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The Judicature Act of 1824 Revisited

CHRISTOPHER P. CURRAN AND MELVIN BAKER

INTRODUCTION

Much has been written about the process leading to the enactment of the Judicature Act of 1824, but the Act's implementation has received relatively little attention.¹ The Act of 1824 placed Newfoundland's system of judicature on a solid statutory foundation. Like the Act of 1792, it was fashioned upon the foundation of its antecedents.² The 1792 Court, styled the "Supreme Court of Judicature of the Island of Newfoundland," had been developed by Chief Judge John Reeves,³ who had consulted widely with those in the Newfoundland fish trade and drew upon his Court of Civil Jurisdiction of the previous year in administering Newfoundland. The Imperial Act of 1792 was, with minor alteration, renewed in 1793⁴ and thereafter continued until 1809 when, by 49 Geo. 3 c. 27, s. 1, it was "made perpetual."⁵ These Acts gave Newfoundland the beginnings of a formal legal and judicial system and laid the basis for elective representative government in 1832 with the seat of government at St. John's.⁶

In 1831 Governor Sir Thomas Cochrane,⁷ at the request of the Colonial Secretary of State, asked the judges of the Supreme Court to report after the first five years of operation on the strengths and weaknesses of the 1824 Judicature Act and its reception in Newfoundland. The report follows below. In addition to

its value as a historical document in its own right, the report sheds considerable light on the social, political, and economic conditions in Newfoundland on the threshold of representative government. This document enhances our understanding of ongoing efforts in the early nineteenth century to build an effective and efficient system of judicature as Newfoundland achieved representative government in 1832 and developed its various aspects of local governance.⁸

NOTES

- 1 For example, see A.H. McIntock, *The Establishment of Constitutional Government in Newfoundland, 1783–1832: A Study of Retarded Colonization* (Plymouth: Longmans, Green and Co., 1941); Gertrude E. Gunn, *The Political History of Newfoundland, 1832–1864* (Toronto: University of Toronto Press, 1966); Leslie Harris, “The First Nine Years of Representative Government in Newfoundland,” MA thesis (Memorial University of Newfoundland, 1959); Keith Matthews, *Lectures on the History of Newfoundland, 1500–1830* (St. John’s: Breakwater, 1988); Sean Cadigan, *Hope and Deception in Conception Bay: Merchant–Settler Relations in Newfoundland, 1785–1855* (Toronto: University of Toronto Press, 1995); Patrick O’Flaherty, *Old Newfoundland: A History to 1843* (St. John’s: Long Beach Press, 1999); Jerry Bannister, *The Rule of the Admirals: Law, Custom, and Naval Government in Newfoundland, 1699–1832* (Toronto: University of Toronto Press, 2003).
- 2 These developments are discussed in Christopher Curran, “The Judicature Act of 1824 and Its Antecedents,” in Christopher Curran and Melvin Baker, eds., *The Face of Justice on Newfoundland’s Northeast Coast* (St. John’s: Law Society of Newfoundland and Labrador, The S. S. Daisy Legal History Committee, 2012), 68–106.
- 3 John Reeves (1752–1829), Chief Judge of Newfoundland’s first civil court in 1791 and author of *History of the Government of the Island of Newfoundland* (1793). See Peter Neary, “John Reeves,” *Dictionary of Canadian Biography*, vol. 6 (1987); Christopher English and Christopher Curran, *A Cautious Beginning: The Court of Civil Jurisdiction, 1791* (St. John’s: Law Society of Newfoundland and Labrador, 1991).
- 4 33 Geo. 3 c. 76.
- 5 The phrase is from Reeves’s “Report of John Reeves Esq. Respecting Newfoundland” (unpublished 1792 manuscript), 54. See the copy at Memorial University’s Maritime History Archive, Public Record Office Reference, BTI-8X/4550.
- 6 How the legislature provided for the governance of St. John’s is discussed in Melvin Baker, “The Government of St. John’s, Newfoundland, 1800–1921,” Ph.D. thesis (University of Western Ontario, 1980), 13–142.
- 7 Sir Thomas Cochrane (1789–1872), Governor of Newfoundland, 1825–34.
- 8 The Judges’ Report can be found at The Rooms Provincial Archives (GN5/2/A/7, Box 82, File “Supreme Court Central Report of Tucker, DesBarres and Brenton on the Judicature

Act, August 1831” and in the *Royal Gazette* for 5, 12, 19 Feb. 1833. Attorney General James Simms did a similar report, which can be found in CO194/84, 1832, pp. 258-3-7, and in the *Royal Gazette* for 26 Feb. 1833.

DOCUMENT

Report of the Judges of the Supreme Court of Newfoundland to His Majesty's Government upon the Judicature Bill

Sir,

To the Report of our opinion upon the Judicature and Jurisprudence of this Colony, which we are about to submit, through your Excellency to the consideration of Viscount Goderich, we deem it necessary to prefix some observations, in excuse for the delay which has taken place in our compliance with the frequent calls that have been made on us for a declaration of our sentiments upon these most interesting subjects; and as an apology for the unsatisfactory manner in which we are at this late hour obliged to perform the truly difficult task that has been assigned to us.

Of all the Countries under His Majesty's dominion, Newfoundland probably opposes the most serious obstacles to the establishment of an efficient Judicature, and a rational system of Jurisprudence. Those obstacles proceed from causes of a physical, moral, and political nature; and a brief enumeration of a few principal circumstances, falling under each of these divisions, will serve to show the intense force with which collectively they must operate.

The practicability of framing regulations, which are to be enforced within certain local limits, must chiefly depend upon the existing facilities of communication between the several places comprised in those limits; for, unless a tolerably free intercourse can take place between the different parts, separate establishments for each still become indispensably necessary. But the climate of Newfoundland, where severe frost and snow prevail for a large portion of the year — the deep indenture of her numerous Bays, which render land travelling exceedingly circuitous and difficult — the state of her population, which, though considerable in the aggregate, is yet “scattered, as thinly as the products of the earth, in distant harbours and coves,” — and the almost total want of roads to connect these settlements with each other — impede and obstruct communication in such a degree, that it would perhaps be more easy and feasible to put all our West India Islands under one Government, and to create a

Court which should exercise jurisdiction throughout the whole of them, than to contrive a system of Judicature by which the same Judge and ministerial officers should be enabled, without the aid of subordinate District Tribunals, to dispense Justice to all the Inhabitants of this Colony.

Great, however, as the impediments to the erection of good Judicature in this Island resulting from the natural causes by themselves are, they are also much aggravated and increased by circumstances connected with the present condition of society here. As the best, if not the only, remedy for those defects in the existing Judicature, which spring from the difficulty in maintaining a due communication between the various settlements, the idea of establishing Courts in as many points as would enable their influence to extend, with suitable energy, to all of them, immediately suggest itself to the mind; but with it must arise the question; how are such Courts to be constituted? And now it is that obstacles proceeding from the state of society begin to present themselves in their force. It will, we imagine, be readily admitted, that it is preferable for a community to have no Court rather than a corrupt one; for though it may be strictly true that the worst Government is better than none, yet the same thing cannot be said of Courts, since greater injustice and oppression may certainly be exercised under cover of the Law, badly administered, than could possibly be practiced by naked fraud and violence. The essential requisite to a Court, therefore, is sound integrity in the person who presides over it; and the necessary security for the existence of this indispensable qualification is a total absence, on the part of the Judge, of all interest in the subject-matter submitted to his determination. But whoever is acquainted with the out-harbours of Newfoundland must be sensible, that a single Individual qualified to discharge the judicial functions, even in a Court whose jurisdiction should be in every respect confined and circumscribed, cannot be found in any one of them; for, without stopping to enquire, whether adequate talent and knowledge for such an office can anywhere be met with, it is abundantly evident, that there is not at this time one person residing in an out-harbour who would not, either directly or indirectly, be strongly interested in the great majority of cases that would be brought before him as a Judge. If, then, the want of communication between the numerous settlements in this Island does really call for, as we conceive it does, the creation of a number of District Courts, the state of society in these settlements equally requires, that the Judges who shall preside in such Courts shall be brought from some other place; and this we are aware will be attended with an expense which will, we fear, be deemed a powerful, if not an insuperable objection to such a measure. Nor can we omit to notice here the

increased difficulty, in the way of a satisfactory administration of the Law in this Island, which is more particularly referable to the political views and intentions which the Government long cherished in relation to it. Under the policy that prevailed during a period of many years, it was the avowed and favourite object to prevent the formation of permanent settlement in Newfoundland; and everything that could for the attainment of this object, by parliamentary enactments and Royal Instructions, was accordingly tried by the Legislature and the Government. But, in spite of all regulation of that sort, population gradually arose in the Island; and as persons who had thus settled themselves in opposition to the Law were not disposed to comply with those rules of it which were designed to deter them from settling here, it naturally followed that Law and Practice, instead of going hand in hand together, as they ought to do, were in several instances directly opposed to each other. From this conflict numerous questions have sprung which, at this distance of time, are by no means of easy solution; and as the British Parliament would not make any Laws for a Community, which it refused to acknowledge as having a legitimate existence, the members of it were compelled to substitute local usages and customs for written Laws. Of those usages, a few have since been confirmed by Parliamentary enactments; others sanctioned it by judicial recognition; and some have become obsolete; but a large portion of them remain unsettled up to this very hour; and as these constantly mingle themselves, in a variety of ways, in most of the Cases which are brought before the Courts, the Judges are frequently called on to examine them with great care, not only for the same of distinguishing those which possess the genuine properties of a Custom, from irregularities and abuses of a partial and local nature; but also for the purpose of ascertaining, whether some of them, which might have been very salutary and beneficial in one stage of society, had not ceased to be so — or, indeed, might not have become positively noxious — under a very altered condition of it. The Law of England, too, is to be observed here only in so far as it is applicable to the circumstances of the Colony; and thus a sort of Legislative Power¹ is blended with the Judicial Functions, which renders our Judicature painfully responsible to those who have to carry it into execution, and a source of constant disquietude to those who fall under the influence of it.

A review of the several points to which we have thus shortly alluded, will, we think, in a great measure, if not wholly, prevent the surprise which must otherwise be felt, that so little progress has yet been made in meliorating the

1 The power of choosing some laws out of a large number cannot, as Lord Bacon observes, be distinguished from the power of making Laws.

Judicature of this Island, after the frequent attempts to do so that have been instituted by the Legislature and the Government, assisted by the information and advice of Chief Justices Reeves and Forbes. But if the efforts of men, with whom we have not the vanity and presumption to compare ourselves in any particular, when directed to this object under circumstances that enabled them to dedicate the whole powers of their mind, and their undivided attention, to it,² have almost entirely failed of producing any beneficial result, how may we venture to encourage even the faintest hope that we shall be able to offer any needful suggestions upon so difficult a subject, in the midst of those official duties which do not permit us to calculate, with any reasonable certainty, upon the enjoyment of a single day free from the interruption of fatiguing and perplexing business? In the difficulty of the undertaking, as strongly evidenced by the failure of all those who have hitherto engaged in it, we conceive we are indeed furnished with a full excuse for the reluctance with which, we confess, we now enter on it; and upon the harassing nature of those official duties which incessantly occupy our time, and engross our attention, we rest our apology for what we are conscious must appear to the noble Secretary of State to be a most lame and imperfect execution of it.

The Judicature established in this Colony by the 5 Geo. IV, c. 67, seems to us to be exclusively contrived for the use of St. John's, and a few other populous settlements; and for them it may, with some alterations, be rendered sufficiently suitable and proper; but, as a mode of dispensing Justice, and imparting civil protection, to the great multitude of people who are diffused, in small bodies along the whole margin of the shore, it is certainly more inefficient, and perhaps less satisfactory to the inhabitants of those distant parts, than the Naval Surrogate System to which it has succeeded. The visits of the Circuit Judge are necessarily made at a season of the year when the whole mass of the population is actively engaged in the pursuits of the fishery — the time of his arrival at any particular place is a matter of the greatest uncertainty — his stay at any harbor is limited to a few days, in order that he may go to as many as he possibly can within the period of a Circuit — and yet, even under this arrangement, he can only call at, comparatively, a small number of them — so that after having been tossed about for some months upon a very terrific coast; exposed to dangers of no trifling magnitude; and exhausted by hardships and sufferings for which his former habits of life have furnished no kind of preparation; he at length returns to the seat of

2 Both Mr. Reeves and Mr. Forbes were in London, and of course far removed from the interruptions of official duty, when they were called on by the Secretary of State to assist in framing a Judicature Bill for this Colony.

Government with a mortifying conviction strongly impressed upon his mind, that the voyage, which has been so fruitful of pain and misery to himself, has been of very little benefit indeed to the Public. Nor is it, we firmly believe, possible to render the present system of Judicature, by any improvements which it is in its nature susceptible of, duly operative in the generality of the out-ports, so long as the climate, the roads, and the habits of the people of Newfoundland, shall continue as they are now. Nothing, therefore, as we have already hinted, short of the establishment of a number of Local Courts, under the presidency of resident District Judges, will, in our opinion, ensure to the remote settlements in this island the essential blessing of speedy Justice; and though such a plan must be attended with a degree of expense which may possibly lead to the rejection of it, we shall, notwithstanding, give a short sketch, or outline, of its principal features; and afterwards return to suggest a few arguments, drawn from a fair statement of the value of this colony to the mother country, and of its consequent claims upon her, in answer to any objections that may be urged to our proposition on account of the expense which must accompany its adoption.

We would, then, very earnestly recommend that four District Courts of Record shall be created; one of which shall possess jurisdiction throughout the whole of Conception and Trinity Bays; another in Bonavista Bay, and in all the settlements north of it to Cape John; a third from Bay of Bulls, inclusive, to Cape Chapeau Rouge, comprising the whole of St. Mary's and Placentia Bays, with the several Islands contained therein; and the fourth from Cape Chapeau Rouge to Cape Ray:

That to each of these Courts there shall be attached the under mentioned Officers:

A Judge
A Deputy Sheriff or High Bailiff
And two Constables

That the Court, thus constituted, shall move about continually, every year, in a suitable half-decked boat which will belong to it, from the first of April to the last of October; in the course of which period it will visit every settlement in such a way that there shall not be an individual in the District who shall not have Justice brought within twelve miles of his door once, at least, in every twelve month.

That the jurisdiction of these Courts shall be altogether of a civil nature, extending to all suits, whether originating in Tort or Contract, the subject matter of which shall not exceed the sum of fifty pounds sterling.

That parties shall be brought into Court by summons; or where the cause of action shall exceed five pounds by attachment of the Defendants goods; the former process issuing gratis, upon the Plaintiff's affidavit of his belief that he has a just ground of action; and the latter upon a similar oath as to the validity of the demand, and upon payment of a fee³ calculated always on a scale at the rate of five percent, on the amount of the writ.

That the only other fee to which a suitor shall be liable, for original process is an allowance of one shilling to the constable, or Baliff, for the service of the summons or attachment, where the distance is less than a mile from the place in which the Court is held, and an extra shilling for every mile beyond it.

That the proceedings shall be altogether summary; and the determination of the case confided solely to the Judge, (who, for this purpose, shall be authorized to examine witnesses, and even the parties themselves, upon oath,) unless either the Plaintiff or Defendant shall desire to refer it to a Jury, or to Arbitration, which may at all times be done by either of them on his advancing three pounds, currency, to be divided equally among twelve Jurors, or thirty shillings, currency, to be divided between the three Arbitrators, one of whom shall be nominated by the Plaintiff; another by the Defendant; and the third appointed by the presiding Judge.

That the extra expense thus attending a trial by Jury, or by Arbitration, shall ultimately be borne by that party upon whom the Judge shall conscientiously conceive it ought to fall, upon a due consideration of the motives which apparently influenced the application for it.

That where a case has not been submitted either to a Jury or to Arbitration, the only costs that can be taxed and allowed by the Judge are: the fee for the writ of attachment; the little allowance for the service of process; a moderate compensation to witnesses for their loss of time; and, in very particular instances, a partial indemnification to an indigent Defendant for any loss, or inconvenience, he may have sustained by having been dragged into Court by a litigious Plaintiff who had not even a probable cause of action against him.

That an appeal from the Judgment of the District Court shall in all cases lie to the Circuit Judge; who, besides this appellate jurisdiction, coupled with a power of examining generally into the proceedings and conduct of the District Judge in every part of his duty, shall also possess, during the period of his circuit, the same original jurisdiction, both civil and criminal which is now

3 The principal motive for coupling a fee to the process for attachment is to deter parties from the use of it, by making it less expensive to them to commence their suits by themselves.

conferred on him by 5 Geo. IV c. 67, and shall exercise such jurisdiction in the manner prescribed by the several sections of that Statute.

That notice of appeal shall be given within two days next after the day on which Judgment shall have been pronounced; and in case it shall be prayed by the party, or parties, who is, or are, directed to pay any sum of money or perform any duty, the District Judge shall direct that the Judgment shall be carried into execution, or that the execution thereof shall be suspended, pending the said appeal, as he may deem most consistent with real and substantial justice; taking care, in case he shall direct the Judgment to be carried into execution, that the person or persons in whose favour the same shall be given shall, before the execution thereof, enter into good and sufficient security, to be approved by the said District Judge, for the due performance of such Judgment or Decree as the Circuit Judge, shall think fit to make thereupon; or, in case he, the District Judge, shall direct the execution of such Judgment to be suspended, pending the appeal, the person or persons against whom the same shall have been given shall, in like manner, and before any order for the suspension of any such execution is made, enter into good and sufficient security for the due performance of such Judgment or Decree as the Circuit Judge shall think fit to make thereupon.

That the Judgment of the District Court shall be enforced by attachment and sale of the lands, goods, debts, and effects of the person or persons against whom it shall be made; but that no process shall in any stage of the proceedings issue from this Court against the person of any individual, except for a Contempt of Court committed by him.

That upon all monies which may be levied by the Deputy Sheriff, or High Bailiff, under any writ of execution directed to him, he shall be entitled to charge poundage,⁴ after the rate of five per centum upon the full amount of the Judgment, where the sum levied shall be sufficient for the entire satisfaction thereof; or upon the sum actually levied, where it shall fall short of the full amount of the Judgment; and such poundage shall cover all the charges attending the attachment and sale of any property, and shall also constitute the only remuneration which the Deputy Sheriff or High Bailiff, shall be entitled to demand, or receive, for his own responsibility and trouble.

That the District Judge shall also be Justice of the Peace, and *Custos Rotulorum*, of the District in which he acts.

That the Governor, or Acting Governor, shall appoint some principal

4 The levying under an execution is one of those disagreeable duties which will seldom be diligently performed, unless the repugnance to discharge them which feelings of humanity give rise to shall be counteracted by considerations of self-interest.

settlement in each District as the residence of the District Judge during four, or five, months in the winter; and where he, in conjunction with two or more, other Justices of the same District, shall hold Courts of Session, for the trial of all offences below capital ones, at some convenient time before his departure in the spring on his visit to the other settlements, and again in the autumn very soon after his return to the place of his winter residence.

That besides the two Courts of Session which are to be thus regularly holden every year at the leading settlement in each District, the Governor, or Acting Governor, may also authorize and empower the District Judge, in conjunction with two or more neighbouring Justices of the Peace, to hold, in the course of the summer, a like Court of Session at such other settlement or settlements in the same District as the Governor or Acting Governor may think proper to appoint.

That the Judge of the District shall also be Judge of the Probate Court, and Registrar of Deeds within the limits of his District; and shall receive, for any services performed by him in either of those capacities such moderate and reasonable fees as the Chief Judge of the Supreme Court shall direct and authorize.

That one of the Assistant Judges of the Supreme Court shall visit each District once in every two years, (limiting his Circuit for one year to the Northern, and for the succeeding year to the Southern, division of the Island) for the purpose of revising the proceedings and superintending the conduct of the District Judge; of hearing and determining all the cases in which an appeal shall be entered for his decision, and of exercising an original jurisdiction in all questions not cognizable by the District Court.

And, lastly, that the District Judges shall change their stations regularly at the end of three years, for the sake of preventing those partialities, and, which is nearly as bad, the suspicion of them, that are too apt to grow out of local connections and attachments.

We have thus endeavoured to convey a clear idea of the most important parts of that system of Judicature which appears to us to be best adapted to the present state and condition of all the harbour settlements in Newfoundland; but, as we are anxious to preserve an uniformity of system throughout the whole Island, so far as a due regard to a difference of circumstances will permit, we shall also suggest some alterations in the Judicature now established in St. John's, with a view of assimilating it as closely as possible to that which we propose for the out-harbours. Before we enter on the subject of the expense with which the general adoption of our plan will probably be attended.

In order, therefore, to give to the inhabitants of St. John's, who may be disposed to avail themselves of it, the same advantage of *cheap and speedy Justice*

which the District Courts will afford to the out-harbours, we would propose, that, during the intervals between the Terms of the Supreme Court, one of the Assistant Judges thereof shall preside in a Court which shall be styled the District Court of St. John's, and shall possess precisely the same jurisdiction and power within twelve miles of the Court House in the Town that the other District Courts are invested with, together with a criminal jurisdiction over all crimes below capital ones; and that all the regulations which have been already pointed out as applicable to those Courts should also be enforced in it, with the single exception, that no appeal⁵ shall be allowed in any case where the subject matter of the suit does not exceed fifty pounds sterling, and does not directly involve any question of title to lands, or by which future rights may be bound. Into this Court all the cases that are now decided by the Justices of the Peace may of course be transferred with great advantage to all the parties concerned; and as all judicial power will thus be taken from the Justices in this District, we conceive that the Police of St. John's will merely require to have two stipendiary Magistrates placed at the head of it, and that a small saving may consequently be made in this branch of the service which may be applied in reduction of the increased expenditure to which the proposed alteration in the system of Judicature will give rise.

We would also suggest, that no Circuit Courts shall at any time be holden in St. John's; but that all suits and actions shall be tried there either in the District Court or in the Supreme Court; and that, for the purpose of rendering the sittings of the latter quite equal to the discharge of all business that can be brought before it, there shall be three fixed Terms of it regularly holden every year at these stated periods: From the 2nd Wednesday in January to the first Tuesday in March; from the 3rd Wednesday in April to the 1st Tuesday in June⁶ and from the 1st Wednesday in October to the 2nd Tuesday in December. Ample

5 As the Jurisdiction of this Court is confined to suits for sums not exceeding fifty pounds, viz. the regulation by which the right of appeal is governed is precisely the same as the Rule prescribed on that subject in the constitution of the Circuit Courts erected under the 5 Geo. 4, c. 67.

6 Under this regulation one of the Assistant Judges of the Supreme Court will be engaged every year on a Circuit for a period of three months (from the early part of June to the middle of September), whilst the other will be employed in holding a District Court in St. John's. The duties of the Circuit, and of presiding in the District Court of St. John's, will thus devolve on them alternately for the space of a year; and the Chief Judge will, during the intervals of the terms of the Supreme Court, give his attention in the business of the Probate Court, and to the other matters which are exclusively confided to his management.

opportunity will thus be given of hearing and determining in this Court all criminal matters, together with all civil causes which from their difficulty, or importance, may require a formal and solemn course of trial; whilst the frequent occasional sittings of the District Court, in the intervals between those Terms, will afford an easy access to a Tribunal perfectly suitable to the adjudication of that large bulk of cases, which, from their subject matter — the transactions that have given birth to them — and the situation in life of the parties interested — will not admit either of delay or expense in their determination. Another advantage, too, of considerable magnitude, that must result from this arrangement of the Courts, is, that by excluding from the Supreme Court all those cases which cannot be fairly tried without great deviation from the established course of practice, and even some departure from the strict rules of Law, the proceedings in that Court will soon acquire that order, uniformity, and consistency, which it is absolutely impossible they should ever attain to under its present constitution. Still further to promote this essential object, of preserving regularity in the proceedings of the Supreme Court, we deem it extremely advisable, that no action shall be commenced in it for less than ten pounds sterling, unless the subject of it shall relate to the possession, or title, of Land or involve some question by which rights in future may be bound. In other respects the Jurisdiction of the Supreme Court may remain exactly on the footing which it is placed by 5 Geo. IV, c. 67; excepting only, that actions for the breach or violation of any law relating to the trade or revenue of the British Colonies in America may be brought or prosecuted before the Chief Judge, or one of the Assistant Judges, instead of being brought before all them, as directed by that statute; and that the Chief Judge shall be solely empowered to appoint guardians for infants and lunatics throughout the Island, and to grant administration of the effects of intestates, and probates of will, where the deceased shall have died within twelve miles of the town of St. John's, or, having died in any other part of the Island, shall have left property to the value of ten pounds sterling in each of two, or more, separate Districts; the grant of administration, and the probate of wills, being in all other cases committed to the District Judge, who is to be guided, in the exercise of this part of his duty, by such regulations and rules as shall, from time to time, be proscribed and settled by the Chief Judge, for the sake of maintaining an uniformity of practice in these matters in every District of the Island.

Having now detailed, as concisely as the nature of the subject would permit, and with such perspicuity as we could, the great outline of that system of Judicature which our observations and experiences have enabled us to suggest

as best adapted to the present state of the Colony, we shall subjoin an estimate of the expense that will probably attend it.

| Items of Expense | Per annum |
|--|-----------------|
| Salary of a District Judge | £300 |
| Travelling allowance to do, at the Rate of 5s a day for a period not Exceeding 200 days ⁷ in the year (at the most)..... | 50 |
| Salary of Deputy Sheriff, or High Bailiff | 150 |
| Travelling allowance to do, at 3s a day | 30 |
| Salary of first Constable | 40 |
| Travelling allowance to do, at 1s 5d a day | 15 |
| Salary of second Constable | 30 |
| Travelling allowance to do at 1s 3d a day | <u>12.10</u> |
| Whole expense of one Court | <u>£ 627.10</u> |
| Whole expense of four Courts | <u>£2510.</u> |

To this, however, something must certainly be added for four boats,⁸ of about 25 tons each, for the conveyance of the officers of the Courts to all parts of the districts; but after making a very liberal allowance for this head of charge, as well as for every other contingent one we can think of, we believe ourselves to be fully warranted in saying, that two thousand seven hundred and fifty pounds a year will abundantly cover the whole expense of our plan; and if from that sum we deduct, as in reason we ought to do, all the savings which will be effected by the change of system, as expressed in the following:

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- 7 It seems better that the Judge and the Officers of his Court should have an allowance to cover their extra expenses during the Circuit specifically granted to them *eo nomine*, and calculated as a daily rate, rather than an equivalent addition to their salary.
 - 8 These boats should be built expressly for the purpose, and provided with all the accommodation which the officers of the Courts may require on their Circuits. The cost of the four will not, however, much exceed £1000; and the expense of keeping them will be very trifling, as they may be respectively navigated by the two constables, with the assistance of one more man to work them.

| | |
|---|-------------|
| Salary of a Clerk of a Circuit Court ⁹ | £200 |
| Hire of a vessel for a Circuit | 200 |
| Extra Constable attending a Circuit | 20 |
| Table money on Circuit | 50 |
| Salary of a Police Magistrate | <u>175</u> |
| In all | <u>£645</u> |

The actual increase to the public expenditure occasioned by this most desirable and valuable improvement in the Judicature of Newfoundland will not much exceed two thousand pounds per annum.¹⁰ Nor can we — though not yielding in our real regard for Public Economy to any of its loudest advocates — for a moment hesitate most strenuously to urge, that this expense shall be incurred; impressed as we are with a deep conviction of the inestimable advantages that will flow from it to the people of this country, and of the force of their claims to this and every other benefit of a good Government. The claims of Newfoundland upon the favourable and kind consideration of the parent state are, indeed, as we confidently believe, on many accounts stronger than those of any other of her colonies; and under the hope of fully supporting the large pretensions which we here advance on her behalf, we shall attempt to

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- 9 There are now three Clerks of the Circuit Court, of whom one must be retained to attend the Circuit Judge and another to act in the District Court at St. John's; but the third appointment will become unnecessary under the new system, as the District Judges will be required to keep their own Records without the assistance of any Clerk.
- 10 That is for the first three years. We recommend, however, that each of the Judges shall be entitled to an increase of £50 per annum to his salary at the end of three years with a corresponding addition to it at the expiration of every successive period of three years, until it shall amount to £500 per annum, which will be the *ne plus ultra* of it. Without the prospect of some such augmentation, the salary we have proposed would certainly be too small; and even with the hope of such future advantage, the scale of remuneration will scarcely be sufficient to induce any professional man from a Colonial Bar to accept an office of so peculiar a character. But as the duty of the Judge will be to administer Justice *secundum bonum et equum*, as between man and man, without reference to general principles, or particular rules of law, a man possessed of sound integrity, a clear understanding, and an acquaintance with the usages and customs of this country, may be as well qualified for this appointment as a regular-bred lawyer. Indeed we do not doubt but that persons competent to discharge the duties of it may be found among the Police Magistrates of St. John's and the Clerks of the Circuit Court; and by giving a new appointment of any of them who may be displaced from their former situations by the change of system, the expense of granting them a compensation for loss of office may be avoided.

establish by clear demonstration, and irrefragable proof, the three following propositions:

That less money has been expended by Great Britain on the civil government and internal improvement of Newfoundland — the oldest of her transmarine possessions — than upon the very smallest and most insignificant of them all.

That not only have the immense fortunes which have been acquired here, and transferred to the three kingdoms, added very considerably to the capital of those countries; and, by consequence, tended to fructify their fields, to extend their manufactures, and to swell their commerce; but that large sums of money have also been remitted from hence directly to the coffers of the British Exchequer, as the proceeds of duties which have been imposed on the importation of various articles into this island.

That from her geographical position, and other physical causes, Newfoundland may justly be deemed one of the most valuable, and perhaps the most valuable, of all the foreign dependencies of the Imperial Crown; to which she is also bound by a firmer and more indissoluble tie than most of them.

In maintaining our first proposition we shall carefully avoid any discussion of the wisdom, or policy, of those anti-colonial views which Great Britain long tenaciously adhered to in respect of this island. Whether those views were originally correct, and the means of enforcing them which were resorted to judicious, are questions that do not concern us, who are not called on either to attack, or defend, measures which have now been abandoned by the government; but simply to point out some necessary effects of those measures which irresistibly confirm the truth of the proposition we have enunciated. We shall content ourselves, therefore, with affirming, upon the unerring testimony of History and Parliamentary Documents, that whilst generous grants of money were annually made to most of the other British trans-atlantic provinces and Islands, to support their civil establishments, and to promote their population, Newfoundland was so far from participating in the bounty of Great Britain, that not only were all sorts of civil establishments withheld from her, but that the design of checking the growth of her population was even carried to such a length, that the naval commander on this station was instructed by the Prime Minister, that “whatever the inhabitants loved to have roasted he was to give to them raw; and whatever they wished to have raw he was to give to them roasted.”¹¹ This system was followed, with some trifling relaxation in practice,

11 These were the very words of Lord North, as we learn from Mr. Knox, who was once an Under Secretary of State. See his evidence before the House of Commons, appointed to inquire into the state of Newfoundland in 1793, p. 113.

until within a very few years, when the first step was taken towards making this Island a Colony with a regular form of civil government; and we think it would be “burning daylight” to labour to prove by any other arguments than those which must necessarily follow from the facts now adverted to, that Newfoundland, regarded as a Colony, has cost the Mother Country much less money than any one of her possessions on this side of the Atlantic. But there is one of those possessions, situated at not great distance from this island, which exhibits a contrast so striking, in the liberality which has been shown to it, to the principle of parsimony which opposes itself to every attempt at improvement here, that we feel ourselves justified in claiming for Newfoundland, as a child of the same parent with Nova Scotia, the small boon she now solicits, on the ground of the far greater indulgences which have been lavished on her more favoured sister. In his splendid speech on “the economical reform,” Mr. Burke said — “the Province of Nova Scotia was the youngest and the favourite child of the Board. Good God! what sums the nursing of that ill-thriven, hard-visaged, and ill favoured brat, has cost to this vital nation! Sir, this Colony has stood us in a sum of not less than seven hundred thousand pounds.” And certainly if the description here given of Nova Scotia had been accurate, we might have been led to conclude, that political parents are, like natural parents, prone to bestow their warmest affections, and tenderest care, upon the most sickly and least promising of their offspring — but from the appearance of strength and vigour which Nova Scotia now displays in this her season of flourishing adolescence, we cannot persuade ourselves that she could have been “an ill-thriven brat” in any stage of her childhood; and so far are we from cherishing any sentiments of envy, or jealousy, towards her, that we do most cordially rejoice at her present prosperity and ardently and affectionately wish that it may be increased and perpetuated. Yet addressing ourselves as earnest suppliants for Newfoundland, we would say to the general government, as to a common parent: Here is Nova Scotia upon whom you had expended more than seven hundred thousand pounds in the year 1780; and upon whom your bounty has since continued to flow in still richer and more copious streams whilst Newfoundland has, comparatively, cost you nothing; and can you then refuse to this your long neglected child, the small grant of a few thousand pounds to secure to her the attainment of that object — the satisfactory administration of Justice — upon which the tranquility and happiness of every community must mainly depend!

But though a just parent is certainly under a strong moral obligation to listen to the prayer of the child, who implores her in this manner to do for it

something like that which she had already done, and in a much higher degree, for another of her children, it may yet be a sufficient ground to justify the rejection of such a prayer, that the petitioner was not worthy to be admitted to any share in her maternal affection and bounty. To prove, therefore, that no such cause of denial can fairly be urged against Newfoundland; but that, on the contrary, she is really entitled to claim from the Justice of the mother country that which she more dutifully sues for as a favour, we shall next point out a few of the many important advantages which the United Kingdom has already derived from this Island; and shall afterwards prove that the enjoyment of some of those advantages may be made to last for ever.

In stating an account between the mother country and any of her colonies, the profit which accrues to the former, from the additional employment of capital in manufactures and commerce, for supplying the wants of the latter, and the security which the empire derives from the extension of its maritime power, which necessarily increases with the number of its foreign possessions, will, in most instances be found to form the only off-sets to the heavy expense with which the charge of governing and protecting those possessions is usually attended. Some proprietors of large estates in Jamaica, and a few other Islands, do, indeed, reside in the mother country; and, by spending there the income they draw from their colonial property, transfer a part of the surplus-wealth of the colony to the place of their domicile. But it is merely a part, and that too a small part, of the wealth of any of those Islands which is thus transferred; for, in the first place, it is only after a large proportion of the produce of an estate has been applied to the cultivation and improvement of it, as also to the payment of rates and taxes which are imposed on it for the support of civil establishments, the construction of roads, and the promotion of other local advantages, that any remittance can be made to the absent owner; and secondly, the number of estates which can furnish the means of living to a distant proprietor is very small in comparison with those that cannot. With Newfoundland, however, the case is altogether different, for, without costing the mother country anything, it did for a long period transfer to her the whole proceeds of those fisheries which Lord Bacon has declared to be a richer source of wealth than all the mines of Mexico and Peru, and which the enormous fortunes formerly acquired by them have proved them to have once been. During the whole of that period this Island was, in its relation to Great Britain, like a piece of land which gives all the manure produced on it to a distant farm; and is itself thus reduced to the lowest condition of sterility, whilst the distant farm is fertilized and embellished by having been made the depository of all its productions. In

the same manner every penny that could be drawn from the fisheries beyond what was absolutely necessary for the bare and scanty support of the sedentary population, has been sent from hence to Great Britain and Ireland; and this sedentary population, now become very considerable, accordingly finds itself almost entirely destitute of every thing necessary and essential to the well-being and comfort of civil society. Exposed, too, to the competition of formidable rivals, who have been indulged with a right of fishing on some of the best parts of the shore by our Government, and are fostered by large bounties paid to them by their own. Deprived of suitable markets for their fish by this competition, and by the poverty and misery of those countries which were formerly the great consumers of it; and threatened with the withdrawal of a large portion of the English capital from a trade which will no longer yield the usual average rate of commercial profit, the people of Newfoundland naturally refer their present embarrassments and distress chiefly to the operation of those measures which for a long time enriched the parent state out of the fruits of their industry and labours; and to that sacrifice which has since been made in treaties with France and America of their particular interests to the peace and general good of the Empire, the power of providing for the expense of civil establishments out of the capital which might otherwise have been accumulated here during the prosperous times of the fishery having been wholly taken away the one, and the means of doing so, out of the profits of any fishery they are now enabled to carry on, being as effectually cut off by the other. They feel, therefore, that on these grounds they have much more than an ordinary claim upon the justice as well as the liberality of the mother country; and when they reflect, that, in addition to this, the returns that have been laid before Parliament furnish indisputable proof, that a sum much exceeding a hundred and twenty thousand pounds was paid by them, as duties upon articles imported into this Island in the course of only ten years, and remitted directly to the British Treasury, they cannot but flatter themselves, that, under the principle, now established by law, of applying all such duties to the use of the colony in which they were raised, His Majesty's Government will, at all events, consider the excess of the duties collected here in times past, beyond the amount of the civil expenditure for the same periods, as a fund which the parent-state holds by a sacred trust for the use and benefit of Newfoundland.

If we have thus succeeded, as we anxiously trust we have, in making out a strong case for this Colony by an unvarnished statement of some of the advantages which the mother country has already derived from it, we are confident that this case will be very much increased in strength by a reference to those

circumstances which still render Newfoundland — depressed as her fisheries and trade now are — must ever continue to render her, in spite of that depression — one of the most important and valuable of the British possessions.

It is certainly true that some of the money derived from the fisheries may be expected to remain henceforward in this country, instead of being entirely transferred to Great Britain and Ireland, as it formerly was, but, as the fisheries must long continue to be almost wholly prosecuted by capital belonging to those countries, it is obvious that a principal share of any profits which during such period the fisheries may yield must centre in those countries, in return for the capital advanced by them, and it is, moreover, in the highest degree probable, that even a considerable part of that proportion of their profits which may fall into the hands of the resident merchant and fisherman will eventually be transferred with them to one of the parent kingdoms; as most men, let their intention of settling here be ever so fixed, will still be disposed to go home, by which endearing appellation the inhabitants of this island always designate the mother-country, whenever they shall have acquired wealth enough to support them there. It is not, however, from secondary considerations like these that a correct estimate of the value and importance of Newfoundland can be obtained. To do this the statesman must refer to the Chart of the Atlantic Ocean; in the midst of which he will find Newfoundland situated in such a manner as to command the navigation of all the British possessions in North America; and affording, by means of the excellent harbours which every where abound on her coasts, convenient stations for ships of war sufficient to intercept most of the trade that is carried on between the Eastern and Western Hemispheres across her Banks, which are industriously resorted to by vessels from all quarters for the sake of ascertaining their longitude. In short, he will perceive that this island has very nearly the same influence on the Atlantic ocean that Gibraltar has on the Mediterranean Sea; and, consequently, that the possession of either of them by a rival maritime nation would do more to wrest from the hand of Britannia the Trident, which we fervently pray that she may ever firmly hold, than any other event that can possibly befall her.

The possession of Newfoundland being, as we apprehend, thus essential to the naval power of Great Britain, the probable duration of such possession must become a matter of the most interesting enquiry; and we have therefore much satisfaction in detailing those reasons which induce us to conclude, that this island may be bound to the mother-country by a more lasting tie than most of her Colonies.

Whatever the value of the Canadas, and of our other continental provinces

in America may be, it is impossible for any one who looks back on the past — contemplates the present — and anticipates the future condition of them — not to regard their separation, at some time or other, from Great Britain, as an event of the most probable occurrence; and it is equally probable that the Islands in their immediate vicinage will share the same destiny with them. To determine precisely at what period this separation will take place may, perhaps, be altogether beyond the reach of human prescience; and we are sensible that it would be most idle in us to enter here into any speculation upon it. We simply maintain, that it is an event which, like natural dissolution, must happen; though nobody can exactly tell when it will occur; and our deduction from this theorem is, that the value of those Provinces and Islands to Great Britain must be lessened, in proportion to the chances of the nearness of the day in which their separation from her will take place. If, therefore, it can be proved, that over Newfoundland Great Britain may, if she pleases, possess “*imperium sine fine*,” it must be admitted that this Colony is, on that account, an object of greater interest to her than any of those which she holds by a less permanent bond of connection. Now it may safely be laid down as a position of universal application, that no country will long remain in a state of dependence on another after it shall have ceased to require assistance from her and as the size of this Island may induce a belief that it is capable, with the aid of its fisheries, of nourishing a population rich enough to provide for their own wants, and sufficiently numerous for their own protection, persons may suppose, that at a future period Newfoundland may also be disposed to assert, and able to maintain, her independence. But a slight attention to the nature of her soil and climate must effectually dissipate so absurd a notion; for though there may be small tracts of pretty good land scattered about in different parts of the Island, and though the partial cultivation of even the inferior soils, by hands which could not in any other way be profitably employed, may be highly useful, as furnishing a subsidiary means of support to the fisherman, yet every one who has visited many parts of the Island must know, that, if from the whole number of acres it contains, those which are covered with water, and those which can yield nothing but rocks, were to be deducted, the remainder would be reduced to a most insignificant sum; and when it is further considered that vegetation is totally suspended here, through the effect of the climate, for, at least, seven months out of the twelve, it will at once be seen, that, with equal advantages of soil, agriculture could not possibly be carried on in Newfoundland with any thing like the success with which it is prosecuted in more temperate regions. Without consuming, therefore, any more time and paper on this topic, we will assert,

under a full assurance of not being contradicted by a single rational being who possesses sufficient local information to enable him to form a correct view of the matter, that Newfoundland never can become a self-subsisting and perfectly independent state. At this moment, indeed, her population — which is certainly less than 100,000 souls — presses so hard upon the means of subsistence that scarcely a winter passes without exposing the inhabitants of some settlements to a scarcity of food approaching very nearly to actual famine; and it is manifest, that so long as the causes which now depress the fisheries shall exist, the major part of this population must continue poor and indigent, even under a permission of cultivating as much land as they please without paying any rent whatever for it. As an auxiliary to the fisheries the free cultivation of that soil, which a French geographer aptly terms “*ingrat et sterile*,” ought to be allowed; but so far is the land from being by itself capable of furnishing a substantive fund for the support of any considerable number of persons, that the whole population of the island cannot possibly exceed, except in the most trifling degree, the number of inhabitants who can earn the principal portion of their livelihood by the fisheries. To them, therefore, the politicians may safely refer us as a true measure of the population of this Colony; and he will accordingly find that, even under the most favourable circumstances of market which the world can offer, it will always be confined within such narrow limits as must completely exclude the idea that Newfoundland can ever become independent. There is, consequently, no reason why the connection between Great Britain and her should ever cease; as it can only be dissolved by her placing herself in a similar state of dependence upon some other nation, which she can never have a motive for doing whilst she is treated with the fostering care and kindness which she fondly hopes to receive from her present powerful guardian and protectress. From the nature, too, of the occupation and pursuits of the bulk of this population, they must continually depend upon the mother-country for the whole of their clothing and other manufactured articles, as well as for a very large portion of their food; and thus the growth and prosperity of this Colony, instead of detracting from its value to the parent state, by leading to a future separation between them, must add incalculably to the advantages which the latter cannot fail to derive from a connection capable of being extended to the remotest ages. To condense, then, the various claims of Newfoundland upon Great Britain into a narrow compass, by a brief recapitulation of the several grounds upon which they rest; it appears, that besides the negative virtue of having cost very little to the mother country, she possesses the positive merit of having sent a large sum of money to her public treasury

— and of having added a thousand-fold more to her stock of private wealth: that the possession of her is, during war, of vital importance to the commerce and naval power of the British Empire, and that the other benefits which that Empire must derive from a connection with her are neither limited in their duration, nor circumscribed in their extent; but may, by proper management, be made to endure forever, continually augmenting with her growth, and increasing with her prosperity.

Supported in her prayer to the mother country for assistance by pretensions like these, it seems to us next to impossible that any reasonable suit she may prefer can be denied to her. The motives which call for the adoption of the most rigid system of public economy that may be consistent with the eternal rules of Justice and doubtless at this time particularly forcible; and were the necessity for it even less imperative than it is, we should still feel, that, as the wants of this country are greater than could conveniently be removed at once, much care and judgment ought to be exercised in the selection of the objects which are most immediately conducive to her happiness; and that even upon these not one farthing should be expended more than is absolutely requisite to the attainment of them upon that moderate scale of expense which, on any accounts, should be inviolably adhered to in every department of the Government. Strictly guided, therefore, by these principles, and thoroughly convinced, not only that an improvement in the Judicature of Newfoundland would be the first and greatest blessing she can now expect to receive, but also that the mode of effecting this improvement which we have suggested is the best and least expensive that can be contrived, we beg leave respectfully and earnestly to recommend the foregoing observations to the favourable consideration of His Majesty's Principal Secretary of State for the Colonies. Should his Lordship, however, contrary to our ardent hopes and wishes, find himself restrained by a sense of duty from adopting the measure we have now proposed, on account of expense that must attend it, our views of improvement in the Judicature of this Island must be confined entirely to such alterations in the existing system as will not demand an increase of the machinery to be employed in it; and as this must chiefly be effected by introducing some changes into the 5 Geo. 4, c. 67, we shall now turn to those provisions of that Statute which seem to us to call for amendment, in the precise order in which the several sections succeed to each other in the Act of Parliament.

5 Geo. 4, c. 67, s. 1: Under this section the Supreme Court possesses a criminal jurisdiction throughout Newfoundland and its dependencies as ample to all

intents and purposes, as His Majesty's Court of King's Bench hath in England; and it may therefore unquestionably try all misdemeanours and crimes of the same magnitude, or degree, that the Court of King's Bench can; but it does not seem to be equally clear and certain, that an act which would constitute an offence of a particular degree by the law of England, if committed there, is by this section rendered penal in the same degree if committed in Newfoundland; or, in other words, that the whole criminal law of England is, through the operation of this section, transferred en masse, to Newfoundland, and made as binding and obligatory as there. From the structure of the clause, as well as from the omission to specify what parts of the criminal law of England shall be enforced in this Colony, it may strongly be inferred, that the whole was to be extended to it whilst, on the other hand, the total inapplicability of a large portion of that law to the circumstances of this country, and the absolute impossibility of carrying many penal statutes into execution here, without violating that fundamental rule of literal and rigid construction which has always been observed in regard to them, cannot fail to create doubts, as to the real force, meaning, and effect on a subject of such vital importance. We would, therefore, recommend, that these doubts should be entirely set at rest by a clear and explicit declaration of the intentions of the Legislature upon this very interesting point; and at the same time we would suggest, that only some select members of the Criminal statute law of England, and not the whole body of that law, ought to be extended to this Island. The compilation of such a code would, we are sorry to add, require much more leisure, and opportunities for calm reflection, than we are permitted to enjoy; and it would consequently, be utterly impracticable for us, situated as we now are, to enter upon an understanding of this sort even if we could bring, what we hardly presume to suppose we can, an adequate share of talent and knowledge to the execution of it.

5 Geo. 4, c. 67 s. 3: The Chamber of Commerce of St. John's have expressed a wish, that Juries shall only be resorted to for the trial of civil suits and actions when they are prayed for by either the Plaintiff or Defendant; but, though we are disposed to attach due weight to the suggestions of that body, upon a question like this we are yet too anxious to form the Supreme Court upon the model of the common law courts of Westminster Hall to consent that Issues of Fact shall be tried in it in any other way than by a Jury. We think it, indeed, of the utmost importance, that order, regularity, consistency, and a uniform course of proceeding, should be as much as possible maintained in that Court which ought to be set apart for the most solemn criminal and civil trials, whilst

questions of a less grave character may obtain a more summary adjudication in the Circuit Courts. In them, therefore, we are so far from objecting to the proposal that both law and facts of a case should be left to the Judge, where neither of the parties to it desire to refer the latter to a Jury, that we conceive the use of a Jury in these Courts may more properly be made to depend on the wish of the suitors to have one, than to rest on the footing upon which it now stands by the 3rd and 12th sections of the Statute.

5 Geo. 4, c. 67 s. 4: As long intervals must necessarily occur between the sittings, or terms, of the Supreme Court, in consequence of the absence of the Judges thereof on their several circuits, we entirely concur with the Chamber of Commerce in thinking, that the power of trying all informations and suits for the breach or violation of any law relating to the trade or revenue of the British Colonies in America, ought to be vested in each Judge, instead of being committed to them jointly as it now is.

5 Geo. 4, c. 67 s. 5 and s. 6: Upon reasons somewhat similar to those which have been expressed by us under the foregoing article, we incline to think, that the grant of administration of the effects of intestates and the probate of wills, together with the appointment of guardians for infants and lunatics, ought to be vested solely and exclusively in the Chief Judge of the Supreme Court.

5 Geo. 4, c. 67 s. 9: In addition to the jurisdiction conferred on the Circuit Courts by this section a power may be given to the Judge thereof, during its sittings, of hearings and determining, according to the course of proceeding in similar instances in the Courts of Vice Admiralty in the Colonies, all informations and suits for the breach or violation of any law relating to the trade or revenue of the British Colonies or Plantations in America, in all cases where such breach or violation of any such law shall be alleged to have been committed within the limits of the District for which such Circuit Court shall be held; with a proviso, that the said judge may also defer such trial until his return to St. John's, if any circumstances should exist to render it, in his opinion, necessary, or desirable, to do so.

5 Geo. 4, c. 67 s. 10 and s.11: At many of the out-harbours it is difficult, and at some of them altogether impossible, to procure a Grand Jury; but there is no place at which the Court can sit where a Petit Jury may not be empanelled if there shall be a real occasion for one; and we would therefore suggest the repeal

of the provision which the 11th section contains for the trial of crimes and misdemeanours by the Judge and three Assessors.

5 Geo. 4, c. 67 s. 12: As we have before mentioned, a Petit Jury may be assembled at all the settlements in which a Circuit Court is held, if there be an absolute necessity for one; but as a frequent attendance upon Court is certainly inconvenient to persons in that class of life from which the Petit Jury are drawn, and as the partial compensation which is necessarily made them for the time they lose by their attendance adds considerably to the expense of a trial, we think that it should be left to the option of the Plaintiff or Defendant to refer the case to a Jury if either of them should wish to do so; and that where neither of them is disposed to do it, the Issue of Fact shall be tried by the Circuit Judge alone, agreeably to the suggestion of the Chamber of Commerce.

5 Geo. 4, c. 67 s. 16: The provisions of this clause have always appeared to us to be dark and obscure. Its primary object certainly is, to prescribe what sort of process shall be used both for the purpose of bringing parties into Court, and also for enforcing any judgment or decree which may afterwards be given or pronounced; but together with this object it has contrived to blend some regulations respecting the mode of trial which seem to be at direct variance with the rules previously laid down on this head in sections 3, 10 and 12. The only method, indeed, by which we could reconcile it with those sections was by supposing, that whilst they prescribed a more regular course of trial in actions for sums exceeding ten pounds, this clause was designed to confer a summary jurisdiction in the Court for all suits below that amount; and by examining the structure of the clause very closely we thought it would well admit of such interpretation, by including the long sentence between the word “abode,” in the ninth line, and the word “and,” in the twenty-ninth line, in a parenthesis; so as to connect the process to be used in actions under ten pounds immediately with the power which is afterwards given of trying the case without a jury. We accordingly framed rules of practice for the Supreme and Circuit Courts in conformity to this construction; but though His Majesty was pleased to confirm the one for the Supreme Court, he yet disallowed the similar one which we had made for the Circuit Courts, on the alleged ground, that a different mode of trial in those Courts had been pointed out in sections 10 and 12. So, however, had the 3rd section also done in respect to the Supreme Court, and that too in a much stronger manner; for whilst the facts as well as the law of a case are submitted to the Judge of the Circuit Court, in a particular

instance, by the 12th section, the trial by Jury appears to be peremptorily established in the Supreme Court, by the 3rd section, in all cases whatever, without a single exception. We confess, therefore, that this confirmation of one, with the rejection of the other, of our rules, has exceedingly increased our perplexity in regard to the true meaning of the 16th section; and, we consequently feel it necessary to draw Lord Goderich's attention very particularly to it, in order that it may be rendered more plain and intelligible than it now is. We likewise consider it proper to mention here that after weighing as well as we are able, and certainly with strict impartiality, all the reasons that have presented themselves to our minds both in favour of and against the application of the Chamber of Commerce, (with whom we believe nearly all the merchants in the island agree on this point) that process of attachment may issue in all actions for sums above two pounds, we cannot bring ourselves to concur in it. In the plan of a District Court, which we have described in another part of this letter, we have indeed proposed, that an attachment might issue where the action was brought for more than five pounds; but in doing that we took care to impose a sufficient check, or what, at least, we hope would act as such, upon the too frequent and vexatious use of this form of process, by compelling a Plaintiff to pay for it, whilst an option is offered him of obtaining a summons gratis; and even where the use of the writ of attachment is accompanied by a restraint like this, we still feel some reluctance in recommending the application of it to so small a sum as five pounds.

5 Geo. 4, c. 67 s. 17: By the terms of the *Charter* which His Majesty has been pleased to make for the Supreme Court, in pursuance of this section, the Judges thereof are authorized, in case there shall not be a sufficient number of Barristers at law to act as such within the Colony, to admit so many other fit and proper persons to appear and act as Barristers as may be necessary; and under this authority several persons who had previously practiced for many years in the Courts of this Island, together with a few others whom the Judges have since deemed worthy of the same indulgence, have been admitted to general practice in the Supreme Court. These persons, however, feeling themselves to be not real, but only quasi-Barristers; and of course excluded from some important privileges — such as a succession to the Bench, and the powers of qualifying Clerks for admission to the Bar — which by the Act of Parliament, and by the Charter, are confined to an enrolled Barrister; are naturally anxious to obtain a more perfect title to the character of Barristers than it is possible for them to acquire under the present regulations; and as we think that practice in the Supreme

Court may, at least, be put upon the same footing with a Clerkship to a Barrister in respect to qualification for enrolment, we would respectfully suggest, that authority should be given to the Judges to enrol as Barristers so many of the persons who may already have practiced, or shall hereafter practice, in the Supreme Court for the term of five years, as they may deem to be fit and qualified, both by professional knowledge and moral character, to discharge the duties, and to sustain the respectability, of a regular Colonial Barrister.

5 Geo. 4 c. 67 s. 18: As we do not possess any information respecting the Labrador, derived from personal observation and experience, we shall entirely refrain from offering any opinion upon the Judicature now established there; but we think it right to notice, that 51 Geo. 3 c. 45, has been erroneously referred to in this section as the statute by which the Labrador is re-annexed to the government of Newfoundland, such re-annexation having been effected by the 49 Geo 3 c. 27.

5 Geo. 4 c. 67 s. 22: Among the various relations which spring from the social compact there is none which more loudly calls for regulation in this country than that of master and servant in all the different departments of life in which it can exist; and we would therefore very urgently recommend that the jurisdiction which by this section is given to the Courts of Session over all disputes concerning the wages of servants in the fisheries should be extended to all other sorts of servants, and that the summary jurisdiction over all complaints and disputes between master and servant which, by numerous statutes, is confided to the justices of the peace in England, should also be granted to the Courts of Session in Newfoundland; or, should the plan of District Courts be adopted, to the Judges of those Courts. It is impossible for us, by any language we can command use of, to convey an adequate idea of the inconvenience now felt and loudly complained of by the members of this community from the want of some tribunal to which they can resort for a speedy adjustment of the differences which almost daily occur between masters and their servants of every class; but most especially apprentices. It would be useful too, we conceive, that the Courts of Session should be invested with authority to compel the putative father to a bastard to make some allowance for the maintenance of it; or to inflict some corporal punishment upon him in the event of his refusing, or being unable to do so. As the provisions to that effect which prevail in England seem to rest altogether on the poor laws; and as those laws do not extend to this country; we have been obliged to hold, that those provisions cannot be

enforced here, although we are exceedingly anxious, that some similar restraints should be opposed to an evil of very frequent occurrence in this town.¹² It can scarcely be necessary for us to add, that any powers which may be given to the justices for this purpose ought to be qualified by a right of appeal from their decision to the Supreme Court.

5 Geo. 4 c. 67 s.23: If those feelings of humanity which the situation of an unfortunate insolvent debtor naturally calls forth were completely suppressed; and the question respecting the expediency of granting him a discharge from his debts were, in consequence, considered merely in reference to its effects upon the general interests of society, it would be found, on the one hand, to be attended with the most important advantages, by restoring to the community the services of a member whose energies and exertions must otherwise be paralysed by despair; whilst, on the other side, it lessens that caution with which obligations ought always to be contracted, by the facility which it affords of eluding the forces of them; and thus not infrequently introduces a taint into the moral character of the individual who avails himself of such a discharge. In constructing, therefore, a system of insolvent law, it is always necessary to guard against this latter tendency with considerable care; and this necessity becomes even more imperative where other causes co-operate, as they do in Newfoundland, to tempt men to enter into engagements which they have not a reasonable chance of being able to fulfil. Instead, however, of being framed upon the principle of extending to its utmost limit the advantage, and of restraining as much as possible the evil, of a release from those obligations which the debtor has not the power to perform, the insolvent law of this country, by fixing the qualification for a trustee at so large a sum as twenty pounds, and by leaving it entirely at the option of the creditors to appoint trustees or not as they may think proper, in some instances permits a poor man to continue under a load of debt which it would be useful to the public as well as beneficial to himself to remove from him; and yet, in other cases, renders the attainment of a certificate of discharge by the insolvent of a higher class, who generally has some zealous friends to back him; even more easy than it probably ought to be. As a corrective of this last defect it may, we think, be advisable that the certificate which by the present law should be signed by one half in number and value of the creditors, shall hereafter in like manner be signed by four-fifths of them;

12 Instances likewise so often occur of the desertion of their wives and families by disolute and unprincipled men that some legislative check to such a pernicious practice seems also to be exceedingly necessary.

and that it shall be competent to the dissenting fifth part, or to any one or more of them, to oppose the allowance of such certificate by the Judges; who shall, after due examination into the nature and grounds of such opposition, either allow or withhold the certificate as they may deem right, upon a fair consideration of all the facts of the case. Under such an alteration the law will become as suitable to the merchants, and the other classes of persons who carry on business on a pretty extensive scale, as the present circumstances of this country will suffer it to be; but in order to extend an equal measure of relief to debtors in the more humble walks of life, we would recommend, that where there are not two creditors whose debts amount respectively to the sum of twenty pounds and upwards, or where the creditors upon being called on to make choice of trustees, neglect to do so, it shall be lawful for the court to appoint trustees to the estate of the insolvent, who shall have the same powers to all intents and purposes as if they had been elected by the creditors; and that the Judges shall also be authorized, in all cases where there shall be no creditors qualified to be elected trustees, or where the creditors shall refuse, or neglect to appoint trustees, and to perform the other acts necessary to entitle the insolvent to his discharge, to order a distribution of the estate to be made among the creditors of the insolvent by the trustees appointed by the court, and thereupon to grant to him a discharge in the same manner as if a certificate had been actually signed by 4/5^{ths} in number and value of the creditors; unless such discharge shall be opposed by the creditors, or a part of them, and such reasons assigned in support of their opposition as may appear to the Judges to be a good ground for suspending the proceedings and deferring the discharge to a future day. And lest the great facility which would thus be given to all descriptions of persons to obtain a release from their debtors, should encourage parties to contract them fraudulently, we think it would be most desirable that the court should likewise be invested with power to order an insolvent who may apply for his discharge without having obtained a certificate from his creditors, and who may be proved to have been guilty of fraud and dishonesty towards any of them, to be incarcerated, for any time it may deem proper not exceeding a year in the whole, at the suit of any creditor who will undertake to make him an allowance of 6d. sterling a day during the time of his confinement, if the estate is insolvent, which is in the first place to be subject to the charge of his maintenance whilst in prison, shall not be sufficient to support him there at the before-mentioned rate of 6d. per diem. Provided always that at the expiration of his imprisonment, the insolvent shall be acquitted and wholly discharged from all the debts contracted by him, previously to the time of his being declared insolvent by the

court. To obviate too any doubts which may exist from the use of the expression, "at the return thereof," which occurs in this section, whether a person, who, being really insolvent, has neglected to plead and prove that fact during the trial, and has in consequence been taken in execution upon a *capias ad satisfaciendum*, may afterwards obtain his discharges from both that suit and also from all his other debts upon a fair surrender of all his property to his creditors, we would strongly recommend that a particular provision should be made for his case, by enabling the court to receive from any such prisoner for debt, a petition for his discharge, accompanied by a list of the debts then due by him and a schedule of all the property to which he is, or conceives himself to be, entitled — to examine him upon oath touching the truth of his statement and all other matters relating to his application — to notify the creditors specified in his list to attend his examination — to appoint a trustee, with full powers for collecting, realizing, and distributing his estate among his creditors according to law — and thereupon to discharge him immediately from prison released from all his debts to the several parties described in the list of creditors, if no good ground of objection against such discharge shall be urged by any of them; or, if it shall appear that the prisoner had been guilty of such conduct as would have induced the court to commit him had he been at large, when he was declared insolvent, then, and in that case, to defer the time of his liberation until he shall have suffered such incarceration, upon an allowance of 6d a day to be paid out of his estate, or, when it shall be insufficient, by the creditor, or creditors, who oppose his discharge for any period not exceeding a year from the time of his first commitment, as the Judges may consider to be adequate punishment for his misconduct. It being well understood that the power of inflicting the punishment of incarceration upon an insolvent, is strictly confined to those cases, in which his discharge from his debts proceeds entirely from the exercise of those particular powers with which the Court is invested where no trustees shall have been appointed by the creditors, and does not in any event extend to an insolvent who shall have obtained a certificate from four fifths in number and value of his creditors; nor of course to an insolvent who is precluded by the want of such certificate from obtaining his discharge. Imprisonment being, in fact, the price at which an insolvent, whose conduct has not been so correct and honourable as it ought to have been, purchases his discharge with the consent and concurrence of his creditors.

5 Geo. 4 c. 67 s. 25: Whether those preferences in payment which are secured to certain classes of creditors by this section are, or are not, conducive to the

true interests of the fisheries is a "*resata quaestio*" upon which the opinion of the merchants is now very much divided. The Chamber of Commerce did, indeed, about the end of the year 1828, come to a resolution that the privilege of the creditor for supplies ought not to be abolished; and we were led to believe that there was a very general, if not a universal, concurrence among commercial men in all parts of the island in this sentiment; but we have lately had an opportunity of ascertaining that there are some merchants in this town, of the highest respectability, who are so far from coinciding in the view which the Chamber of Commerce have taken of this subject that by them the repeal of the law of Current Supply is regarded as a certain death-blow of our fisheries. Under such a contrariety of feeling among persons whose situation in life must have prompted them to investigate this question with a more scrutinizing attention than we have been able to give to it, we wish we could consider ourselves at liberty to decline any discussion of it. As the Secretary of State will, however, probably desire to be furnished with our opinion, in order that he may throw the weight of it into one of the scales if an exact equipoise should otherwise seem to exist between them, it will be our aim, in conveying our opinion to his Lordship, to lay before him also the reasons upon which it is founded in such a manner as will enable him to determine what degree of credit ought to attach to it.

The practice of remaining in this island during the winter, in opposition to the policy of the British Government, had not taken deep root before the merchants on the other side of the water began to perceive, that the fisheries could be carried on with more advantage by these residents than it could be either by the fishing ships, or by the bye-boat keepers who annually returned home; and they accordingly came forward with great alacrity to advance those residents (who acquired, probably from their connection with the soil, the denomination of Planters) all the supplies necessary for the prosecution of the fisheries. In a pursuit, however, which is exposed to all the vicissitudes of weather, and to various other casualties, instances of failure must occur very frequently; and as the planter's ability to pay for the supplies he had received depended wholly upon the success of his voyage, the merchants who had furnished those supplies became alarmed the moment they saw any cause to apprehend that the catch of fish would not be a good one. The fears of all the creditors of the planter being thus excited, each of them strove to obtain the earliest possible settlement of his account, by seizing all the property of the planter he could anyhow lay his hands on; and, in their several struggles for the attainment of this object, they often injured one another, besides ruining the unfortunate planter, by

carrying off the fish before it was properly cured, and by putting an end to the voyage before the chance of taking more fish had entirely ceased. To prevent the fatal mischief resulting from such a system, the rule of lien for wages and of preference in payment for Current supplies, was first introduced by custom, and afterwards sanctioned by Law. Nor can it be doubted but that in a state of society where, from the absence of all independent and impartial Courts of Justice, "force had usurped the privileges of right and strength had become lord of imbecility," such a regulation, whatever exceptions it may otherwise be open to, must have proved practically beneficial, by removing those motives for the enforcement of immediate payment which had produced strife and contention, accompanied with serious loss, among the creditors; exposed the poor planter to complete ruin; and inflicted a very severe injury upon the general interests of the fisheries. The merchants, however, were not slow in discovering that the lien upon the catch of the voyage which the servant was indulged with as a security for the payment of his wages, had a direct tendency to lessen his interest in the success of the enterprise, and, by consequence, to relax his exertions, as soon as he perceived that there was fish enough caught to pay all the wages; and they stoutly maintained, that the labour which was employed in the fisheries ought only to be put, in respect to payment, upon the same footing with the food which was consumed in the prosecution of them, as the one was just as essential to them as the other. But whilst they protested and remonstrated against the superior advantages which by means of their lien the servants enjoyed over them, they did not scruple to push their own privileges very much beyond their due and natural limits, by extending those preferences in payment which the Law intended to confine to debts contracted for supplies necessary to the fishery, to debts contracted by the planter for articles which had no real connection with it; and by applying a rule which could only be salutary where, as in the instance of the planter, it was requisite for supply of the want of capital by substituting credit in lieu of it, to the case of the most extensive merchant, and in fact to that of every class of persons who might happen to become insolvent in this Island. In these attempts they were for a long time assisted by the Courts, which were far too feeble to oppose themselves, even if they had wished to do so, to the united force of the mercantile body; and accordingly when Mr. Forbes was appointed Chief Justice of this Colony, it had become a generally received doctrine, that the expression "Current Season" was synonymous to Year, that the word "supplies" included every article that could be bought and sold; and the estate of every person who was declared insolvent was liable to be distributed according to the law of current

supply, whether he had, or had not, been directly engaged in the fishery. To an understanding enlightened like his, the decisions of the Surrogates upon which the system had been built appeared so contrary to the principle by which the rule of current supply ought to be governed, and at the same time so injurious to the general interests of the trade of this Island, that he did all in his power to reform a practice which was too firmly fixed to admit of being altogether removed by him; and, through his efforts, seconded by subsequent parliamentary enactments, the most prurient and worst excrescences upon the law of Current Supply have been happily lopped off. Yet even in its present amended state we strongly incline to think, that the evils which spring from it, in conjunction with its in-born sister regulation of "Lien for Wages," greatly preponderate over the advantages which are supposed to be derived from these preferences in payment. The argument by which it is attempted to maintain the necessity for their continuance is, that the merchant will not advance supplies to the planter, nor the fisherman engage in his service, if they should be deprived of any part of their present privileges; and that the planter being thus stripped of credit, would no longer be able to prosecute his employment. And assuming that the truth of this proposition cannot be controverted, its supporters at once proceed to deduce from it, as a necessary corollary, the destruction of the fisheries — the extinction of the trade — and the starvation of the inhabitants of Newfoundland. But though we are fully sensible that the most serious mischief might be produced by the absence of that care and caution, which should always be observed in overturning ancient usage, even when they rest upon foundations notoriously wrong, and though we unhesitatingly admit, that the credit which is the offspring of preferences in payment ought not to be extinguished unless Credit erected on a firmer basis can instantly be substituted for it, we are at the same time so much persuaded, that such a substitution would take place, if the abolition of the law of current supply, and lien for wages, were gradual and prospective, that we have little hesitation in recommending, that for one year from the passing of another Act of Parliament the privileges of the servant and of the current-supplier shall continue on exactly the same footing on which they now stand by this section — that after the end of one year the lien shall be taken away, and the preference of the supplier for the current season over the one of the preceding season shall also cease and determine — that creditors for wages that may become due in the second year after the passing of a new Act, and for such supplies necessary for the fishery as may *bona fide* have been furnished to the planter within two years from the passing thereof, shall rank together in the same class of privileged

creditors, as shall be entitled to be paid 20s in the pound before any other description of creditor shall be admitted to participate in a dividend of the insolvent estate, provided the insolvency shall be declared in one of the Courts within two years from the passing of the Act; and that all debts which shall be contracted by any person after the termination of two years, shall thence forward be paid before all debts of an earlier date; but that among the debts which shall be so contracted from the commencement of the third year no preference or privilege to demands for wages or to claims for current supplies shall in any shape whatever be granted or allowed.¹³

Such notice will thus, we think, be given of the intention to abrogate the law of preference in payments, and such precautions used in preparing the way for its extinction, as will entirely prevent those inconveniences which might arise from the annihilation of the credit which built upon it before sufficient time has been allowed for the formation of another description of credit upon a safer bottom and, as the success of all attempts to introduce changes into an old system must principally depend upon the existence of circumstances favourable to the contemplated alteration in it, we have much satisfaction in adding, that various events connected with the trade of this country have for several years past been gradually leading to the disuse of the privileges of the current supplier, that we are persuaded their entire repeal may now be effected with perfect ease and safety, provided a moderate share of prudence and caution is observed in the mode of doing it.

The mere practicability, however, of innovating can never, we are fully aware, justify a departure from a long established system, unless it can be clearly

13 Every law, as Lord Bacon has justly observed, ought to give warning before it strikes. In compliance with this principle, we think that no change whatever ought to be introduced with respect to the law of lien for wages, and of preferable payment of current supplies, by a new law, until the expiration of a year after the passing thereof; in order that those persons who may have been influenced by it shall have due notice of its repeal before the security they derived from it shall in any degree be withdrawn. We do not, therefore, propose in making any alteration in the privileges of the servant and of the current supplier until the commencement of the second year; when they may both, we believe, be put on such a footing as to admit of their entire abrogation at the close of that year. Still, however, it will be necessary, that when the law of current supply shall wholly cease the merchant shall not be restrained from advancing supplies by the apprehension that the fruits of the voyage may be applied to the payment of debts previously due by the planter; and we accordingly recommend that whatever debts may be due by the planters when the law of supply shall cease to operate, shall be postponed in payment to those subsequently contracted by him.

proved that the system is of such a nature as to call for a change; and we therefore feel it necessary to advert to some of the most prominent of those pernicious consequences resulting from the lien for wages, and the preferable payments of current supplies, which induce us to desire their entire abrogation. We do not scruple then, in expressing it as our opinion, that, through the joint operation of those practices, the following evils have been either wholly produced or materially increased and aggravated in those instances where their origin may more properly be ascribed to some other cause:

1. Idleness and drunkenness among the labouring classes;
2. Loss to the merchant, and ruin to the planter, from the means which they have furnished to the latter of carrying on the business of the fishery upon credit founded on a false and destructive principle;
3. Extensive Litigation: accompanied with all the bad feelings and heart burnings which it never fails to engender;
4. Numerous insolvencies;
5. And, as a general consequence naturally flowing from the several particular effects already specified, the most serious injury to the fisheries and trade of the Island.

Among all the feelings which influence human beings, there is unquestionably none so universal, or so powerful, as self-interest; and accordingly the exertions of mankind in any given pursuit will invariably be in the direct ratio of the force with which this feeling is connected with the attainment of the object proposed. Hence it is obviously desirable, that it should, as much as possible, be kept constantly alive, and made to act unremittingly, in every department in life, from the highest offices in the State to the most humble situation in which human agency can be employed; but there are some occupations which demand that a direct and immediate interest in their success should be presented to the view of those engaged in them with an intensity of operation which is not so absolutely requisite in others, for, if an occupation be in the nature extremely laborious and hazardous — if it be attended with the privation of many comforts — and if those who have the direction of it possess little authority over the subordinate agents — a sense of their own interest, continually acting on their minds, can alone execute these agents to those efforts which necessarily cost them considerable pain. And this is so precisely the character of the fisheries that it seems to us impossible that they can be carried on in the manner they ought to be, unless the fisherman shall be stimulated, by

the consciousness that he has a direct share in the proceeds of the voyage, to render it as productive as he possibly can. In the seal fishery, indeed, it is generally allowed, that every person engaged in it must have a share of the seals caught by him and though the peculiar dangers to which the persons who follow that branch of the fisheries are exposed, can make the plan of service upon wages still more unsuitable to it than it is to the cod-fishery, there is yet a sufficient resemblance between the two branches, in several material points, to convince those who look into the subject with strict impartiality, that a system which would be altogether fatal to the one, must also be, to some extent, injurious to the other. But the cupidity of gain, however desirous the prospect of the realizing it may be, will continue to maintain the practice of conducting the cod-fishery with hired servants, so long as men who have no capital, and consequently nothing to lose, shall be able to obtain supplies, and to hire servants, upon the credit which the law of current supply, and of lien for wages, now secures to them; and at the same time the fisherman instead of being furnished with an incentive to industry, by no interest in the fruits of his toils and labours, is actually encouraged to idleness by an assurance that it signifies not a jot to him whether the catch be great or small, provided the amount of the proceeds of the voyage shall be only large enough to pay the wages that are due out of it. Nor does an interest in the success of the enterprise, even to the trifling extent of covering the wages, act upon each individual with due force; for as each man in a boat has the same lien upon the fish caught by his comrades as upon that which is taken by himself, those who are idly disposed will be prone to rely less upon their own exertions than upon the efforts of those who by their bad example will have a strong tendency to corrupt; and thus the law, by giving to the idle man an interest in the labour of the industrious one, confirms the one in his idleness, and tempts the other to imitate it. But to the contrary, where rum is so excessively cheap, drunkenness is, among the lower orders, the inseparable companion of idleness, or rather they stand toward each other in the relation of effect to cause; and therefore whatever has a tendency to create the one must likewise produce the other.

If it be true, as it certainly is, that the evils which take place in all transactions between man and man, from the absence of integrity on either side, can never be effectually prevented by any regulations which the acutest and most sharp sighted genius can contrive, it must follow that a system which threatens the attention that ought always to be paid to character, by substituting preferences in payment in lieu of honesty and skill on the part of the planter, must in the end prove detrimental to the merchant; and if the fact that the law

of current supply has done so can be established by the experience of those who have trusted to it, since the monopoly of the fish-markets which this country enjoyed during the war has ceased, we are convinced, that in a great majority of instances, the merchants who have advanced supplies chiefly on the security which that law professes to confer on them, have had deep cause to regret the confidence they repose in it. But whatever loss it may have occasioned to the merchants, the planters, taken in a body, must have been still greater sufferers from it; for by enabling persons, who are in no respect qualified to sustain the character of a useful planter, to obtain supplies, and to hire servants, it has kept the price of the former, and the wages of the latter, so much beyond what the fisheries under their present circumstances can bear, that many of them who had amassed large sums of money in the golden days of these fisheries, are already very nearly reduced to poverty; whilst others, whose funds were more limited are altogether sunk in hopeless ruin. In short, the planters who, destitute of capital, devoid of knowledge, and deficient in principle, have sprung up wholly from the law of preference in payments, have destroyed those planters who, together with a competent share of knowledge and experience in the conduct of the fisheries, possessed also some property — just as Pharaoh's lean kine ate up the fat ones.

It is so obvious that all privileges conferred on particular classes of creditors must tend to produce controversy between them and those who are excluded from the same privileges; the one eternally striving to push them much beyond, and the other as zealously endeavouring to confine them as far within, their legitimate bounds; that we shall refer to the Records of the Courts of Newfoundland for the sake of showing how numerous the pretences are which ingenuity, goaded by interest, has devised in the conflicts which these privileges in respect to payment gave birth to, rather than from any idea that it can be necessary to offer proof of a proposition which must be regarded as an axiom. It is, indeed, curious to observe how this law of preference has entered into, and blended itself with, the greater part of the questions that have come before the Courts in such a manner that the largest portion of those bitter waters of legal strife have hitherto so much abounded in this Colony has manifestly been "*ex hoc fonte derivata*."

The most singular property of the Law of Current supply is, that it at once tends to create credit and to destroy it; for as the preference in payment occasions an issue of supplies in many cases where they ought to be denied, so the fear of losing this "vantage-ground," by neglecting to enforce an early payment, frequently urges the supplier to insist on a settlement much sooner than he

otherwise would be inclined to do; and thus the law, like a most unnatural parent, cruelly suffocates its own offspring almost as soon as it has “stepped over the threshold of life.” That insolvencies should follow in the train of such system may reasonably be expected; and that they have actually done so is too certainly attested by the melancholy list of them which the Records of these Courts will exhibit.

If the truth of our four first propositions has been established by these observations, we may fairly assume, as a general deduction from the whole, that the law of lien for wages, and of preferable payments for current supplies, must be highly prejudicial to the prosperity and happiness of the people of Newfoundland; and as we have before attempted to explain the manner in which we conceive that it may be abolished without depriving this community of any counter-benefits they may be supposed to have derived from it, we shall now dismiss a subject upon which we have dwelt with an interest and zeal commensurate with its extreme importance to the welfare and prosperity of this Colony.

5 Geo. 4 c. 67, ss. 26: If it shall be deemed advisable to adopt the alterations we have suggested in the foregoing section, it will, of course, become necessary, to introduce corresponding changes into the rules prescribed by this clause for the distribution of the estates of persons who may die insolvent.

5 Geo. 4 c. 67, ss. 27–33: Much difficulty has been experienced in carrying into effect the several provisions of this Act relative to the registration of deeds and wills. The 28th section directs that where any interest in land is affected by them, they shall be respectively registered within a certain time from the passing of the Act; and the 32nd section declares that all such deeds as require registration, and shall not have been registered within the time, and in the mode prescribed, shall be null and void to all intents and purposes.

But it most unluckily happened that, through the delay which took place in preparing the Royal Charter, no office of registration could be established until long after the period in which many deeds and wills were required to be registered by the terms of the law; and attempts have accordingly been made to avoid several deeds on account of their non-registration, under colour of the enactment of the 32nd section. In these instances the Judges have resorted to the rule, that¹⁴ “Acts of Parliament that are impossible to be performed are of no validity;” and in conformity to it have decided, that an instrument which absolutely could

14 Black. Coms. Vol., 1, p. 90.

not have been registered within the time directed by the Act, because there was then neither office of registration nor registrar in existence, was not avoided by the want of such registration, provided due diligence had been used in procuring the registration of it so soon as the appointment of a registrar, and establishment of his office within the district, would admit of its being done.

The question as to them seems, therefore, to be pretty nearly set at rest; but it may notwithstanding be expedient, in order to silence every doubt upon so interesting a subject, that the validity of all conveyances falling under the circumstances we have described be confirmed by an express enactment of the legislature. It will also, we apprehend, be necessary to make some alterations in the rules respecting registration; as it is extremely difficult, and indeed in some cases very nearly impossible, to deposit a deed which may have been executed at a settlement in a very remote part of the island about the beginning of the winter in the proper District registration office within six months from the execution thereof; and it is likewise attended with great inconvenience and expense to parties to be obliged to proceed from those distant quarters to acknowledge the execution of deeds before the registrar of the District. For the correction, therefore, of these evils we would recommend, that where a party executing an instrument by which lands may be affected shall reside at a greater distance than twelve miles from the proper office of registration, the execution thereof may be verified before the registrar by the oath of a subscribing witness thereto, or the party executing the same may acknowledge the execution thereof before some neighbouring magistrate; by whom such acknowledgements shall be duly certified in a form prescribed by the Act; that every deed affecting lands, whether verified by a witness, or acknowledged by the party executing same, shall be deposited within nine calendar months of the time of its execution in the office of the registrar of the District, who shall enter in a book of registry a memorial of the deed and indorse on it a certificate of such registry; and that every conveyance which shall not be so deposited in the office of registration within nine calendar months at furthest from the execution and delivery thereof, shall, as against purchasers for a valuable consideration, be altogether null and void.

From the report of the Chamber of Commerce of St. John's, we observe that it is the wish of that body that there should be but one office of registration for the whole island, and that it should, of course, be kept in this town; but this proposal has, we know, encountered violent opposition in some of the out-harbours; and though there may be good reason why all those instruments under which an interest in land is transferred from one person to another should be registered in St. John's, which may be considered as the focus of the

whole trade of the Island, it still seems hard that those persons who, from proximity of their residence, may be supposed to be immediately and strongly interested in those transfers, should be compelled to go out of their own District to obtain authentic information respecting them. We would therefore propose, in the hope of meeting the wishes of both parties, that these instruments shall continue to be registered in the District in which they were executed; and that the registrar of each District shall be required to transmit quarterly to the registrars of the two other Districts an abstract of all the deeds and wills which may have been recorded by him in the preceding three months, which abstract shall be carefully preserved by the registrar to whom it was sent, and entered in a book kept by him for that express purpose.

In the report of the Chamber of Commerce we also notice a suggestion, that leases for a term not exceeding thirty one years should be exempted from a liability to registration; and though is a matter which can hardly be brought within the limits to which we proposed to continue our observations, we yet cannot refrain from mentioning, that, as the bare reversion of a term of thirty one years would be worth very little in this market, the power which would thus be afforded of making secret conveyances of the most valuable interests in lands, by means of long leases at a very trifling, or mere nominal rent, would in a great measure, emasculate the spirit, and defeat the object, of the provision for registration. If, therefore, a privilege of exemption is to be granted to any leases, we would certainly recommend, that it should be confined to short terms of three, or, at the most seven years.

We have now gone through all the clauses of 5 Geo. 4 c. 67 upon which we feel ourselves at present prepared to offer remarks; and it accordingly only remains for us to touch upon those parts of our *Fishery* and *Marriage Acts* which appear to call for alteration, and to susceptible of improvement.

5 Geo 4 c. 51 s. 7: There is a class of persons employed in the cod-fishery termed “shoremen,” whose duty consists in making and curing fish; and as doubts have arisen whether they are included under the designation of “seamen and fishermen,” it may be well to remove all uncertainty on that point by mentioning them specifically in this clause of the act, or by introducing into it some expression which will certainly embrace them.

5 Geo. 4 c. 51 s. 8: The regulation which prohibited the master from advancing more than a certain proportion of wages to his servant, before the expiration of the period of his service, was intended to secure a provision for the latter during

the winter which he was required by the law to spend in Great Britain or Ireland, and formed a part of the system under which it was attempted to compel an annual return of the servants from this country. Upon the abandonment, therefore, of the policy upon which that system was founded it might very well have been permitted to expire — “*cessante ratione cessat et ipsa lex*,” — and, indeed, even as a member of that system it was, we believe, very nearly, if not altogether, inoperative and useless “*vox et praeterea nihil*.” At all events it has proved, as far as our experience of it extends, a perfect dead letter; and ought, consequently, we think, to be expunged from the statute; for as a dead branch, encumbers and injures the healthy limbs of a tree, so an useless, or impertinent, enactment must impair the vigour of all the other rules which are associated with it. “Obsolete laws,” says Lord Bacon, “should be cancelled; for, as an express statute is not regularly abrogated by disuse, it happens, that, from contempt of such as are obsolete, the others also lose part of their authority. Whence follows the ‘torture of meaentius’ whereby living laws are killed in the embraces of the dead ones.”

5 Geo. 4 c. 51, s. 10: We beg leave to refer here to the arguments we have already urged in favour of the prospective abolition of the servants’ lien upon fish and oil; and to the additional observations upon the same subject which will incidentally be advanced by us in the following article.

5 Geo. 4 c. 51, s. 11: It is both curious and instructive to trace the law of lien in this country through some of its principal effects and consequences. That law having provided the fisherman with an ample security for the payment of his wages, the desire to obtain a certain reward for his labours, rather than trust to the precarious success of the fishery, induced him to prefer a contract for wages to an engagement for shares; and at the same time the planters, lured by the hope of profit — forgetful of the real changes which had taken place in the conditions of these fisheries — and falsely persuading themselves that men might be made to work for wages as industriously as if their exertions were stimulated by shares — were even more inclined to propose contracts for wages to the servants than they were disposed to enter into them. A practice of prosecuting the fishery with hired servants, instead of shares men, having thus become pretty general, it was soon discovered that when a divorce has taken place between interest and duty mankind are too prone to neglect the latter; and therefore the terrors of pecuniary interests and corporal punishments were resorted to by the Legislature in order to check that propensity to neglect their duty which quickly displayed itself on the part of the hired servants in the

fishery. The futility, however, of every attempt that has hitherto been made to render those servants industrious and sober through the coercion of fines and penalties is strongly attested by the changes which have at different times taken place in the mode of inflicting those fines and penalties, and by the necessity which is now admitted to exist for further alteration in it. Nor is it in the least likely that human ingenuity will ever contrive a method by which an object can be accomplished by such means. But whilst these enactments have wholly failed in imposing a wholesome restraint upon idleness and drunkenness, as they were designed to do, they have proved a cause of strife between master and servant, and even sometimes unfairly been resorted to by the former as a means of reducing his liability to pay high wages when the voyage has turned out a losing one. We doubt therefore, whether their entire repeal, by removing one of the false props upon which the system of hiring servants now rests, would not, in the long run, prove more beneficial to the fisheries than the modifications of the existing enactments proposed by the Chamber of Commerce; and we are quite confident, that, if it be necessary that servants should continue liable to fines and imprisonment for neglect of duty, the power of imposing these punishments should not be confided to persons, who, like the magistrates in the out harbours, have a close connection with the fishery and are consequently either directly or indirectly interested in every case that can be brought before them. If the servant is to be fined, let him at any rate have the benefit of a fair trial under a strictly impartial Judge.

5 Geo 4 c. 68: By the provisions of this Chapter the right of celebrating marriage in Newfoundland and its dependencies is confined to persons in holy orders and in such teachers of religion, unconnected with any employment except that of a school-master, as shall be licensed for that purpose by one of His Majesty's principal Secretaries of State, or by the Governor of the Colony; and as a large proportion of the inhabitants reside in situations which place them for a large proportion of the year, entirely beyond the reach of either of these descriptions of persons to whom the right of celebrating marriage is conferred, a compliance with the provisions of this act which in numerous instances have proved so impracticable, or at least inconvenient, as to have occasioned a total disregard to it. It seems, therefore, to be a question worthy of serious consideration, whether a state of concubinage under a total absence of all matrimonial rites, both civil and religious, which the present marriage act necessarily gives rise to in some parts of the Island, or a general permission to contract marriage by the observance merely of certain civil forms, unaccompanied by any religious ceremonies,

is most to be deprecated. For ourselves we trust we shall have fully discharged our duty by bringing the important subject under Lord Goderich's notice without presuming to offer any opinion of our own upon the propriety of adopting, either of the two alternatives which alone offer themselves for his choice; satisfied as we are that when his Lordship shall have once been put in possession of the facts of the case his own superior discrimination and judgment will enable him to take a correct view of it, in all its extensive relations and easily to determine which is the best course for him to pursue in regard to it.

Before we close these our crude suggestions on the present Judicature and Jurisprudence of Newfoundland, we must take liberty of respectfully repeating, what we have frequently urged on other occasions, that the applicability, or inapplicability, of the laws of England to the circumstances of this country, furnishes a most vague and unsatisfactory rule for the decision of suits affecting either life or property; and that the Jurisprudence of this Colony must, consequently, continue very defective and imperfect until a Code of Laws shall have been formed expressly for it by a selection of such parts of the Law of England, both criminal and civil, as are suitable to it, with the addition of those particular regulations which its particular conditions call for. The compilation of such a Code, we may add, would certainly be a laborious and delicate undertaking; but by no means an impracticable one.

As we commenced with an enumeration of the difficulties attending the preparation of this Report and a candid avowal of the insufficiency of our powers for the performance of such a task, so we must now close our letter with an expression of our sincere and deep regret, that any expectation which his Majesty's Principal Secretary of State for the Colonial Department may have entertained of deriving much useful information and assistance from us must be sadly disappointed.

We have the honour to be your Excellencies most obedient and humble servants:

“Signature” R. A. Tucker

A.W. DesBarres

E. B. Brenton

Judges' Chambers,

August, 1831.

To: His Excellency The Governor.