

# "A Matter of Custom and Convenience": Marriage Law in Nineteenth-Century Newfoundland

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[See table of contents](#)

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# “A Matter of Custom and Convenience”: Marriage Law in Nineteenth-Century Newfoundland

TRUDI JOHNSON

THE ISSUE OF MARRIAGE LAW in Newfoundland was raised initially in the late eighteenth century when local church officials became increasingly concerned about the custom of common-law marriages. Court records indicate that the practice of common-law marriages had been a problem for the courts for some time. In Ferryland in 1750, for example, John Allen and Elizabeth Gobbett were brought into court at the request of the Justice of the Peace to declare that they were not married but only living together.<sup>1</sup> While church officials were uncomfortable with the number of couples living together in common-law relationships, they were also aware of the scarcity of missionaries qualified to perform the marriage ceremony on the island. In fact, missionaries were so scarce on the island it had become customary

for the Lord of the Harbour ... to perform the ceremony in the same way as it was performed in England by clergymen, and that in Winter when they have no Lord of the harbour, it is performed by any common man that can read.<sup>2</sup>

Although the act of living common law without the benefit of clergy appears to have been practised for some time, it was not until the number of instances increased that church and legal authorities demanded legislative action to enforce marriage law and properly designate clergy to perform the ceremony.

The years of the French Revolutionary and Napoleonic wars marked major changes in Newfoundland's economic history. The island's population increased to just over 40,000 in 1815. The cod fishery became a completely Newfound-

land-based operation as the migratory fishery came to an end. The expanding seal fishery provided employment and the economic base of the island widened.<sup>3</sup> These changes increased the permanent resident population in Newfoundland and brought to official attention problems that had previously been ignored. What could be done to discourage the number of common-law relationships? Who was authorized to perform the marriage ceremony on the island? What were the legal implications regarding inheritance for those couples who were not legally married? These questions came to public attention when church officials began to debate who was qualified to conduct marriage ceremonies. Interestingly, what began as a local concern for the number of common-law relationships grew into a broader debate over the reception and application of English marriage law in the colony. Thus, the establishment of marriage law in Newfoundland was contingent upon three interrelated factors: the reception of English law, the sectarian debate over the right to perform the marriage ceremony, and the relationship between marriage law and the inheritance of property.

The extent to which English law was received in colonial jurisdictions varied from colony to colony. It depended on local or imperial legislation to designate a formal date of reception and on colonial courts to decide on the reception of law.<sup>4</sup> Furthermore, it was contingent upon whether the colony was acquired through conquest or by settlement. As a general rule, in colonies of settlement the settlers brought with them existing English law, both judge-made and statute. Those laws would become the basis, at least, of the law in the colonies, with the exception of those laws deemed incompatible with local circumstances. The common law was received as a uniform body of law throughout the Empire and was not contingent upon a date of reception.<sup>5</sup> However, the reception of statute law was determined by a cut-off date for reception which in many colonies was designated by local and imperial statutes.

English interest in the Newfoundland fishery from the sixteenth century created a unique context for the issue of legal reception on the island. The gradual growth of settlement during the seventeenth and eighteenth centuries led to a structured system of justice in Newfoundland, and beginning in 1791, the Judicature Acts<sup>6</sup> confirmed the existence of English law and reflected the changing needs of a permanent population. The Acts provided for a structure of English law and for the jurisdiction of a Supreme Court. However, it was also clear that the laws of England could only be applied as local circumstances would permit. How English common law and statute law would be applied remained uncertain and open to interpretation by the courts. The question, as in other English common-law jurisdictions, was how much of that English law had been applied, and could continue to be applied to local circumstances. Two examples were the law governing marriage and the law pertaining to the inheritance of property. Since inheritance law was predicated on relationships brought about by marriage, they needed to be clarified. As Church of England officials debated marriage law, legal authorities raised the question as to

the reception of the law of property and inheritance in Newfoundland. Clearly, the issues of marriage law and property law were important, at least in some circles, because the new colonial legislature made them a priority and passed laws pertaining to both soon after its inception in 1832. The passage of the Chattels Act in 1834 settled the issue of property law by affirming that all landed property on the island would be designated as chattels real<sup>7</sup> for the purpose of inheritance.<sup>8</sup>

Matters concerning matrimony had been regarded as spiritual questions as early as the seventh century in England, and after the separation of lay and spiritual jurisdictions was completed in the twelfth century, the subject of matrimony fell exclusively to the jurisdiction of the church. These divisions remained until the middle of the nineteenth century.<sup>9</sup> For the sake of consistency, both ecclesiastical and secular authorities insisted on a public ceremony of marriage. As of 1215, they required banns to be published on three successive Sundays to ascertain whether anyone objected to the proposed marriage. If there were no objections, the ceremony took place at the church door and was followed by a mass inside. The event was formalized and required witnesses; however, written registration of marriages in England did not begin until the sixteenth century.<sup>10</sup>

Although only church marriages were socially proper, the customary practice of clandestine marriages continued in England throughout the sixteenth century. In 1563, the Council of Trent changed the law, requiring a priest to be present for validity, but the Church of England did not follow suit. The first parliamentary sanctions in England were imposed in 1694, when it became a criminal offence to marry without banns or a licence. The statute was designed to facilitate the taxation of marriage.<sup>11</sup> In 1753, Lord Hardwicke's Act<sup>12</sup> prohibited secret marriages and required a licence, the publication of banns, and parental consent for those marrying under the age of 21. All marriages had to be celebrated in a parish church or public chapel. Two witnesses were also required and the marriage had to be publicly registered.<sup>13</sup> The statutory provisions were not applicable to marriages performed outside England and Wales, and the law governing the celebration of marriages in the colonies was considered the law of the place of celebration, which in some places was the English common law (or canon law). English courts would still have to pronounce on the validity of the marriages.<sup>14</sup> Thus it was likely that in colonies such as Newfoundland where the marriage law was uncertain, both the churches and the courts would become involved in a debate.

This issue was not unique to Newfoundland. Marriage law was contentious in Upper Canada, New Brunswick, Nova Scotia and Prince Edward Island, where legislation gave the Church of England clergy a monopoly on the right to perform the marriage ceremony. Upper Canada passed its first marriage act in 1793. It limited legal marriages to those performed by the Church of England clergy, or by a magistrate if no such clergyman lived within 18 miles of the bride. Methodists were excluded until 1831 when the authority was extended to all clergy.<sup>15</sup> In 1758 the Nova Scotian legislature similarly gave a monopoly to Church of England clergy,

despite the scarcity of missionaries. However, Dissenting clergy could perform marriages after reading the banns if both parties belonged to the same congregation. The legislatures of Nova Scotia and New Brunswick granted the right to all denominations in 1834, and the Prince Edward Island legislature in 1832.<sup>16</sup>

Church doctrine came to Newfoundland through the efforts of missionaries in the eighteenth century. The Church of England began overseas mission work in 1701 through the Society for the Propagation of the Gospel in Foreign Parts (SPG).<sup>17</sup> The first connection to Newfoundland occurred in that year when Dr. Thomas Bray, founder of the SPG, included Newfoundland in his study of the state of religion in North America.<sup>18</sup> The Bishop of London assumed responsibility for SPG missionaries, and he requested that the King “devolve all ecclesiastical jurisdiction in those parts upon him and his successors, except what concerned Inductions, Marriages, Probate of Wills, and Administrations.”<sup>19</sup>

The Judicature Acts of 1791, 1792 and 1824 did not make provision for ecclesiastical law in Newfoundland, and in the absence of ecclesiastical courts, the civil courts were responsible for legal matters normally addressed by canon law. In Newfoundland, since the earliest days of settlement, the celebration of marriage had been regulated by local custom, and in the absence of clergy, marriages continued to be solemnized by anyone who could read the service. Church of England clergy in Newfoundland performed the marriage ceremony, and the right of Roman Catholic priests was not questioned by governors.<sup>20</sup> Some Congregational and Methodist clergy<sup>21</sup> conducted marriage services for their own members but usually in areas where there was no resident Church of England clergyman.<sup>22</sup> Often, couples simply declared their desire to be married and a leading community member, usually a merchant, performed the ceremony. The service would be repeated when a clergyman arrived in the harbour. This customary practice, well established by the beginning of the nineteenth century, continued in remote areas even after marriage laws were enacted.<sup>23</sup>

Why, then, did church and legal authorities in the early nineteenth century become concerned about illegal marriages? In correspondence to Governor William Waldegrave in 1797, the Reverend J. Harries, a Church of England cleric in St. John’s, expressed his concern about the *frequency* of clandestine marriages:

The banns of marriage have never been regularly published in the several churches and districts of this Island, because the solemnization of the Rite has not been confined to the appointed Minister, or to the Magistrate in his absence, but performed indifferently by all, and at any place, and at any time.<sup>24</sup>

Harries complained that it seemed impossible for the local legal authorities to do anything about it. Earlier interventions by the Reverend George Jenner and Magistrate Charles Garland, who both lived in Conception Bay, had been ignored. Harries recommended that the governor should do what he could to introduce the

English Marriage Act to the island, along with any necessary limitations or restrictions. Governor Waldegrave responded that his power was insufficient to act, but he intended to discuss the matter with the Chief Justice the following day. He would also bring the matter to the attention of the Archbishop of Canterbury and the Bishop of London upon his return to England. He was confident that they, along with the Secretary of State, would act to “quickly eradicate the seeds of irreligion and immorality” on the island.<sup>25</sup> Waldegrave received a similar letter from Jenner complaining of “incestuous marriages” and calling for the Marriage Act to be enforced: publishing banns would enable local authorities to take action *before* the ceremonies took place.<sup>26</sup>

The Chief Justice, D’Ewes Coke,<sup>27</sup> recommended immediate action to “punish the delinquents.” The English Marriage Act did not extend beyond the seas, but the Supreme Court had the power to issue a “Rule of Court” to punish offenders. Marriage ceremonies performed by anyone other than those legally authorized would be declared null and void by the court, the children deemed illegitimate, and the husband, wife and children denied claim to any property devised to them by will or any other means. Coke’s concern was that the practice of clandestine marriages would prevent the court from distinguishing the rightful owners to real and personal property on the island.<sup>28</sup>

In 1812 Governor Sir John Thomas Duckworth tried to prevent further controversy over the issue by requesting a ruling on the law of marriage on the island from the Law Officers in London.<sup>29</sup> He had first consulted Chief Justice Thomas Tremlett<sup>30</sup> who confirmed that the English marriage law did not apply in Newfoundland. In response, the governor posed six questions concerning the legality of marriage in Newfoundland, and, therefore, the right of children and descendants to inherit real estate in England. The questions considered whether a marriage was valid

1st: Between a Protestant and a Roman Catholic, if performed by a Roman Catholic priest, at a time and in a place where there was a clergyman of the Church of England?

2nd: Between the same parties if performed by a layman who is a magistrate, under similar circumstances?

3rd: Between two Protestants of the Church of England under similar circumstances of the cases no. 1 and no. 2?

4th: Between two Protestant Dissenters (not Quakers) if performed by a mere layman?

5th: Between a man and a woman generally without adverting to their religious sentiments, if performed by a layman who is a magistrate in a place where there is no clergyman?

6th: Between the parties and under the circumstances in the last case or any of the former cases, if performed by a mere layman? Or in other words, can a marriage be valid if performed by a Justice of the Peace, and not so if he is a mere layman who is not a magistrate?<sup>31</sup>

Tremlett had no legal training and did not respond; nor did the Law Officers. However, a reply eventually came from the learned counsel practising at the bar of the Doctors' Commons, who were respected for their opinions in three areas: admiralty, probate and ecclesiastical law. They reported on 11 May 1812,

that as the Marriage Act does not extend to the British settlements abroad, the validity of marriages had at Newfoundland will depend rather upon what has been the practice and custom of the place, than upon any form of celebration which is indispensably required.<sup>32</sup>

While marriages solemnized by Roman Catholic clergymen were acceptable, the performance of the ceremony by laymen, including justices of the peace, could only be justified out of necessity or by "peculiar customs of the place." It appears that the counsel recognized that although marriage practices in the colonies "should conform as nearly as local circumstances will permit, to the practice of the Mother Country," conditions in Newfoundland made this difficult and unlikely.

When a Methodist congregation was established in St. John's in 1815, relations between the Church of England parish and Dissenting congregations initially appeared congenial. The new wooden chapel was destroyed by fire on 12 February 1816 before it was completed. David Rowland, rector of the Church of England Cathedral parish, offered the homeless congregation the use of the parish school for worship until they could rebuild.<sup>33</sup> As poor economic conditions loomed with the approaching winter, Protestant clergy combined efforts to preach charity sermons to raise money for the poor.

However good relations soon broke down. George Cubitt,<sup>34</sup> the minister of the Methodist congregation in St. John's, conducted marriages, although he could not plead necessity in a place where there were both Church of England and Roman Catholic clergy. The Congregational minister, James Sabine,<sup>35</sup> who arrived in June 1816, was inspired by Cubitt's initiative. Rowland vehemently objected to what he considered a breach of the privileges of the Church of England.

The issue came to a head as a result of a wedding that took place on 25 September 1816. In a quiet evening ceremony, Peter Montgomery and Margaret Courtney were married in the Methodist chapel in St. John's. With them as witnesses were Andrew Canavan, George Allan and Nathan Graham. The young couple probably could not have predicted the repercussions of their decision to be married in the Methodist chapel. Cubitt was, in fact, knowingly solemnizing the marriage of two young people from Rowland's congregation. Moreover, they were underage, marrying without their parents' consent, and using assumed names. When he heard about the ceremony, Rowland appealed to Governor Francis Pickmore:

the Methodist ministers have lately taken upon themselves to solemnize the rite of marriage in that town, contrary to the laws of the realm and to the irreparable injury of

the persons concerned and their innocent offspring, and [I] humbly entreat your Excellency to adopt such measures as may be thought effectual to prevent the recurrence of such abuses in future.<sup>36</sup>

Pickmore summoned Sabine and Cubitt and accused them of unlawfully performing marriages. The governor forbade them to perform any further marriages, and threatened to close the Methodist and Congregational meeting houses if they did. The marriage of Protestants by anyone other than Church of England clergymen, Pickmore declared, was illegal. Both Sabine and Cubitt responded that there was no law to prevent them from continuing to do as they had done. They refused to comply with the governor's wishes not to perform the marriage ceremony in a place where an Episcopal minister might be found.<sup>37</sup>

The two ministers, though novices, were clearly not intimidated by the governor's threats. They continued to officiate at weddings, announced the weddings in local newspapers,<sup>38</sup> and threatened legal action if the governor interfered. They appealed to the general public in a lengthy statement published in two issues of *The Mercantile Journal* in October and November 1816.<sup>39</sup> Sabine and Cubitt argued that if all marriage ceremonies in Newfoundland were governed by English statute law, then indeed many of them were invalid, since English law required that they be performed in an Episcopal church or chapel, either by the publication of banns, or by a licence. But,

From time immemorial, marriages have been solemnized in this island, not only by persons not episcopally ordained, but by the Reverend Clergy or the Church of England, without either banns or licence.

The application of English marriage statutes to Newfoundland was, in their view, a very important question since it had repercussions for the "chastity of parents" and the "legitimacy of children." They concluded that the English Marriage Act did not extend to the island, only the *principles* of English law. Marriage, they suggested, is a divine institution, and as such did not require a specific form of celebration. Furthermore, they cited William Blackstone's<sup>40</sup> view that marriage is a "civil contract" and, in the absence of specific laws on the subject, "there must be no impediments of a civil nature" to a simple civil contract.

Of the existence of custom in Newfoundland, by which Dissenting ministers, magistrates, and even laymen solemnize marriages, no doubt can be entertained; and custom, where there is no express statute, is law, the *lex non scripta*.

Governor Pickmore was adamant, and decided that legislation was the only way to curtail marriages by Dissenting clergy, at least where Church of England



clergy were available. As a result of his representations, in 1817 the first Marriage Act, an imperial statute, was passed. It acknowledged that

doubt had existed whether the Law of England requiring Religious Ceremonies in the celebration of Marriage to be performed by persons in Holy Orders for the perfect validity of the Marriage Contract, be in force in Newfoundland; and by reason of this doubt, Marriages have been of late celebrated in Newfoundland by persons not of Holy Orders.<sup>41</sup>

The Act prohibited the celebration of marriages by Methodist and Congregational clergy. All marriages contracted before 5 January 1818 were legitimized, but subsequent marriages were to be conducted, except in “circumstances of peculiar or extreme difficulty,” by “persons of Holy Orders,” or in their absence, by magistrates or other persons authorized by the governor. Pickmore assured the Roman Catholic bishop, Thomas Scallan, that the traditional right of Catholic priests to perform marriages would be protected. “Persons in Holy Orders” referred to Church of England clergy and, by extension, to Catholic priests.<sup>42</sup> It also included clergy from the established (Presbyterian) Church of Scotland. Angry Dissenters saw the legislation as a way “to establish popery and to prosecute Protestantism.”<sup>43</sup>

Sabine retaliated with the publication of an essay entitled “View of the Moral State of Newfoundland” in which he noted the scarcity of clergy on the island. SPG clergy were to be found only in larger outports, such as Trinity and Harbour Grace, and the number of Methodist missionaries numbered only 11 in 1817. Sabine even questioned the moral character of the SPG clergy, claiming that they were not men of “missionary character,” and suggested that their sacred duties would be better performed by school teachers.<sup>44</sup> The Act had apparently failed to recognize the shortage of Church of England clergy in the colony and the marriage ceremony continued to be performed without adherence to the new law.

In 1823 the Methodists seized an opportunity to lobby for a new statute which would allow any minister of religion legally to perform marriages. At this time, former Chief Justice Francis Forbes was drafting a new Judicature Act, and he added clauses regarding marriages.<sup>45</sup> However, when the bill reached Newfoundland, Catholics were outraged. The draft included clauses that would allow “any other Protestant minister of religion” as well as Catholic priests to perform marriages, but only when it was not “convenient” to obtain the services of a Church of England clergyman. Technically, this would prevent Catholics in larger centers such as St. John’s from having their marriage ceremonies performed by Catholic clergy. Led by Bishop Scallan and supported by Governor Hamilton,<sup>46</sup> Catholics flooded the Colonial Office with petitions.

Since the establishment of Roman Catholic priests in the Island they have been invariably allowed to marry all those of their own communion, your petitioners would con-

sider such an Act, if passed, an unnecessary penal law, which in the most favorable construction of it, would open a field to endless reactions, and disturb the peace of the community ...

They hoped that the Bill would allow them the “free exercise of their Religion” particularly in the celebration of marriage. Failure to recognize Roman Catholic clergy’s right to perform marriage ceremonies, in their view, would result in “a degrading and distressing infliction.”<sup>47</sup> A petition from Roman Catholics on the island to the House of Commons in Britain reassured the authorities that proper procedures were being followed by Roman Catholic priests, and that marriage registers were being properly kept.<sup>48</sup> A petition from Dissenters to the Privy Council pointed out that their ministers had been solemnizing marriages in every part of the island for many years.<sup>49</sup> Members of the Church of England were also upset, because the statute would permit Methodists and other Dissenting clergy to solemnize marriages in some circumstances, and recognized these clergy as “Protestant ministers of religion.” Formal protests followed. James Stephen,<sup>50</sup> legal advisor to the Colonial Office, expressed his concern about the precedent the Act would set, although he conceded that Newfoundland’s special circumstances might justify such action.<sup>51</sup> In the end, the Church of England’s representations were powerful enough to win concessions, and the term “Protestant minister” was changed to “a teacher or preacher of religion,” who could assist at marriages in circumstances of necessity, and with a special licence from the governor.<sup>52</sup>

Correspondence moved back and forth between Newfoundland and London, and in 1824 James Stephen wrote a lengthy report on the subject for Robert Wilmot Horton, Under-Secretary at the Colonial Office.<sup>53</sup> Stephen acknowledged that the Marriage Act had always been understood *not* to extend to the colonies. The validity of marriages depended on the customs of the place, which had allowed any teacher or minister of religion to celebrate marriages, although this practice was not sanctioned by the common law. The 1817 Act had not solved the issue; rather, it had created “extreme confusion and difficulty.” Stephen made several valid points. First, if by “persons in Holy Orders” the Act was referring to clergy of the Church of England and, by extension, Roman Catholic clergy, there was clearly an insufficient number of them on the island. Stephen acknowledged that Catholics had been accustomed “from the earliest times to solemnize marriages” and added that he believed they were “entitled by Law to do.” Furthermore, the provision referring to “cases of peculiar and extreme difficulty” was not clearly defined and was certainly open to interpretation. How much “difficulty” would be an excuse for someone who was not in “Holy Orders” to perform the ceremony? As far as Stephen was concerned, the exception of “peculiar and extreme difficulty” was so vague that it only served to increase rather than diminish the problem. Stephen suggested that since the Act of 1817 had been passed, many couples had been married “without any assurance of their validity,” which he judged as a “moral and political evil.” He

proposed that the new legislation should simply rule that all marriages which had taken place in Newfoundland be considered valid, as if the Act of 1817 had never existed — it should be treated as a “nullity,” leaving the common law or the customs of Newfoundland to decide the validity of marriage.<sup>54</sup> According to Stephen, all marriage ceremonies should be conducted by Church of England clergy, although he acknowledged two exceptions. The first occurred when both parties dissented from the doctrines of the established church. In such cases, a written declaration would be required, delivered at the time of the ceremony and signed by both parties. The second exception pertained to distance, when the residence of the bride was at least 20 miles from any church or chapel belonging to the established church. In these two instances, Stephen argued, it would be justified to permit a Roman Catholic priest or other authorized teacher of religion to perform the ceremony.

Josiah Butterworth, representing Dissenters in Newfoundland, expressed his concerns and proposed changes in a series of letters to Horton in May 1824.

I had a conversation yesterday with Lord Bathurst respecting the Newfoundland Marriage Act, now before Parliament, and I stated the impracticality of the parties going twenty miles, or even a short distance at certain places and seasons of the year. It was there proposed to adopt the provision made in the Bill of last year, in that it was “inconvenient” to obtain a clergyman of the Church of England, and other Protestant ministers who had taken the oaths might celebrate the marriage.<sup>55</sup>

Butterworth had argued that the word “inconvenient” would cause “doubt and dispute,” and so proposed to replace the word with the provision that where there was no Church of England clergyman in the community where the bride resided, any Protestant clergyman would be allowed to perform the ceremony.

While the initial intention had been to provide for marriages by Methodist clergymen, the Methodist position worsened as the bill went through six different drafts. The first draft was unacceptable, since it provided an alternative only when it was “inconvenient” to have a cleric from the Church of England. But in the end, Methodist ministers were ranked far below Church of England and Roman Catholic priests, in that they were not even acknowledged as clerics, and required civil licences. Even the condition of licensing narrowed as the bill went through several changes. For example, a licence was considered valid only if the woman could not go from her residence to an Church of England church “without extreme inconvenience” and the marriage certificate was to be delivered to a Church of England clergyman. Only after strenuous objections by influential Methodists was the word “extreme” removed.<sup>56</sup>

Clauses pertaining to marriage law which Forbes had intended to be included in the 1824 Judicature Act were left out. In the end, separate Judicature and Marriage acts were passed. The Marriage Act<sup>57</sup> allowed all marriages to be celebrated

by "Persons in Holy Orders." Then it sought to clarify the 1817 Act by stating that the marriage rites must be those of the Church of England. The new legislation extended the period of automatic legitimization to 23 March 1825. Two exceptions were allowed by the Act. Because Church of England clergy were often inaccessible, the governor was permitted to appoint full-time teachers or preachers to perform the marriage ceremony. However, a loss of licence or fine could be imposed on those who married couples who could have availed of Church of England rites. A certificate of marriage had to be delivered to the governor or Church of England clergyman within a year, so that names could be recorded in the Book of Marriages. Failure to provide two credible witnesses would result in a fine of £10 levied on the person performing the ceremony.<sup>58</sup> While the Act was to run for nine years, not surprisingly, the sectarian debate continued.

Correspondence between the governor and the Colonial Secretary indicates that officials recognized the need to make further adjustments although they gave no indication as to how this should be done. In 1826, Colonial Secretary Lord Bathurst wrote to Governor Thomas John Cochrane that the inhabitants of Newfoundland lived in conditions unparalleled elsewhere, making the introduction of new principles of law and judicial proceedings exceptionally difficult.<sup>59</sup> An opportunity to adapt the law to local conditions was forthcoming.

In 1832 Newfoundland was granted representative government. The new colonial legislature which consisted of a legislative council and a legislative assembly, was in a position to pass its own marriage act. Lord Goderich, Bathurst's successor, sent a letter to Governor Cochrane to be read at the first session of the colonial legislature on 9 January 1833. Goderich pointed out that although those who settled in Newfoundland had carried with them "the Law of England as the only Code by which the rights and duties of the people in their relation to each other and in relation to the state could be ascertained," the provisions of English law were not entirely applicable "to the wants of a population so peculiarly situated."<sup>60</sup>

Since the Marriage Act expired in 1833, Methodists pressed to be included in new legislation, and the legislature soon received petitions from Methodists in St. John's, Carbonear, Harbour Grace, Port de Grave, Brigus and the North Shore of Conception Bay. The Methodist congregation in St. John's claimed that the Act of 1817 had denied them privileges that they had once enjoyed. They argued that the previous marriage acts were not suited to the local circumstances of the colony. Furthermore, in the spirit of current reform in "an enlightened age," it was time to remove the restrictive legislation and replace it with one that allowed all clergy to perform marriage ceremonies. They called on the local legislature to recognize that the houses of assembly in "Sister Colonies," namely the Canadas, New Brunswick and Prince Edward Island, had given Methodist missionaries the unrestricted right to celebrate marriages. The petitioners claimed that there was no evidence that Methodist ministers had done anything to justify the forfeiture of "a privilege they have so long and usefully exercised." This custom of the country, in their view,

should be placed into law.<sup>61</sup> The Roman Catholic bishop, Michael Anthony Fleming, supported their cause and asked the legislature to extend to Dissenters and Methodists “the privilege of solemnizing marriages in their own congregations.” Fleming referred to the “painful condition in which a large and respectable portion of fellow-Christians, the Dissenters of the country, are placed.”<sup>62</sup> The Marriage Act of 1833 passed by the colonial legislature permitted marriages to be solemnized by any person in Holy Orders or by any resident minister “publicly recognized as the Pastor or Teacher of any Congregation having a Church or Chapel” and licensed to celebrate marriage.<sup>63</sup> The colonial legislature had finally passed its own Marriage Act and settled the issue of the right to perform the marriage ceremony. It did not, however, provide for a divorce or a right of remarriage. Such legislation would have to wait. The instructions given to Governor Cochrane in 1832 were clear:

You do not, upon any pretence whatsoever, give your assent to any Bill or Bills that may have been or shall hereafter be passed by the Council and Assembly of the Island under your government for the naturalization of aliens, nor for the divorce of persons joined together in holy matrimony.<sup>64</sup>

Initially, it was the increasing number of clandestine marriages that drew the attention of local church officials and legal authorities to the issue of marriage law in the early nineteenth century. To address the concerns about the custom of common-law marriages, and to help settle rightful heirs to property, the British government passed the Marriage Act of 1817. Unfortunately, the imperial act only served to inflame public opinion and the debate over the right to perform marriages continued.

Evidence of a strong political will to deal with the legality of marriage is illustrated by the fact that it was a priority of the new colonial legislature in 1832. The new Marriage Act of 1833 settled the question of who could perform marriage on the island by extending the right to all those ministers with publicly recognized congregations and chapels. Thus, in bringing English marriage law to Newfoundland, church officials and legal authorities resolved the long-standing debate over the right to perform marriage ceremonies, legitimized heirs to property and discouraged the practice of clandestine marriages. Nevertheless, in doing so, they were forced to address customary practice and adapt the law to suit the needs of the local community.

## Notes

<sup>1</sup>Provincial Archives of Newfoundland and Labrador (PANL), GN 2/1/A, Colonial Secretary's Office, Outgoing Correspondence, vols. 1-4, 1749-1770, 27 August 1750.

<sup>2</sup>John J. Mannion, ed., *The Peopling of Newfoundland: Essays in Historical Geography* (St. John's, 1977), 35.

<sup>3</sup>Shannon Ryan, *Fish Out of Water: The Newfoundland Saltfish Trade, 1814-1914* (St. John's, 1986), 36-37.

<sup>4</sup>A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property* (Aurora, ON, 1985), 54.

<sup>5</sup>Peter Hogg, *Constitutional Law of Canada* (Toronto, 1996), 30. Hogg designates Newfoundland as a "settled" colony despite English policy regarding settlement in the seventeenth and eighteenth centuries. On the reception of law in the British colonies, see also J.E. Côté, "The Reception of English Law," *Alberta Law Review* 15 (1977), 29-92.

<sup>6</sup>(U.K.) 31 Geo. III, c. 29 (1791); (U.K.) 32 Geo. III, c. 46 (1792); (U.K.) 49 Geo. III, c. 27 (1809); 5 Geo. IV, c. 67 (1824). For a summary of these Judicature Acts, see Newfoundland Law Reform Commission, *A History of the Newfoundland Judicature Act, 1791-1984* (St. John's, 1989).

<sup>7</sup>Chattels real refers to the classification of property which involves an interest in land for a fixed term of years (leasehold), rather than for indeterminate duration, as with real property. William Geldart, *Introduction to English Law* (Oxford University Press, 1991), 76.

<sup>8</sup>(1834) 4 Wm. IV, c. 18 (Nfld.): An Act for declaring all Landed Property, in Newfoundland, Real Chattels, *Journal of the House of Assembly*, March 1834.

<sup>9</sup>J.H. Baker, *Introduction to English Legal History* (London, 1990), 545.

<sup>10</sup>Baker, *English Legal History*, 547.

<sup>11</sup>(1694) 6 & 7 Wm. and Mary, c. 6.

<sup>12</sup>(1753) 26 Geo. II, c. 33

<sup>13</sup>Baker, *English Legal History*, 549.

<sup>14</sup>Baker, *English Legal History*, 550.

<sup>15</sup>John S. Moir, *The Church in the British Era: From the British Conquest to Confederation* (Toronto, 1972), 89.

<sup>16</sup>John S. Moir, *Church and State in Canada, 1627-1867: Basic Documents* (Toronto, 1967), 63.

<sup>17</sup>The first meeting of the SPG in England was held on 27 June 1701. A charter, standing orders and by-laws were adopted. No reference was made to ecclesiastical laws relating to marriage, probate of wills or the division of personal property. *Classified Digest of the Records of the Society for the Propagation of the Gospel in Foreign Parts, 1701-1892* (London, 1895), 6.

<sup>18</sup>The first direct involvement occurred in 1703 when the SPG financially supported Rev. John Jackson who had been serving in St. John's as a naval chaplain since 1697. The contributions of the SPG laid the foundations for the Church of England in Newfoundland. *Encyclopedia of Newfoundland and Labrador (ENL)*, vol. 2 (St. John's, 1984), 572.

<sup>19</sup>*Classified Digest of the Records of the SPG*, 2.

<sup>20</sup>Thomas R. Millman and A.R. Kelley state that the right of Roman Catholic clergy to perform the marriage ceremony had been secured by Bishop Patrick Lambert around the same time as he established a Roman Catholic cemetery in St. John's (1811). However, correspondence and petitions during the marriage law debate indicate that they had this right for a much longer time. Thomas R. Millman and A.R. Kelley, *Atlantic Canada to 1900: A History of the Anglican Church* (Toronto, 1983), 91.

<sup>21</sup>Newfoundland was one of the first overseas mission fields of the British Wesleyan Methodist Conference. In the mid-1760s Lawrence Coughlan introduced the principles of Methodism in Conception Bay and in 1768 directed the construction of the first Methodist chapel. "Methodism," *ENL*, vol. 3 (1991), 519-525.

<sup>22</sup>Raymond J. Lahey, "Catholicism and Colonial Policy in Newfoundland, 1770-1845," in Terrence Murphy and Gerald Stortz, eds., *Creed and Culture: The Place of English-Speaking Catholics in Canadian Society, 1750-1930* (Montreal, 1993), 59.

<sup>23</sup>*ENL*, vol. 3 (1991), 467.

<sup>24</sup>PANL, GN 2/1/A/13, Colonial Secretary's Office, Outgoing Correspondence, vol. 13, Harries to Waldegrave, 25 August 1797.

<sup>25</sup>PANL, GN 2/1/A/13, Colonial Secretary's Office, Outgoing Correspondence, vol. 13, Waldegrave to Harries, 26 August 1797.

<sup>26</sup>PANL, GN 2/1/A/13, Colonial Secretary's Office, Outgoing Correspondence, vol. 13, Jenner to Waldegrave, 26 August 1796.

<sup>27</sup>D'Ewes Coke served as Chief Justice from 1792 to 1797. *ENL*, vol. 1 (1981), 476.

<sup>28</sup>PANL, GN 2/1/A/13, Colonial Secretary's Office, Outgoing Correspondence, vol. 13, Chief Justice D'Ewes Coke to Waldegrave, 29 August 1797.

<sup>29</sup>Colonial Office Records (C.O.) 194/52, Governor Duckworth to the Earl of Liverpool and a copy to the law officers of the Crown, 14 April 1812.

<sup>30</sup>Thomas Tremlett was appointed Registrar of the Vice-Admiralty Court in 1801 and Chief Justice in 1803. *ENL*, vol. 5 (1994), 413.

<sup>31</sup>C.O. 194/52, Governor Duckworth to the Earl of Liverpool and a copy to the law officers of the Crown, 14 April 1812.

<sup>32</sup>C.O. 194/53, f. 79, Correspondence from Doctors' Commons, 11 May 1812. The Doctors' Commons was the bar founded in 1511 and ended in 1857. For a history of the Doctors' Commons, see G.D. Squibb, *Doctors' Commons: A History of the College of Advocates and Doctors of Law* (Oxford, 1977).

<sup>33</sup>J.W. Nichols, ed., *A Century of Methodism in St. John's, Newfoundland, 1815-1915* (St. John's, 1915), 20.

<sup>34</sup>Reverend George Cubitt (Cubit) was ordained in London, England, as a Methodist missionary in 1816 and left immediately for his assignment in St. John's. He remained only four years.

<sup>35</sup>James Sabine was the pastor of the first Congregational Church in St. John's. He arrived in St. John's from Poole, England, in 1816 and stayed only two years.

<sup>36</sup>C.O. 194/59, f. 5, Letter from Rev. David Rowland to Governor Pickmore, 28 September 1816.

<sup>37</sup>Lahey, "Catholicism and Colonial Policy," 60.

<sup>38</sup>*Royal Gazette*, 10 January 1817.

<sup>39</sup>*The Mercantile Journal*, "Proclamation on the Solemnization of Marriage in Newfoundland," 26 October and 2 November 1816.

<sup>40</sup>William Blackstone, *Commentaries on the Laws of England* (1764) (Buntingford, 1966).

<sup>41</sup>(1817) 57 Geo. III, c. 51: An Act to Regulate the Celebration of Marriages in Newfoundland.

<sup>42</sup>Lahey, "Catholicism and Colonial Policy," 61.

<sup>43</sup>Raymond J. Lahey, "Bishop Scallan," in *Dictionary of Canadian Biography (DCB)*, vol. VI, 692.

<sup>44</sup>James Sabine, "View of the Moral State of Newfoundland," 1818, 5-9. A copy is available in the Centre for Newfoundland Studies, Memorial University.

<sup>45</sup>C.O. 194/69, f. 334, 4 Geo. IV: A Bill for the better administration of justice in Newfoundland, and for consolidating and amending the Laws relating to the said Colony, 10 July 1823.

<sup>46</sup>C.O. 194/67, f. 123, Letter from Governor Hamilton to Lord Bathurst, 27 February 1824.

<sup>47</sup>C.O. 194/67, f. 88, Memorial of the Roman Catholic Clergy and Laity of St. John's to Governor Hamilton, 27 October 1823.

<sup>48</sup>C.O. 194/69, f. 506, Petition from Roman Catholics to House of Commons, 23 March 1824.

<sup>49</sup>C.O. 194/68, f. 475, Petition of Protestant Dissenters and others, the inhabitants of the District of Conception Bay.

<sup>50</sup>James Stephen became the legal advisor to the Colonial Office in 1813. He served as Assistant Under-Secretary from 1834 to 1836 and Permanent Under-Secretary from 1836 to 1847. His report on the "Suggested Legislature for Newfoundland" is found in the appendix in A.H. McLintock, *The Establishment of Constitutional History in Newfoundland, 1783-1832: A Study in Retarded Colonization* (London, 1941) as well as in C.O. 194/82, 19 December 1831.

<sup>51</sup>C.O. 194/69, f. 19, James Stephen to Robert Wilmot Horton, 24 April 1823.

<sup>52</sup>Lahey, "Catholicism and Catholic Policy," 62.

<sup>53</sup>C.O. 194/68, f. 112, Stephen to Horton, 12 March 1824.

<sup>54</sup>C.O. 194/68, f. 112, Stephen to Horton, 12 March 1824.

<sup>55</sup>C.O. 194/68, Josiah Butterworth to Robert Wilmot Horton, 7 May 1824.

<sup>56</sup>C.O. 194/68, f. 232, Butterworth to Horton, 27 May 1824.

<sup>57</sup>(1824) 5 Geo. IV, c. 68: An Act to repeal an Act passed in the Fifty-seventh Year of the reign of His late Majesty King George the Third, entitled, "An Act to regulate the Celebration of Marriages in Newfoundland" and to make further Provision for the Celebration of Marriages in the said Colony and its Dependencies.

<sup>58</sup>Coll. 319, Robert Saunders collection, Journal of the House of Commons, v. 29, p. 479, Centre for Newfoundland Studies Archives, Memorial University.

<sup>59</sup>C.O. 195/17, f. 233, Lord Bathurst to Governor Cochrane, 10 April 1826.

<sup>60</sup>*Journal of the Legislative Council*, 1833.

<sup>61</sup>*Journal of the House of Assembly*, January 1833.

<sup>62</sup>*Journal of the House of Assembly*, January 1833.

<sup>63</sup>(1833) 3 Wm. IV, c. 10 (Nfld.): An Act to repeal the Laws now in force concerning the celebration of Marriages and to regulate future celebration of Marriages in this Island.

<sup>64</sup>A copy of Instructions to Governor Sir Thomas John Cochrane, 1832, is found in the appendix of *The Consolidated Statutes of Newfoundland* (1918) (St. John's, 1919). The reference to divorce is found in section 20.