

Leaving the State of Nature: A Locke-Inspired Political Community in St. John's, Newfoundland, 1723

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INTRODUCTION

AFTER THE LAST OF THE migratory fishing ships had left St. John's in November 1723, a group of men gathered to discuss the fate of their small community. They feared anarchy and lawlessness while they waited for the thaw of spring and the arrival of next year's fishing ships. This fall someone had a suggestion. Since the King had not provided them with a court of law they would create one themselves. To justify this decision they turned to the philosopher John Locke. The declaration of the community began with a quotation from Locke's *Essay Concerning The True Original, Extent, and End of Civil Government* (1690), and finished with a pledge to obey the decisions of three elected magistrates. Fifty-one merchants, planters and other prominent men added their signature or their X to a social contract. In doing so, they "left the state of nature" and formed a political community.

All that is known about this Lockean community is the result of examining three documents. The most important of these is a copy of the declaration of the community. This document was first brought to the attention of historians in 1931 by Judith Patterson.¹ Most other historians of this period have acknowledged the existence of this community, but none have examined it closely. This episode deserves attention for several reasons. In the first place, this was a vernacular court, a court created by the residents not the British state. As such it gives us a sense of the legal *mentalité* of the society, a culture that was substantially different from the formal statute law of Newfoundland.² This case also allows us

1 Judith Patterson, "The History of Newfoundland, 1713-63" M.A. thesis, University of London, 1931, pp. 40-42 and Appendix 1. The original document was transcribed and reproduced in C.O. 194/7, pp. 246-52, Colonial Office Records, Public Record Office [microfilm].

2 For views of formal law see Christopher English, "The Development of the Newfoundland Legal System to 1815", *Acadiensis*, XX, 1 (Autumn 1990), and Alexander Campbell McEwen, "Newfoundland Law of Real Property: The Origin and Development of Land Ownership", Ph.D. dissertation, University of London, 1978.

to examine the reception of the ideas of Locke in the New World. These people were contemporaries of Locke and their actions enable us to glimpse how Locke was read in the early 18th century. Newfoundland's constitutional position in the 18th century has been described as settlement without government. As a result, the episode can also give us some insight into the specific problems of maintaining a social order in a community without government.

The absence of government did not mean the absence of "the law". King William's Act in 1699 attempted to compromise between the need for settlers to protect Britain's claim to the island, and the protection of the reason Newfoundland was valuable — the West Country migratory fishery.³ Though frequently ignored, this "Newfoundland Act" remained the constitutional law of Newfoundland for the next century. It was particularly significant for its recognition that settlement was legal, and that the residents had the right to *use* any fishing rooms that they had occupied before 1685, as well as any new rooms they opened up.⁴ To discourage the settled population from growing large enough to interfere with the migratory fishery, no government services were to be provided to the residents during the winter.⁵

In legal areas not covered by King William's Act, however, indigenous custom prevailed. During the summer the Fishing Admiral System remained in place, and any serious crime committed in Newfoundland could be tried in any court in England.⁶ It was an ineffective system, particularly since it left the residents with no courts during the winter. When a serious crime was committed some citizen had to take the responsibility to hold the alleged criminal until the spring and pay the cost of transporting that person, and any witnesses, to Britain to stand trial. Not surprisingly, this rarely occurred, and the residents periodically petitioned the Crown for the provision of year-round judicial institutions.⁷

3 Statute 10/11, William III, C.25 [1699].

4 A "fishing room" would include all of the waterfront property required to prosecute the fishery, stores, sheds, flakes upon which the fish could dry, etc. See George Story *et al.*, *Dictionary of Newfoundland English* (Toronto, 1982), pp. 417-419.

5 Keith Matthews, "The West of England Newfoundland Codfishery", D.Phil. thesis, University of London, 1968.

6 While the Crown vacillated on whether or not to allow settlement the island's residents and the migratory fishermen created their own legal system — the Fishing Admiral. In essence, the first ship's captain to arrive in a harbour at the beginning of the year was responsible for administering justice in that harbour for the remainder of that season. Once this system evolved it was legitimized by the Crown and ultimately the commander of the British Convoy was given the responsibility for hearing appeals.

7 In a different reading of the 18th century Christopher English has suggested that there was an absence of widespread demands for local judicial institutions. This was a result, in his view, of the transient nature of the population. English, "The Newfoundland Legal System to 1815", pp.104-5. Possibly the residents did not want judicial institutions for which they would have to pay, but their desire to have the Crown provide protection for their property was a different matter.

In the absence of a court the residents often took matters into their own hands. In addition to the kind of moral economy which functioned in many pre-industrial communities, at least two vernacular courts had been convened, in 1711 and 1712.⁸ The commander of the garrison presided over these bodies, which may have been primarily a way of organizing the inhabitants to defend themselves against the French. John Reeves, Newfoundland's first Chief Justice and first historian, recognized these as analogous to the emergence of states in Europe when he wrote that, "these assemblies were somewhat anomalous, a kind of legislative, judicial, and executive, all blended together; and yet perhaps not more mixed than the proceedings of parliaments in Europe, in very early times."⁹ There was no threat of invasion to spur the inhabitants into organizing themselves once more in 1723, but the experience of these previous assemblies must have been on their minds.

Assuming authority without royal sanction, or even in this case without the cooperation of military authorities, required an intellectual justification. For this the residents turned to John Locke's *Second Treatise* on civil government, first published in 1690. It is difficult to be precise about how well known Locke's second essay was in the early 18th century colonies. This is not the place to enter the controversy about the importance of Locke in the American Revolution, except to note that even those who see Locke as central to the revolution agree that Locke's influence was minimal in the early part of the century.¹⁰ John Dunn has argued that the *Second Treatise* did not enter colonial American political discourse until after 1750.¹¹ Richard Beale Davis, on the other hand, has shown that after 1714 dozens of southern American libraries contained editions of the *Works of Locke* that included the essays on government, and there are indications that Locke's essay on government was known in Williamsburg as early as the 1690s.¹² This episode in St. John's in 1723 is certainly not the earliest reception of Locke's second essay in the New World, but it appears to be the only case in

8 D. W. Prowse, *A History of Newfoundland from the English, Colonial and Foreign Records* ([1895] Belleville, 1972), pp. 271-3.

9 John Reeves, *History of the Government of the Island of Newfoundland* (London, 1793), p. 53.

10 Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America* (Ithaca, 1990), p. 164.

11 John Dunn reports one isolated copy of Locke's *Second Essay* in the library of a Virginia planter in 1701 and suggests that it was not until 1724 that it became available in the northern colonies in the form of an edition of the *Collected Works of Locke* acquired by Harvard College. The earliest edition of the *Two Treatises* that Dunn was able to substantiate with definite colonial provenance was 1728. See John Dunn, "The Politics of Locke in England and America in the eighteenth century", in John W. Yolton, ed., *John Locke: Problems and Perspectives, A collection of new essays* (Cambridge, 1969), pp. 69-80, especially p.69, fn. 3.

12 Richard Beale Davis, *Intellectual Life in the Colonial South, 1585-1763* (Knoxville, 1978), Vol. II, pp. 594-5.

which the essay was explicitly used in the design of a state prior to the American Revolution.¹³

Locke proposed that men were born into a state of nature and gave up liberty by entering into a political community. Thus, he maintained, they achieved security of person and property by consenting to the rule of the community.¹⁴ This proved to be an excellent basis for an independent court in St. John's in several ways. First, Locke provided an intellectual justification for seizing authority which normally resided in the Crown, a revolutionary proposition. Second, it contained a useful defence of the ownership of property, as Locke argued that the ownership of property was a part of the natural order. In other words, Locke's treatise set out intellectual ground upon which one could attack the Crown while defending the social order.¹⁵ This was precisely what was required if the local elite was to assume the power of the king to defend their property.

The philosophy of Locke was useful to the St. John's elite in another way as well. The declaration of the community maintained that the 51 signatories were "the majority of the place". Since the population fluctuated so much during this period it is impossible to be precise about the number of residents, but it is clear this group represented a majority of the masters and merchants only.¹⁶ Yet the preamble from Locke asserted that no one would be subject to the political power of another without his consent. This is explicitly contradictory to the operation of the court, which punished people who had not signed the declaration. This also raises an important question about Locke's *Second Treatise*, and the issue of whether Locke intended to include the plebeian population in political society is a matter of some controversy among scholars. C.B. Macpherson suggested that to most 17th and 18th century minds the creation of a political community consisting only of the owners of property would not have seemed in contradiction with the notion of all men being born equal into a state of nature. The dominant ideology of the period, in Macpherson's view, dictated that "members of the labouring class did not have, could not be expected to have, and were not entitled to have, full membership in political society; they did not and

13 I am making a distinction here between the man and the text. As Shaftesbury's secretary Locke had helped to draft the Fundamental Constitutions of the Carolinas, but the text of the "second essay" was not used.

14 John Locke, *Two Treatises of Government* (New York, 1965).

15 David McNally, "Locke, Levellers and Liberty: Property and Democracy in the Thought of the First Whigs." *History of Political Thought*, X, 1, (1989) p. 26. For a reading of Locke that presents him as a more radical figure see Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* (Princeton, 1986).

16 The inhabitants of St. John's, Quidi Vidi, and Torbay in 1723 were reported as 93 Masters, 117 Man Servants, 73 Mistresses, 5 Women Servants, and 156 Children. See "Returns of the Fishery", C.O. 194/7.

could not live a fully rational life".¹⁷ Furthermore any political rights they might have had would have been alienated when they entered into service. Yet there was no question of their not being subject to the rule of the community. In short, Locke provided a moral basis for a state that would defend ruling class interests.¹⁸ James Tully and others have maintained that Locke did intend to include all men in political society.¹⁹ This reading may be the closest to Locke's intentions, but Macpherson has accurately described the interpretation of Locke by most of his contemporaries. It is clear that these "principal inhabitants" in St. John's were reading Locke as if political society included only property owners.

The Lockean community elected three justices, the Chaplain John Jago, and two merchants, Samuel Rooke and Allyn Southmayd, who during that winter held a weekly court in Southmayd's house. Despite the inflammatory language of the declaration, which warned of "insolences and rapines", the court operated more to resolve tensions within the society than to punish any criminal behaviour. A total of 15 decisions were recorded, and these hardly justified the fears of a state of anarchy. Two of these cases were disputes over money owed for lodging. Two were cases of assault (the cause of which was not described). Three cases of theft were heard, as well as an incident of "breaking boats", an activity which may have been the 18th century Newfoundland equivalent of cattle maiming. The magistrates also ordered the destruction of two wooden chimneys which posed a fire hazard to the town.²⁰

Another function of the court was to reinforce masters' control of their servants. Three such cases were heard, and one of these warrants closer examination:

William Bully deposed upon the holy Evangelists yt. on Sunday ye 16th of Febr'y, he ordered his servant Thos. Slaughter (then being disordered in drink) to eat his supper and go to bed, and that ye said Slaughter refused it, and called him rascal, Scoundrel, and other base names, and struck him and defyed any justice — The same day Mrs. Sarah Bully deposed yt. the said Slaughter called his master scoundrel, Dog and told him yt. he kept company with none but Scoundrels, and that he spit in her face.²¹

17 C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford, 1964), p. 226.

18 *Ibid.*, p. 250.

19 James Tully, *A Discourse on Property: John Locke and his Advisories* (Cambridge, 1980); Jeffrey Isaac, "Was John Locke a Bourgeois Theorist?: A Critical Appraisal of MacPherson and Tully", *Canadian Journal of Political and Social Theory*, XI, 3 (1987), pp. 107-129. and Martin Hughes, "Locke on Taxation and Suffrage", *History of Political Thought*, XI, 3 (1990), pp. 423-442.

20 Patterson, "The History of Newfoundland, 1713-63", Appendix 1, and C.O. 194 / 7, pp. 246-252.

21 *Ibid.*

Slaughter said nothing in his defence, and was sentenced to be tied to a post and receive 11 stripes upon the bare back. The harshness of the punishment was later defended by three justices:

[He abused both his Master and his Mistress, but] neither is the only reason for which this fellow was punished. He was all that winter mutinous in the highest degree, threatening to burn houses, to cut people down with his hatchet, bringing other man servants into frequent Caballs and admonishing them to abuse their Masters and to withdraw even common decency and respect, he was so very dangerous and incendiary that in all probability many tumults and disorders would have happened if he had not been brought to publick punishment.²²

This later account was written to justify the court's action, so one must be wary of accepting their version of Slaughter's activities. If he was organizing servants to resist their masters this is a remarkable case, and one wonders if such activity might be the principal reason for the establishment of the court that winter. If the three justices were misrepresenting Slaughter's activities, however, it may be significant that they chose to accuse him of organizing collective action. This was not a time at which the British government was likely to be lenient with plebeian resistance; after all, 1723 was the year of the Black Act, which added more than 50 capital offences to the British statutes.²³

The other issues the court heard were two cases of property ownership. Though the Crown admitted that the right to use fishing rooms as private property existed, it is unclear as to whether any legal right to enclose agricultural land would have been recognized. However, the people in St. John's were acting as if English common law traditions of property ownership applied on the island. When a dispute arose over the ownership of a piece of property, for example, the matter was decided on the principle of possessory title:

The same day Robert Willicott, Edward Cunduit and John Jones, and Hannah Bohun made oath that a certain parcel of Land, commonly known by the name of Samson Job's meadows, belonged in right to Thos. Le-Fever (Son-in-law and only heir of the said Samson Job) — Hannah Bohun moreover deposed that she had known it to have been in the possession of the said Job 36 years ago; and that the claim which Nicholas Cleymour pretended was invalid, that Cleymour could produce no proof of property — Whereupon Thos. Le-Fever allowed to possess it in right of Samson

22 "An account of the Proceedings of the persons that administered Justice at St. John's Newfoundland in the year 1723/4", C.O. 194, 8 ff. 1v-16v.

23 E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York, 1975).

Job, until a better title can be produced and proved.²⁴

This case is significant for its recognition that the right to inherit land was accepted by this vernacular court. In another matter the legal counsel for the Lords Commissioners for Trade and Plantation (the Board of Trade) later determined that the right to inherit property contravened the King William's Act, and thus did not exist in Newfoundland as far as the Crown was concerned.²⁵

Another common law principle was applied in settling a dispute between Thomas Leigh and William McLaughlin. They had jointly enclosed their turnip gardens for a number of years, until McLaughlin cut down Leigh's fence, on the grounds that it blocked a public path. The court decided that an easement existed along that path and ordered that the fences of both Leigh and McLaughlin be taken down. The court also assumed a quasi-legislative role, giving notice "that no one for the future should presume to appropriate publick paths or lands to any private design or interest".²⁶

The legitimacy of the court seems to have been accepted by the majority of the people who were called to appear before the magistrates, with two notable exceptions. First, Thomas Slaughter, the servant in the case discussed above, repeatedly absented himself from the proceedings. Secondly, when Andrew Horsam brought charges against the carpenter William Bevil for "abusing" him, the latter refused to appear before the court; Bevil said he would have appeared if given two weeks' notice.

The British authorities became aware of the establishment of unauthorized civil authority when the commander of the annual convoy, Captain Bowler, returned to Britain in the fall of 1724. The convoy commander was both the highest ranking officer with the Royal Naval contingent and a court of appeal under the fishing admiral system. The Board of Trade were concerned that three persons in St. John's had "exercised a judicial authority as well as concerning private property and possessions in question or dispute between the inhabitants there: as also in inflicting corporal punishment on Criminals".²⁷ Accordingly the Board of Trade amended its usual inquiry into the state of the fishery to instruct their agent to "make diligent enquiry into the proceedings of this new voluntary association, that due care may be taken to prevent any ill consequences from thence to such of His Majesty's subjects as shall remain in the sd. Island during the winter seasons".²⁸ In reply an explanation of the court's proceedings in the

24 Patterson, "The History of Newfoundland, 1713-63", Appendix 1, and C.O. 194/7, pp. 246-252.

25 McEwen, "Newfoundland Law of Real Property", pp. 43-5.

26 "An account of the Proceedings of the persons that administered Justice at St. John's Newfoundland in the year 1723/4", C.O. 194, 8 ff. 1v-16v.

27 Popple to Burchett, 21 April 1725, C.O. 195/7, pp. 134-136.

28 *Ibid.*

case of Thomas and Lee and the case of Slaughter was forwarded to London.²⁹ Whether the British attention dissuaded the inhabitants from repeating their experiment during the following winter is unknown. No records of further attempts exist.

The experience of 1723 had once more pointed out the inadequacy of King William's Act, and helped force the Board of Trade to reconsider Newfoundland's legal system. In 1727 Captain St. Lo took matters into his own hands and appointed a winter justice for St. John's. The following year the Board of Trade decided that the convoy commander could be granted the power to appoint winter justices without contravening the "Newfoundland Act". In 1729 Captain Henry Osbourne was appointed governor.³⁰ This was by no means the end of agitation for legal reform, but marked the beginning of a new phase in the legal history of Newfoundland. It also reminds us that local agitation for increased government authority was not simply a movement of the 1830s, but must be traced back to the earliest stages of local government.

Locke's "state of nature" never existed in Newfoundland any more than it had existed in Europe. From the time of discovery English class relations and the British state were extended into the Newfoundland frontier. Yet British policy dictated that the state was absent during the winter, leaving the residents to make do with their own moral economy. The self-regulating functions of this moral economy were inadequate when presented with a serious crime or a perceived threat to the social order. In the absence of Britain's willingness to enforce order during the winter the resident property owners were capable of creating their own rudimentary court. The decisions of this court indicate that consensus existed within the elite of the community about property and appropriate behaviour. They agreed that English common law applied in Newfoundland, including the right to enclose agricultural land and inherit property. They followed the common law not only because it was accepted by all classes, but also because they were attempting to reproduce West Country English society, from its class relations to its ideology. In doing so they turned to a contemporary expression of political philosophy to justify their actions. Locke's *Essay Concerning The True Original, Extent, and End of Civil Government* provided an appropriate statement of political theory to meet their needs.

JEFF A. WEBB

DOCUMENT

Proceedings of the harbour of St. John's on 26th day of November in the tenth

29 "An account of the Proceedings of the persons that administered Justice at St. John's Newfoundland in the year 1723/4", C.O. 194, 8 ff. 1v-16v.

30 Matthews, "A History of the West of England Newfoundland Fishery", pp. 354-8.

year of the reign of King George, and in the year of our Lord, 1723.

Men being by nature all free, equal, and independent, no-one can be put out of this estate, and subjected to the Political power of another, without his own consent. The only way whereby anyone divests himself of his Natural Liberty, and puts on the Bonds of civil society is by agreeing with other men to join and unite into a Community, for their comfortable, safe and peaceable Living, one amongst another, in a secure Enjoyment of their Properties and a greater security against any, that are not of it. This any number of men may do, because it injures not the Freedom of the rest; they are left as they were in the Liberty of the State of Nature. When any number of men have so consented to make one Community or Government, they are thereby presently incorporated, and make one Body politick, wherein the MAJORITY have a right to act and conclude the Rest.

Locke's Essay Concerning the True Original, Extent, and End of Civil Government. — page 256, Book 2nd, Chap. 8th, Edition 4th, Lond: Printed by John Churchill, 1713.

A copy of the writing, whereby the majority of St. John's enter'd into a Community.

St. John's, Newfoundland

Whereas the Inconveniences are many, and the Losses very considerable which the inhabitants of this Country, in General, but of this Port more particularly, sustain from a multitude of men of desperate fortunes —

And whereas the Act of Parliament for the Regulation of the Fishery, and Fishing rooms, &c, has not made any provision for the Security of Such as remain upon this Island after the Fishing Ships are departed hence —

And whereas many wicked and malicious men take an advantage here from That no Civil Magistrate is settled here to restrain their Vices, and to punish their Insolences and Rapines — And whereas frequent Burglaries are committed, Cattle Stolen, Merchants insulted, Servants cajoled to leave their Masters without just cause or Grievances, and many Trespasses and Acts of Wrong are daily committed, to the prejudice of those that endeavour at an honest Living —

We, the underwritten, Minister, Merchants, Factors, Principal Inhabitants and House Keepers, or Masters of Families, being the majority of this Place, do hereby under our hands and Seals indent, engage and agree to enter into an Association and embody ourselves into a Community for the mutual Preservation of His Majesty's peace and the PROTECTION OF US AND OURS during

the winter, that is until the arrival of the British Fishing Ship in this harbour.

And moreover, that our honest Intentions may not be liable to any misconstruction, we here unanimously declare, and testify by these Presents, that we most heartily agree to guide ourselves and others by the Laws of Great Britain both as to the Allegiance which is due our Rightful and Lawful Sovereign, King George, and also as to that Law of Equity which the King's Courts distribute, without favour or affection, Prejudice or Partiality, to any person whatsoever.

Hereby, we conceive that vice may not only be punished, but Virtue promoted, the Honour of God maintained, and the joint Interest of this Place advanced. We likewise oblige ourselves to leave this affair to the management of three men to be annually elected (upon the departure of the last ship) by the majority of the Subscribers hereunto. We likewise oblige ourselves joyntly and Severally, our Heirs, Executors, Administrators, and Assigns, in the penalty of £50 to be levy'd by the majority, and disposed of as they shall judge proper, upon the failure of our complying with these articles which we shall sign. Given under our hands and Seals this 26th of November in the 10th year of our Sovereign Lord King George, anno domini 1723.

John Jorard ?	Issac Higgins	John Carter
John Savery	James ?	John Higgins
John Downing	William Luly	Thomas Morey
John Cock	John Bradford	Thomas Lee
John Gramacly	John Battlaird ?	John Hodder
John Jago Chaplaine	Michael Gill	Sam Dibbs
William Bool	Arthur Caine	Francis Horbrook
Wili Ricket	Hugh Tucker	John Bird
John Hugo	John Oliver	John Cole
John Olford	? Parker	Thos. ?
Tho. Hawkins	Andrew Knowlan	? Braid
Christopher Archer	John Do Grave	Samuel Rooke
Alex Wyley	Allyn Southmayd	Samuel Pollington
William Robbitt	William Bulley	? La doffs?
Wm McLaughlin	Peter White	Wm Slaughter
John James	John Shipling	Girard Freeman
John Woodmoser	William Bevil	William Lanning

The three men chosen Justices by the majority of the subscribers are :— John Jago, Chaplaine; Samuel Rooke, Allyn Southmayd, Merchants. Who took an oath before the subscribers to do the best of their skill and knowledge.