

*Source:* Great Britain. Colonial Office. [C.O.] 194, 21, 23, 49, 64, 70, 80, 81, Office of the Colonial Secretary, "Abstract Census and Return for the Several Electoral Districts of Newfoundland", 1793-1830, Maritime History Archives.

*accompli.* Their inhabitants might be resettled, deported or, as in the past, ignored. That they were not was the result of changes in the fishery and in imperial policy. From mid-century the traditional migratory fishery was being transformed into a settled one. It benefitted from England's struggle against Revolutionary and Imperial France which sustained a generation of unprecedented prosperity on the Island. By war's end, in 1815, Newfoundland had achieved the requisite "critical mass" to emerge as a distinct entity. The temporary judicial arrangements of 1791, made permanent in 1809, would provide the basis for the assumption of legal personality as a colony in 1824, and pave the way for representative government in 1832.<sup>4</sup> The change in imperial policy reflected the

4 31 Geo. III c.29 [1791], 32 Geo. III c. 46 [1792], 49 Geo. III c. 27 [1809], 5 Geo. IV c. 67 [1824], 23

threat of social disorder at home and the lure of free trade and industrial preeminence. In response Great Britain accepted a devolution of responsibility in favour of the emergent white dominions. In Newfoundland she positively promoted it. The colony entered upon the new adventure enthusiastically, but it was markedly vulnerable. Newfoundland had no secure sources of revenue, and her one staple crop was prey to rapid fluctuations in international markets upon which she wholly depended. Private property rights had only recently been recognized,<sup>5</sup> and, as yet, there were few institutions — ecclesiastical, educational, cultural or political — upon which to build a functioning society. Against this sober litany, the law offered an exception and a hope of success. The product of 120 years of development and adaptation, it appeared favourably situated to serve as mediator and guide. It is proposed that an awareness of the components of Newfoundland's legal experience down to 1815 offers a useful perspective on her later development as a distinct political entity in the modern era.

The ability of the law to lend continuity to the Newfoundland experience was a product of its emergence as a unique amalgam, the result of local adaptations to the dictates of imperial policy tempered by the local realities of geography (isolation), climate (inhospitable) and topography (non-agricultural). As such, Newfoundland did not fit the North American colonial mold. Indeed, arguments over the nature and extent of her reception of English law had little currency. To ask the question is to assume, mistakenly, that it was an issue.<sup>6</sup> For Newfoundland did not resemble either the settlement or the conquest prototype. Here was no legal void awaiting the transplantation of law, personnel, institutions or ideology as in the North American colonies of the first British empire. Nor was English Law to supplant or adapt to a pre-existing system as in New France.<sup>7</sup> To admit reception with the establishment of representative government in 1832 is one thing, though it overlooks the formal adoption of English criminal law in 1837.<sup>8</sup> To read reception back to the beginnings of "settlement" is another. Because settlement was illegal the issue did not arise; because there were no legally recognized property rights there was no need to argue over the nature or applicability of law which would almost exclusively be applied to property

William IV c. 78 [1832].

5 *R. v. Patrick Keough* (1819), E.P. Morris, ed., *The Reports, 1817-1828: Decisions of the Supreme Court of Newfoundland* [hereafter 1 NLR] (St. John's, [1829] 1901), p. 174. See Patrick O'Flaherty, "Sir Francis Forbes", *Dictionary of Canadian Biography* [hereafter DCB], VII (Toronto, 1988), pp. 301-2.

6 Peter Hogg, *Constitutional Law of Canada* (Toronto, 1985), pp. 21-4.

7 On the reception issue, besides *ibid.*, see J.E. Côté, "The Reception of English Law", *Alberta Law Review*, 15 (1977), p. 29.

8 Nfld. 1 Vic. c.4 [1837].

disputes.<sup>9</sup>

Commentators who have categorized Newfoundland's history as one of "retarded colonization" have also imposed a model which does not fit. The Island's failure, curious and exasperating, to follow the allotted path from colony to nation has been ascribed to a conspiracy. First enunciated by John Reeves in 1793,<sup>10</sup> "in a book which has been studied and eagerly accepted by almost every historian who came after him", it had become holy writ<sup>11</sup> by the time of D.W. Prowse's quite remarkable *History of Newfoundland* in 1895.<sup>12</sup>

Both Reeves and Prowse had personal experience of Newfoundland, Reeves visiting for two summers in 1792 and 1793 and Prowse as native born and resident. Each was a lawyer and a judge. Each was a considerable stylist and claimed access to previously unexploited governmental records. Each, in his way, was a Newfoundland nationalist and had identified the enemy of the Island's course towards self-actualization and independence.<sup>13</sup> Each was presentist in outlook and values;<sup>14</sup> each refined the whiggish, progressive and optimistic rationale<sup>15</sup> for what A.H. McLintock in 1941 termed "retarded colonization".<sup>16</sup>

- 9 I am grateful to Philip V. Girard for this insight. The hypothesis that reception may occur without legislative or judicial rules in the form of local adherence to a model of law external...to the adhering group, although undeveloped, appears more closely to reflect the Newfoundland experience. H. Patrick Glenn, "Persuasive Authority", *McGill Law Journal*, 32, 2 (1985), pp. 261-98.
- 10 John Reeves, *History of the Government of the Island of Newfoundland* (London, 1793). See Peter Neary, "John Reeves", *DCB*, VI (Toronto, 1987), pp. 636-7.
- 11 Keith Matthews, "Historical Fence Building: A Critique of Newfoundland Historiography", *Newfoundland Quarterly*, 74, 1 (1978), pp. 21-30.
- 12 D.W. Prowse, *History of Newfoundland from the English, Colonial and Foreign Office Records* (London, 1895).
- 13 Reeves, *Island of Newfoundland*, succinctly proposed his thesis. It concerned the struggles and vicissitudes of...the *planters* and *inhabitants*...who...needed the protection of a government and police, with the administration of justice: and the *adventurers* and *merchants*...who...needed no such protection for themselves, and had various reasons for preventing its being afforded to the others (p. 1). For Prowse, *History of Newfoundland*, the struggle against the Courts and the Government [raised] by West Country influence, and by narrow commercial jealousy, lasting to 1828, was as bitter...as the design to extirpate the settlers (p. 288).
- 14 Reeves, *Island of Newfoundland*, noted that by the 1760s "justice administered [by the fishing admirals] could have but little of the authority and effect, which should attend upon the sentence of a court" (p. 157).
- 15 "The later Georgian era is the transition period in our history between the bad old days of tyranny, corruption, and violence, and the dawning of the brighter days of civilization and progress" (Prowse, *History of Newfoundland*, p. 304).
- 16 A.H. McLintock, *The Establishment of Constitutional Government in Newfoundland, 1783-*

The few professional historians who wrote between the wars sought to fill the gaps in the prevailing theory. None were Newfoundlanders. All approached Newfoundland as a minor counter on the imperial board, "worthy of study only insofar as it threw light on something else".<sup>17</sup> Like Reeves and Prowse, they did their research abroad in state documents, hence the weight they gave to politics and legislation. The statutes (1699, 1775, 1792, 1824, 1832) provided ready "fenceposts" which required only a mildly progressive developmental thesis — from migratory to settled fishery, from settlement to colony to nation — to serve as the thin connecting wire. Simple and seductive, with villains (English mercantilists and West Country merchants) and heroes (Sir Humphrey Gilbert, Captain Henry Osborne, William Carson and Patrick Morris),<sup>18</sup> the thesis overlooks variations in both imperial policy and local response, and the complexity and reality of a hard life in an inhospitable environment.

In the trenchant essay from which this critique of the school of "retarded colonization" is drawn Keith Matthews also did much to distinguish and delineate the indigenous, changing and unique realities of the fishery to 1800. It waxed and waned, changed and developed, and with it so did settlement, governance, culture and the law. What is proposed here is a modest attempt to see the law not as an alien, static or repressive imposition but as an evolving institution which reflected and responded to local realities within a unique imperial relationship. The fact that Newfoundland's legal experience was not typical of developments elsewhere does not make it aberrational. Comparisons are often enlightening, but we must be wary of assuming that the law is best understood in light of mainland norms. If some of the critical aspects of Canadian legal history which await investigation are "the development of the legal profession and of legal education, the evolution of curial structures and the influence of equity",<sup>19</sup> they surely cannot be a starting point in Newfoundland. Three centuries of legal experience preceded the emergence of judges and lawyers and there was no formal reception of English law until the 19th century. Courts, familiar at least in terminology, emerged with Oyer and Terminer in 1750, Common Pleas, very

1832. *A Study in Retarded Colonization* (London, 1941).

17 Matthews, "Historical Fencebuilding", p. 40, illustrates how the Reeves-Prowse thesis was refined by Agnes M. Field in "The Development of Government in Newfoundland, 1638-1713", M.A. thesis, University of London, 1924 and propagated in essence by C.B. Judah, *The North American Fisheries and British Policy till 1713* (London, 1933); R.G. Lounsbury, *The British Fisheries in Newfoundland, 1634-1763* (London, 1934); and H.A. Innis, *The Cod Fisheries* (Toronto, 1940).

18 For the activities of Carson and Morris see Gertrude E. Gunn, *The Political History of Newfoundland, 1832-1864* (Toronto, 1966).

19 M.H. Ogilvie, *Historical Introduction to Legal Studies* (Toronto, 1982), p. 381.

briefly, in 1789, and a Supreme Court of Judicature in 1793 and 1824. Equity there was, but like judges and courts it assumed a local and customary form until 1824.

On the other hand, Newfoundland seemed to anticipate developments in other areas, despite a contemporary legal scholar's dismissing its legal history in a sentence.<sup>20</sup> While the General (later, Supreme) Court in Halifax from 1749 may be the longest continually sitting court in Canada, Sessions courts under magistrates appeared in 1729 in Newfoundland, eight years after the earliest courts in Canada are said to have adjudicated on Common Law principles at Annapolis in 1721. Barristers in Newfoundland were enrolled before the Supreme Court from 1826,<sup>21</sup> and a Barristers' Society was created by statute (4 William IV c.23) in 1834. The first volume of reported cases before the Supreme Court (1817-1828) was contemporaneously edited, complete with headnotes, by a practising lawyer, R.R. Wakeham, and details at least 144 actions.<sup>22</sup> The commendable promptness with which this volume appeared was not maintained by succeeding editors. However, Wakeham's initiative stands out as law reporting in the Maritimes, generally speaking, began quite a bit later. These developments challenge the easy assumption that there are generally applicable models of Canadian legal development to which jurisdictions will normally accord.

Research into the legal culture of Newfoundland is in its earliest stages. With the exception of entries in the *Dictionary of Canadian Biography*, the private research of those labouring in the vineyard is still largely in typescript form.<sup>23</sup> This paper draws on that material, supplemented by statutory and archival research. Chronologically it is restricted to the period down to 1815, and substantively to the formal manifestations of the legal regime: statute, prerogative writ, institutions, personnel, procedure and the ideology which informed them. In this latter respect it is worth emphasizing that outside formal structures lay private methods of dispute resolution which were implicitly sanctioned by the community. Because a statute says something and a court endorses it does

20 *Ibid.*, p. 383.

21 The Law Society of Newfoundland, Barristers' Roll, signed by those admitted to the Bar of the Supreme Court of Newfoundland. Eight men were first listed in 1826. Not all practising lawyers appear to have enrolled as barristers. I am grateful to the Law Society for permission to view the volume. See Christopher English, "The Development of the Law in Newfoundland, 1815-1832: The Supreme Court", mss. (1990).

22 1 NLR. Nine volumes, of variable quality, comprise a first series to 1911. For comparative data on the initial dates of publication and the quality of other law reports in the Atlantic region, see Jennifer Nedelsky and Dorothy Long, *Law Reporting in the Maritimes* (Ottawa, 1981).

23 The work of the late Keith Matthews, and that of my colleagues Melvin Baker, Patrick O'Flaherty and George Story, has informed my own views. They are, of course, not to be taxed with the liabilities of this essay.

not always end the debate or bar contrary belief and practice.<sup>24</sup> An English observer noted in 1838 that there were no taxes or tithes to finance government or a judicial system. As long as shore inhabitants and natives [Beothuks] of the interior

refrain from public violence and interference with the [propertied]...classes — and submit to the exactions of the traders — they are left alone by the authorities.... It is a rare thing to see a civil magistrate leaving...St. John's or Placentia, to go among these rude people, to protect the innocent or punish the guilty... They are...left to settle their own disputes in their own way...[via] a regular...knockdown...in which he who is stoutest wins the cause — but the conqueror is sometimes obliged to 'foot the bill of costs', by giving the vanquished party and the witnesses attending, as much liquor as they choose to drink!<sup>25</sup>

The first geological surveyor, touring the coast at the same time, wrote that this "simple, honest, industrious, good-natured and hospitable people...[were prone to] acts of private or public vengeance...to the extent of maiming the person" but recorded that "scenes quite as bad have taken place at elections at home [in England and]...in Ireland".<sup>26</sup> Jukes was probably thinking of the case of Henry David Winton, the outstanding journalist of his generation, whose *Public Ledger* was an outspoken critic of Catholic clericalism. On 19 May 1835 he and a companion were attacked on the road between Carbonear and Harbour Grace by five men with painted (blacked?) faces. He was assaulted and his ears stuffed with mud and gravel. Two sections were cut from one ear and the other was severed entirely. Despite a reward of £1,500 the assailants were never identified and a popular ballad celebrating "Croppie Winton" soon made the rounds.<sup>27</sup>

Newfoundland was different from the beginning, a result of the value placed upon her as a seasonal berth from which to exploit the cod stocks of the Labrador current and the Grand Banks. Whatever the merits of the debate over John Cabot's landfall, whether Bonavista Bay or Cape Breton, the merchants of Bristol and the English West Country had secretly exploited the fishery for some years before 1497. Even in a pre-mercantilist age the value of the fish staple, for domestic consumption in Great Britain and for export to Catholic Europe, was

24 For English and American case studies see Thompson, *Whigs and Hunters*, and Hendrik Hartog, "Pigs and Positivism", *Wisconsin Law Review* (1985), pp. 899-935.

25 E.W. Tucker, *Five Months in Labrador and Newfoundland* (Concord, 1839), pp. 66-8.

26 J.B. Jukes, *Excursions in Newfoundland, 1839-40* (London, 1842), I, pp. 238-9.

27 Patrick O'Flaherty, "Henry David Winton", *DCB*, VIII (Toronto, 1985), pp. 947-9.



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 whaling industry pursued by French and Spanish Basques in the 16th century is apparent from the recent archaeological discoveries at Red Bay on the Strait of Belle Isle.

The Royal Charters granted private individuals, Sir Humphrey Gilbert in 1578 and Lord Baltimore in 1610, and Companies under Sir John Guy or Sir David Kirke in 1628, the London and Bristol Company or the Western Company of Adventurers (1634), were duplicated at that period in other parts of the Empire. But when they failed through a combination of under-capitalization, ill-prepared and inadequately supplied settlers, isolation and an unforgiving climate, the succeeding system of Crown Colonies, as in Virginia or the West Indies by 1660, was not applied in Newfoundland. Instead, vacillation, procrastination and indecision prevailed to 1699.<sup>28</sup>

The explanation for Newfoundland's separate status probably lies in the continuing primacy of imperial policy: the importance of the fishery and the fact that Britain's local control was insecure. While the Spanish had deferred by the mid-17th century, France was only gradually contained via the treaties of Utrecht (1713) and Paris (1763). France's retention of the right to fish and to dry its catch on the French Shore, a huge stretch of coastline from Cape Bonavista to Cape Race to 1783, and from Cape St. John to Cape Race to 1904, was indicative of the primacy of imperial concerns. Newfoundland would be won or lost on the battlefields of Europe and the high seas, and according to the degree that she served England's interest.<sup>29</sup> Migratory and seasonal, the fishery demanded neither government expenditures nor governance. It offered a lucrative staple crop, and provided employment to thousands of seamen and fishermen and profits to those who supplied them with ships, gear, food and supplies. 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.

Against this list of priorities settlement was deemed extraneous, expensive and compromising. Although some people remained in isolated coves after the failure of the proprietary colonies, and at the end of each fishing season, they were vulnerable to the depredations of fishing admirals in the summer, official indifference or hostility, the vagaries of European wars and peacemaking, a

28 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.

29 Keith Matthews, *Lectures on the History of Newfoundland, 1500-1830* (St. John's, 1973), p. 35; F.F. Thompson, *The French Shore Problem in Newfoundland: An Imperial Study* (Toronto, 1961).

fluctuating fishery and the ever-present reality of cold, fog and wind in a land largely barren of agricultural potential. The population grew slowly when it grew at all. For settlement was not only discouraged; it was difficult and, by 1699, affirmed by statute to be illegal.

The legal regime during the Island's first 200 years emanated from the power assigned via charter and prerogative writ to private and corporate entrepreneurs.<sup>30</sup> By convention the first fishing captain to arrive in Newfoundland from a British port in a given 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. A few guidelines were enunciated by the Court of Star Chamber in 1633: regulations for the protection of fishing facilities and the preservation of forests (for fuel, boat building and the construction of fishing stages and flakes), against taverns and mandating sabbatarianism.<sup>31</sup> The jurisdiction of the fishing admirals was limited only by the requirement that those accused of the capital crimes of murder, or theft to a value of 40 shillings be brought to England for trial, accompanied by two witnesses. In the event 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 via rough justice of the masthead variety, though the evidence here is anecdotal or the product of editorializing. Prowse, an unsparing critic 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 [shack], 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>32</sup>

Prowse's vignette is undocumented although he had access to previously unresearched archives. A high Victorian lawyer and judge, he echoes the claim of his

30 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 since he attempted to do so during one season only in the north-eastern harbour of Trinity. Reeves, *Island of Newfoundland*, pp. 5-8.

31 *Ibid.*, p. 8.

32 Prowse, *History of Newfoundland*, p. 226.

respected British contemporary A.V. Dicey that statute and high judicial decisions are the purest emanations of the law. Such assumptions are no longer so widely shared.<sup>33</sup> And a modern commentator might also question the difference between Prowse's inference of bribery and a modern suitor's access to justice on the basis of an ability to pay lawyers and to sustain the costs of private judicial actions.

By 1660 captains were forbidden to transport passengers to Newfoundland. In 1670 Additional Rules limited the fishery to British subjects and reaffirmed its migratory and seasonal nature by prohibiting ships to leave 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 sea-or fishermen. No one was to over-winter and one in five of the crew must be a "fresh man", a seaman of not more than one year's experience, affirmative of the importance of the fishery as a nursery for seamen. West of England calls for a seasonal governor were repulsed by the Board of Trade in a 1675 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, from 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>34</sup>

The increased attention paid Newfoundland in the late 17th century was not a response to the fact of settlement, legally prohibited in 1675, allowed 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 the 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 and Louis XIV never shared his minister Colbert's enthusiasm for mercantilism. But the French threat was credited in London. The result was an uneasy compromise. Settlement was inconsistent with a migratory fishery. But because of her almost constant

33 H.W. Arthurs, *'Without the Law'. Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto, 1985).

34 Reeves, *Island of Newfoundland*, pp. 14-20.

war with France between 1689 and 1713 Britain could not prevent it. The treasury was exhausted and decrees dating back a century prohibited taxing the fishery. Britain could not afford to leave, surrendering an international staple and its markets to France. The solution was to hold the ring, ignore settlement and reaffirm the status quo in statutory form.

The statute 10/11 William III c.25 would provide the determining juridical regime for Newfoundland through the 18th century. For Reeves in 1793, and for the dominant school of historiography he founded, it was a disappointment and a missed opportunity.<sup>35</sup> But he was right in describing it as “little more than an enactment of the rules, regulations and constitution that has mostly prevailed there for some time”.<sup>36</sup> That is precisely what it was intended to be, as is evident in six themes which distinguish “King William’s Act”.

First, this “[A]ct to encourage the trade of Newfoundland” codified the sporadic pronouncements of the Royal Prerogative as applied by chartered companies and the 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 requirements that every fifth crewman be a “green man” (s.10) and 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 and prohibitions against the sale of alcohol (s.16) and the taxing of fish (s.17). The authority of fishing admirals to allocate fishing grounds and inshore facilities (s.4) and to settle local disputes (s.15) reappeared.

Second, three provisions signalled a new legal role for the state in the fishery. The authority of the fishing admirals was no longer absolute since an appeal from their decision 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 provisions of

35 Prowse, *History of Newfoundland*, 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 strong influence of Devonshire and bribery that we can explain...such a measure” (p. 225).

36 Reeves, *Island of Newfoundland*, p. 31. References to the Act are scattered and vague, as if commentators assumed everyone was so familiar with it that it needed no explanation. Reeves gave it careful scrutiny but the depth and subtlety of his analysis has been largely ignored.

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 or jurisdiction and forward it to the Privy Council upon his return to England. Since s.14 made no mention of merchants or Adventurers they presumably fell outside the Act's ambit and would continue to resort to English courts for redress.

Third, the Act recognized the existence, though not the legality, of settlement. Shore premises which since 1685 had been detained to private use, distinguished from a use consequent upon pursuit of the fishery, should by s.5 be given up. The intent appears to have been to settle who had the use of what premises as captains had taken to leaving a crewman to over-winter in order to claim premises the following season. The cut-off date of 1685 implicitly recognized the validity of non-fishery uses of the land predating that year and sustained ever since. By "use" no title to property was intended. By s.6 no shore premises were to be taken up until all demands of the fishery had been satisfied. Once achieved, however, there would presumably remain no bar to private individuals settling on the land. Finally, it was recognized that those who 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).

Fourth, once permanent settlement had been recognized, could some provision for future governance be far behind? The assumption underlay later commentators' criticism of the Act. But they had the benefit of hindsight. Like most policy makers the men of 1699 had their eyes on the past. They might recognize 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, as in appropriating unsupervised fish flakes for fuel during the winter, for rinding, and for the indiscriminate cutting of 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".

Fifth, merchants or Adventurers were excluded from the policing provisions of ss.14, 15, which applied only to masters, fishermen, seamen and settlers. Commentators inclined to the interest group conspiracy theory find this significant. But in 1699 there were few, if any, merchants, to say nothing of Western Adventurers, seasonally resident, unlike in 1792 when Reeves visited. If the Act's intent was to consolidate and rationalize, it cannot surprise that 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 to be pulled from England.

Finally, the fact that these predominantly traditional provisions were enshrined in statute was an earnest of the permanence which the framers of the Act ascribed to it. In a word, it was intended to last. The incalculable elements

remained the response of those who remained on the ground in Newfoundland and the dictates of foreign policy. The failure of King William's Act to stipulate penalties, and the fact of year round settlement led the Board of Trade in 1708 to consider according sea captains a land command and police 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>37</sup> Meanwhile it was becoming apparent in London, as the long series of wars with France ran down, that provision would have to be made for Placentia, transferred by France to England at Utrecht in 1713.

The response to these demands lay not in statutory reform but in the issuance of prerogative writs. Why was this means preferred? Was it intended to fill the gap opened by the absence of a judicial administration during the winter? Did it offer a means for the resolution of private disputes in tort or contract? Did it permit *ad hoc* adjustments to the statutory regime without doing violence to its principles? Was it a useful way of filling gaps in the statute which became apparent with experience, which permitted trial balloons, and put off the day of parliamentary scrutiny and debate? Did it 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 documented, harshness and variability of justice dispensed by the fishing admirals?

We may be posing a series of questions which were not asked by contemporaries. Harry Arthurs has persuasively argued that the primacy of statute and judge-made law was a construct of the late 19th 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>38</sup> Where, in short, we perceive anomaly, or even a contradiction, contemporaries may only have discerned another, parallel, historically sanctioned way of making law. For whatever reason, the Board of Trade in enforcing the act of 1699 proceeded hesitantly and pragmatically, preferring to force new wine, as in making provision for the collection of private debts, into the old statutory bottle. Moreover, in the 60 years between the appointment of a civil governor and the successful judicial challenge to that decision in 1787 a

<sup>37</sup> *Ibid.*, pp. 35, 53, 55-63.

<sup>38</sup> Arthurs, *Without the Law*, pp. x, ix.

practical, informal, viable, indigenous legal system emerged which co-existed with the over-arching statutory scheme of 1699, itself reaffirmed in 1775 and 1786.<sup>39</sup>

As part of the enhanced power of the commander of the summer naval contingent, upgraded from an appellate to a civil gubernatorial jurisdiction, Captain Henry Osborne in 1729 appointed 16 justices of the peace and 13 constables to 11 centres in six districts stretching from Placentia to Bonavista.<sup>40</sup> At the same time he delegated power to subordinate naval officers to act as “surrogates”. On its face neither appointment was inconsistent with the Act of 1699 as long as the justices of the peace restricted their activities to the winter and as long as the naval presence in Newfoundland was seasonal. But in practice the availability of these alternative sources of justice, notably the governor’s surrogates, was, according to Reeves, “flown to by the poor inhabitants and planters as the only refuge that they had from the West Country merchants, who were always their creditors, and were generally regarded as their oppressors”. The magistrates may have been “but mean people and not used to subject to any Government”, according to Osborne.<sup>41</sup> That may have been a problem for Osborne, but it suggests that the magistrates were prepared to navigate by their own lights and were applying local conceptions of justice. Fifty years later Reeves noted the magistrates’ inadequate training and skills, and their vulnerability to the influence of the local merchant. But he sought not their abolition but their improvement via an infusion of fresh personnel and decent salaries.<sup>42</sup> He and his successors ridiculed the inadequacy of Osborne’s having equipped each centre with a copy of *Shaw’s Punctual Justice of the Peace*, each embossed in gold with the name of the community, and with copies of the 1699 statute and further Acts on trade and navigation.<sup>43</sup> But they were practical aids and probably marked a quantum leap from what the fishing admirals had had at their disposal. In any case few would have foreseen that the magistrates would enjoy an unbroken tenure to the present day. Undoubtedly they met a need and effectively, if illegally, sitting in courts of Session year round acted to resolve local disputes.

39 15 Geo. III c. 31; 26 Geo. III c. 26.

40 Paul O’Neill, *The Story of St. John’s, Newfoundland* (St. John’s, 1975-76), II, p. 533. The centres were: Placentia, St. John’s, Carbonear, Bay Bulls, St. Mary’s, Trepassey, Ferryland, Bay de Verde, Trinity, Old Perlican and Bonavista.

41 Reeves, *Island of Newfoundland*, pp. 154-5. Osborne to the Duke of Newcastle, 14 October 1729 in Prowse, *History of Newfoundland*, p. 287.

42 John Reeves, Second Report [on Newfoundland] to Rt. Hon. Henry Dundas, 1792, Great Britain, Public Record Office, Board of Trade [hereafter PRO.BT.], 1/8, Maritime History Archives, Memorial University of Newfoundland [hereafter MHA].

43 Reeves, *Island of Newfoundland*, p. 73; Prowse, *History of Newfoundland*, p. 286.

Osborne also moved to fill the statutory gap with regard to enforcement. He constructed stocks, whipping posts and a prison in St. John's. Another was planned for Ferryland. From the first the requirement that those charged with capital offenses be sent to England appears to have been ignored. This was reflected in the Board of Trade's proposal for a criminal court of Oyer and Terminer, first made in 1738 and implemented in 1750. Out of caution and perhaps a regard for the significance of this challenge to the authority of the fishing admirals, the Board limited the court to one annual session while the governor was resident on the Island, lest such power "be too much to be entrusted in the hands of judges and juries very little skilled in such proceedings".<sup>44</sup> In any event, the governors' establishment of other institutions served to extend their jurisdiction. A naval officer was appointed in St. John's in 1739 to suppress smuggling. A Court of Vice-Admiralty was created there in 1744. It was followed by a Customs House in 1763, and the assignment of deputy customs officers to leading outports. While the governor had delegated power to surrogates and magistrates, he continued to play a judicial role: "every matter, civil, and criminal, used to be heard and determined in open court before [him]".<sup>45</sup>

Although these arrangements could be rationalized as temporary expedients, they seemed to recognize and respond to the fact of settlement. The population was growing, from 3,000 in 1728 to double that by mid-century, and to 16,000 by 1764 (see Table I). How was it, then, that even after 1800 when the population surpassed 20,000 the governors could canvass the prospects for mass resettlement and deportation?<sup>46</sup> Two hypotheses suggest themselves. They lead one to inquire as to the nature of the population which was increasing and the nature of the economic growth which sustained it.

To this point we know little about these 18th century immigrants to Newfoundland. The climate and prospects for employment in sectors outside the fishery were no more favourable than in the past. So long as the fishery remained a migratory one, as it did past mid-century, the incidence of immigration by merchants or professionals was likely to be modest. One might suggest that a significant proportion of the small population was made up of young single men who stayed on in Newfoundland at the end of the fishing season. In all likelihood their home communities in the West Country or in southern Ireland, where the ships stopped each season to fill their complement of seamen and fishermen,

44 Reeves, *Island of Newfoundland*, pp. 112-13.

45 *Ibid.*, p. 155.

46 Governors Waldegrave (1799), Barton (1801) and Gower (1805) recommended the deportation of dieters and were assiduous in preventing the exploitation of waterfront premises in St. John's for non-fishery purposes. Linda Parsons, "Dieters" in J.R. Smallwood, ed., *Encyclopedia of Newfoundland and Labrador*, I (St. John's, 1981), p. 623.



offered little incentive to return. (The Irish by 1750 were said to outnumber the English in St. John's.) Some may have preferred the risks and possibilities for adventure and a better future in a new land to the bleak prospects and rural and urban poverty of life at home. Evidently a blind eye was turned toward the 1699 prohibition against carrying passengers to Newfoundland. The ships regularly carried a complement of "dieters" — men who signed on for a single voyage in return for room and board. With their return passage money, or a portion of it, in hand, they might eke out an existence in St. John's looking for work, or bartering a promise to work in the local fishery the following summer in exchange for lodging over the winter months. "Dieter" is an imprecise term and appears to have been generally applied to male seasonal workers who were not householders or perceived as either stable or respectable members of the community. The first week in May when the ships arrived from England and the cod fishery was getting underway was marked by the cry: "Out dogs, and in dieters!" In all likelihood many of these young men were transients, spending a season or two in Newfoundland. Noted for their drunkenness and violence, they were the despair of the "respectable" classes and considerable relief accompanied their moving on to greener pastures on the mainland.<sup>47</sup>

One must be wary of reading back into history. But in the late 18th century the merchants appear to have been no more committed to permanent residence than were the dieters. From St. John's in 1785 47 West Country firms, together with two from London and one from Greenock, supplied the fishery, usually on consignment, in exchange for first claim on the catch. Only 12, a quarter of them, had been in Newfoundland before 1750, and 11 would be insolvent by the 1790s.<sup>48</sup> Within such firms, though again one must be careful of generalizing from scanty data, it appears that young men, frequently nephews of the principal owners back in Poole or Dartmouth, would come out as agents or junior partners for a few years in hopes of expanding business and making their fortunes. With the caution that the data comes from the 1790s and the early 19th century, it appears that even when one married a local girl it was quite typical to return to England in one's early 40s to run the business from that end, or even to retire in a less rigorous climate and a more civilized culture. If these hypotheses have merit, many more people may have passed through Newfoundland than gross population figures, themselves unreliable, indicate. If such transients were

47 *Ibid.*; Keith Matthews, "The Class of '32 :The Newfoundland Reformers on the Eve of Representative Government", *Acadiensis*, VI, 2 (Spring 1977), pp. 80-94; W.S. MacNutt, *The Atlantic Provinces* (Toronto, 1965), p. 74.

48 Keith Matthews, "The West Country Merchants in Newfoundland" (St. John's, n.d.), mss. MHA, pp. 4-5.

drawn from all classes the pressure which it was necessary for them to mount in favour of more permanent forms of governance may have been lacking. And the nature of the imperial response, *ad hoc* and arguably temporary adjustments via prerogative writ, may have taken the impermanence and modest growth of the settled population into account.

The economy upon which the population and the prospects for its growth depended exhibits some of the same features: long term growth susceptible to downturns and setbacks which emphasized vulnerability and impermanence. As in the past, the fishery, apart from vagaries in the migration patterns of the cod stocks, waxed and waned depending on the crucial variable of external markets over which the Island had no control. War, in general, was good for trade. Fortunately for the local population the 18th century offered plenty of wars — the Austrian Succession (1740-48), Seven Years (1756-63), American Revolution (1776-83) and Revolutionary and Napoleonic (1792-1815) — although the recurring phenomenon of post-war recession, especially in the 1780s, could be devastating. By mid-century, after a generation of war, Newfoundland was exporting a record 476,000 quintals [100 lb. barrels] of cod. Three years later the fishery employed 20,000 men and its value exceeded £600,000.<sup>49</sup>

If war-generated prosperity brought a slow, albeit tentative, growth in population, it was not significant enough for most of the century to force a reassessment of the statute of 1699. But there were some signs that the gap between principle and practice was becoming apparent to observers. When the Board of Trade recommended the establishment of Oyer and Terminer in 1738, it argued that to do so via prerogative writ would not infringe the statute. How the Board intended to finesse the powers granted exclusively to fishing admirals to try cases at first instance and the provision that capital crimes be tried in England is unclear. But it proposed that the new court was analagous to the powers assigned to naval commanders to try charges of piracy and pointed out that similar powers had already been given to the governors of other colonies. Finally, on the grounds that Newfoundland in the period of proprietary colonies could be considered to have been a plantation, the full force of the Navigation Acts was said to apply.<sup>50</sup> The thrust of these arguments seemed to indicate that Newfoundland, despite her unique status since 1660, was on her way to becoming an imperial entity *comme les autres*.

To what extent these initiatives signalled a change in direction is unclear. On their face they do not square with the statutory reiteration of the 1699 principles signalled by “Palliser’s Act” (15 Geo III c.31) in 1775. In all likelihood not much thought was given to the matter. Britain’s claim to a closed mercantilist empire

49 McNutt, *Atlantic Provinces*, pp. 20, 73.

50 Reeves, *Island of Newfoundland*, pp. 113, 127.

was under seige in the last half of the 18th century. Increasingly imperial policy — the Navigation Acts, the Stamp Act and the Townshend Duties — centred on the need to retain and to rein in the American colonies. The Act of 1775 may have reflected a wider need to rationalize and make uniform imperial policy, to batten down the hatches to meet the American squall. It also bears the personal stamp of Sir Hugh Palliser himself.<sup>51</sup>

The Act assumed that the provisions of 1699 were still viable, for it was titled “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 over-wintering, 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 was reserved to British subjects arriving from Europe (s.1), which seemed to exclude 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 the forfeiture of the season’s wages except for the passage home (s.17). He might then be arrested and tried, and, if guilty, publicly whipped and deported.

Finally, the Act differed from its predecessor in recognizing the modifications made via prerogative writ since 1729. Whereas King William’s Act had stipulated a police and judicial power exercised by fishing admirals alone, with an appeal to the naval commander, that regime 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 who were absent without leave. All disputes over wages and infractions of s.17 were to be settled locally by the Sessions courts or that of Vice-Admiralty as appropriate. By s.34 an appeal lay from the Newfoundland

51 “According to his lights, he was an excellent Governor — in labour incessant, the very spirit of unrest, remarkably clear-headed, but very dictatorial”. Prowse, *History of Newfoundland*, p. 319.

courts to the British Admiralty Court or Privy Council.

Presumably, since they were not mentioned, disputes in contract or tort, not involving masters or sea-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 of local judicial authority, one might argue that matters not falling within the 1699 statute now fell to the 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 recognized the legality of the four courts of civil jurisdiction which had emerged since 1728 as far as they limited themselves to hearing matters — those of the fishery — stipulated by the Act. The Acts which followed simply refined that of 1775 with regard to bounties (s.1), the jurisdiction of the Vice-Admiralty Court (s.18), penalties for unauthorized absence (s.17) and desertion and non-compliance with court orders,<sup>52</sup> or took into account changes to the empire as a result of the United States' independence.<sup>53</sup>

For the liberal progressive school the Act of 1775 is exasperating, the product of either wilful blindness or capitulation once again to a West Country lobby determined to deny Newfoundlanders their rightful destiny. Reeves, 16 years after the Act, reported that it was "submitted to with silent discontent".<sup>54</sup> Prowse attributed it 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>55</sup> Assessed in its contemporary context in which English ministries were determined to ensure the primacy of imperial interests by means of an uncompromising enforcement of

52 26 Geo. III c.26 in 1786 extended the bounties (s.1), and removed the Vice-Admiralty Court's jurisdiction to hear disputes on seamen's wages "because of the unfavourable impressions...made respecting the practice...in that court" (Reeves, *Island of Newfoundland*, p. 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 12 years might follow (s.13). 29 Geo. III c.53 added further regulations for the whale fishery.

53 28 Geo. III c.35 in 1778 updated the provisions of the treaties of Utrecht (1713) and Paris (1763) to take account of the Treaty of Versailles (1783). St. Pierre and Miquelon were ceded fully to France. France's access to the French Shore was reconfirmed but given new geographical limits. Permanent settlements created by French fishermen on the shore were to be removed, as were English fishing facilities erected there.

54 Reeves, *Island of Newfoundland*, p. 136. The analysis throughout his study is worthy of respect, but here he was nearing the end of his story and simply summarized the Act in two pages.

55 Prowse, *History of Newfoundland*, p. 319.

the Navigation Acts, the Act appears not entirely unsuited to the times. That it should stress the nursery for seamen in the aftermath of a war which had been 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 was understandable. The emphasis on a migratory fishery was the restatement of a historic English policy of at least a century's standing. If it failed to recognize by statute the changes which were transforming the fishery to an indigenous one, it is also clear that that process was not yet accomplished and that the local population was neither permanent nor large enough, at perhaps 15,000, to sustain it. If the Act was a disappointment to the local inhabitants, which is not at all apparent, the disappointment was one tempered by a recognition that imperial interests, as ever, were bound to predominate.

Research on with what success the indigenous, pragmatic and informal system of legal institutions which had emerged during the 18th century functioned, and on the ideology which underpinned it, is in its earliest stages. But there is enough to provide glimpses of how some contemporary English norms had been adapted to local circumstances. As was the case in contemporary England and France, most crimes appear to have been committed against the person. For the most part the formal judicial system was concerned with crimes, reflected in the wide net cast to make them capital ones, against property. Property was sacred because so many people had so little. The loss of a cow or a few chickens, sources of milk or eggs to be sold in a local market, or of a hut by fire was often enough in 18th century France to push a small farmer or agricultural labourer over the line into permanent indigence.<sup>56</sup> In 1754 four drunks were indicted before the court of Oyer and Terminer in St. John's for killing a cow. A fifth was accused of receiving the butchered meat. All were sentenced to hang, though two were recommended to the Governor's mercy. Their eventual fate is not noted. In 1792 six men were publicly whipped for destroying sea birds for their feathers and for crushing their eggs,<sup>57</sup> presumably because to do so was to deny the community a supplementary source of food. For stealing a piece of pork valued at one shilling, and two of ham valued at twopence, William Petcain at Placentia in 1791 received 36 lashes on his bare back and he and his family were deported.<sup>58</sup>

56 Olwen Hufton, *The Poor of Eighteenth Century France* (Oxford, 1974) notes that a fifth of the French population was probably landless and propertyless, a vast, volatile and transient population which might be the scourge of the more fortunate.

57 G. Deir, "A Study of Capital Crimes in Newfoundland, 1750-1800" (St. John's, n.d.), p. 12, MHA.

58 Brenda Griffin, "Law and Order in Newfoundland in the Eighteenth century (1741-1792)" (St. John's, 1969), MHA.

Detailed studies of the incidence of crime in Newfoundland are in their infancy, largely confined to a few undergraduate essays. In a general study, based on the correspondence of the Colonial Secretary over 30 years, 28 trials before Oyer and Terminer are cited. Eleven were for murder, 15 for theft, including break and enter or forgery, and two for rape.<sup>59</sup> Another study agrees in finding an average of one capital verdict per year. Fifty-five per cent of the 30 cases, involving 17 for homicide, two for rape, five for break and enter and theft, four for forgery, one for receiving stolen money and one for the theft and killing of a cow, arose in St. John's. The accused were equally split between English and Irish. Of the 18 cases traced, 14 occurred in the fishing season, between July and October. Whether the accused were transients is not considered. Of the 30 guilty only nine were executed. Four had been involved in the particularly outrageous break and enter and murder of William Kean in 1754.<sup>60</sup> In a complementary paper 57 capital trials were examined in which 82 people stood accused of murder, rape, robbery and various felonies: forgery, assault, destruction of property or chattels. Of 22 on trial for murder, nine were found innocent, two guilty of manslaughter and nine were hanged.<sup>61</sup> Presumably the remaining two received a lesser sentence.

In a more sophisticated study of both civil and criminal cases for Ferryland (1774-1793) and Placentia (1757-1806) Brian Payne concentrated on class factors. Of 177 civil cases, 120 concerned debt or wages, 27 damage to property and 30 a miscellany distinguished by disputes over seamen's contracts, damaged goods, or demands for increasing the collateral on a loan. Of the 160 criminal charges, 55 were for assault, 27 for theft, 19 for assault, theft and drunkenness combined, and 59 were various: for example, neglect of duty, defamation, rape, obstructing a constable, contempt of court and trespass. From his statistical analysis he concluded that lower class plaintiffs in civil cases (servants, boat keepers, fishermen, non-commissioned officers, soldiers, debtors and tenants) brought twice as many actions (93 as opposed to 46) as did members of the upper classes (planters, merchants, merchants' agents, ship's masters, landlords and creditors). Of course, the former were much more numerous in the population as a whole. But they were clearly ready to use the legal system. Indeed, it was their sole recourse as many of the actions were against the withholding of wages. The incidence of class in criminal cases was reversed: 71 upper class actions against 36 brought by the lower classes. And half as many lower class plaintiffs were successful against upper class defendants as was the reverse. Overall the ratio of convictions to acquittals was three times higher for upper class plaintiffs against lower class

59 Sandra Hounsell, "A Summary of the Court of Oyer and Terminer for the Period 1750-1780" (St. John's, 1972), MHA.

60 L. Normore, "Capital Crimes in Newfoundland, 1750-1789" (St. John's, n.d.), MHA.

61 Deir, "Capital Crimes", p. 9.

defendants than was the reverse. Plaintiffs versus defendants of the same class fared slightly better than lower class plaintiffs against upper class defendants but with only half the success rate of upper class plaintiffs versus lower class defendants. Finally, when the State prosecuted it was successful in all 28 criminal cases. The stocks, imprisonment, flogging and deportation were the common sentences.<sup>62</sup>

These few studies sketch in broad tantalizing strokes a judicial system based on the activities of magistrates/justices of the peace sitting in Sessions courts and hearing cases of all sorts and description year 'round. By the 1780s the governor's surrogates sat with them providing speedy, summary and inexpensive justice in the out-ports. While upper class litigants appeared most successful, no obvious bias was discerned in the questions posed by the 12-man juries of Oyer and Terminer.<sup>63</sup> (An obvious omission in the available studies is any mention of gender.) The secure and the propertied had the literacy, confidence and status to mount a successful action in the courts. Whether the Courts were persuaded more easily on that account is an open question.

In its time, down to the successful challenge to its jurisdiction mounted at Exeter in 1787, the informal system of summary justice appears to have met local needs. But the number and complexity of cases, especially those for debt in the post-war depression of the 1780s, consequent upon an increasing population and expanding economic activity, may have threatened to overwhelm the system from within.<sup>64</sup>

What were the hallmarks of this system? It was accessible and resorted to by the common people. In the absence of lawyers, and of judges with legal training, it was informal. Except for capital offenses, presumably the exclusive domain of Oyer and Terminer, it was summary. The usual penalty was a fine or forfeiture. This was preferred for several common-sensical reasons. Most outports lacked facilities for incarceration. Where they existed, they were confined, cold, barren and uncomfortable, reason enough for the guilty to prefer a fine. Since the successful plaintiff was responsible for the costs of imprisoning his unlucky adversary, a fine was to be preferred, especially after 1788 when he was required to split the proceeds of the fine with the Crown.<sup>65</sup> The sheriff, who had to absorb the prison charges if the successful plaintiff did not, also preferred a fine: one keeper over 15 years found himself out of pocket £900. Finally, the community itself had reason to prefer fines, for in the event of an unsuccessful defendant

62 Brian Payne, "An Analysis of Criminal and Civil Cases in the Ferryland and Placentia Court Records" (St. John's, 1973), MHA.

63 *Ibid.*

64 *Ibid.*

65 28 Geo III c.35, s.1.

being unable to meet the court's costs the local magistrate maintained a census list of all residents. From it each master would be assessed twopence for each of his servants. If that was insufficient the charge would 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 source of financing the justice system. Since the British Treasury provided nothing and judges and sheriffs had to be paid, there was little or nothing available for capital expenditure. The cost of a new court house and gaol in St. John's in 1786 was estimated at £1080. It was not proceeded with.

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 where the consequences of a guilty verdict precluded a summary approach. Two or three weeks before its (still annual?) sitting five to seven "commissioners" were named to serve as judges by the governor who set a date for the session, always in September or October. Presumably this was scheduled so as not to conflict with the fishery but before the onset of winter, given the hazards of travelling to St. John's from distant parts. Trials lasted up to two days and the docket rarely exceeded two cases. A Grand Jury of 24 men handed down the indictment and examined witnesses for discovery. The resulting record was signed by a justice of the peace or several respectable citizens. The testimony of witnesses not available for trial was entered by this means though whether this included absence for any cause other than death is unclear. At discovery hearsay was excluded, after which the parties submitted pleadings to the court.

At trial a Petty Jury of 12, for which members of the Grand Jury were ineligible, was sworn. It questioned the witnesses. Having heard enough the jurors withdrew under the care of the bailiff who was sworn "to keep them without meat, drink, candle or lodging or suffer any son to speak unto them" until they had agreed on their verdict.<sup>66</sup> The foreman announced the verdict, the courtroom was cleared, the commissioners deliberated, the court reconvened and penalty was pronounced. The governor might recommend a pardon or 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. The liberal use of the governor's power in light of the wide incidence of capital offenses and the delays involved in an overseas reference probably explain why London deferred to the governor's views in almost every case<sup>67</sup> and the fact that only a third of capital sentences

66 Deir, "Capital Crimes", p. 8.

67 Deir found only one case in which London balked, in 1780, when Michael Darrigan was guilty of



were carried out.<sup>68</sup> The whole appears a neat, internally coherent and functional scheme in which the actors — judges, jury, bailiff and sheriff — are familiar. The notable absences to a modern eye are prosecutor and defense counsel, but the system appears to have functioned satisfactorily without them.

While many crimes carried a capital penalty a lesser sentence was often substituted. Guilty of the manslaughter, while drunk, of John Kelly, Lawrence Kneeves of Harbour Main was branded on his right hand with an “R”, forfeited his goods and chattels, and paid court costs. Of 19 guilty of theft to a value of £4 or more, one was actually hanged. These crimes against property were usually punished by whipping, branding and/or deportation. In 1776 Patrick Knowlton received successively 20 lashes by the public whipper in the public square, 20 in front of his victim’s house, and 20 more at Admiral’s Beach from whence he was deported having assumed court costs and forfeited his goods. Newfoundland was distinct in permitting deportation back to the Mother Country,<sup>69</sup> although it seems to have occurred in the early colonial experience of Nova Scotia.<sup>70</sup> Since the offender was by this time without resources the cost of deportation presumably fell to a public authority, perhaps to the justice system or to the Royal Navy.

Transportation added another element to a system nicely tailored to local needs: deterrence, public participation, ridding the community of a disruptive element and, perhaps above all, economy. The harsh principles of the law were tempered, as Douglas Hay would have it in the English context, with majesty, justice and mercy.<sup>71</sup> The latter two have been spoken to. On the majesty of the law as reflected in dress, pomp and ceremony, and court procedure we know little. But claims about the impersonal nature of the law — “execution was a fate decreed not by men, but by God and Justice”<sup>72</sup> — find a nice echo in Oyer and Terminer. Deir notes that the law was not predicated upon deterrence or punishment. Rather it was a means of dealing with those who had transgressed the guidelines laid down by divinity and the King. The guilty had acted against the “Peace of our Said Sovereign Lord, the King, His Crown and Dignity”.<sup>73</sup> In

the vicious murder of Cornelius Gallery. *Ibid.*

68 Hounsell, “Oyer and Terminer”, offers 9 of 30; Deir, “Capital Crimes”, 9 of 22. These are slightly lower, in an admittedly small sample, than comparable figures for England — up to 50 per cent.

Douglas Hay, “Property, Authority and the Criminal Law” in D. Hay *et al.*, eds., *Albion’s Fatal Tree* (New York, 1975), p. 43.

69 Matthews, *Lectures*, p. 203.

70 Information courtesy of P.V. Girard.

71 Hay, “Property, Authority and the Criminal Law”, p. 26.

72 *Ibid.*, p. 29.

73 Deir, “Capital Crimes”, citing the Governor’s report to the Colonial Secretary, 1780.

exercising the power of reprieve the King played the impersonal and even-handed deity: "both the god of wrath and the merciful arbiter of men's fate".<sup>74</sup> Despite parallels between the systems in Great Britain and in Newfoundland there were obvious differences. Newfoundland did not offer benefit of clergy; her class system and governance was very different; the economy was sea rather than land based, with important implications for transience; and there was no private ownership of land. In the end these may appear differences of degree rather than substance. At the least the question of the legal *mentalité* that immigrants and seasonal workers brought with them from the West Country and from southern Ireland offers intriguing possibilities for research.

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.<sup>75</sup> The successful appeal, against a fine levelled in Newfoundland, of Richard Hutchings to the Devonshire Quarter Sessions at Exeter in 1787 caused havoc.<sup>76</sup> Between 1788 and 1791 over 1200 writs for debt collection were issued and the parties grew desperate for a quick legal decision. Only Oyer and Terminer continued to function on the grounds that its authority was clear in the prerogative writ of 1750. 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 the agreement of the parties. By the time his successor, Governor Milbanke, arrived the situation was desperate: the fishery was down, bankruptcies rampant and debts that were contested could not be collected. On the advice of Aaron Graham,<sup>77</sup> 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 with a civil and criminal jurisdiction exercised by three judges and a jury. The merchants opposed it and the legal advisers to the Crown ruled it illegal. Nevertheless it limped along, staffed by Graham, customs inspectors and naval personnel,<sup>78</sup> while the governor dispensed his "advice" to parties, a holdover

74 Hay, "Property, Authority and the Criminal Law", p. 29. See also Deir, "Capital Crimes" p. 6.

75 On this whole question see Matthews, "England-Newfoundland Fishery".

76 Matthews, *Lectures*, p. 207. See Matthews, "Richard Hutchings", *DCB*, V (Toronto, 1983), pp. 443-4.

77 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, 1793, Calvin Evans, "Aaron Graham", *DCB*, V, p. 361. On Governor Mark Milbanke see Frederic F. Thompson, *ibid.*, pp. 595-6.

78 Griffin, "Law and Order".

of the judicial function exercised by his office earlier in the century. With the statutory system undermined by later developments which themselves had been ruled illegal, and faced with an increasing population fuelled by Irish immigration,<sup>79</sup> the decline of the migratory fishery and the emergence of the seal fishery, and changes in imperial policy and diplomacy, policy makers, however reluctantly, had to act. Still in accordance with government policy which opposed settlement,<sup>80</sup> the Board of Trade accepted the Attorney-General's proposal that prerogative writ be employed to create a "Court of Civil Judicature" of one English judge and two assessors appointed by the governor to hear cases during the summer. But even this was ruled unconstitutional by the Lord Chancellor.<sup>81</sup>

While circumstances in Newfoundland demanded haste, caution ruled at Westminster. The new Act (31 Geo III c.29) would take effect in June 1791 for one year and until the conclusion of the next parliamentary session.<sup>82</sup> Recognizing that the Acts of 1775 and 1786 in their

provisions...for the administration of justice in civil cases, are insufficient, and 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). Like the Attorney-General's previous proposal the court was comprised of a Chief Justice and two assessors, one of whom would sit 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 [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 via "levy and sale of the goods and chattels, or arrest of the person" (s.2). In cases over £100 notice of appeal,

79 John J. Mannion, *Irish Settlements in Eastern Canada* (Toronto, 1974), p. 19. The Irish population, concentrated around St. John's, grew seven-fold in the 40 years after 1794.

80 Lord Granville spoke for the government in 1789: "Newfoundland is in no respect a British colony and is never so considered in our laws. On the contrary, the uniform tenor of our laws respecting the fishery there...goes...to restrain the subjects of Great Britain from colonizing that island". George Story, *Christmas Mummings in Newfoundland* (Toronto, 1969), p. 18.

81 Matthews, "England-Newfoundland Fishery", pp. 555-87. He overlooks 31 Geo. III c.29 entirely.

82 It was titled: "An Act for establishing a court of civil jurisdiction in the island of Newfoundland, for a limited time".

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 Stat. 15 Geo. III c. 31, s. 18 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 lines of Palliser's and King William's Acts were, it appeared, to remain in place. The weight of inherited law and policy on 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. It was the sole civil court during the fishing season. Complaints 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, and 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>83</sup> Reeves' *Report* of December 1791 set the scene for an amended Act the following year. That continuity rather than change was envisioned was evident when the new bill was accompanied by a "regulating" bill to tighten up enforcement of Palliser's Act.<sup>84</sup> However, the incompatibility of the two must have been recognized because the second was not proceeded with and is lost from sight.

The new Act marked a clear departure from the previous statutory regime and accelerated the trend towards reconciling statute with 18th 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 circumstance and conditions, however, 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). The powers, salaries and discretion to appoint officers and staff of 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).

83 John Reeves, "Report on the Judicature of Newfoundland", December 1791, PRO.BT., 1/8, MHA; Matthews, "England-Newfoundland Fishery", p. 567.

84 Matthews, "England-Newfoundland Fishery", pp. 572-3.

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 24 citizens from which to draw a jury of 12. 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.

For the first time provision was clearly made 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 sea and fisherman’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, the subject of considerable litigation in the years after 1815. It was held by Chief Justice Francis Forbes<sup>85</sup> to be implied in light of the third priority of 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 must be brought within six years; otherwise the limitation period was 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 could be heard before Sessions courts of two justices of the peace, neither of whom could now 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. They could award costs, execute by attachment and their decision was final (ss.12,13). The Chief Justice had sole jurisdiction over intestacy and probate (s.10), the sheriff, and the procedures, rules and fees of all four levels of court<sup>86</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

85 *Luke Doyle’s Servants v. Receiver of the Voyage* (1821), 1 NLR, p. 263.

86 The Board of Trade issued “A Table of Fees” of the Newfoundland Court in 1792 with a scale

remained the sole source of revenue to run the judicial system. In keeping with the Act's intention to rationalize 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).

Finally, caution remained paramount. Like its predecessor of 1791 the Act had to be renewed annually until, slightly amended, it was made permanent in 1809.<sup>87</sup> Evidently the progress of the new regime was carefully monitored. In his report on his second season in Newfoundland in 1792 Reeves spent a good deal of time on the problem of how to assure the independence of the magistrates in the outports.<sup>88</sup> The local merchant appeared all-powerful. The doctor was usually on a retainer from him. Who else was available? Although there were only five Anglican clergymen 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 Geo. III [c.31] will remain a dead letter, as it hitherto has been". Here was a clear reflection of the official mind-set of the 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 the continued use of the royal prerogative via proclamations by the governor. Although he noted that questions might be raised about this procedure in light of the statutory regime, he had in a recent case involving the killing of sea birds upheld the governor. And although in 1791 he had recommended a public fund and a legislature to complement a Judicature Act, he now felt the second could be dropped as the population was not ready for

which increased at levels of £5, 50, 100, 1000 and 4000, PRO.BT, 1/2, MHA.

87 49 Geo. III. c.27 [1809]. The amendments provided: (1) that the civil jurisdiction of the courts be extended to cause of action arising in Great Britain or Ireland; (2) that either party to a civil action over 40s. could demand a jury trial; (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 1824: 5 Geo. IV. c.67. See Edward M. Archibald, ed., *Digest of the Laws of Newfoundland (including the Judicature Act, Royal Charter, Rules and Orders of the Supreme and Central Circuit Courts, Abstracts of all Laws in Force, Tables of Acts Repealed, Executed, Expired...)* (St. John's, 1847).

88 "The great and pressing evil...still is the want of a regular and formal administration of justice". Reeves, "Second Report".

representative institutions.<sup>89</sup> Finally, the chief justice was not required to be a year-round resident until 1798 and the governor ceased to be a seasonal visitor only in 1818.

The late 18th century marked a watershed in Newfoundland affairs. But it was not brought on by imperial policy or the legal regime. Rather it was due to change in the fishery and to population growth. Largely unnoticed, the fishery from mid-century was being internally transformed from a migratory and seasonal to a settled and year round enterprise. The Revolutionary and Napoleonic wars contributed to this process and brought such an era of prosperity that despite the post-1815 economic slump there could be no going back. Exports of fish grew to 400,000 quintals 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.<sup>90</sup> Ten years later the population stood at 55,000 (see Table I). 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 make a seasonal wage of the previously undreamt of order of £70. Seals from 1794 offered a supplementary source of income, 40,000 being taken by ships from Conception Bay in that year. By 1804, 160,000 pelts were being exported, with 1500 men in 150 vessels sailing annually to the Front off Labrador.<sup>91</sup> Logging and ship-building offered the prospect of helping to sustain the population in a year-round economy.

By War's end it appeared that 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 80 acres on the "higher levels" above St. John's for agriculture.<sup>92</sup> The first municipal institutions were in place: two schools in 1804, a postal service in 1805, a

89 *Ibid.* After 65 hand written double-spaced folio pages on the legal regime Reeves went on at 88 to deal with subsidiary matters: the duty on rum, the debt incurred by the district of St. John's, the options for granting crown land (by occupancy or Act of Parliament?), the best means to assure the passage home at the end of the fishing season of its servants, the Labrador fishery and, finally, the state of the wild Indians in the Interior.

90 Matthews, "England-Newfoundland Fishery", p. 599, n. 33.

91 *Ibid.*, pp. 599, 592, 598, 594; MacNutt, *Atlantic Provinces*, p. 140.

92 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 Geo III, c.45, s.1). Prowse, *History of Newfoundland*, p. 386, notes that the result was the issuance of 30 year leases.

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 Irish Society in 1806), and a hospital in 1811.<sup>93</sup> 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>94</sup> were in practice.

Newfoundlanders, for as such they were beginning to see themselves, were still precariously situated and a long way from being *maîtres chez eux*. 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 Magdalene Islands. The continuing and consistent refusal of Britain to help fund 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. 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, embracing institutions, personnel, substance, process and ideology, was in place. 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 reform. The law, its values, and its practitioners who would rapidly emerge, stood ready to assume a leadership role. Indeed it appears to have been theirs for the taking.

93 O'Neill, *St. John's*, I, p. 183.

94 David Davis, "James Simms", *DCB*, IX (Toronto, 1966), pp. 507-8; Diane Janes, "William Dawe", *Encyclopedia of Newfoundland*, I, p. 600.