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Newfoundland's Constitution from Contact to King William's Act

Philip Girard

In his work *The British Empire in America*, published in 1708, the historian John Oldmixon observed casually that in Newfoundland, “there’s no need of much Law, for the Inhabitants have not much Land and no Money.”¹ The premise was correct, but the conclusion did not necessarily flow. Observers often lamented the absence of law and legal institutions in early Newfoundland, and there were a variety of attempts to bring law to the plantation in the 17th century, all of them strange and unfamiliar to modern eyes. None of the apparatus of 19th-century colonial governance was established before 1700: there were no royal governors, no sheriffs, no judges appointed as such (Richard Whitbourne himself was more of a one-man commission of inquiry), no attorneys, no barristers, not even that workhorse of empire, the justice of the peace; the first one would not be appointed until 1729, over a century after the first attempts at colonization. Instead, there were semi-feudal magnates, fishing admirals, naval commanders, and a parliamentary commissioner. The fact that the 17th century did not bequeath any *institutional foundation* to modern Newfoundland and Labrador does not mean the period is of no relevance today. Some very important constitutional *ideas and practices* with lasting importance were implanted in that century, as will be argued in my conclusion.

The paper proceeds in two parts. Part I describes in broad strokes the formal evolution of the plantation’s constitution, such as it was, down to *King William’s Act* of 1699. The second part will be interpretive. What meaning can be placed on these events, both in their historical context, and with an eye to the future? Here I will do something that is seldom done, and that is to compare Newfoundland’s experience with that of other possessions of the English crown, principally Rupert’s Land, granted to the Hudson’s Bay Company in 1670, and the 17th century Atlantic seaboard colonies that would eventually turn into the United States. Legally and functionally, Newfoundland and Rupert’s Land were similar: both were “commercial colonies” rather than agricultural ones, devoted to exploiting a single resource from which the capital generated was channelled to England rather than retained in the colony. Settlers were seen as undesirable in both, although

the Hudson's Bay Company was more easily able to enforce this policy by returning Company employees to Britain at the end of their service. This slow growth of a resident European population in turn delayed the movement for self-government already obvious by the later 17th century in the much more populous southern colonies.

I. The seventeenth-century constitution of Newfoundland

For most of the 17th century there was little doubt that colonial affairs were part of the royal prerogative. Consequently, with a brief exception in the 1650s after the English civil war, parliament did not become involved in Newfoundland's constitutional affairs until the *Act of 1699*. Even then, as we will see, the *Act of 1699* merely ratified legal solutions that had already developed on the ground—or more precisely, at the interface of land and sea. Thus, the constitution of Newfoundland was contained in direct emanations of the prerogative such as the charters of the London and Bristol Company (1610), those granted to Sir George Calvert (1623) and Sir David Kirke (1637), and the *Western Charter* of 1634, which was followed by a series of orders in council that merely recapitulated or amended it.²

However, these formal constitutional laws acknowledged and to some extent competed with an informal law that was much older. From some time in the 16th century, the hundreds of ships that arrived from March onwards had to find a way to resolve their conflicts over access to the shore. The English conducted an inshore fishery based on the “dry cure”; this involved erecting wooden flakes upon which split cod were exposed to dry. Given the climate of Newfoundland, even in the summer this could take some time so that access to wood and suitable drying spaces was crucial.³ And in spite of the island's very lengthy coastline, there were a limited number of such sites available. The potential conflict over these spaces was resolved by a tradition that the captain of the first ship arriving in a particular cove was recognized as the “fishing admiral” who could take such space as he liked and was then recognized as having the authority to regulate disputes among later arrivals for the season. The next year the whole process started over again, as Europeans did not overwinter on the island.⁴ As Peter Pope and others have shown, this was not just an English tradition but one that was respected by the representatives of various nations and ethnic groups who also conducted inshore fishing during the period.

For various reasons the British Crown became interested in supporting schemes for permanent settlement in Newfoundland in the early 17th century. These settlements had the potential to occupy the best coastal sites to the exclusion of the migratory fish-

ers, leading to constant tensions between the two groups. First we will concentrate on these settlements and then return to the tensions.

Both the corporate form of the London and Bristol Company and the proprietorships of Calvert and Kirke were popular ways for European monarchs of the early modern period to extend their sovereignty in North America by means of delegated powers to private parties, thus insulating the crown from direct financial risk. They were the instruments through which European states sought to exploit North America's resources, protect their investments, normalize their presence on the continent, and deal with each other and with native peoples.

All the charters had to set up governance structures, as European monarchs of the first half of the 17th century did not yet have the financial or administrative resources that would allow them to rule directly through Crown agents. The French in New France followed the same path, until Louis XIV took over the colony directly in 1663-64. The London and Bristol Company, like the Hudson's Bay Company later in the century, had a governing council which was to sit in London, and it could and did appoint local governors to govern its territories in Newfoundland, first John Guy (1612-1616) and then John Mason (1616-1621). It also had the power to "make ordayne and establishe all manner of orders lawes direcons instruccons formes and ceremonies of go[v]ument and magistracie fit and necessarie for ... the go[v]ument of the saide-Colonye".⁵ The governor was to carry out these laws but also had a broad discretion to establish his own laws "in cause of necessitie" provided they were "as neere as conveniently be agreeable to the lawes, statutes, go[v]uments and policie of this our Realme of England".⁶ It is perhaps necessary to point out that these "governors" did not hold royal commissions and were responsible only to the company, not the king or the English government, in spite of the seeming amplitude of their powers. In any event, the London and Bristol Company had ceased to function by the early 1620s, and indeed the corporate vehicle was being gradually replaced by the proprietorship as the favoured instrument of colonization by this time.⁷ Some corporations continued to be created, however, and the charter of the Hudson's Bay Company, created in 1670, proved to be the longest-lived of all the 17th century charters.

Before looking at the proprietorships of Calvert and Kirke, it is useful to consider briefly the question of the applicability of English law in Newfoundland. We often assume that English settlers brought the common law with them, and this idea did become established in the 18th century, but in the 17th things were more complex. No less an authority than Sir Edward Coke stated in 1628 that "the common law meddles with

nothing that is done beyond the seas.”⁸ The crown was not bound by the common law in its dealings with the inhabitants of its overseas plantations, and none of the 17th century documents purported to export it to Newfoundland. The laws governing the royal prerogative, the *lex coronae*, derived from the law of nations and nature and from Roman law.⁹

However, English-born colonists or their issue born overseas were still English subjects and so retained the “English liberties that are incident to their persons” according to Matthew Hale.¹⁰ As long as the subject remained in allegiance, the monarch was bound to govern by the rules of natural equity, i.e., not to interfere arbitrarily with life, liberty or property. This was an idea deriving from natural law and Roman law, which thus set some limits to the exercise of the royal prerogative. An important right in this context was the right of the subject to appeal to the monarch if he or she felt that these liberties were infringed by a mere deputy such as a governor.¹¹ So even though we tend to equate the royal prerogative with an almost unlimited discretion, even here there was some nascent concept of the rule of law growing out of the quasi-contractual relationship between monarch and subject.

The grant of Newfoundland to the London and Bristol Company had been in free and common socage, but that was not to be the case for the proprietorships granted to Calvert and Kirke. Calvert had been secretary of state to James I and was thus well placed to secure a grant for his colonizing endeavours after the failure of the London and Bristol Company. James also made him an Irish peer, naming him the first Lord Baltimore, the name by which he is more commonly known today since he was later granted the province of Maryland as proprietor. The charter issued to him in April 1623 did not cover all of Newfoundland, but was restricted to the greater part of the Avalon peninsula. It was Calvert himself, a late convert to Catholicism, who gave his colony the name the peninsula still bears today, Avalon in Somersetshire being a site long associated with the origins of Christianity in Britain.

Calvert was granted Avalon in a feudal tenure, “in Capite by Knights service,” and was given the palatine jurisdiction of the Bishop of Durham, which is to say the most extensive jurisdiction granted to any subject next to the king himself.¹² As Christopher Tomlins observes, in Britain itself this type of jurisdiction was limited to Ireland and to marchlands; it was “designed for remote and contested regions [so as to] allow authorities to exercise effective regional sovereignty.”¹³ Pursuant to this authority Calvert could appoint such judges and magistrates as he liked. Further, he was granted the power to make laws on any subject whatsoever, provided they were not contrary to reason or re-

pugnant to the laws of England, “with the Advice, assent and approbacon of the Freeholders of the said Province or the greater part of them,” whom Calvert was to “Assemble in such sort, and forme as to him shall seeme best.”¹⁴ And in case of urgent necessity, Calvert could dispense even with this approbation and make laws on his own as long as they were published. Clearly this assembly was to be largely dependent and not to interfere with the extensive powers granted to this feudal magnate, powers which even extended to “Taking away Member or Life” if the “quality of the Offence” required it.¹⁵

Calvert had a large manor house built for himself, his family and retinue at Ferryland harbour, the foundations of which still survive.¹⁶ In a more literary or mythical sense, it lives on in the title of Wayne Johnston’s 1999 memoir *Baltimore’s Mansion*.¹⁷ Calvert spent the winter of 1628-29 there and, after observing that winter did not lift until May, decided that was enough of that and left to pursue his colonizing initiatives in the gentler climate of Chesapeake Bay. He died in 1632 and his son Cecilius, the second Lord Baltimore, appointed a resident governor to look after the few remaining colonists. In spite of this action, in 1637 the Privy Council declared that Calvert had “abandoned” Avalon and granted a new patent to Sir David Kirke, an adventurer who was already familiar with North America as he and two of his brothers had been involved in the expedition that captured Quebec from the French in 1629;¹⁸ another of his brothers would be one of the initial investors in the Hudson’s Bay Company, and this brother’s daughter would become the first wife of Pierre-Esprit Radisson. The Kirkes, born in Dieppe to an English merchant who conducted cross-Channel trade, had the cultural background, the court connections and the boldness to exploit the commercial opportunities opening up in northern North America in the “era of discovery.”

The Kirke patent expanded Calvert’s territorial authority from Avalon to “that whole continent Island and Region ... commonly knowne by the name of Newfoundland,” and named him the “true and absolute Lord and Proprietor” of it.¹⁹ Like Calvert’s patent it was granted in knight’s service but unlike his it did not grant palatine authority. Even without it, however, it is clear that Kirke was effectively a viceroy, empowered to make laws with the assent of the freeholders and to appoint magistrates, but his authority was significantly limited in one very important respect. He was specifically prohibited from exercising any authority over the migrant fishers, and his patent forbade the “inhabitants” from taking up the best fishing places in advance of the arrival of the migrant ships.²⁰

So here we see an attempt to reconcile the interests of the migratory fishery, supported by the English West Country merchants, with those of the new settlers, or planters

as they were called.²¹ The West Country merchants lobbied the Privy Council to protect their interests, and the result was the *Western Charter* of 1634, promulgated between Calvert's departure and Kirke's arrival. It aimed to protect the rights of the migrant fishers by declaring that they were subject only to the king's direct authority, and not to that of the local magnates such as Kirke. The Charter took up some of the problems that Richard Whitbourne had pointed out some fifteen years earlier: it prohibited the casting out of ballast into the harbours, the overuse of wood, interfering with the nets, flakes or fishing gear of others, and the setting up of taverns.²¹ It confirmed the "auncient custom" of the first comer being named as admiral. But it created no local enforcement mechanism: offences committed on land in Newfoundland could only be brought before the mayors of Plymouth and various West Country ports, while those committed on sea had to be brought before the vice-admiralty courts in Southampton, Dorset, Devon or Cornwall.²² The Hudson's Bay Company charter, by contrast, empowered Bayside governors to "judge all persons belonging to the said Governor and Company that shall live under them" but likewise contained a clause permitting offenders to be transported "into this Kingdome of England" for trial and punishment if that were "thought most convenient," although this option was not exercised until the late 18th century.

David Kirke evicted William Hill, the governor Lord Baltimore had left behind, and moved into the Calverts' manor house.²⁴ From here he and his family held sway over the settlement for much of the rest of the century, interrupted for a time when Oliver Cromwell's government took an interest in the island in the 1650s and appointed commissioners to govern it. Kirke held a manorial court around Ferryland for some time, though unfortunately the records have not survived.²⁵ The Calverts tried to reassert their rights to Avalon (Sir David died in 1654 in England while in prison as a result of Calvert litigation) and succeeded in theory soon after the Restoration but were unable to enforce their rights on the ground. As Wayne Johnston observes, "[t]he impossibly complicated and protracted litigation over Avalon makes the lawsuits in Bleak House seem expeditious by comparison."²⁶ The conflict between the Calverts and the Kirkes eventually petered out in the mid-18th century with both claims being declared invalid. Meanwhile, the Privy Council tinkered with the *Western Charter* after the Restoration and its provisions were more or less codified in *King William's Act* of 1699. Prior to that, in 1675, the Privy Council had ordered the naval commodore Sir John Berry to remove all the inhabitants of Newfoundland but he did not follow those orders and the plantation continued to struggle along.²⁷

The Kirkes had no way of exerting their authority much beyond Ferryland itself, and in the later 17th century, a new form of quasi-government emerged with the establishment of naval authority. As an English admiralty lawyer sent out to investigate matters in Newfoundland in 1701 observed,

It hath been customary for the commander in chief upon complaints to send his Lieutenant to the several harbours and coves to decide all differences and disputes that happen betwixt commanders of merchant ships and the inhabitants and planters and betwixt them and their servants.²⁸

Examples of these kinds of proceedings can be found as early as 1680. The two streams of authority—the fishing admirals and the navy—were brought together in *King William's Act* by the expedient of providing for appeals from the former to the latter.

In other respects *King William's Act* simply repeated the provisions of the *Western Charter* of 65 years earlier. It did not set down any penalties for the various offences it created, and provided that felonies committed in Newfoundland had to be tried in any English county court. *King William's Act* was not meant to provide a formal constitution for Newfoundland, and did not do so. As has recently been demonstrated, it was not even a government bill, but rather one put forward by various mercantile interests with a view to keeping the terms of the Newfoundland fish trade as free as possible.²⁹

II. What is the significance of Newfoundland's 17th-century constitution?

The constitutional development of 17th century Newfoundland may seem quaint, foreign, or simply bizarre. But in many respects it followed, on the surface at least, a path similar to the course of events in Britain's more southerly possessions. In a recent account of the role of law in colonizing English America, Calvert's patent is even seen as a turning point. "From the early 1620s," writes Christopher Tomlins, "English charters made palatine authority and institutions key features of the evolving design of North American colonization."³⁰ The patent to Maryland given to Calvert's son Cecilius was even more expansive than that granted to his father, and was "remarkable for its combination of palatine vice-regality with virtually unrestricted land tenures."³¹ Calvert junior was permitted to grant land in fee simple or fee tail to be held of himself, not the crown, the statute of *Quia Emptores* notwithstanding; i.e., he was allowed to subinfeudate, which had not been permitted in England for over 300 years. Several of the eastern seaboard colonies did follow the Calvert model, and yet we know their subsequent

constitutional development was very different from that of Newfoundland. What happened?

In the proprietary colonies south of Maine the vast powers granted to proprietors such as Cecilius Calvert did not last long in the face of pressures for self-government. In fact the proprietors tended to face pressure from both top and bottom in the later 17th century: from the Crown which tried to resume some of the control it had delegated earlier in the century; and from the settlers, who assumed that they should have the right to govern themselves and were not content to be represented in a milque-toast assembly that was expected to rubber-stamp the proprietor's own legislative initiatives. By the end of the 17th century the assemblies had taken over lawmaking authority, subject only to the governor's veto and possible Crown disallowance. In some colonies the proprietor had a technical veto but it had declined rapidly in practical effect, just as the Crown's veto had declined in Britain itself.³² Queen Anne's refusal to assent to the *Scottish Militia Bill* of 1708 was the last time it was exercised by a British monarch.

The main reasons why Newfoundland did not follow the trajectory of the more southerly colonies are twofold: the population and the resource—too few people and too many cod. Population growth was too slow, such that no assembly of freeholders who might have challenged Kirke as proprietor was ever called. The eastern shore of the Avalon Peninsula had only 1700 or so permanent inhabitants in the 1670s, though thousands more visited seasonally. But growth was slow in large part because Newfoundland's main resource, cod, could be effectively exploited with a mobile, largely migratory labour force, unlike the agricultural colonies to the south. And although cod was a hugely valuable resource, the capital from its exploitation stayed in England, in the hands of the West Country merchants, unlike the capital generated by American agriculture, much of which stayed in the colonies. Those English merchants who provided capital for the fishing industry did not wish to see it taxed in order to pay for a local government. They eventually saw that some settlement was useful, but still did not wish to pay for it. Thus governance and the administration of justice gradually migrated to the one institution already on the local scene that could carry out these tasks at little additional cost: the Royal Navy.

Slow population growth left the colony vulnerable to metropolitan manoeuvrings. As we saw, in 1675 the Privy Council wanted all the permanent inhabitants of Newfoundland removed, and the idea continued to be mooted until the 1720s and even later. After peninsular Nova Scotia was ceded to Britain by the *Treaty of Utrecht* in 1713, the British government seriously considered transferring all the inhabitants of Newfound-

land to its new possession, where the land was much more propitious for agriculture. (The French actually did so, transferring the inhabitants of their former colony at Plaisance (Placentia) to the new settlement to be established at Louisbourg.) When that idea was scrapped, the British government finally decided to endow the island with a minimal year-round governmental infrastructure to supplement the system of seasonal naval governance that had grown up since the 1680s, appointing the first justices of the peace in 1729.³⁴

The combined effect of slow population growth and the power of metropolitan merchants over the Newfoundland cod economy ensured that local institutions powerful enough to challenge metropolitan control did not develop, as they did in the Atlantic seaboard colonies, which had a population of a quarter million by 1700. Jerry Bannister has argued that the system of naval governance found in Newfoundland in the eighteenth century was effective and suitable for local circumstances. That may well be; the main point being made here is that the navy was not really accountable to the inhabitants, leading to an attitude that government was an outside force to be endured, even if it brought some benefits, rather than the product of collective decision-making. This point will be expanded upon in the conclusion.

A second theme in the early constitutional development of Newfoundland concerns relations with the native people. Given the eventual extinction of the Beothuk, Newfoundland may not immediately leap to mind as a model of settler-aboriginal relations. But in the 17th century at least, there was a desire on the European side for harmonious relations and no obvious sign of the fate that awaited the Beothuk a century later. There must have been encounters between the Beothuk and seasonal fishers in the 16th century, but the first recorded encounter with the English is that of John Guy in 1610. He provides a charming account of meeting with eight Beothuk men, during which they shared food, traded furs for European goods, sang and danced together. The Beothuk did not like beer but did appreciate aquavita, and discovered the musical properties of empty bottles: “And one of them blowing in the aquavita bottle yt made a sound, which they fell all into a laughture at.”³⁵ Richard Whitbourne speaks mostly favourably of the Beothuk in his 1620 *Discourse and Discovery*. He is quite keen on Christianizing them, but strikes a universalist note in his observation that “even we ourselves were once as blind as they in the knowledge and worship of our Creator, and as rude and savage in our lives and manners.”³⁶ He even suggests that the Beothuk would aid in the process of settlement by teaching Europeans about the landscape and resources. For this reason he encouraged settlement of the area near Trinity, where the

Beothuk were known to live. Should this advice be followed, he declared,

I see no reason to the contrary, but that a speedy and more certaine knowledge might be had of the Countrey, by reason those savage people are so neere; who being politikely and gently handled, much good might be wrought upon them: for I have had apparant proofes of their ingenuous and subtile dispositions, and that they are a people full of quicke and lively apprehensions.³⁷

Whitbourne gained his knowledge from the French and Basques who had had more extensive relations with the Beothuk, and possibly from John Guy as well.

What does the Calvert patent have to say about relations with the indigenous inhabitants? There is only one paragraph, and it reads as follows:

And because in soe remote a Country, and scituate amongst soe many Barbarous nations, the Incursions as well of ye Salvages themselves, as of other Enimies, Pirates, and Robbers, may probably be feared, Therefore wee have given ... power unto the said Sr George Calvert Knt. his Heires and Assignes by himself or his Captaines or other his Officers to Leavye, Muster and Traine, all sorts of men whatsoever, ... to make warre and prosecute the Enimies and Robbers aforesaid as well as by Sea as Land, ... to vanquish and take them and being taken to putt them to death by the Lawe of war, or to save them, as the said Sr George Calvert, his heires and assignes shall thinkefitt.³⁸

The Kirke patent contained the same clause almost verbatim. The patents contemplate possible attacks by native peoples and by Europeans, and clothe Calvert and then Kirke with the authority to raise a militia to defend the settlements and effectively to declare martial law. This is not surprising: the New World was known to be a dangerous place, and proper caution demanded that some kind of defensive mechanism be provided to would-be colonizers. But it is to be noted that the attacks of “Enimies, Pirates and Robbers”—Europeans—are at least as much on the mind of the patent drafter as those of “ye Salvages.” And in fact the eastern shore of Newfoundland was plagued with pirates in the 17th century. Chief among these was the arch-pirate Peter Easton, who raided ships with impunity from Trinity Bay to Ferryland in the 1610s, built a fort at Harbour Grace, pressed men into his service, and in fact captured Richard Whitbourne and kept him prisoner for 11 weeks, releasing him only after Whitbourne agreed

to seek a pardon for him. Easton inflicted losses of some 20,000 pounds on the fishing fleet before heading off to the Mediterranean for more piratical adventures.³⁹ In addition to this the French and the Dutch were always waiting in the wings, threatening and attacking the small English settlements when opportunity presented. The few depredations of the Beothuk, who sometimes took fishing gear that the English left behind for the winter, were a negligible annoyance in comparison.

Yet a scholar has recently interpreted the Calvert patent as the first that “conceptually, expelled indigenous populations from the territory it covered and authorized uninhibited warfare against them.”⁴⁰ Aboriginal dispossession takes centre stage in Christopher Tomlins’s account of English colonizing in America, and rightly so, and there is much in his account of the legal technique of dispossession with which to agree. Speaking of the 17th century, he argues that

the narrative of English colonizing is one that progressively banishes existing inhabitants to the margins of its consciousness by denying their civic capacity, their sociability. In the English narrative the indigenous become brutes, in whose place the colonizer first desires, then actively imagines, an empty landscape to populate anew. ... [In this telling, the charters] elevated land over people as the primary object of the colonizer’s attention. It rearranged both the legalities and the institutional mechanisms of colonizing accordingly.⁴¹

Such an interpretation has considerable force in the agricultural colonies south of Maine, where direct competition between Europeans and indigenous peoples, who also practised agriculture, was dramatic, savage, and prolonged.

But neither in Newfoundland nor in Rupert’s Land was there competition between natives and newcomers for the land resource. In Rupert’s Land the whole *raison d’être* for the British presence was the exploitation of furs provided by indigenous suppliers. Conflict with native peoples was anathema to the HBC and the establishment of a mutually beneficial trading relationship was the only way to extract profit from the territory.

In Newfoundland there was competition between the English themselves over particular favoured coastal locations, and to some extent between the English and those of other nations. But the Beothuk are not thought to have inhabited the Avalon Peninsula before European arrival, and were only lured there occasionally by the prospect of

acquiring metal goods. Much later, it is true, with the expansion of European settlement, there was competition for coastal access, and it may be that this played a role in the decline and ultimate disappearance of the Beothuk. But that was an 18th century phenomenon. The Calvert and Kirke patents can be seen as providing, prudently, for European defence in case of attack by indigenous people, but they do not “elevate land over people as the primary object of the colonizer’s attention,” as Tomlins asserts, because land was virtually irrelevant in Newfoundland except for the coastal fringe. There was no agricultural frontier. The English interest in the Beothuk, as demonstrated by Whitbourne, was developing the fur trade with them and learning what they could about this new environment from them, not in “clearing the decks” for an agricultural colony.⁴² However, the Beothuk were not necessary to the prosecution of the fishery in Newfoundland as they were to the fur trade in Rupert’s Land, and their presence was thus less valued by Europeans.

III. Conclusion

In his magisterial study of the 17th-century Newfoundland fishery, Peter Pope draws a distinction between a vernacular industry and a directed one. A directed industry is more of a top-down model, whereas a vernacular one evolves more or less spontaneously based on the opportunity to exploit a particular resource. A vernacular industry tends to be governed by custom rather than written protocols and directives, and can respond nimbly to new challenges and opportunities. Pope does not apply this binary to law but I am going to suggest that it provides a useful perspective on constitutional law in 17th Newfoundland. Richard Whitbourne was one of the first of a long line of imperial missionaries who sought to interest the British Crown in exerting a more robust form of authority over the plantation. But the island’s radically decentralized pattern of settlement and small population presented a challenge to all such schemes. Except for a few occasions when removal of all the inhabitants was contemplated, the Crown wished to maintain a skeleton crew of settlers for geo-political reasons, to prevent others European nations from claiming the island. Yet it was for a long time unwilling to tax the fishing industry to support local institutions of governance. Via the Royal Navy, the Admiralty and other imperial institutions the Crown provided some means to resolve disputes between the settlers and the migratory fishers. But for most purposes, the settlers were left to their own devices. This was in marked contrast to the colony of Canada, for example, where by 1700 the French had reproduced all the legal structures of provincial France and introduced virtually all of French law, for a population of some 14,000 souls strung out along the St. Lawrence Valley. This contrast is not meant to imply that

Newfoundland was lawless, merely that its inhabitants were obliged to develop their own, vernacular, means of ordering, and that these tended to reside at the most local level. Even here they were unsanctified by any authority other than local custom, but this type of communal self-government proved very long-lasting. Municipal government in the modern sense was very slow in coming to Newfoundland; even St. John's did not get a "Municipal Board" until 1888, most town councils were not formed until after 1949 and a number of communities even today possess no formal local government.⁴³ Nor was the full panoply of English law particularly necessary. Much of it had to do with estates in land, which were not recognized in Newfoundland. *King William's Act* did recognize a form of property in coastal parcels called ship's rooms which had been occupied prior to 1685, but this property was treated as a chattel interest, not realty, a custom finally codified in the *Chattels Real Act* of 1834—a statute long a source of puzzlement to real property scholars in the rest of Canada but perfectly understandable in the Newfoundland context.⁴⁴ As Jerry Bannister has demonstrated, when gubernatorial proclamations and statutory law eventually did arrive, they often codified solutions that had already been locally arrived at, although the malleability of custom meant that it was relatively easy for the more powerful to bend the law to serve their own interests.⁴⁵

While *King William's Act* was not meant to provide a constitution for Newfoundland, in a sense it recognized that one already existed. The principal concern of that constitution, evident in the *Western Charter* of 1634 and subsequent orders-in-council down to the 1699 *Act* itself, was free trade in fish, to which all other rights, liberties and duties were subordinated. The Newfoundland plantation was thus the exact obverse of Rupert's Land, where the Hudson's Bay Company possessed a monopoly over the fur trade, one that it jealously guarded until it surrendered its vast territories to Canada. Free trade in fish required a minimum of government regulation and inspired a suspicion of state authority, but at the same time created space for local law to flourish in the nooks and crannies of the island. That constitution would be remarkably enduring.

Endnotes:

1. *The British Empire in America* (London, 1708), I, 11.
2. The documents are conveniently collected in Keith Matthews, comp., *Collection and Commentary on the Constitutional Laws of Seventeenth Century Newfoundland* (St. John's: Memorial University, 1975) [hereafter, CCCL].
3. Peter Pope, *Fish into Wine: The Newfoundland Plantation in the Seventeenth Century* (Chapel Hill and London: University of North Carolina Press, 2005).
4. Jerry Bannister, *The Rule of the Admirals: Law, Custom, and Naval Government in Newfoundland, 1699-1832* (Toronto: University of Toronto Press, 2003), 30-32.
5. London and Bristol Company Charter, CCCL, 23.
6. *Ibid*, 28.
7. Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1585-1865* (New York: Cambridge University Press, 2010), 166.
8. Robert C. Johnson et al., eds., *Commons Debates, 1628*, 6 vols. (New Haven, CT: Yale University Press, 1977-83), 3: 487, as cited in Daniel J. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence" (2003) 21 *Law & Hist Rev* 439 at 439.
9. Ken Macmillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (New York: Cambridge University Press, 2006), 30-31.
10. Hale, *The Prerogatives of the King*, D.E.C. Yale, ed. (London: Selden Society, 1976), cited in Macmillan, *Sovereignty and Possession*, 37.
11. Macmillan, *Sovereignty and Possession*, 38.
12. *A Grant of the Province of Avalon to Sir George Calvert and his Heires*, in CCCL, 43-44.
13. Tomlins, *Freedom Bound*, 171.
14. CCCL, 46.
15. *Ibid*, 47.
16. For extensive historical and archaeological information on Ferryland, see <www.colonyofavalon.ca> (accessed 14 January 2015).
17. *Baltimore's Mansion: A Memoir* (Toronto: Alfred A. Knopf, 1999).
18. The fledgling colony would be returned to the French by the Treaty of St-Germain-en-Laye in 1632; see Andrew D. Nicholls, *A Fleeting Empire: Early Stuart Britain and the Merchant Adventurers to Canada* (Montreal and Kingston: McGill-Queen's University Press, 2010).
19. CCCL, 85-86.
20. *Ibid*, 88, 93. The prohibition was asserted and removed several times in the seventeenth century. Pope, *Fish into Wine*, follows the flip-flopping on this issue at 194-95.
21. Sean T. Cadigan, *Newfoundland and Labrador: A History* (Toronto: University of Toronto Press, 2009).

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22. Richard Whitbourne, *A Discourse and Discovery of New-found-land* (Amsterdam and New York: Da Capo Press, 1971 [1620]).
23. For the text of the Charter, see CCCL, 71-75.
24. “Hill at first refused but found himself unable to hold out against Kirke’s superior strength. He ‘with drew himselfe into a litle house adjoining and not being able to doe otherwise yeelded up the possession of the said Chiefe Mansion house to the said Sir David Kirke”’: Gillian T. Cell, “Hill, William,” <www.biographi.ca>.
25. Pope, *Fish into Wine*, 255-57.
26. Johnston, *Baltimore’s Mansion*, 15.
27. Pope, *Fish into Wine*, 194-95.
28. Bannister, *Rule of the Admirals*, 33.
29. Alan Cass, “Mr Nisbet’s Legacy: the Passing of King William’s Act in 1699” (2007) 22 *Newfoundland & Labrador Studies* 505.
30. Tomlins, *Freedom Bound*, 171.
31. *Ibid*, 172.
32. See generally Mary Sarah Bilder, “English Settlement and Local Governance,” in Michael Grossberg and Christopher Tomlins, eds., *The Cambridge History of Law in America*, I (New York: Cambridge University Press, 2011).
33. Bannister, *Rule of the Admirals*, 42-3.
34. Bannister, *Rule of the Admirals*, explores the system of naval governance as it developed after King William’s Act of 1699, but Pope, *Fish into Wine*, 309-10, provides some evidence of its origins in the 1680s.
35. John Guy to Sir Percival Willoughby, 6 October 1610, in Gillian T. Cell, ed., *Newfoundland Discovered: English Attempts at Colonisation, 1610-1630* (London: Hakluyt Society, 1982), 74.
36. Whitbourne, *Discourse and Discovery*, 14.
37. *Ibid*, 5.
38. CCCL, 53-54.
39. E. Hunt, “Easton, Peter,” <www.biographi.ca>.
40. Tomlins, *Freedom Bound*, 176.
41. *Ibid*, 132-33.
42. I expand on these idea in “Imperial legacies: Chartered enterprises in North British America,” in Shaunnagh Dorsett and John McLaren, eds., *Legal Histories of the British Empire: Laws, Engagements, and Legacies* (London: Routledge, 2014), 127.
43. James K. Hiller, “Newfoundland Confronts Canada, 1867-1949,” in E.R. Forbes and D.A. Muise, eds., *The Atlantic Provinces in Confederation* (Toronto: University of Toronto Press, 1993) at 355.

- ⁴⁴. *Chattels Real Act*, SN 1834, c 18. And see Trudi Johnson, "Defining Property for Inheritance: The Chattels Real Act of 1834," in Christopher English, ed., *Two Islands: Newfoundland and Prince Edward Island, Essays in the History of Canadian Law*, vol. IX (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2005).
- ⁴⁵. Bannister, *Rule of the Admirals*, 159-62.