MATRIMONIAL PROPERTY LAW IN NEWFOUNDLAND TO THE END OF THE NINETEENTH CENTURY

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MATRIMONIAL PROPERTY LAW IN NEWFOUNDLAND TO THE END OF THE NINETEENTH CENTURY

by

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ABSTRACT

In Newfoundland, the passage of three married women's property acts between 1876 and 1895 occurred without any apparent public demand, reform movement, or community response. Although the acts expanded the definition of married women's property, they were only significant to a small minority of married women in Newfoundland at the time of their passage. This was because the legislation largely put in statutory form an existing matrimonial property system which had evolved since the earliest days of English contact. Three broad factors had contributed to the formation of this system. The first was the reception of English law of property, marriage and inheritance. Although they were clearly defined by English law they were applied as far as they could be to local circumstances in Newfoundland. A second factor was the meaning and significance of property in light of Newfoundland's place on England's agenda. From the time of England's earliest interest in Newfoundland, the cod fishery determined the definition of property on the island. As the number of permanent residents increased, there were legislative and judicial attempts to provide a framework for a matrimonial property regime. Finally, the prominent place of customary practice in the ways that residents acquired property and passed it on to future generations was a third factor influencing the evolution of matrimonial property rights. The partible inheritance system that evolved up to the end of the nineteenth century suited the social and economic conditions of the island and reflected the long-standing custom of possessory claim. Property was conveyed through gifts, deeds of conveyance, trusts, wills and by intestacy by family members who were motivated by custom, affection, and desires to provide for the economic security of the next generation as well as to recognize the beneficiaries' contribution to the survival and well-

being of the family. Inheritance practices indicate a society that placed the needs and responsibilities of the family above individual rights, thus tempering the English law of coverture.

The development of a matrimonial property regime in Newfoundland was a gradual, uncoordinated process which received little direction from England. The reception of English property law depended on the tests of local experience and utility. Similarly, late in the nineteenth century Newfoundland adopted English statutory reforms to meet local needs in a way which resolved the ambivalence and contradiction of decided cases.

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Chapter 1: Introduction

In recent years, legal historians have welcomed the shift from a belief in the static nature of the law to accepting the notion that the law is constantly being transformed and modified by the changing norms of society. Those who held to the former position believed that English common law could not change, that its rules were simply applied to new circumstances and thus given the appearance of modification. For some, the progress of legal history has been "a slow revelation and refinement of essentially immutable ideas".[1]

History has proven, however, that at no time has the common law stood still. It has evolved through a series of reforms, some only minor modifications, barely perceptible, others the result of broad, sweeping judicial decisions and legislative enactments. If a code of law can do nothing more than reflect "the opinion of competent observers upon the needs of a given moment",[2] then it is not surprising that profound changes were made to matrimonial property law throughout the early modern period in Britain.

Current Canadian legal historiography has expanded to include a type of legal history which emphasizes the relationship between law and society. Studies of the law in isolation, or "internal" legal history, have given way to investigations that focus on the interaction between social and legal change. No longer accepting the static nature of the law embodied in the phrase 'rule of law', legal historians have embraced a more progressive

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[1] J.H. Baker, *An Introduction to English Legal History*. (3rd ed.) (London: Butterworths, 1990): 223.

[2] C.H.S. Fifoot, *English Law and its Background*. (London, 1932): 3.

approach to methodology in the discipline,[3] one that continues to explore ways in which the law relates to all aspects of society. It has been suggested that such a focus would bring together the impersonality of legal method with history's preoccupation with "change, contradiction and explanation" to produce a new method unique to the study of legal history.[4]

The discipline of Canadian legal history provides a means by which to venture into the uncharted territory of investigating the historical development of matrimonial property law and practice in Newfoundland society. Historians who have studied legal reforms affecting women in society and the broader question of state intervention in family law have begun with an analysis of women's legal status in the community and proceeded to look at how reform was introduced and accepted by the community over time. These studies of law reform have tried to determine how the law adjusts to meet the requirements of society[5] and to what extent the law either represents or coerces community values.[6]

While the evolution of matrimonial property rights in English common law has been

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[3] For an explanation of the "progressive" movement within Canadian legal history, see Barry Wright, "Towards a New Canadian Legal History", *Osgoode Hall Law Journal*, 22, 2 (summer, 1984): 349 - 374. Katherine O'Donavan deals with the concept of 'rule of law' and the impact of feminist theory on legal history in "Engendering Justice: Women's Perspectives and the Rule of Law", *The University of Toronto Law Journal*, 39, 2 (spring, 1989): 127 - 148.

[4] Wright, "Towards a New Canadian Legal History", 360.

[5] Maria Cioni, *Women and Law in Elizabethan England with Particular Reference to the Court of Chancery.* (New York: Garland, 1985): 1.

[6] Marylynn Salmon, *Women and the Law of Property in Early America.* (Chapel Hill: University of North Carolina Press, 1986): xii.

studied in Britain and many of its colonial jurisdictions, this dissertation marks the first study of this topic in Newfoundland[7] history. The major themes of the literature on married women's property rights are examined in Chapter 2. Traditional liberal historiography took the position that highlighted a major legal reform movement of the late nineteenth century, one that, among other things, challenged the long-standing assumptions governing marital unity as presented by William Blackstone in the eighteenth century. Historians studying women's legal history in recent years have argued that women were deprived of their legal rights by the English common law, a patriarchal system which imposed the restrictions of coverture.[8] Their analyses have focused on the legal disabilities placed on women during the eighteenth and nineteenth centuries. They viewed the reforming legislation not only as an important step in improving the legal status of married women but also as a great liberating force which bestowed on married women the rights they had enjoyed as single women. Indeed, several historians have singled out married women's property rights

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[7] For the purpose of this dissertation, Newfoundland includes the island only. The Labrador fishery was the object of European attention for centuries. By the end of the eighteenth century the Labrador ship fishery was well-established with ships arriving annually from England, France, the United States and the British North American colonies. In 1763 Thomas Graves was appointed Governor and Commander-in-Chief of the island of Newfoundland and the coast of Labrador and the Labrador fishery remained under the jurisdiction of the Newfoundland naval governor. The Newfoundland-based Labrador fishery consisted of "floaters", fishermen who operated from schooners, and fishermen who operated from shore premises on the coast. *Encyclopedia of Newfoundland and Labrador*, "Labrador", 203 - 206.

[8] Coverture refers to the legal status of a married woman but is often used to describe a married woman's loss of legal personality which formerly existed at common law whereby, for example, a married woman could not own property free from her husband's claim or control. *Black's Law Dictionary*, (6th ed.): 366. Linda Kerber has defined coverture as "the common law tradition that interposed husbands between their wives and the civic community." Linda Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America.* (Chapel Hill: University of North Carolina Press, 1980): 139.

legislation as paramount in a long progression of reforms in English common-law jurisdictions.

In the 1990s, studies have challenged the impact of these restrictions of coverture at the everyday level, suggesting that in many communities under English common-law jurisdiction, the rules of coverture for various reasons were unworkable.[9] They have broadened our understanding of matrimonial property reform by shifting the focus away from the manner in which laws have been imposed on the community and accepted by its members. They criticize earlier work for having focused on the inadequacies of the common law system and for having generally ignored many examples where the law achieved its goals. Amy Louise Erickson's extensive study of married women's property rights in early modern England examined what was practised in the absence of or ignorance of the law of coverture.[10] Maxine Berg's study of women's property in Britain during the nineteenth century also showed that many women found "alternative legal arrangements" to protect their property within marriage.[11] In her investigation of married women's separate property in Britain, Susan Staves found that legal rules failed to have their obvious social effects because local people simply did not know what the rules were or the rules did not apply to realistic circumstances in the community, or individuals had simply developed

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9 Amy Louise Erickson, *Women and Property in Early Modern England.* (London: Routledge, 1993): 224.

10 *Ibid.*

11 Maxine Berg, "Women's Property and the Industrial Revolution", *Journal of Interdisciplinary History*, 24, 2 (autumn, 1993): 234.

effective avoidance practices such as the use of trusts.[12] Furthermore, those who have studied English colonial jurisdictions have found that in some instances the majority of women neither called for reform nor supported it when it was proposed.[13] For example, Philip Girard's study of married women's property rights in Nova Scotia challenged the literature which placed married women's property rights in the midst of a wave of feminist reform in the nineteenth century. Indeed, the conclusions drawn by these studies and others encourage us to ask a much broader question: how does the community deal with legal questions when, for a variety of reasons, the law is uncertain, inapplicable or inappropriate? This is especially important in the case of Newfoundland where, as in Nova Scotia, there appears to have been no popular movement advocating reform, for example, of the restrictions signalled by coverture or the property rights of married women.

This study of matrimonial property rights encompasses three areas of English law: property, inheritance and marriage. Property law includes the rules governing real and personal property as well as the classification of property known as chattels real[14] which is

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12 Susan Staves, *Married Women's Separate Property in England, 1660 - 1883.* (Cambridge: Harvard University Press, 1990): 205 - 206. Staves cites the example of the law of dower which according to her research was forgotten or unknown in some communities before the passage of the Dower Act of 1833. Dower consists of a married woman's life interest in one-third of the land owned by her husband. *Black's Law Dictionary*, 493. Dower is discussed in Chapter 3.

13 For an elaboration of these arguments regarding recent histories of married women's property legislation, see Philip Girard and Rebecca Veinott, "Married Women's Property Law in Nova Scotia, 1850 - 1910", in Janet Guildford and Suzanne Morton, (eds.) *Separate Spheres:Women's Worlds in the 19th century Maritimes.* (Fredericton: Acadiensis Press, 1994): 67 - 91.

14 Chattels real refers to the classification of property which involves an interest in land for a fixed term of years (leasehold). William Geldart, *Introduction to English Law.* (Oxford: Oxford University Press, 1991): 76.

of particular importance to the Newfoundland experience. Inheritance law informs us of the ways in which individuals conveyed their property to others through a variety of means, such as wills, deeds, trusts, and via intestacy. Marriage law was vital in establishing the rightful heirs to property. In the early nineteenth century the reception of English marriage law in Newfoundland became an issue for local clerical and legal authorities who were concerned that marriage ceremonies performed by anyone other than those legally authorized to do so would prevent the court from determining the legitimate heirs to real and personal property.[15] English law of property, marriage and inheritance are intricately connected and are further examined in Chapter 3.

My research into married women's property rights in Newfoundland began with an examination of local statutes passed between 1876 and 1895. Records of the two houses of the Newfoundland legislature and several newspapers[16] from the period indicated that the reforms to English matrimonial property law in Newfoundland were not attended by a reform movement. The statutes reflected, for the most part, the statutes passed in Britain in 1870 and 1882. There was no debate in the Newfoundland legislature, no public demand for reform and no discernible public response to the statutes. These findings inspired

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15 Provincial Archives of Newfoundland and Labrador (PANL), GN 2/1/A/13, Colonial Secretary's Office, Outgoing Correspondence, Chief Justice D'Ewes Coke to Waldegrave, August 29, 1797. In 1812 Governor Sir John Thomas Duckworth sought the advice of law officers of the Crown in London regarding the legality of marriage in Newfoundland and the right of children to inherit real property in England. Colonial Office Records (C.O.) 194/52, Governor Duckworth to the Earl of Liverpool and a copy to law officers of the Crown, April 14, 1812.

16 Newspapers included "Royal Gazette and Newfoundland Advertiser", "Patriot and Terra-Nova Herald", and "Public Ledger" for the years 1870 to 1895. Legislative records included the *Journal of the Legislative Council of Newfoundland* and the *Journal of the House of Assembly of Newfoundland.* The records examined were those of the years in which the statutes were passed, 1876, 1883 and 1895.

several questions. How did the population of Newfoundland, whose roots were in Britain, regard matrimonial property? What circumstances influenced the ways in which the community responded to property issues? What significance did title to property have in a domestic economy based on the fishery? People had lived on the island since at least 1610. Had the community perhaps devised ways to own or share property prior to statutory reform in the late nineteenth century?

In seeking the answers to these questions, it became necessary to begin with the history of the earliest years of English contact with the island. For almost three centuries after the discovery of the Newfoundland cod stocks, the English government[17] regarded Newfoundland as a fishing station. The English fishery gradually developed throughout the sixteenth century in competition with the Portuguese, Spanish and French.[18] The migratory fishery was valued as a supplier of cod and a source of recruitment for the Royal Navy.

The importance of Newfoundland's fishery on the imperial agenda, as we shall see in Chapter 4, directly affected settlement of the island and the gradual emergence of a legal regime. Following the example of the Spanish and Portuguese in establishing colonies in the New World, English attempts at colonization began in 1583 when Sir Humphrey Gilbert sailed into St. John's harbour. Royal charters to establish proprietary colonies offered land to corporations and to individuals in the early seventeenth century. The colonial proprietors had jurisdiction over the seasonal fishery but their jurisdiction was

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[17] The terms British, Britain and Great Britain came into use after the union of England and Scotland in 1707. In this dissertation, Britain is used in reference to events after that date but refers specifically to England.

[18] Shannon Ryan, "Newfoundland: Fishery to Canadian Province", in E. Boyde Beck et al, (eds.) *Atlantic Canada: at the Dawn of a New Nation, an Illustrated History.* (Burlington, ON: Winsor Publications, 1990): 10.

contested. While many of these colonies failed, permanent settlement continued.[19] Expansion of settlement into more harbours followed from the development of the migratory fishery, rather than through colonization. Permanent settlement, though not large, became an issue for the English government. After 1650 the government attempted to discourage settlement because of fears that a resident fishery would interfere with the migratory one and eliminate an important source of recruits for the Royal Navy. However, by this time the migratory fishery was becoming increasingly dependent on Newfoundland planters.[20]

For those who lived on the island and those who continued to visit, resident governors and their appointed surrogates after 1729 exercised their authority and heard disputed cases by virtue of their commissions. There was only an *ad hoc* response to local developments through the royal prerogative. Residents and the local judiciary adjusted the rules when circumstances dictated. Until 1699 there was no statutory legislation specifically directed towards Newfoundland since colonies were directly held by the Crown not the English Parliament. Thus Newfoundland was a possession of the English monarchy.[21]

Because of the importance of the island to the English fishery, private ownership of

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19 In 1677 there were 28 harbours permanently occupied by a total population of 1,863 residents. They included: 162 planters, 137 sons, 130 daughters, 1,327 men servants and 13 women servants. Ryan, "Fishery to Canadian Province", 13.

20 Planters were resident fishermen. Ryan, "Fishery to Canadian Province", 14. Also see Chapter 4 of this dissertation.

21 Keith Matthews, *Collection and Commentary on the Constitutional Laws of Seventeenth Century Newfoundland.* (St. John's: Maritime History Group, Memorial University, 1975): 8.

property was formally discouraged. The royal charters to the colonies in Newfoundland provided for the application of English law but raised crucial questions about property, who was to hold it, and under what conditions. Property ownership was only gradually permitted, confirmed by statutes, and administered by registration of deeds in the early nineteenth century. Legislation passed by the English Parliament gradually created a legal system towards the end of the eighteenth century and the nature of property was shaped and gained legal definition.

In this dissertation we examine three interrelated factors which contributed to the system of matrimonial property rights in Newfoundland up to the passage of legislation which ended with the third statute in 1895. The first factor is the reception of the English law of property, marriage and inheritance. While English law operated in Newfoundland from the earliest days of European contact, its formal reception and the manner in which laws could be applied to "local circumstances" remained an issue throughout the nineteenth century. While the laws pertaining to property, inheritance and marriage were clearly defined by English common law, it was not always possible or appropriate for local authorities to enforce the formal rules of common law given local customs and practices.

A second component in the evolution of matrimonial property rights pertains to the legal definition of property as debated within the legislative and judicial circles. This is an important factor in light of the value of the fishing room to the individual and to the economy. The debate over the meaning of property surfaced as early as 1792 when Chief Justice John Reeves ruled on the case of *Kennedy v. Tucker*.[22] It was manifested in the decision made by the first colonial legislature in 1834 to classify landed property as chattels

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22 PANL, GN 5/4/C/1, Ferryland Court of Sessions Minutes, Southern District, 1786 - 1838, *Kennedy v. Tucker*, 1792.

real, thereby defining the nature of property for the purposes of inheritance. By doing so, legislators in the initial years of representative government, were attempting to either affirm or declare, depending on the interpretation, that land in Newfoundland was considered chattels real. As such, it possessed the characteristics of leaseholds rather than those of real property. The reception of English law and the Chattels Real Act are examined in Chapter 5.

A third feature which contributed to matrimonial property rights was the prominent place of customary practice in the manner in which residents acquired possession of property and passed their real and personal property to others through deeds, trusts, wills, and via intestacy. Throughout the eighteenth century, inhabitants chose and cleared pieces of ground on which to build for the purpose of carrying on the fishery. They claimed title to property by quiet possession. Over time, these lands were recognized in the communities as belonging to the family of the individuals who cleared it. Just as local disputes were regularly mediated outside the formal rules of common law,[23] matters of inheritance and ownership of property often took on their own complexion in small, isolated communities where in the absence of or ignorance of a local authority, boundaries of property were recognized and sanctioned by the community. Property was passed on to family members of the next generation who were close at hand. Sons and sons-in-law built houses on the land owned by the previous generation. The family was expected to take care of its own needs unless the husband, father, and collateral kin were no longer present or refused assistance. Like the legal definition of property, the inheritance system reflected the value

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[23] Christopher English, "From Fishing Schooner to Colony: The Legal Development of Newfoundland, 1791 - 1832", in Louis A. Knafla and Susan W.S. Binnie, (eds.) *Law, Society, and the State: Essays in Modern Legal History.* (Toronto: University of Toronto Press, 1995): 91.

of the fishing room and the importance of providing a measure of economic security in a society with precarious economic conditions. The land was valued, not as an indicator of wealth, but by its proximity to the sea, the very source of livelihood. The transfer of possession, therefore, was crucial. The features of the inheritance system are the focus of Chapter 6.

The Sources

Primary sources for the construction of these themes are found in three locations: the Centre for Newfoundland Studies (CNS) at Memorial University of Newfoundland; the Provincial Archives of Newfoundland and Labrador (PANL) and the Registry of Deeds at the Confederation Building in St. John's. Court records from the 18th, 19th, and 20th centuries are partially preserved in the Provincial Archives.[24] The court records are organized by district: northern, central and southern and by the types of courts: Surrogates Court; Courts of Sessions, Magistrates Court, and the Supreme Court, in St. John's and on circuit. The records are divided into various categories such as minutes, writs, judgements, causes, miscellaneous and estate matters. A detailed list is found in the bibliography. Researchers should note that these records often overlap so they should not, for example, limit their research to files labelled "estate matters" when researching evidence pertaining to property matters. No court transcripts are included in these records. The "minutes" records provide only the date of court cases, the parties and a description in a few sentences of the dispute. The outcomes of cases are not always noted. There is a chronological structure to the records but there is considerable overlapping of time periods and topics and gaps in the records. There are no finding aids or indices to locate the

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[24] The Government Documents directory at PANL notes that the Court Records are kept in 90 metres of boxes. There are general indices which are helpful for focusing on a particular Court, district, or general time period.

property cases generally or particular court cases. The researcher should also be aware that, as these are the original ledgers, the older records from the eighteenth century and early nineteenth century are very fragile, hand-written, faded and occasionally illegible. In researching the court records for evidence pertaining to matrimonial property my intentions were: to find court cases where property rights were in dispute; to uncover evidence of women appearing before court to deal with property matters; to find evidence of wills, deeds of gift and conveyance, and trusts; and to find judicial commentary on property rights and property law. All wills found in the court records were included in this study.

A Registry of Wills is also held at the Provincial Archives. Six volumes of wills from 1824 to 1900 have been provided by the Supreme Court of Newfoundland and have been placed on microfilm. The first four volumes are typed. The wills are not arranged in a strict chronological order, although each has a general time frame of two decades of the nineteenth century. Volume one contains wills from the 1820s and 1830s, volume two covers the 1840s and 1850s, volume three contains wills primarily from the 1860s and 1870s, and volume four consists of wills from the 1870s and 1880s. Volumes five and six which are found on one reel of microfilm are in the original handwriting and include wills from the 1880s and 1890s. The Registry of Deeds located in the Confederation Building in St. John's provides another source of wills. These are scattered throughout ledgers of handwritten deeds from the eighteenth and nineteenth centuries. The wills found in each of the six volumes in the Registry of Wills and the ledgers labelled "Miscellaneous Deeds and Wills, 1744 - 1810" in the Registry of Deeds were examined.

The Provincial Archives also holds several manuscript collections which include family papers, records from law firms, and private collections donated to the Archives. Several of these have finding aids and are listed in alphabetical order in the directory of

manuscript collections. Forty-seven collections were examined for records of wills, deeds and property transactions and evidence from eleven of these was found pertinent to this dissertation. The Centre for Newfoundland Studies Archives at Memorial University also holds many collections of papers, both private and public records, containing wills and records relating to property ownership and conveyance. Nine collections were researched for this study. All wills found in collections held in the Provincial Archives and the Centre for Newfoundland Studies Archives were examined. For the analysis of inheritance practices found in chapter 6, 423 wills were used. Of these, 81 wills or 20 percent represent all the wills written by women, as widows, single women and married women. Wills representing each decade from 1759 to 1899 made it possible to determine whether testation practices changed significantly over time. Further analysis of the demographics and contents of the wills is found in chapter 6.

The Centre for Newfoundland Studies at Memorial University and the Provincial Archives hold the Colonial Office Records (C.O. 194, 195) which are valuable primary sources for Newfoundland history. They consist of documents and correspondence from the Governor's office and other high level officials in Newfoundland to the Colonial Office in England. The Centre for Newfoundland Studies also holds copies of local newspapers, statutes and proceedings of the local legislature which were essential to this study. Several secondary sources from Newfoundland historiography provided the background for Newfoundland's early economic history, legal history, and settlement patterns.

Chapter 2: Review of the Literature on Matrimonial Property

Research on matrimonial property law in English common-law jurisdictions has expanded in recent years and has focused on four basic themes. First, many legal historians place property rights legislation within a broader legal reform movement which began in Britain in the last half of the nineteenth century and surfaced in the colonies. Secondly, those who study women's history have associated the passage of married women's property rights legislation with a gradual loosening of the restrictions of coverture, marital unity and patriarchal control over property, developments they consider vital to the emancipation of women. Thirdly, while statutory reform improved the legal status of married women in the long term, some writers suggest that the immediate effects were minimal. The legislation, they argue, was passed in a strongly patriarchal society and the law simply accommodated rather than challenged the traditional power structure of society and the home. Moreover, those who demanded matrimonial property reforms were concerned to protect the economic interests of a rising middle class. Some of these historians have also assessed the impact of the reforms once passed by local legislatures by examining, for example, how the judicial system responded to these new laws. A fourth and more recent dimension to the issue of matrimonial property rights brings us beyond the reform movement to consider a number of questions. What was the significance of matrimonial property legislation in colonial jurisdictions where there was no reform movement? Did the community find ways to adapt or circumvent the law of property to suit its own needs? This chapter reviews each of these four themes as well as various secondary sources on Newfoundland history.

Much of the British and American historiography on the reform of married women's property rights in the 1970s and 1980s begins by placing it within the context of a major reform movement, the intention of which was to streamline and consolidate a legal system which was generally considered outmoded and cumbersome at that time.[1] In the second half of the nineteenth century, the successful passage of English common-law reform inspired the colonies under British jurisdiction to copy or adapt legislation in their own territories, though not always for the same reasons.

Early in the twentieth century, A.V. Dicey identified two consecutive trends in British legal reforms of the previous century. The first was an emphasis on the promotion and protection of individual liberties, the second aimed at passing legislation to protect groups of people, such as the homeless and sick and to improve the rights of married women.[2] Within this wider movement, efforts to reform the law of property were designed to "defeudalize" the law and force it to adjust to changing economic conditions. In some cases, mere changes in judicial procedures, partially at least, accommodated changes in divorce laws and matrimonial causes.[3] J.H. Baker cites these changes as part of a "wave of systematic reform" of the English legal system[4], culminating in the consolidation of

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[1] Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England.* (Toronto: University of Toronto Press, 1983): 47. Norma Basch, *In the Eyes of the Law: Women, Marriage and Property in Nineteenth-Century New York.* (New York: Cornell University, 1982): 228.

[2] *Ibid.*, 300.

[3] Mary Lyndon Shanley, " "One Must Ride Behind": Married Women's Rights and the Divorce Act of 1857", *Victorian Studies*, 25, 3 (1982): 355.

[4] Baker, *An Introduction to English Legal History*, (3rd ed.): 246.

common law[5] and equity[6], in 1875.[7]

The second major theme of the literature has been advanced by those who have studied the legal status of women throughout history. Legal history's recent emphasis on the law as an emanation of wider social norms has created a receptive atmosphere for studies in women's legal history. One focus of these studies has been to investigate the ways in which male-defined rules of law affected married women, the extent to which these rules served the interests of men, and the reasons why some women accepted or rejected them. One of their objectives has been to determine how men and women held power in the family by studying their respective rights and control over property. The extent to which matrimonial property rights legislation removed some of the restrictions of coverture has been a prominent subject for discussion.

Feminist historians of family law have challenged traditional assumptions regarding the law's objectivity, revealing the varied experiences of women from the perspectives of women themselves.[8] They have also considered how the law functioned in practice as well

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[5] Common law consists of those principles and rules of action which derive their authority from customs and usages and the judgements and decrees of the courts. Common law is distinguished from laws that are created by the enactment of legislatures. *Black's Law Dictionary*, 50. See also William Blackstone, *Commentaries on the Laws of England*, v. 1 (1764) (Buntingford: Layston Press, 1966): 442.

[6] Equity was a system of judge-made rules and principles which originated in fifteenth-century England to modify what was perceived as the harshness of the common law or as an opportunity to obtain justice where the common law seemed inadequate. *Black's Law Dictionary*, 484. Further explanation of equity is found in Chapter 3.

[7] A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England in the Nineteenth Century.* (London: Macmillan, 1914): 208.

[8] Susan Boyd, "Some Postmodernist Challenges to the Feminist Analysis of Law, Family and State: Ideology and Discourse in Child Custody Law", *Canadian Journal of Family Law*, 10,1 (1991): 79 - 113.

as in theory by investigating how legal rules directly affected the daily lives of women.[9] If the law is coercive as well as representative of community values, it is important to know what these legal rules were, whose goals were served, how they affected the experiences of women, and how they influenced the roles of both men and women in society.

These works also focus on the significance of property reforms in the wider context of other reforms affecting the legal status of women and the ways in which the patriarchal nature of society shaped the legislation and its judicial interpretation. Improvements in the law regarding the rights of women, such as legislation governing property ownership, child custody, divorce, prostitution, infanticide and rape are seen as part of the agenda of the nineteenth-century feminist struggle.[10]

Several historians have assessed the motives of those who opposed the passage of married women's property reforms. They conclude that such individuals were fearful that the male dominance of the public and private spheres was being threatened by changes in the law. Joan Perkin, for example, has argued that the recognition of a wife as a separate person entitled to separate property caused tremendous concern among members of the British Parliament in the 1860s.[11] Change was slow because men feared that giving women control of their own property and earnings would somehow end wifely obedience,

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9 Salmon, *Women and the Law of Property in Early America*, xi.

10 There are many sources which highlight the role of the feminist movement in gaining legal rights for women in the nineteenth century. Among these are: Holcombe, *Wives and Property.* (Britain), Constance Backhouse, *Petticoats and Prejudice.* (Toronto: The Osgoode Society, 1991) (Canada), Joan Hoff, Law, *Gender and Injustice.* (New York: New York University Press, 1991) (U.S.)

11 Joan Perkin, *Women and Marriage in Nineteenth-Century England.* (Chicago: Lyceum Books, 1989): 304.

give women a novel sense of independence and ultimately result in a "parliament in petticoats".[12]

Historically, the laws governing married women, in particular, were representative of the law's protective function. The common law subordination of wife to husband was accepted and praised for providing women with protection. Blackstone in the eighteenth century concluded his description of the laws pertaining to husbands and wives with the words, "so great a favourite is the female sex in the laws of England".[13] Historians cite the valuable role of equity in protecting the property of married women, particularly a daughter's inheritance from an unscrupulous husband through the use of a marriage settlement.[14] William Holdsworth has argued that while equity "faithfully followed the law in the variety of estates which it recognized", it retained considerable power to mould decisions regarding these estates in accordance with its ideas of "justice and public policy".[15]

Feminist historians have argued, however, that neither the law nor the position of married women in it was fixed and immutable. While marriage settlements may have been an adequate means of protecting inheritance, the access to and cost of marriage settlements

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[12] (Great Britain) Hansard, *Parliamentary Debates*, 3rd series, 240 (19 June, 1878).

[13] Blackstone, *Commentaries*, v. 1, 433.

[14] Dicey, *Lectures*, 376. For a more recent analysis of the role of equity in protecting married women's property "despite the common law rules", see Cioni, *Women and Law in Elizabethan England.*

[15] William Holdsworth, *The History of English Law*. v. XII (London: Methuen, 1924): 266.

was proof that the law as it existed before the reform legislation favoured the wealthy and guaranteed one law for the rich and one for the poor. Whatever protection law offered to the married woman, the rules which offered protection also imposed restraints and it is those restraints which the demand for property rights legislation in some English common-law jurisdictions tried to eliminate. The new property laws of the late nineteenth century, in their view, gave women some degree of economic independence by offering them the opportunity to secure separate ownership of property.[16]

A third theme of the literature suggests that the primary reason behind the passage of the legislation was not a wish to improve the legal status of married women, but economic. They argue that the desire to reform women's property rights came from creditors who wanted to rid the law of the common-law rule that a woman was not responsible for her prenuptial debts and could use her husband's credit without incurring any obligation herself.[17] Some men might benefit from taking automatic possession of their wives' property since that property would remain free from creditors. This motive on the part of married men underlies the nineteenth-century shift in the nature of property from land to movable property such as money. It reinforces the argument that middle-class interests that were at stake in these reforms.[18] The property acts attempted to regulate

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[16] Carol Dyhouse, *Feminism and the Family in England, 1880 - 1939.* (Oxford: Basil Blackwell, 1989): 57.

[17] Mary Lyndon Shanley, *Feminism, Marriage and the Law in Victorian England, 1850 - 1895.* (Princeton: Princeton University Press, 1989): 16. For a discussion on the connection between the passage of married women's property acts and the motives of creditors in Ontario, see Lori Chambers, *Married Women and Property Law in Victorian Ontario.* (Toronto: The Osgoode Society, 1997).

[18] Shanley, *Feminism*, 16.

debtor-creditor relations and thus reflected a desire to make the law fit the needs of a commercial market economy. Business interests took advantage of adjudication through the courts because it was less politically conspicuous than the legislative process.[19]

This is a recurring theme in the literature from several jurisdictions. These historians argue that the legislation benefitted some women economically but only to the extent that creditors were not detrimentally effected. In her study of married women's property reform in the United States, for example, Norma Basch views the political and economic adjudication of property rights as part of a wider movement for legal change which suited the economic order, namely the needs of an increasing middle class.[20] Constance Backhouse also contends that one of the goals of the legislation in Ontario was to regularize creditors' rights, by subjecting married women to the same property laws that governed everyone else.[21]

As the rules of coverture were less rigidly enforced, reform extended equity treatment to all women. Legislators responded to changing economic conditions which necessitated among other things that the obligations between a married woman and her

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[19] Morton J. Horwitz, *The Transformation of American Law, 1780 - 1860* (Cambridge: Harvard University Press, 1977): 16 - 30. See also Deborah Rhode, *Justice and Gender: Sex Discrimination and the Law.* (Cambridge: Harvard University Press, 1989).

[20] Basch, *In the Eyes of the Law,* 228. Norma Basch also argues that there were few differences between the British and American application of common law to married women. The major departure was procedural and for the most part necessitated by the sale of land. Basch, *In the Eyes of the Law*, 23.

[21] Constance Backhouse, "Married Women's Property Law in Nineteenth-Century Canada", *Law and History Review*, 6,2 (fall, 1988): 212.

husband's creditors should be fixed in law.[22] Mary Shanley credits the middle class, which found its power and status in "moveable" property, for changes in married women's property rights.[23] Middle-class men, who normally would not champion such causes, were prepared, if not anxious, to provide their daughters with economic security independent of their husbands.[24] Shanley and Dorothy Stetson agree that a trust or separate estate in equity was favoured by wealthy fathers and appealed to many middle-class men.[25] Each group supported legislation to extend legal and equitable trusts to all married women.[26]

Several writers have drawn a connection between property reform and the entry of more women into the marketplace. For centuries married women faced "social closure" because they lost control of their property to their husbands. Although their material circumstances might vary, all women were affected by the economic constraints of coverture and it was this condition which led the early feminists to argue for married women's property reform. Susan Atkins and Brenda Hoggett identify the married women's property acts of 1870 and 1882 in Britain as marking the end of woman's dependence upon

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[22] Hoff, *Law, Gender and Injustice*, 122.

[23] Shanley, *Feminism*, 15.

[24] Peggy A. Rabkin, *Fathers to Daughters: The Legal Foundations of Female Emancipation.* (Westport, Connecticut: Greenwood Press, 1980): 13.

[25] Dorothy Stetson, *A Woman's Issue : The Politics of Family Law Reform in England.* (Westport, Connecticut: Greenwood Press, 1982): 58. See also Shanley, *Feminism.* 15.

[26] Stetson, *A Woman's Issue*, 58.

her husband and providing her greater opportunity to participate in the marketplace,[27] a position supported by Linda Kerber's study in the United States.[28]

The property rights of women have been seen as a key component in women's struggle for economic independence because the rights were directly affected by coverture and because property is passed on from one generation to the next through an inheritance system. By carefully defining who the heirs should be, the law helped to shape the economic security of the next generation.

With respect to the relationship between property rights and coverture, Linda Kerber's study suggests that "by inhibiting the independent manipulation of property [by a woman], coverture reinforced political weakness and was used to justify other elements of the traditional legal system that did the same".[29] The courtroom, for example, remained a male domain as women were excluded from formal legal training and were not permitted to serve on juries.

Did the property reforms have an immediate and positive impact on the legal status of women in the workplace and in the home? While law reformers tended to argue publicly that a legal affirmation of women's legal equality was necessary, the laws were passed in

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[27] Susan Atkins and Brenda Hoggett,*Women and the Law*. (Oxford: Basil Blackwell, 1984): 101.

[28] Linda Kerber, "Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History", *Journal of American History*, 75, 1 (1988): 22.

[29] Kerber, *Women of the Republic*, 152.

the midst of a patriarchal society.[30]Atkins and Hoggett caution that these statutes did not have the great liberating effect that some have assigned to them. Women, in their role as housewives, were fully dependent upon their husbands to provide a family wage. The spheres were clearly separate and enveloped in ideals of respectability and domesticity as they were valued at the time.[31] Any deviation from the Victorian standard of the male breadwinner was considered by many to be a threat to society. While married women's rights legislation formally improved the legal position of women, reform, it has been argued, occurred within societies where the legal, economic and social subordination of women was firmly entrenched. In her critique of histories of the family, Susan Okin argues that the "egalitarian family" did not exist at the end of the eighteenth century. [32] She challenges the conclusions of Randolph Trumbach[33] and Lawrence Stone[34] that the patriarchal power of husbands was diminished by the late 1700s. She further criticizes the

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[30] Atkins and Hoggett, *Women and the Law*, 101. See also Shanley, *Feminism*, 12.

[31] Joan Hoff identifies three 'legal fictions' pertaining to women in the nineteenth century, none of which contributed to an improved legal status. They are: the fiction of marital unity, the inherent inferiority of women due to their biological make-up, and the more modern assumption of the moral purity represented by women. Hoff, *Law, Gender and Injustice*, 119.

[32] Susan Moller Okin, "Patriarchy and Married Women's Property in England: Questions on Some Current Views", *Eighteenth Century Studies*, 17, 2 (1983/1984): 121 - 138.

[33] Randolph Trumbach, *The Rise of the Egalitarian Family: Aristocratic Kinship and Domestic Relations in Eighteenth-century England.* (New York: Academic Press, 1978).

[34] Lawrence Stone, *The Family, Sex and Marriage in England, 1500 - 1800.* (New York: Harper and Row, 1979).

position that changes in married women's property rights were indicative of this shift to egalitarian relations within the family, especially between husband and wife. Okin cites a number of reasons to support her position including the common law of coverture, the practice of having the husband appointed trustee in equity settlements, and the legal limitations on the rights of married women to dispose of their property.[35] The public recognition of the right to separate property, she argues, did not affect the allocation of economic power within the home.

Support for the position that the property laws did little to improve women's immediate legal status is substantial.[36] Rachel Harrison and Frank Mort argue that reforms such as married women's property acts and divorce, though considered progressive legislation, were, nevertheless, limited in their impact by the patriarchal nature of nineteenth-century British society.[37] The legislation did little to undermine the husband's authority over his wife; he remained head of the household and the power structure of the family was not in any way jeopardized.[38] Men retained their control over most property

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[35] Okin, "Patriarchy and Married Women's Property in England", 123.

[36] For a discussion on the concept of patriarchy, see Judith M. Bennett, "Feminism and History", *Gender and History*, 1, 3 (autumn, 1989): 251 - 271. In that article, Bennett quotes the definition of patriarchy found in Adrienne Rich's, *Of Woman Born*. (London, 1976): 57. Patriarchy is defined as: "...a familial-social, ideological, political system in which men - by force, direct pressure, or through ritual, tradition, law, and language, customs, etiquette, education, and the division of labour, determine what part women shall or shall not play, and in which the female is everywhere subsumed under the male".

[37] Rachel Harrison and Frank Mort, "Patriarchal Aspects of Nineteenth-Century State Formation: Property Relations, Marriage and Sexuality", in Philip Corrigan, (ed.) *Capitalism, State Formation, and Marxist Theory*. (London: Quartet Books, 1980): 108.

[38] Julia Brophy and Carol Smart, "From Disregard to Disrepute: The Position of Women in Family Law", *Feminist Review*, 9 (autumn, 1991): 5.

through inheritance or by virtue of the fact that they were the primary wage-earners. Although there were some differences in the way women of different classes were treated in high courts and magistrates' courts, the courts in general took a dim view of women who, as adulterers or single mothers, violated the family structure and undermined patriarchal authority.[39] Albie Sachs provides an added dimension by focusing on the changes that were taking place in the family and in the nature of property as a result of industrialization.[40] While nineteenth-century society initially rested on the legally-supported monogamous family and the traditional distinction between land and other forms of property, Sachs argues that industrialization was gradually creating new forms of wealth and transforming the family. Such new indicators of wealth as investment capital necessitated legal reform of inheritance rules. The marriage settlement as a device to protect a daughter's inheritance was becoming outmoded and legislation to allow women to hold property of any design separately from their husbands was needed.[41] But, Sachs cautions, the Married Women's Property Acts and the Matrimonial Causes Act were just the beginning of a series of reforms involving women which extended well into the twentieth century and were designed to complement rather than compete with the rights and privileges of men. Jeffrey Weeks agrees that changes in property acts were a result of

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39 *Ibid.*

40 Albie Sachs, "The Myth of Male Protectiveness and the Legal Subordination of Women", in Carol Smart and Barry Smart, (eds.) *Women, Sexuality and Social Control.* (London: Routledge and Kegan Paul, 1978): 35.

41 *Ibid.*

industrial capitalism and the resulting changes in family patterns.[42] The legal changes which occurred allowed increased freedom of testation.

For many of these historians, the property reforms did little to challenge the old concept of marital unity so entrenched in English common law. Norma Basch suggests that the challenge to the "marital prototype" in American society came from the demand for structural reform of the legal system, particularly the need to make more uniform property laws. While the reforms responded to the need to change the law to suit the increasing complexities of the marketplace, the laws were also able to secure woman's place in the "lofty sphere" by maintaining some of the constraints of coverture.[43] Thus, in agreement with much of the other literature, Basch argues that the legal fiction of marital unity certainly survived the legal reforms of the nineteenth century.

Constance Backhouse summarized the motives of Canadian legislators by suggesting that their goals were varied and sometimes conflicting.[44] Some were motivated by a paternalistic desire to provide women with a source of income while others adhered to the traditional protective function of the law and wished to preserve married women's property from seizure for their husbands' debts. In terms of the colonies' response to the reforms passed in Britain, Backhouse has argued that the later legal reforms, at least, were representative of a "self-imposed genuflexion on the part of an imitative subservient colony

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[42] Jeffrey Weeks, *Sex, Politics and Society.* (London: Longham, 1981): 82.

[43] Basch, *In the Eyes of the Law*, 39.

[44] Backhouse, "Married Women's Property Law", 241.

to an imperial power".[45]

Lori Chambers' recent study of married women's property rights in Ontario in the nineteenth century is the first substantive study of that topic. In her doctoral dissertation[46] and book that followed, she concludes that any revolutionary effects of statutory reform were both unforeseen and for the most part, undesired. Building on Backhouse's conclusions, she argues that the laws were enacted incrementally in a practical attempt to protect wives from their husbands' abuse and misconduct. Reform resulted from a concern that men were ignoring their familial obligations. Moreover, legislators constructed the reforms in such a way to preserve the authority of husbands within marriage. Except in rare circumstances, judges were fully supportive of the legislation, having taken upon themselves the responsibility to protect the "weak and defenceless". In this way, Chambers argues, "the responsibility for such protection simply passed from family patriarchs to male representatives of the state".[47]

The slow movement to reform may have reflected a lack of agreement between the legislature and the courts towards the changes being sought.[48] Concern over the changing roles of women and the alterations made in the operation of the family economy by new

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[45] *Ibid.*.

[46] Lori Chambers, "Married Women's Property Rights in Nineteenth Century Ontario", Ph.D dissertation, University of Toronto, 1994.

[47] Lori Chambers, *Married Women and Property Law in Victorian Ontario.* (Toronto: The Osgoode Society, 1997): 12.

[48] Richard Chused, "Late Nineteenth-Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures", *American Journal of Legal History*, 29, 1 (January, 1985): 3.

statutes affected these attitudes. Courts and legislatures were confronted with a variety of disputes raising issues about the appropriate definition of a married woman's separate estate. The vague language in many of the statutes left considerable room for argument and litigation. Disputes arose about the sorts of property that could be owned by a married woman, the form of the documents necessary to establish a separate estate, the ability of women to invest in their own property and to dedicate their property to the payment of personal obligations, and the legitimacy of contracts dealing with separate estates.

The literature also suggests that any great strides towards legal equality intended by the legislators were hampered by judicial response. Much of the Canadian and American literature examines ways in which a conservative judiciary in the nineteenth century served to subvert any progressive tendencies of the new reforms by adhering to the demands of the traditional male power structure in society. Backhouse, for example, challenges the notion that the reforms in Ontario had an immediate social impact by showing the judiciary's reluctance to bring about immediate change.[49] The majority of judicial decisions relating to women's property rights in nineteenth-century Canadian society, Backhouse argues, illustrated a reluctance on the part of judges to undermine the male authority in the family.[50] Thus, even with the legislative measures passed, restrictive judicial interpretation necessitated extensive amendments. As a result, a positive social impact that might have been forthcoming from the passage of the legislation was gradual rather than immediate. Chambers concludes that judges interpreted the married women's property acts liberally when wives could prove that their husbands were economically

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[49] *Ibid.*, 211 - 257.

[50] *Ibid.*, 219.

irresponsible but narrowed their interpretation when a woman's property was perceived as threatening to the male dominance within the home.[51]

In the early period following the enactment of legislation in the United States, the interpretative role of judges adhered to the strict construction of statutes in derogation of the common law and limited the practical gains of married women.[52] The legislation, therefore, did not revolutionize the legal status of women but merely modified existing legal conditions. Furthermore, any genuine potential they may have held was eroded in the appellate courts.[53]

Susan Boyd and Elizabeth Sheehy conclude that judicial attitudes in Canada reinforced the overall structure of relations between men and women within the market economy.[54] Narrow judicial interpretations affected property cases and other areas of the law. While Canadian legislators gradually broke with the English model of legislation, Canadian judges in such areas as rape law followed English precedent extensively and gave no indication that they thought there was any distinction between Canadian and British law. In the application of family law, judges restricted the scope of the legislation so that, by the

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[51] Chambers, *Married Women and Property Law in Victorian Ontario*, 180.

[52] Leo Kanowitz, *Women and the Law: The Unfinished Revolution.* (Albuquerque: University of New Mexico Press, 1969): 40.

[53] Basch, *In the Eyes of the Law*, 38.

[54] Susan Boyd and Elizabeth Sheehy, "Canadian Feminist Perspectives on Law", *Journal of Law and Society*, 13, 3 (autumn, 1986): 289.

end of the century, legislatures responded with a series of statutory amendments.[55] A study of the attitudes of the Canadian magistracy towards prostitution concludes that social conservatism, scepticism about the inability of the law to induce moral change and close identification with police values and imperatives prevented most male magistrates from understanding the reformers and their priorities.[56] In short, the philosophy of control was maintained and the reformers had little impact on the thinking and values of most members of the magistracy. In her investigation of nuisance cases, Jennifer Nedelsky suggests that Canadian judges followed English precedents but ignored the most recent English courts that relaxed the nuisance laws to accommodate the needs and demands of an industrializing society. [57] They protected traditional rights and felt that changes to property rights, if necessary, should be done only by legislative intervention. Dorothy Chunn also downplayed the "stimulus-response model" of law reform by showing that there was no direct link between what reformers demanded and what political decision makers implemented as policy.[58] Demands for reform, she argues, were always tempered by

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55 Constance Backhouse, "Nineteenth-Century Canadian Rape Law, 1800 - 1892", in David H. Flaherty (ed.) *Essays in the History of Canadian Law*, v. II (Toronto: The Osgoode Society, 1983): 200.

56 John McLaren, "The Canadian Magistracy and the anti-white Slavery Campaign, 1900 - 1920", in Wesley Pue and Barry Wright, (eds.) *Canadian Perspectives on Law and Society: Issues in Legal History*. (Ottawa: Carleton University, 1990): 329.

57 Jennifer Nedelsky, "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law, 1880 - 1930", in David Flaherty (ed.) *Essays in the History of Canadian Law*, v. I (Toronto: The Osgoode Society, 1981): 305 - 312.

58 Dorothy Chunn, "Maternal Feminism, Legal Professionalism and Political Pragmatism: The Rise and Fall of Magistrate Margaret Patterson, 1922 - 1934", in Pue and Wright, *Canadian Perspectives*, 109.

political pragmatism and shaped by economic interests. Indeed, the latter helped determine which reform demands were even entertained at particular points in time.[59] R.C.B. Risk concludes from his study of the relationship between the law and the economy in Ontario that there had been an implicit assumption that the function of the courts was primarily, if not entirely, to adjudicate disputes according to the settled principles of the common law and the terms of statutes.[60] The judges assumed little or no responsibility for change and creativity. This attitude was expressed most clearly in the use of precedent. The courts never strayed from their constitutional obligations and functions and the law continued to express the values of the judges and the powerful interest groups. The obligation to follow English authority seemed greatly to restrict the power to create.[61] Risk's findings are complemented by studies in the United States. American historian Joan Hoff shows that the experiences of women did not improve significantly as a result of reform because lawyers and judges facilitated the needs of American entrepreneurs and used the legal system as an instrument of economic reform.[62] In a study of households in the northern American states,[63] Toby Ditz concludes that the courts' attitude towards property rights for women

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[59] *Ibid.*

[60] R.C.B. Risk, "The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective", in Flaherty, *Essays*, v. I: 88.

[61] *Ibid.*, 106.

[62] Hoff, *Law, Gender and Injustice*, 120.

[63] Toby L. Ditz, *Property and Kinship*. (Princeton: Princeton University Press, 1986): 119. Ditz defines a "patriarchal household" as one in which a patriarch is "the ultimate arbiter of decisions concerning the internal organizations of the household", and

was one of "rueful acknowledgement of some of the illegitimate consequences of patriarchal power".[64] As in other English common-law jurisdictions, the American courts' response was to protect the dependent woman and her heirs.[65] Ironically, Ditz argues, married women were denied unrestricted power to transfer property because such decisions placed them in the position of being coerced by their husbands whom they were required to obey.[66] Ownership of productive property by wives could have been one of the equalizing relations within households. However, rather than grant the rights of property that could have encouraged such shifts, the courts and the legislatures chose to protect those whom they presumed inevitably dependent.[67] As Chambers has argued, "a culture of sentimentality and protectiveness encouraged legislative and judicial interference in the privacy of the home".[68]

In summary, much of the recent historiography on married women's property rights in Britain, the United States, and central Canada has supported the view that the impetus for change with respect to property and other nineteenth-century reforms affecting

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has "the power to speak on behalf of his dependents in matters dealing with the larger community".

[64] *Ibid.*, 124.

[65] As will be shown in Chapter 6, the courts and legislature in nineteenth-century Newfoundland also acted to protect deserted wives, children and the elderly.

[66] Ditz, *Property and Kinship*, 124.

[67] *Ibid.*, 125.

[68] Chambers, *Married Women and Property Law in Victorian Ontario*, 180.

women, occurred as a result of demands prompted by the changing roles of women in society, including a movement of more women into the marketplace. Legislators, bowing to a progressive stance, conceded the reform out of paternalism or pressure from economic interests. The judiciary, in turn, subscribing to loyalty and obligation to English precedent, applied the new acts in the narrowest possible scope. The historiography suggests that while the actual statutes and some legislators may have spoken eloquently about the need to remove the restraints of coverture with respect to property ownership, women were denied the same access to social, political, and economic opportunities as men for many years following the passage of the legislation.

Philip Girard and Rebecca Veinott challenge traditional arguments in examining Nova Scotia, a jurisdiction which passed married women's property acts modelled on the British statutes, but where a significant reform movement was absent.[69] In attempting to isolate the factors indigenous to Nova Scotia, Girard and Veinott draw several conclusions at variance with earlier literature. Criticizing current historiography for emphasizing what was wrong with common law and failing to explore why it was acceptable to a 'silent majority' of women, they argue that the doctrine of marital unity and the restraints of coverture were tempered by colonial attitudes which saw the family as a complete unit where responsibilities superseded individual rights.[70] Not authority, but the abuse of the

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69 Girard and Veinott, "Married Women's Property Law", 67 - 91. Philip Girard, "Married Women's Property, Chancery Abolition and Insolvency Law: Law Reform in Nova Scotia, 1820 - 1867", in Philip Girard and Jim Phillips (eds.), *Essays in the History of Canadian Law*, v. III (Toronto: The Osgoode Society, 1990): 80 - 127.

70 *Ibid.*, 6.

husband's economic authority was the problem addressed by the legislature.[71] Girard and Veinott claim that a broad impetus for legal reform was not apparent in the Maritime experience; rather, it was the problem of the deserted wife which impelled the legislators to consider reform.[72] Similarly, Chambers identifies the plight of the deserted wife in Ontario as a primary reason for reform. Judges and legislators, she argues, addressed the daily problems facing the deserted wife but did not intend to eliminate male privilege.[73]

For the most part, the spirit of law reform was an influence from Britain although Girard clearly identifies some American influence and an interest in American precedent evident in the Nova Scotian experience.[74] He and Veinott question the weight given to the economic motive in bringing about the reform, claiming that while the acts may be considered "debtor-relief" legislation to some degree, they also reflect a changing attitude towards debt.[75] Their criticism of the patriarchal motive is supported by Lorna Hutchison who, writing on the life experiences of Annie Waltham in New Brunswick, argues that "...to see women solely as victims of a patriarchal plot is simplistic, ahistorical and even

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71 *Ibid.*, 39.

72 *Ibid.*, 9.

73 Chambers, *Married Women and Property Law in Victorian Ontario*, 180.

74 Girard, "Married Women's Property, Chancery Abolition and Insolvency Law", 87.

75 Girard and Veinott, "Married Women's Property Law", 44.

condescending".[76] Girard and Veinott conclude that the judicial interpretation of the legislation was uneven because it was not a direct copy from other statutes.[77] Nevertheless, the passage of the legislation did indicate a change in the local government's perceived role of "active intervenor in spousal relations, rather than passive conservator of marital right".[78]

Recent research on the property-holding experiences of working-class and middle-class women has shown that there were several alternative legal arrangements available and for some, significant protection of a wife's property within marriage. Women were not subordinated to their husbands' control over property as the legal texts implied.[79] Analysis of actual practices of women who left wills and the treatment of women in men's wills provides a better understanding of how ordinary women fared in the property stakes. Maxine Berg's English study of Birmingham and Sheffield reveals that the most common constraint on inheritance was the age of the beneficiary. Men left their property to the wives until their deaths or until they remarried. Some men and many of the women left wills with a "sole use" provision, intended to preserve some individual wealth for their daughters and female kin and to prevent intermeddling by sons-in-law.[80] "Sole use" in wills provided that

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[76] Lorna Hutchison, " "God Help Me for No One Else Can": The Diary of Annie Waltham, 1869 - 1881", *Acadiensis*, 21, 2 (spring, 1992): 73.

[77] Girard and Veinott, "Married Women's Property Law", 49.

[78] *Ibid.*, 36.

[79] Berg, "Women's Property", 234.

[80] *Ibid.*, 248.

daughters would receive property for their own use which could not be claimed by current or future husbands.

Amy Louise Erickson's investigation of early modern England examined ways in which individuals and communities circumvented the restrictions of the law or adapted the common law rules to their own social customs.[81] She challenges the assumptions commonly held concerning coverture, married women's property and inheritance. In particular, she argues that in their analyses, historians have ignored the other bodies of law which also regulate property ownership, including the role of equity, ecclesiastical law, manorial law and parliamentary statutes. Erickson's study and analysis of probate documents specifies the ways in which women in eighteenth-century Britain were disadvantaged by the law of property, the means that were employed by both men and women to circumvent the laws, and the decisions they made about property.[82] The practice of circumventing accepted custom and the law is also shown in wills of wealthy Londoners in Horwitz's study of testamentary practice.[83]

Erickson argues that the common-law rules of coverture and inheritance were impractical. Several of her findings regarding inheritance practices compare with those in the Newfoundland experience. She concludes that, in practice, daughters inherited from their parents on a remarkably equitable basis with their brothers and that wives maintained substantial property interests of their own. Widows often enjoyed much more property than

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81 Erickson, *Women and Property* , 18.

82 *Ibid.*

83 Henry Horwitz, "Testamentary Practice, Family Strategies, and the Last Phases of the Custom of London, 1660-1725", *Law and History Review*, 2, 2 (fall, 1984): 223-239.

the law entitled them, although a man rarely gave complete discretion to his widow upon his death. Widows and single women had different ideas than men about property and usually gave preference to female relatives in their bequests. Erickson refutes the argument that only families with land cared about inheritance. Her study investigates the ways in which property was transmitted by those who owned either small pieces of land or personal property. Her conclusions add a different dimension to traditional views on the reform of matrimonial property law. She challenges us to go beyond the legislation and court system to find the ways in which the law interacted with social custom and practices and to determine the various factors that inform the conveyance and ownership of property in the community.

One way to convey property to others was through inheritance. Defined as "the combination of laws, customs, land tenure rights and settlement restrictions that regulate the partibility of land at a succession",[84] it was, as in most pre-industrial societies the dominant method of transferring wealth and an important determinant in the property rights customarily held by the community. As we will see in Chapter 6, the inheritance system that evolved in Newfoundland suited its social and economic conditions. There are many ways to devise property. Most testators[85] choose between a single heir or multiple heirs. Inheritance systems range from strict impartibility to equal partibility. In a single heir, or impartible system of inheritance, all real and personal property is given to one heir to the

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[84] Lutz K. Berkner and Franklin F. Mendels, "Inheritance Systems, Family Structure, and Demographic Patterns in Western Europe, 1700 - 1900", in Charles Tilly, (ed.) *Historical Studies of Changing Fertility.* (Princeton: Princeton University Press, 1978): 212.

[85] The term "testator" refers to males who left wills and "testatrix" refers to females. Unless otherwise designated, "testator" is used throughout the dissertation to refer to both men and women.

exclusion of all other claims on the estate. Conversely, a partible system of inheritance, or multiple heirs, calls for more or less equal distribution of wealth among all legitimate claimants. For example, all children receive an equal fraction of their parents' real property. Between partible and impartible systems there is a wide range of possibilities which is called preferential partibility. The land may be divided among several of the children but one of them receives a larger or preferred share of the patrimony.[86]

The type of inheritance system in place may influence not only the division of land, but population growth and social mobility. Partible inheritance, for example, generally results in the fragmentation of the land and rapid population growth through local settlement and a high marriage rate. Impartible inheritance, on the other hand, maintains a fixed number of households on the land, encourages the emigration of children and leads to slow population growth.[87] In *Hopeful Travellers*, David Gagan identified a third type of inheritance system, one which may be considered a hybrid of these two. In this system, the estate was left to a single heir, usually a son, who in return was obligated to provide, more or less equitably, for the remaining legitimate heirs. This, Gagan argues, combines the "economic conservatism of the impartible system" with the "social and sentimental egalitarianism of the partible".[88]

H.J. Habbakuk's study of inheritance among peasant families of Western Europe presents two conflicting aims in inheritance practices: to keep the family property intact and

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[86] Berkner and Mendels, "Inheritance Systems", 212.

[87] *Ibid.*, 209.

[88] David Gagan, *Hopeful Travellers: Families, Land and Social Change in Mid-Victorian Peel County, Canada West.* (Toronto: University of Toronto Press, 1981): 51.

to provide for the younger children.[89] Societies differed very widely both in the relative importance they attached to these two aims and in the methods they customarily adopted to achieve them. Habbakuk's study shows that in addition to the differences in the extent of provision for younger children, there were differences in the form in which the provision was made. Sometimes they took their share in land, sometimes in money; sometimes they had a choice between the two, and sometimes the choice was made for them by law or convention. Rather than two sharply distinguished systems of inheritance, there was a wide range of compromise between the two principal aims of family policy. Furthermore, in communities where family members worked together in a domestic economy, a sense of fairness and economic security have been generally reflected in the language of wills. This was also documented by B.A. Holderness in his study of widows in pre-industrial Britain.

> The abiding impression from a study of hundreds of seventeenth century wills is that most countrymen were content not to upset the traditional relationship of widows and children in the inheritance of property rights. Wills frequently contain clauses in which bequests were made conditional upon dutiful and decent behaviour, but most testators attempted to be fair to all rightful claimants upon their estates, using wills to modify or supplement customs of inheritance.[90]

His view is borne out in the inheritance system in Newfoundland which evolved as the population became permanent and was greatly influenced by an economy based on the fishery. This fact had a major impact on inheritance practices and was reflected in the

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[89] H.J. Habbakuk, "Family Structure and Economic Change in Nineteenth-Century Europe", *The Journal of Economic History*, XV, 1, (1955): 1 - 12.

[90] B.A. Holderness, "Widows in Pre-industrial Society: An Essay Upon Their Economic Functions", in Richard M. Smith, (ed.) *Land, Kinship and Life-cycle.* (Cambridge: Cambridge University Press, 1984): 433.

testators' provisions for their daughters and widows.[91] Such wills provide information on the type and extent of property that men and widows wanted their daughters and sons to inherit. They also indicate who was to have the responsibility as guardian of children and executors of estates.

While earlier works in Newfoundland historiography did not examine the place of women in society and the economy, much less their place in the property regime, they do provide historical background to settlement and economic development in Newfoundland from the time of the first English contact.[92] Several of these represent the first attempts of placing the law in the Newfoundland experience. John Reeves' *History of the Government of the Island of Newfoundland* was the first comprehensive history of Newfoundland.[93] Reeves established an interpretation of the island's history based on the struggle between two contending interests. The first group consisted of planters or inhabitants who, having settled in Newfoundland, needed the protection of government and a judicial system. The second consisted of adventurers and merchants who carried on the fishery from Britain, visited the island for a season, and needed no protection. Reeves used contemporary documents, especially imperial statutes from 1699 to 1785 and argued that settlement in

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91 Amy Louise Erickson also found this to be the case in her study of early modern England. Erickson, *Women and Property*, 40.

92 A survey analysis of early Newfoundland historiography is found in Keith Matthews, "Historical Fence Building: A Critique of Newfoundland Historiography", *Newfoundland Quarterly*, 74, 1 (1978): 21 - 30.

93 John Reeves, *History of the Government of the Island of Newfoundland.* (London: J. Sewell, 1793). As we will see in Chapter 5, rulings made by Chief Justice Reeves in *Kennedy v. Tucker* in 1792 and Chief Justice Forbes in *Williams v. Williams* in 1818 are significant in defining property in Newfoundland.

Newfoundland was hindered by the demands and priorities of the migratory fishery and the recruiting policies of the Royal Navy.

Reeves' interpretation strongly influenced those that followed, notably D.W. Prowse's detailed account of 1898.[94] Prowse, nineteenth-century Newfoundland judge and historian, had the advantage of placing Newfoundland history and the development of a legal system in an imperial context. He argued that the trans-atlantic fishery centred in Newfoundland was a determining link binding Europe and North America. Newfoundland's history was a struggle between the settlers and the ship-fishermen and western adventurers from England, who wanted to keep the island solely for fishing. Thus, they banded together to resist settlement. In the area of women and the law, Prowse wrote that by the end of the nineteenth century the law had eliminated many of the contradictions with respect to the legal status of married women.[95] He was especially pleased that the statute of 1883 protected the deserted woman. Under the legislation, a wife could apply to the Supreme Court for an order to protect her property and earnings from a husband who had deserted her. Thus, she could keep her earnings from a business which she conducted independently of her husband.

Gillian Cell's books are surveys of colonization in the late sixteenth and seventeenth centuries. As the Newfoundland fishery became increasingly valuable to West Country merchants, it was necessary to protect it from outside competition. As in New England, the

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94 D.W. Prowse, *History of Newfoundland from the English, Colonial and Foreign Office Records.* (London, 1895). See also A.H. McLintock, *The Establishment of Constitutional Government in Newfoundland, 1783 - 1832: A Study in Retarded Colonization.* (London: Longmans, Green, 1941) and John G. Higgins, "The History of Law and Legal Institutions in Newfoundland", manuscript in Collection 87, Centre for Newfoundland Studies Archives, (St. John's: Memorial University).

95 D.W. Prowse, *The Justices' Manual*, (St. John's, 1898): 375.

English government was not prepared to become actively involved in settlement. Therefore, early settlement ventures were private initiatives governed by charters. Cell examines the proprietary colonies of the seventeenth century in light of the traditional theme of conflict between migratory fishermen and settlers.[96]

Keith Matthews' doctoral dissertation, "A History of the West of England Newfoundland Fishery" is a comprehensive study of the migratory fishery and how it shaped the island's history.[97] He drew on the unique relationship between Newfoundland and the imperial government to explain the evolution of the legal system in the context of local circumstances.[98] In contrast to Reeves' interpretation, Matthews argued that the English government consistently set itself against settlement while West Country merchants were opposed to the interference of government and eventually came to depend upon the inhabitants. He maintained that trade strategies adopted by English merchants influenced population growth and settlement. Furthermore, population growth was slow until the mid-eighteenth century because of economic fluctuations in the fishery and the instability created by war.

The theme of migration dominates Gordon Handcock's *Soe Longe as There Comes Noe Women.* He describes the patterns of migration from the southwest and southern regions of England to Newfoundland and the settlement formation that followed

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[96] Gillian Cell, *Newfoundland Discovered: English Attempts at Colonization.*(London: Hakluyt, 1982) and Gillian Cell, *English Enterprise in Newfoundland, 1577 - 1660.* (Toronto: University of Toronto Press, 1969).

[97] Keith Matthews, "A History of the West of England Newfoundland Fishery", D. Phil. dissertation, Oxford University, 1968.

[98] Keith Matthews, *Lectures on the History of Newfoundland, 1500 - 1830.* (St. John's: Breakwater, 1988): 89 - 95.

from them.[99] The themes include: the origins of English settlers; the conditions of their homeland areas; processes of recruitment, transfer and absorption; the establishment of planter lineages; and the social and economic characteristics of the migrants both in England and in Newfoundland. He concludes that the decisions of individuals to settle permanently in Newfoundland appear to have been strongly related to prospects for marriage on the island. Most migrants who settled on the island married daughters and female servants of established settlers. In the seventeenth century, the female population was too small to support any significant growth in the native-born population. There were considerable demographic disruptions caused by war, settler expulsion, and the tendency to leave after a brief stay. In the late eighteenth century, Newfoundland experienced a strong population growth and immigrant absorption, due mainly to the increase in the native-born female population and a small but significant migration of single females, mainly from Ireland. Conditions associated with the Napoleonic Wars promoted the establishment of a permanent population. Many of the mercantile functions previously maintained in England as part of the seasonal migration were transferred to Newfoundland. Merchants began to maintain more employees year-round and families were more inclined to remain on the island.

More recently legal historians in Newfoundland have focused on how the law was received, what laws were received and how it fitted local circumstances. In an article published in 1990, Christopher English identified the key role of the law in shaping Newfoundland's history, for it

> defined the parameters of Great Britain's experience in Newfoundland: a migratory and seasonal fishery carried on by West Country merchants, where entrepreneurs'

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[99] Gordon Handcock, *Soe Longe as There Comes Noe Women.* (St. John's: Breakwater, 1989).

economic interests complemented the economic, strategic, diplomatic, and defence policies of the Crown.[100]

The first comprehensive research into the nature of real property in Newfoundland was carried out by Alexander McEwen. In a doctoral dissertation in 1978, he argued that the evolution of land titles in Newfoundland was an integral part of the struggle towards the island's settlement and self-government. In defiance of an imperial policy which resisted permanent settlement, residents remained on the island and made possessory claims of their land. While their rights remained formally unrecognized, McEwen argues, it was in "their actual possession and working of the soil that land titles in Newfoundland find their true origin".[101] As to the question of whether real property in Newfoundland was governed by the English law of inheritance, McEwen shows that formal requests for a definitive ruling on this point met with inconclusive responses. The result was that in some cases of intestacy, the courts debated whether in Newfoundland land devolved to the heir at law (the eldest son) as real property or the land was divided among the descendants.[102]

More recent literature has revealed the place of women in the settlement, economy

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[100] Christopher English, "The Development of the Newfoundland Legal System to 1815", *Acadiensis*, 20, 1 (autumn, 1990): 89

[101] Alexander McEwen, "Newfoundland Law of Real Property: The Origin and Development of Land Ownership", Ph.D dissertation, University of London, 1978, 21.

[102] In 1792, for example, Chief Justice Reeves ruled in the case of *Kennedy v. Tucker* that primogeniture had not been practised in Newfoundland and in cases of intestacy, property should be divided equally among the children. Similarly, in 1818, Chief Justice Forbes decided in the case of *Williams v. Williams* that the eldest son of someone who had died intestate was not entitled to the property as sole heir and would have to share with his brothers and sisters. However, in *Blennerhasset v. Keen* in 1840, Chief Justice Bourne argued that only the passage of the Chattels Real Act of 1834 had prevented the eldest son from inheriting real property as heir at law. The reception of English law, the Chattels Real Act and judicial interpretations of it will be dealt with in chapter 5.

and the law of Newfoundland. Sean Cadigan's doctoral dissertation[103] in 1991 and his book, *Hope and Deception in Conception Bay*, published in 1995 include an examination of the role of women in the domestic economy of the fishery in Conception Bay communities from 1785 to 1855. He notes that women's role in the shore work of the fishery was determined by the schedule of men's work in the cod fishery but that women were not recognized as full partners in this endeavour. Cadigan's analysis of court records reveals inheritance practices which reflect the valuable role of women in Newfoundland society. He argues that widows inherited little from their deceased husbands' estates and those who did were entitled to their inheritance only for the remainder of their "natural lives." They were prohibited from alienating the property from "their husband's patriarchal line".[104] Cadigan also concludes that widows had a markedly stronger role in society than married women. In addition to a stronger presence in the court system, widows in Conception Bay communities enjoyed the right of residence in the family home and were generally assured support and maintenance from their children. Chapter 6 of this study elaborates on this custom in other districts.

Peter Pope's doctoral dissertation in 1992 examined English settlement in Ferryland and the South Avalon area from 1630 to 1700 within the context of the West Country

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103 Sean T. Cadigan, "Economic and Social Relations of Production on the Northeast Coast of Newfoundland, with Special Reference to Conception Bay, 1785 - 1855", Ph.D dissertation, Memorial University, 1991.

104 Sean T. Cadigan, *Hope and Deception: Merchant-Settler Relations in Newfoundland, 1785 - 1855.* (Toronto: University of Toronto Press, 1995): 66.

migratory cod fishery.[105] Pope focuses on the economic factors which contributed to the slow population growth in this region. He provides valuable background on the planter economy and the role of women during the period. Pope identified several female planters who as widows achieved high social status in the community as the heads of large plantations in the South Avalon area.[106] The economic responsibilities of women in the domestic economy were reflected in the inheritance system and despite the patriarchal authority of the husband, if circumstances prevented him from taking care of family interests, his wife acted in his place. Numerous court records showed wives acting on behalf of their husbands.

A significant addition to the fledgling field of women's history in Newfoundland is Linda Kealey's edited collection, *Pursuing Equality: Historical Perspectives on Women in Newfoundland and Labrador*.[107] The book highlights the political and legal history of women in Newfoundland throughout the nineteenth and twentieth centuries. It goes beyond the approach of earlier works on women's history which attempted to fill in the gaps of history with the experiences of women and complements more recent Canadian women's history by examining the historical construction of gender divisions in all aspects of society, including the law. Of particular importance to this study is chapter 3, "A Woman's

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105 Peter Edward Pope, "The South Avalon Planters, 1630 to 1700: Residence, Labour, Demand and Exchange in Seventeenth-Century Newfoundland", Ph.D. dissertation, Memorial University, 1992.

106 *Ibid.*, 306 - 313.

107 Linda Kealey, (ed.) *Pursuing Equality: Historical Perspectives on Women in Newfoundland and Labrador*. (St. John's: Institute of Social and Economic Research (ISER), Memorial University, 1993)

Lot", which casts an overview of women and law in Newfoundland from the period of the royal charters in the seventeenth century to the Matrimonial Property Act of 1981 which gave a spouse, widow or widower the right to one-half of the couple's marital property.[108]

These sources from Newfoundland historiography have provided useful starting points for more comprehensive research into the evolution of the matrimonial property regime in Newfoundland. In many ways, they have inspired the focus of the question. They have not, however, provided explanation for the absence of a reform movement, the lack of public policy regarding matrimonial property, or the lack of community response to the passage of the statutes in late nineteenth century.

In conclusion, property rights legislation in the late nineteenth century in English common-law jurisdictions has been viewed as a valuable step in promoting the economic independence of married women and improving their legal status in society and in the home. Nevertheless, a substantial body of evidence suggests that the effects of the legislation, at least in the short term, were minimal. The laws accommodated middle-class men in an industrializing society. Moreover, the judiciary endorsed existing norms rather than challenging them. Beyond these arguments, more recent literature looks at the ways in which society customarily adjusted, adapted to or ignored the law. It is to this second body of literature that the Newfoundland experience contributes.

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[108] Linda Cullum and Maeve Baird, "A Woman's Lot", *Ibid.*, 66 - 162.

Chapter 3: The English Law of Property, Inheritance and Marriage

Historically, matrimonial property rights in England were determined by two features of English common law: primogeniture in inheritance, and coverture in marriage. These disadvantaged women in English common-law jurisdictions throughout the early modern period. As long as descent to the *heir* remained a principle of succession, land was disposed of through a lineal, dynastic system with preference given to the first-born son. Personal property left intestate (without a will) was generally inherited by the spouse and children of a marriage rather than a sole heir.[1] As early as the thirteenth century, English common law had established the doctrine that any property which a wife had owned as a single woman became her husband's when they married. The restraints on women during coverture were justified in legal circles as protective rather than restrictive in design.[2] This chapter outlines those areas of English law which affected matrimonial property rights, as well as the law pertaining to inheritance and to marriage. It will show how statutes and customary practices in England produced a system of matrimonial property law that became the object of statutory reform in the late nineteenth century.

English law distinguishes two principal types of property, real property and personal property. Real property is land and generally whatever is attached to the land,

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[1] P.V. Baker, (ed.) *Megarry's Manual of the Law of Real Property.* (5th ed.) (London: Stevens, 1975): 274.

[2] Blackstone, *Commentaries on the Laws of England,* v. 1, c. 15, 433.

fixtures, as well as the rights and profits annexed to or issuing out the land.[3] Real property was divided into freehold and leasehold. There were three estates[4] of freehold: fee simple, fee tail and life estate. The fee simple continued as long as there were heirs, including in the absence of children, passing it to collateral relations. In practice, it was held in absolute ownership.[5] The fee tail, on the other hand, was limited to a person and his heirs, that is, his lineal descendants.[6] Thus, if the original tenant died leaving only a brother, for example, a fee simple would continue but a fee tail would end. A life estate was not an estate of inheritance nor could it continue for any longer than the life of the tenant. Leases of land were classified as "chattels real", generally considered a hybrid of real and personal property.[7] As a category of property, it carried its own rules regarding inheritance and conveyance.

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[3] Halsbury, *Laws of England.* (2nd ed.) v. 27 (London: Butterworths, 1937): "Meaning of Real Property" at 572. An action which was brought to recover a specific property was called a "real" action while a "personal" action was brought to enforce an obligation or to recover compensation. J.H. Baker, *An Introduction to English Legal History.* (2nd ed.) (London: Butterworths, 1971): 120.

[4] In the English law of real property, an estate is described as an interest in land of some particular duration. The word "fee" meant that the estate was an estate of inheritance and one that might continue for unlimited duration. Robert Megarry and H.W.R. Wade, *The Law of Real Property.* (5th ed.) (London: Stevens, 1984): 38.

[5] Megarry and Wade, *The Law of Real Property,* 59.

[6] The fee simple and life estate have a long history in English law. The fee tail was introduced by the Statute De Donis Conditionalibus in 1285. Megarry and Wade, *The Law of Real Property*, 39.

[7] Alan M. Sinclair, *Introduction to Real Property Law.* (2nd ed.) (Toronto: Butterworths, 1982): 10.

Personal property legally includes all property other than freehold estates and interests in land. Personal property was called chattels by the common law and often referred to by the ecclesiastical court as "moveable goods", which included such items as money, debts, clothing, household goods, and food and all other moveables and the rights and profits related to them.[8] Personal property[9] also includes two categories of property, chattels personal and chattels real. Chattels personal refers to things that are moveable and are entirely separate from the category of real property and from chattels real.[10] Chattels real are interests issuing out of or annexed to land and are similar to real property in that they are not moveable but chattels real do not have indeterminate duration, thereby putting them into the classification of chattels.[11] To distinguish them from moveable chattels, they were given the name "chattels real". They include, therefore, an interest in land for a fixed term of years (leasehold) which was originally considered not as an interest in land but as a contractual right.[12]

Since land was historically the most important determinant of wealth, separate laws

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[8] Halsbury, *Laws of England*, (3rd ed.) v. 29 (London: Butterworths, 1960): "Definition of Personal Property" at 355.

[9] The distinction between real property and personal property is less clear, however, when those things which are classified as chattels become part of the land, as in fixtures. A fixture is an article in the nature of personal property which has been so annexed to the real property that it is regarded as a part of the land. Baker, *Megarry's Manual*, 7.

[10] Halsbury, *Laws of England*, (3rd ed.) v. 29, "Chattels Personal" at 358.

[11] Geldart, *Introduction to English Law*, 76.

[12] *Ibid.*, 77.

and separate courts dealt with real and personal property. Real property was handled in the common law courts and manorial courts, while personal property came under the jurisdiction of the ecclesiastical courts.

Areas of English law which affected property rights

Several streams of law determined and regulated property rights: common law, equity, manorial law, parliamentary statutes and ecclesiastical law. Common law is distinguished from laws that are created by the enactment of legislatures. It consists of those principles and rules of action which derive their authority from customs and usages and the judgements and decrees of the courts.[13] Equity refers to judge-made rules and principles which originated in fifteenth-century England and were administered in the Court of Chancery.[14] Its purpose was to modify the harshness of the common law, with its often rigid and inflexible rules, and to provide justice where the common law seemed inadequate. Protection under the rules of equity was well established by the end of the Elizabethan era and made it possible, for example, for married women to have their property put in trust, protected for their own use. Manorial or borough law varied locally throughout England, affecting specifically the inheritance of land within the manor. In some places, for example, land was partible among all sons rather than falling exclusively to the eldest. Over time parliamentary statutes played an increasing role in regulating property, notably by seizing jurisdiction from ecclesiastical law.[15]

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13 Blackstone, *Commentaries*, v. 1, 442.

14 For the distinction between legal and equitable interests in land, see Megarry and Wade, *The Law of Real Property*, 110 - 115, and Halsbury, *Laws of England*, (2nd ed.) v. 27, "Equity" at 665 - 770.

15 Erickson, *Women and Property in Early Modern England*, 5.

Until the nineteenth century, the ecclesiastical courts had both a civil and a criminal jurisdiction. They enforced a broad range of religious regulations running from sexual conduct to conformity in worship. The criminal jurisdiction included all offenses of the clergy and church wardens in the performance of their duties, and those crimes to which the laws of the realm gave ecclesiastical cognisance, such as heresy, adultery, incest, fornication, simony, brawling in church or churchyard, and defamation. Its civil jurisdiction extended to matrimony and divorce, testamentary and intestate causes, such as the probate of wills, and grants of administration, and controversies related to the same, such as legacies and tithes.[16] In 1357 administrators of property of those dying intestate were given the same power to sue or be sued as executors of wills did. The ecclesiastical courts dealt with matrimonial suits, testamentary suits and suits for defamation until 1857.[17]

English Law of Inheritance

For centuries inheritance has been the main method of transmitting real and personal property to the next generation. Until the passage of the Property Act in 1925 in Britain,[18] the descent of heritable interests in land to the heir distinguished real property from personal property. Different bodies of law determined what happened to each upon the death. Further, the distribution of that property depended on the heir's social status, place of residence and gender.

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[16] Halsbury, *Laws of England,* (2nd ed.) v. 11, "Jurisdiction of Ecclesiastical Courts" at 595 - 596.

[17] S.M. Waddams, *Law, Politics and the Church of England: The Career of Stephen Lushington, 1782 - 1873.* (Cambridge: Cambridge University Press, 1992):5.

[18] (1925) 15 Geo. 5, c. 20: Law of Property Act.

The law of inheritance was predicated on relationships brought about by marriage. Before the Norman Conquest, the usual custom of transmitting property across generations was coparcenary, that is, inheritance by all the sons equally or if there were no sons, then inheritance by daughters.[19] English customs of succession were designed to provide for the whole family of the deceased by dividing the estate into shares for the wives and children, referred to as their "reasonable parts" which usually meant halves or thirds. Initially, the influence of Christian doctrine ensured that the deceased was also given a "part" to dispose of by testament for the good of his soul. The remaining two parts went to the widow and children. Under the early common law, a writ of *de rationabili parte bonorum* allowed the widow and children to make this claim. The rules governing the division of personal property were not as strict as those that applied to land. They tended to vary according to time and place but generally, wives and children were entitled to their customary "reasonable parts" which in most cases, meant one-third to the wife and two-thirds divided equally among any surviving children.[20]

Customs regarding inheritance rapidly gave way to the certainty of the common law. While the Normans held the custom of giving land to the eldest child, either son or daughter,[21] during the reign of Henry I, this rule was changed. Common law protected inheritance as a right and needed, therefore, to carefully and precisely define the heir. By the end of the twelfth century, primogeniture in real property was widely, though not

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19 Halsbury, *Laws of England*, (2nd ed.) v. 27, "Custom of Gavelkind" at 589.

20 Baker, *Introduction to English Legal History*, 435.

21 *Ibid.*, 306.

exclusively, practised in England.[22] Real property was passed to the *heir at law*, the eldest son, and in the event there were no sons, daughters inherited equally as parceners. If there were no lineal descendants, the inheritance passed to the collateral relations of the deceased.[23] Primogeniture grew out of the need to fulfil the requirements of military tenure and great offices of state which were indivisible. It allowed great landowners to keep their estates intact.

Customs gradually took on the status of rules of testamentary and intestacy law.[24] As wills were not permitted under feudal land law, leaving land by will was made possible only by means of the *use*, an arrangement recognized in equity.[25] Prior to the passage of the Statute of Uses in 1535,[26] a division was possible between the legal estate in land and the use in land. The use was defined as a trust or confidence.[27] The legal power to

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22 Certain areas of England, such as Kent, maintained the practice of gavelkind, which provided for equal partibility of land among all sons in intestacy cases. Halsbury, *Laws of England.* (2nd ed.) v. 27, "Gavelkind" at 589.

23 James Armstrong, *Laws of Intestacy in the Dominion of Canada.* (Montreal: J. Lovell, 1885): 5.

24 Baker, *An Introduction to English Legal History,* (3rd. ed.): 304. The full rules of descent are given in Blackstone, *Commentaries, v.* ii, c. 14 , 200 - 240 and summarized in A.W.B. Simpson, *An Introduction to the History of the Land Law.* (London: Oxford, 1961): 54-90.

25 Baker, *An Introduction to English Legal History*, (3rd ed.), 232.

26 (1535) 27 Hen. VIII, c. 10.

27 Halsbury, *Laws of England*, (2nd ed.), v. 27, "The Statute of Uses" at 594.

bequeath land by wills was granted by the Statute of Wills[28] of 1540 which empowered a testator to dispose of his real property "at his will and pleasure" and forbade married women from making wills. According to the statute, wills of land and wills of personal property had two common characteristics: they were secret and they did not come into effect until the death of the testator. However, unlike wills pertaining to personal property, wills of land or estates from the Statute of Wills came under the jurisdiction of the common-law courts until 1837.[29] As of the thirteenth century, matters pertaining to the testate and intestate succession of personal property fell to the jurisdiction of the church courts where it remained until the eighteenth century.[30] Under ecclesiastical jurisdiction, the fixed one-third/two-thirds portions could only be claimed if the deceased died either wholly or partly intestate or if a local custom preserved the older principle which restricted testation to the deceased's "part".

The remaining customary procedure to be overturned by statute was the limit on a testator's freedom to bequeath personal property. In many localities, married men with children could only dispose of one-third of their goods by will because one-third had to go to the spouse and one-third to the children. As the sixteenth century drew to a close, a controversy rose over the legitimacy of such restraints under the common law. The prevailing opinion maintained that testators should have complete testamentary freedom over their personal property and that no mandatory division under the common law should exist unless a locality specifically adopted the division. Those advocating testamentary

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[28] (1540) 32 Hen. VIII, c. 1.

[29] Holdsworth, *A History of English Law*, v. vii, 362.

[30] Baker, *Introduction to English Legal History*, (3rd ed.), 435.

freedom contended that it kept wife and children in line, while those for the customary restraints believed protection for wife and children was needed.[31]

In the 1690s, parliamentary statutes mandated testamentary freedom over personal property in the ecclesiastical province of York, the cities of York and Chester, and Wales. Only London retained the old custom. These statutes essentially meant that men could restrict the inheritance of their personal property to whomever they pleased. The only claim a widow had on her husband's estate was her lifetime third of real property.[32] Studies of English testamentary behaviour indicate that the new testamentary freedom liberalized the distribution among children but there was little interest in giving a larger share to collateral kin or wives. Husbands often limited their widows' ownership over personal property and real property more than the intestacy laws would have.[33] In the seventeenth and early eighteenth centuries an increasing number of widows had remarriage penalties attached to their portions of both real property and personal property. Freedom of testation was not universal in England until 1724, when it was extended to the city of London. Probate of wills and related litigation belonged to the Church courts until 1857.[34]

In response to a case brought to the King's attention in 1666, a statute was passed which standardized the distribution and descent of personal property in the absence of a

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31 Carole Shammas, Marylynn Salmon and Michael Dahlin, *Inheritance in America from Colonial Times to Present.* (New Brunswick, N.J.: Rutgers University Press, 1987): 27.

32 *Ibid.*

33 *Ibid.*, 28.

34 Baker, *Introduction to English Legal History,* (3rd ed.), 436.

will. Personal property, including leaseholds, passed to the next-of-kin according to the rules laid down by the Statute of Distribution of 1670 which applied to intestate estates only after June 1, 1671.[35] Having paid debts and expenses, administrators were required to divide the personal property among the deceased's wife and children, one-third to the wife and two-thirds divided equally among the children regardless of gender. The deceased's "part" was abolished by the statute. It also provided that local customs would be observed.

Under the common law of inheritance, the heir at law to the deceased would already be entitled to take the deceased's real property, but would receive an equal part of the children's share of personal property as well. Thus if a widower died intestate leaving three sons and four daughters, the eldest son was the heir and took all the real property but all seven children shared the personal property equally.[36] In the event that there were no children, the wife would receive one *moiety* (one-half) of the estate and the rest would be distributed equally among the next-of-kin of the deceased.[37] By the Statute of Distributions (1670) as well, the husband was entitled to the deceased wife's personal estate absolutely, to the exclusion of other relatives if she had made no will with his consent or if no settlement had been made providing for the contrary.[38] If no children survived, the widow

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35 P.V. Baker, *Megarry's Manual*, 274.

36 *Ibid.*, 263.

37 (1670) 22 & 23 Car. II, c. 10: *An Act for the Better Settling of Intestates' Estates.* (Statute of Distributions)

38 Armstrong, *Laws of Intestacy*, 52.

split the personal property with the husband's next-of-kin.[39] These rules, which were clearly outlined in Blackstone's *Commentaries* in 1764,[40] served as the basic pattern for intestate division of personal property in English common-law jurisdictions for centuries.[41] In both Britain and the American colonies, children inherited two-thirds of the intestate's personal property if there was a widow surviving. They divided the entire estate if there was no widow. Also, the colonies, like Britain, gave no formal inheritance rights to illegitimate children. The common law dictated primogeniture descent for land and the Statute of Distributions specified equal division of personal property among widows and legitimate children.

In English law, notable differences existed as to succession on intestacy and in the variety of estates and interests that could exist. For example, personal property (goods and money) and chattels real (such as leaseholds) were at common law the subject of absolute ownership. Successive interests could not exist as they could within the category of real property.[42] The fact that leaseholds were considered personal property meant that upon death they did not pass to the heir as inheritable land did. Instead, they passed to the next-of-kin on the intestacy of the deceased. The Law of Property Act of 1925 in Britain

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[39] There were exceptions. London, Wales, and the north of England had slightly different rules of division that under certain circumstances gave more to widows and less to the children and the eldest son.

[40] The full rules of descent are given in Blackstone, *Commentaries*, v.2, c. 14, 200 - 240.

[41] For an analysis of inheritance patterns in colonial America, see Shammas, *Inheritance in America.*

[42] G.C. Cheshire, *The Modern Law of Real Property*. (10th ed.) (London: Butterworths, 1967): 87.

abolished many of the legal distinctions between real and personal property.

English Marriage Law

The third area of English law which affected matrimonial property rights is the law pertaining to marriage. Matters concerning matrimony were 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.[43] For the sake of consistency, both ecclesiastical and secular authorities insisted on a public ceremony of marriage. As of 1215 banns were required to be published on three successive occasions to call on anyone who objected to the proposed marriage. If no objections were raised, 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 did not begin until the sixteenth century.[44]

Although only church marriages were considered socially proper, the customary practice of clandestine marriages continued 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 license. This statute was designed to facilitate the taxation of marriage.[45] In 1753, Lord

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[43] Baker, *Introduction to English Legal History*, (3rd ed.), 545.

[44] *Ibid.*, 547.

[45] (1694) 6 & 7, Wm. and Mary, c. 6.

Hardwicke's Act [46]prohibited secret marriages and required a license, 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.[47] The statutory provisions were not applicable to marriages performed outside England and Wales. 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[48] and imperial statutes were often passed to regulate the performance of marriage ceremonies in the colonies.[49]

English Matrimonial Property Law

By the beginning of the nineteenth century the English system of common law maintained a doctrine of marital unity which defined the legal status of married women. Under common law, a woman's legal identity during marriage was eclipsed by that of her

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[46] (1753) 26 Geo. II, c. 33.

[47] Baker, *Introduction to English Legal History*, (3rd ed.), 549.

[48] *Ibid.*, 550.

[49] In Newfoundland, the first imperial statute pertaining to marriages was (1817) 57 Geo. III, c. 51: *An Act to regulate the celebration of marriage in Newfoundland.* It was followed by: (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.* The issue of the reception of marriage law in Newfoundland will be dealt with more extensively in Chapter 5.

husband.[50] The principle of marital unity and the rules of coverture defined early by William Blackstone declared that husband and wife are one person in both criminal and civil law. A wife's legal existence during marriage was regarded as incorporated and consolidated into that of her husband, and she was considered incapable of acquiring or enjoying any property, real or personal, independently of her husband.[51] Legally deprived of property, married women were also denied the power and civil rights of other persons under the law. The married woman's legal position was clearly presented by Blackstone's *Commentaries.* One of the first compilations of the laws of England, it recorded the traditional view that:

> ...by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything: and is therefore called in our law - french a feme-covert...is said to be covert-baron, or under the protection and influence of her husband, baron, or lord; and her condition during her marriage is called coverture.[52]

Unlike a feme sole or single woman, a married woman gave up many of her rights at the time of marriage.[53] A husband, legally considered her baron or lord, was expected to take care of his wife during coverture. She lost the capacity to own separate property, to make contracts, and to sue or be sued independently of her husband.

The origin of the doctrine of 'marital unity' is founded in the belief in the inferiority

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[50] *Halsbury's Laws of England*, (2nd ed.) v. 16, "Effect of Marriage with Regard to Property" at 613.

[51] *Ibid.*

[52] Blackstone, *Commentaries,* v.1, 442.

[53] Baker, *Introduction to English Legal History*, (3rd ed.), 551.

of women and the power that social custom gave the husband over his wife. Interestingly, the principle of marital unity was not universally applicable. The wife could not be punished for her husband's crimes,[54] nor for certain offenses which she committed under his influence. She was not held accountable for his debts.

The rules of coverture under common law dictated a wife's surrender of her property to her husband. Legally, the property rights of a woman were greatly reduced when she married although a husband's right to his wife's property depended upon the nature of the property in question. The property that a woman brought to marriage, known as her dowry or portion, all came under the immediate control of her husband. A woman's real property became her husband's to control and manage during their marriage. He held her real property "in the right of his wife" and received the profits from it, although he could not permanently dispose of the land without her consent.[55] A wife could not alienate (transfer title and possession) real property without her husband's consent and could not will real property at all. A married woman's personal property also became her husband's under the law with the one exception being her paraphernalia. [56]

A husband was entitled to property classified as chattels real which his wife possessed at the time of their marriage or which she acquired during the marriage. He was entitled to the rents and profits from it, could mortgage it, and could dispose of it as he wished, including paying his own debts. If his wife predeceased him, the property became

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[54] For an early and authoritative treatise on the English criminal law as it applied to married women, see P.R. Glazerbrook, (ed.) *East's Pleas of the Crown* (1803), (London: Professional Books, 1972): ch. 5, 336 - 371, ch. 11, 450-462, ch. 12, 463-472.

[55] Erickson, *Women and Property in Early Modern England*, 24.

[56] Paraphernalia referred to a married woman's clothes and personal effects.

his absolutely, although he could not dispose of it by will. If the wife survived her husband, she reclaimed both title and possession of the property[57] subject to any alienation he might have made during his lifetime. Her right could not be defeated by her husband's will.[58]

In summary, much of a woman's property, whether it was possessed by her at the time of marriage or acquired by her during marriage, became the property of the husband. With her husband's permission, a wife could make a will of her personal property but his permission might be revoked at any time. Under common law, she had no power to devise land. Furthermore, the father had legal custody of the children. A married woman could not sue or be sued for contracts. Her word was not binding in law except where she had contracted debts upon property settled upon her through equity. A husband was liable for the debts his wife contracted before marriage. The concept of marital unity dictated that neither partner could testify against the other. A wife was excused from punishment of certain offenses if she was acting under her husband's influence.

In practice, however, matrimonial property rights were affected by other legal requirements: the practices of curtesy and dower, the influence of ecclesiastical courts, and the Chancellor's jurisdiction in equity. Husbands and wives were entitled to life estates in each other's real property upon the death of the spouse. The widower maintained a life estate over all of his late wife's real property provided that a child of the marriage had been born alive.This was known as "an estate by the curtesy of England," or simply, his "curtesy". However, only real property of which the wife was still seised at her death was

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[57] A.H. Manchester, *Modern Legal History*. (London: Butterworths, 1980): 370.

[58] Halsbury, *Laws of England*, (2nd ed.), v. 16, "Effect of Marriage with Regard to Property" at 613.

subject to curtesy. Upon her death, if a child had been born to the marriage, her widower received lifetime use of all of his wife's real property whether or not he had remarried. At his death, the real property went to their children, or if none survived, to his wife's next-of-kin.[59]

Legal provision for wives who survived their husbands was made by the law of dower. A widow was not considered an heir of her husband, but had a separate legal status as doweress. If a married woman survived her husband, under common law she was entitled to dower for her lifetime.[60] By the fourteenth century in England, dower consisted of a widow's right to life interest in one-third of the real property which her deceased husband had held during their marriage.

The practice of dower originated in the twelfth century in response to concern for the livelihood of the wife in the event that her husband predeceased her. Originally dower was voluntarily given by the husband to his wife. The husband made a gift to his wife on the day they were married, at the church door.[61] It would take effect on the husband's death if the wife survived him. The Church made this endowment a permanent feature of the marriage ceremony. The lands to be assigned as dower were designated before the marriage after negotiations between the families. The husband gave his wife symbols of dower and stated, "with this dower I thee endow."[62] By the fourteenth century, this

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[59] *Ibid.*, v. 27, "Curtesy" at 706.

[60] *Ibid.*, v. 27, "Dower" at 711.

[61] Baker, *An Introduction to English Legal History*, (3rd ed.), 308.

[62] *Ibid.*

endowment ceased to be a gift and became a common-law right. [63] Upon the death of the husband, the land became the wife's estate for life. In contrast to the conditions of curtesy, no children need have been born for the conditions of dower to apply. Whereas a married man could dispose in advance of his wife's dower after her death, according to common law, a married woman was unable to make a will, so she could not dispose in advance of her husband's curtesy upon his death. It descended automatically to her children. Gradually, a widow became entitled to reject such a specified dower and claim her common-law share.[64]

Disputes over dower were common in the early royal courts. To protect the heir, the common law forbade the specific assignment of more than one-third of the husband's lands as dower. An alternative arrangement was for the husband to endow his wife with all his lands without designating any specific property. The widow was then entitled to claim a life estate of a reasonable share of her husband's land, which the law fixed as one-third. Custom might allow more. For example, gavelkind custom in Kent gave the widow one-half of the husband's estate of inheritance, but the right continued only so long as she remained unmarried.[65]The colonies closely followed the English common law with respect to a wife's loss of property rights and her husband's claim to her real property. In the American colonies, whatever the widow got above the one-third portion depended on local

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[63] T.F.T Plucknett, *A Concise History of the Common Law*. (5th ed.) (London: Butterworths, 1956): 566.

[64] Baker, *Introduction to English Legal History*. (3rd ed.), 309.

[65] Ibid., 308.

custom.[66] Her right to real property extended for life in some areas, and only "during widowhood" in others. [67]

Dower was not permitted on copyhold lands.[68] In compensation, custom granted the widow "free bench" for as long as she remained unmarried. The concept of free bench referred to the right of the widow to be allowed to remain in the house of the deceased along with the children. In other words, she was given the right to food and lodging in her husband's house, regardless of whether or not the house had been inherited by his heir, namely the eldest son. [69] By the Dower Act of 1833,[70] a widow was not entitled to dower out of any land which had been absolutely disposed of by her husband in his lifetime, or by his will. Dower was abolished in Britain by the Administration of Estates Act in 1925.[71]

Even while the common law of England was taking shape in the last years of the twelfth century, canon law regarding the property rights of married women was fixed and

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[66] Shammas, Salmon and Dahlin raise the question whether the demographics of a region determined whether a widow kept or lost her inheritance upon remarriage. They consider that if there was a large younger generation in a community, there might be pressure to terminate dower upon remarriage, but if there was a large population of older women, widows would be allowed to hold on to their inheritance for life. Shammas, Salmon, Dahlin, *Inheritance in America*, 25.

[67] *Ibid.*

[68] Copyhold land refers to land held by the lord of a manor, either at will or according to the custom of the manor.

[69] Cioni, *Women and Law in Elizabethan England* , 175.

[70] (1833) 3 & 4 Wm. IV, c. 105: Dower Act

[71] (1925) 15 Geo. 5, c. 23.

would have considerable influence on English law and practice. In contrast to the structured approach of the common-law courts to legal rights and obligations, ecclesiastical judges were flexible and made informal use of judicial power in order to achieve results that they considered just.[72] Furthermore, the theoretical recognition by the ecclesiastical courts of the separate legal personality of a married woman was noted by Blackstone in the eighteenth century as a marked exception to the common-law doctrine of marital unity of husband and wife.[73] But the ecclesiastical courts went a step beyond theory. In contrast to the common-law rule regarding costs, a husband was bound to pay his wife's costs, and interim alimony each day during litigation regardless of the outcome. The ecclesiastical courts argued that these rules were essential because married women controlled no property and the court felt it had to be accessible to those with just grievances against their husbands.

Ecclesiastical law had an effect on the property rights of women during and after their marriage in that it regulated the division of personal property.[74] It tended to follow Roman civil law, which was more egalitarian than common law in so far as it advocated a form of community property within marriage and the equal division of parental wealth among all children.[75] The canonists were also concerned with the devolution of property

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[72] Waddams, *Law, Politics and the Church of England*, 182. According to Stephen Lushington, a judge in the Consistory Court of England during the nineteenth century, "all rules of law depend upon the principles of common sense." Waddams, 185.

[73] Blackstone, *Commentaries* , v.1, 44.

[74] Michael Sheehan, "The Influence of Canon Law on the Property Rights of Married Women in England," *Mediaeval Studies*, 25 (1963): 109 - 124.

[75] Erickson, *Women and Property in Early Modern England*, 28.

owned by a married couple when their marriage came to an end either by separation or death.

The influence of ecclesiastical law on customary practice in England is evident in documents from the thirteenth and fourteenth centuries. One important influence was on the testamentary rights of married women. For example, in contrast to common law which enforced the denial of a wife's right to chattels, ecclesiastical law attempted to establish and defend the rights of the wife in the property of the family by giving her a power of bequest[76], a frequent practice of married women.[77] At the same time it limited the testamentary freedom of her husband so that a portion of his moveable property would be hers.

In the eighteenth century, as a result of inefficiency within ecclesiastical courts and an offensive by the civil courts, the wide jurisdiction which the ecclesiastical courts had over wills and intestacies of personal property was considerably diminished. As early as the Middle Ages, the common law had begun to assume some jurisdiction over such liabilities and by the seventeenth and eighteenth centuries, the court of Chancery had acquired a general jurisdiction over the administration of the assets of a deceased person, and would make a decree for the administration of the estate at the suit of a creditor or a beneficiary. Nevertheless, some jurisdiction of ecclesiastical courts remained, including

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[76] According to Sheehan, testamentary freedom to all adults in ecclesiastical law was rooted in the theory of alms, which suggested that the freedom to bequeath was as much a need of the wife as it was of the husband. Sheehan, "The Influence of Canon Law", 119.

[77] *Ibid.*, 113.

exclusive power to make grants of administration in respect to personal property[78] and to rule on disputes over bequests of personal property.[79]

The civil courts had no power to dissolve marriages except by an act of Parliament. The ecclesiastical court, however, had the power to grant a divorce *à mensa et thoro* which had the effect of judicial separation and the power to compel payment of alimony by a husband for the support of his wife.[80] In 1857 the Matrimonial Causes Act transferred the ecclesiastical court's jurisdiction in matrimonial causes to the newly established divorce court.[81] At the same time, the ecclesiastical court's jurisdiction over testamentary matters and intestacy was transferred to a new court of probate.[82]

However, the victory of the common law courts was not complete. A third factor which affected matrimonial property rights was equity[83] which from the fifteenth century, tempered the rigidity of common law doctrine. A married woman's property rights were protected by principles of equity which carried when common law proved rigid, deficient

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78 Holdsworth, *A History of English Law*, v. xii, 687.

79 Peter Charles Hoffer, *Law and People in Colonial America.* (Baltimore: Johns Hopkins University, 1992): 78.

80 Waddams, *Law, Politics and the Church of England*, 6.

81 (1857) 20 & 21 Vict. c. 85: *Matrimonial Causes Act*

82 (1857) 20 & 21 Vict. c. 77, ss. 3,4: *Court of Probate Act*

83 Equity has been defined as "...the correction of that wherein the law, by reason of its universality, is deficient." W.C. Robinson, *Elementary Law*, (revised ed.) 385 - 386, quoted in James F. Colby (ed.) *A Sketch of English Legal History by Frederic W. Maitland and Francis C. Montague.* (New York: Putnam, 1978): 219.

or obscure.[84] While equity was designed to complement the common law, in the area of married women's property rights it often stood in direct opposition. The Court of Chancery[85] permitted a married woman to hold property independently of their husbands by recognizing her separate property or separate estate within the marriage.[86] Property could be placed in trust for a married woman, immune from the claims of her husband or strangers. The aim was to allow or enable a father who gave property to his married daughter the security of knowing that she would possess the property as her own separately and independently and that in the event of a marital breakup the property would remain within the family.

This protection was afforded by the Court of Chancery through the legal principle that a person, although unable to hold property of her own, may allow another person, a trustee, to hold that property for her.[87] Property given to the woman before or after her marriage was placed in trust for her. While under common law it became the property of the trustee, under equity, the trustee was bound by the rules of the trust which in effect were in accordance with the wishes of the woman. As a result, the rules of common law were circumvented and through the principle of equity, the property remained the separate estate of the woman.

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[84] Cioni, *Women and Law*, 8.

[85] For the evolution of the Court of Chancery, see also Geoffrey Cross and G.D.G. Hall, (eds.), *Radcliffe and Cross, The English Legal System* .(4th ed) (London: Butterworths, 1964).

[86] Holdsworth, *The History of English Law*, v. III , 520-533.

[87] Dicey, *Lectures*, 376.

Separate property in equity could take any form: real property, personal property or chattels real, and be created in three ways. First, a written document could be drawn up setting forth the terms of the trust: a deed, a will or a marriage settlement. This contract would be in place before the marriage occurred and was enforceable only through the courts of equity. The document usually described the property and named its trustee. If a trustee was not named, the Court of Chancery reserved the right to name a trustee, which was usually the husband. He agreed to hold the property in trust for his wife, according to the terms of the trust and could not therefore treat it as his own.[88] Secondly, separate property could be created through a verbal agreement between the husband and wife in which a husband simply had to agree that certain property belonged to his wife. The husband was then considered the trustee of the wife's property. Thirdly, separate property could be created through a principle known as equity to a settlement. This principle applied to a woman's *choses in action* such as money held by her trustee, stocks held by her trustee, legacies bequeathed to her in a will but not yet received, or property which she had inherited but had not been transferred by the administrator of the estate.[89]

Historians have disagreed over the frequency of the use of marriage settlements in colonial jurisdictions in the seventeenth and eighteenth centuries.[90] Some have argued that since the supervision of marriage settlements fell under the jurisdiction of chancery courts which were uncommon in the colonies, marriage settlements were not as popular in the

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88 Holcombe, *Wives and Property*, 40.

89 *Ibid.*

90 For a discussion on the use of marriage settlements in colonial jurisdictions, see Salmon, *Women and the Law of Property*, and Backhouse, "Married Women's Property Law".

colonies as they had been in Britain. Only by the end of the eighteenth century and early nineteenth centuries did the marriage settlement become common in the United States.[91] There were two specific types of marriage settlements. The principal feature of a strict settlement was the settlement of an estate upon future male heirs, usually on the occasion of a son's marriage. The settlement reinforced the practice of primogeniture. In addition to entail[92] on sons and future grandsons, strict settlement could also define portions for other children. Historians agree that strict settlements were generally confined to wealthy families.[93] The second, less popular type was the trust for a married woman's "sole and separate estate." These trusts, like strict settlements, were usually established just prior to marriage and were defensible only in equity. A woman planning to be married could establish her own trust only before marriage. A trust could be set up for her by anyone else at any time.[94]

In summary, the Court of Chancery enabled a married woman to possess separate property over which her husband had no control and which with the permission of the trustee, she could dispose as she wished. Under equity, a wife could receive an income from her property and not be subject to her husband's creditors. She could sell or give away her personal property, chattels real or equitable choses in action. Her trustee could

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[91] Shammas, Salmon, Dahlin, *Inheritance in America*, 36.

[92] entail: to settle or limit the succession to real property. *Black's Law Dictionary*, 476.

[93] Amy Louise Erickson, "Common Law versus Common Practice: the use of Marriage Settlements in Early Modern England," *Economic History Review*, XLIII, 1 (1990): 21.

[94] *Ibid.*, 22.

sue on her behalf. She could lend money or incur debts using the separate property to satisfy those debts as well as carry on a business without being subject to her husband or his creditors. Her husband took her personal property, chattels real and choses in action upon her death.[95]

To those who demanded reform of married women's property rights, however, there were several problems with the rules of equity regarding married women's property. The court of equity designated a special status of married women, in that a wife did not have the same rights as a single woman or a married man but merely had certain rights to property under specified conditions. Further, she had the rights but not the responsibilities or liabilities that came with the property.[96] Both her contractual capacity and her testamentary capacity were limited. Although the rules of equity created separate property for the woman, her husband, in the absence of a designated trustee, was usually her trustee. He was still liable for her debts and her contracts entered into after marriage in so far as they did not involve her separate property. A man was responsible for the support of his family regardless of the separate property of his wife. As we shall see in Chapter 6, these are the restrictions that reformers sought to eliminate in their campaign for property reform in the second half of the nineteenth century.

Since the thirteenth century in England, the common law had declared that much of a woman's property was given to her husband as a principle of coverture. Statutes and custom framed the evolving system of laws pertaining to matrimonial property, inheritance and marriage. Although English common law would come to Newfoundland with those

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[95] Holcombe, *Wives and Property*, 43.

[96] *Ibid.*, 44.

who settled, the reception and application of these laws would be contingent upon how well they fit local circumstances and addressed the needs of residents.

Chapter 4: "Quiet and Peaceable Possession": Defining Property and Property Law in Newfoundland

To this point, we have reviewed recent research on matrimonial property reforms in other English common law jurisdictions and examined English law pertaining to property, inheritance and marriage. In order to determine how the law of matrimonial property operated in Newfoundland, we will now have to focus on three contributing factors: the reception of English law; the impact of the fishery on settlement and the meaning of property; and the emergence of a legal system.

"As Far as the Same can be Applied": Reception of Law

The extent to which English law was received in colonial jurisdictions varied from colony to colony. It depended on several factors, including the formal date of reception, the existence of local or imperial legislation which regulated reception, and decisions by colonial courts regarding the reception of English law.[1] Furthermore, it was contingent upon whether the colony was acquired through conquest or by settlement.

English colonies received their English legal inheritance "... by virtue of local permutations of and qualifications to the fundamental principles."[2] As a general rule in settled colonies, settlers brought with them existing English law, both judge-made and

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[1] A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property.* (2nd ed.) (Aurora, Ontario: Canada Law Book, 1985): 54

[2] M.H. Ogilvie, *Historical Introduction to Legal Studies.* (Toronto: Carswell, 1982): 376. For further discussion on the reception of English law in the English colonies, see J.E. Côté, "The Reception of English Law", *Alberta Law Review*, 15, 1 (1977): 29 - 92. Carole Shammas, "English Inheritance Law and its Transfer to the Colonies", *The American Journal of Legal History*, 21, 2 (April, 1987): 145 - 163.

statute. Those laws would become the basis, at least, of the law in the colonies, except for those laws which were deemed unsuitable to the circumstances of the colony. The common law was received as a uniform body of law throughout the empire and was not contingent upon a date of reception.[3] However, the reception of statute law was determined by a cut-off date for reception which in many colonies was designated by local or imperial statutes. In Newfoundland, the date when the colony received its first legislature was designated as the formal date of reception.[4] The first Legislative Assembly was held on January 1, 1833 and the cut-off date for the reception of English law was accordingly held by the courts to be December 31, 1832. The application of English property law did not become a political issue on the island until settlement was legally recognized and property ownership was sanctioned in the early nineteenth century.[5] By that time, customary practice helped to shape the definition of property and the application of property law on the island.

The fishery lent a unique context to the issue of legal reception in Newfoundland. English law came to the island as a "settled" possession of England by several means. The

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[3] Peter Hogg, *Constitutional Law of Canada.* (4th ed.) (Toronto: Carswell, 1996): 30. Hogg designates Newfoundland as a "settled" colony despite English policy regarding settlement in the seventeenth and eighteenth centuries.

[4] Chief Justice Forbes ruled that English statute laws remained in force until the beginning of a local legislature. *Yonge v. Blaikie* (1822) 1 Nfld. L.R. (St. John's: J.C. Withers): 277 at 283.

[5] English, "The Development of the Newfoundland Legal System to 1815", 91. In 1811, an imperial statute granted private title to property. (1811) 51 Geo. III, c. 45: *An Act for taking away the public use of certain ships rooms in the town of St. John's, in the Island of Newfoundland; and for instituting Surrogate Courts on the Coast of Labrador, and in certain islands adjacent thereto.*

first means was through the birthright of English settlers.[6] Their birthright was grounded in a statute in 1350 which was used to support an argument in *Calvin's Case* in 1608 that "the law of England doth extend to acts and matters done in foreign parts."[7] Those who came to Newfoundland carried the English common-law tradition with them and applied it as was necessary to accommodate local circumstances. A second means was through the royal prerogative.[8] The patent issued by Queen Elizabeth I to Sir Humphrey Gilbert on June 11, 1578, gave him the right to establish a colony. He was authorized to occupy for six years lands that were not "actually possessed of any Christian prince or people"[9] and to apply the law "as neere as conveniently may, agreeable to the forme of the lawes and policie of England."[10] A series of grants or charters to establish proprietary colonies

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6 George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence.* (Burlington: C. Goderich, 1858): 206.

7 B.H. MacPherson, "Scots Law in the Colonies" (1995, Part 2) Reprinted from *The Juridical Review*, (Edinburgh: W. Green): 194.

8 The royal prerogative is the right enjoyed by the sovereign by virtue of the common law. It extended to British colonial jurisdictions unless otherwise prescribed by imperial or colonial statute. Halsbury, *Laws of England*, (2nd ed.) v. 6, "Royal Prerogative" at 443. For elaboration on the issue of the reception of English law in Newfoundland, see Christopher English, "The Reception of the Law in Ferryland District", a paper presented to the joint session of the CLSA and CHA, Brock University, St. Catharines, June 1996.

9 D.W. Prowse, *A History of Newfoundland from the English, Colonial and Foreign Office Records.* (London: Macmillan, 1895): 62. See also Keith Matthews, *Lectures on the History of Newfoundland, 1500 - 1830.* (St. John's: Breakwater, 1988): 60

10 Richard Hakluyt, *The Principal Navigations Voiages and Discoveries of the English Nation.* (1589) v. 2 (Cambridge: Hakluyt Society, 1965): 678.

followed over the succeeding decades to English joint-stock companies, such as the London and Bristol Company in 1610 and to individuals such as Sir George Calvert, Lord Baltimore, in 1623 and Sir David Kirke in 1637. However, the extent of the law and the manner in which it was interpreted and enforced depended on those who held the charter. The early colonies ended in failure due to lack of financial support, inexperience, isolation, the harshness of the climate and the seasonal nature of the cod fishery, but sporadic settlement continued. For those who continued to visit the island each year, seasonal and, after 1818, permanently resident governors exercised the royal prerogative through their commissions and instructions. They heard disputes and delegated authority to *surrogates* and magistrates from 1729 who presided over courts, including the Court of Oyer and Terminer and General Gaol Delivery after 1750.[11]

A third means by which English law came to Newfoundland was through a series of Western Charters beginning in 1633 - 1634 which were designed to establish some measure of legal authority. Imperial statutes passed by the English Parliament at Westminster comprised a fourth means. Imperial law consisted of statutes which applied *ex proprio vigore*, that is, by its own force, by virtue of the fact that territories were part of the empire.[12] These statutes regulated such imperial concerns as trade and navigation, piracy, and courts of Vice-Admiralty. Other imperial statutes applied specifically to only one or more colonies and constitute the fifth means by which English law was received. In

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[11] Surrogate courts were enshrined in statute by (1792) 32 Geo. III, c. 46, made perpetual by statute, (1809) 49 Geo. III, c. 27 and eliminated by (1824) 5 Geo. IV, c. 67. The Court of Oyer and Terminer and General Gaol Delivery had a strictly criminal jurisdiction. Magistrates courts survive today as Provincial courts.

[12] Côté, "The Reception of English Law", 31 - 37.

Newfoundland, for example, these statutes included the Act of King William in 1699, Palliser's Act in 1775 and a series of Judicature Acts beginning in 1791.[13] Both types of imperial statutes remained in effect until the beginning of a local legislature in 1832 when they ceased to apply to the extent that they conflicted with local statutes.[14] A sixth application of English law included statutes that specifically received part of English law after the local legislature was created. For example, in 1837 an act of the local legislature allowed all criminal laws and statutes of the British Parliament in force in England on June 20, 1837 and all statutes passed concerning criminal law, in the following twelve months, to apply to Newfoundland.[15] The question of reception, however, focuses on English laws that were received in colonies simply because they were laws of England and were brought to the island with settlers. Thus, English domestic statute was a sixth means of receiving English law in Newfoundland. Equity, considered an integral part of English law, was considered received with English law.[16]

The Imperial and Local Context: The Fishery

The English fishery in Newfoundland gradually developed throughout the sixteenth

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[13] (1699) 10 & 11 Wm. III, c. 25; (1775) 15 Geo. III, c. 31; (1786) 26 Geo. III, c. 26; (1791) 31 Geo. III, c. 29.

[14] Christopher English, "The Official Mind and Popular Protest in a Revolutionary Era: the Case of Newfoundland, 1789 - 1819", in Barry Wright and Murray Greenwood (eds.), *Canadian State Trials*, v. 1 (Toronto: Osgoode Society/University of Toronto Press, 1995): 300.

[15] (1837) 1 Vict. c. 4 (Nfld.): *An Act to Extend the Criminal Law of England to this Colony under Certain Modifications.*

[16] Côté, "The Reception of Law", 57.

century in competition with the Portuguese, Spanish and French. During the seventeenth and eighteenth centuries, the English sought commercially to produce the best possible product at the cheapest possible price, and by diplomatic and military means to weaken their competitors. International events throughout the sixteenth century enabled a secure English fishery and a Newfoundland fishery dominated by England and France.[17]

England's claim to Newfoundland rested on five assertions: the voyage of John Cabot in 1497; the existence of the English fishery in Newfoundland for fifty years; the scarcity of native inhabitants on the island; the need to develop Newfoundland's economy, and the fact that the island had not been claimed by any Christian King.[18] Rather than rule the island directly, the English government issued charters which gave the right to set up colonies to promoters in order to establish claim to the territory.[19] These charters, such as the London and Bristol Company Charter of 1610, created a governing council of shareholders in England and gave them ownership and complete legislative authority over a defined area in Newfoundland. At the same time, they expressly reserved the rights of fishermen to their "singular liberties", although these rights were not stated.[20] The charters empowered the company of adventurers, their "heirs and assigns", [21]to impose taxes and

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17 Ryan, "Fishery to Canadian Province", 10.

18 "London and Bristol Company's Charter", 1610, in Keith Matthews, *Collection and Commentary*, 17 - 31.

19 *Ibid.*, 2.

20 *Ibid.*, 20.

21 *Ibid.*, 18.

customs duties, and to make all laws "as neere as conveniently may be agreeable"[22] to the laws of England. They were not to interfere in any way with the migratory fishery.

The island's place on England's agenda and in particular the value of the Newfoundland cod fishery greatly determined the application of English laws and the meaning and importance of property on the island. Fishermen and labourers who participated in the migratory fishery at Newfoundland went out from England in the spring and returned to their homes in the fall. On the island, these migratory fishermen built and repaired stages and flakes using wood that was easily accessible.The early fishermen carried out two different types of cod fisheries, the shore fishery on the island's east coast and by the early eighteenth century, the bank fishery on the Grand Banks which extended south-east 300 kilometres from shore. Every spring fishermen arrived in the harbours and lived along the shore. They produced a processed fish, lightly salted and dried, which required shore stations called fishing rooms[23] to be maintained, along with wharves, stages,[24] flakes,[25] wooden vats to hold cod livers, and living quarters.

Others made their way to Newfoundland through the efforts of charter-holders. Between 1610 and 1660, colonial development was placed in the hands of private

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[22] *Ibid.*, 28.

[23] A fishing room or ships-room is a tract or parcel of land on the waterfront of a cove or harbour from which a fishery is conducted; the stores, sheds, flakes, wharves and other facilities where the catch is landed and processed and the crew housed. *Dictionary of Newfoundland English (DNE)*, 184.

[24] A stage is a narrow, wooden building projecting into the water where the fish, when taken out of the boats, were headed, split and salted. *DNE*, 525.

[25] A flake is a platform built on poles and spread with boughs for drying cod fish on the shore. *DNE*, 187.

individuals or joint stock companies. Fishermen who became residents of the island were often referred to as inhabitants while resident fishermen who were comparatively well-off were known as planters. Unlike the other resident fishermen, planters owned large fishing rooms, stages, flakes, other buildings, boats and equipment needed to process fish. They also hired servants in England and later Ireland to come to Newfoundland to work for them.[26]

In 1610 the London and Bristol Company[27] sent John Guy to Newfoundland with settlers, supplies and instructions to found a colony which he did in the small harbour of Cupids, Conception Bay.[28] In 1611, Governor Guy discovered that old fishing structures in Cupids were being deliberately destroyed and the forest set on fire. He also noticed that the harbours were being littered with ballast from ships arriving for cargoes of fish. As a result, Guy published the first set of laws in Newfoundland which prohibited destructive practices and listed heavy fines to be imposed on those who broke the laws.[29] From 1613 to 1631, the colony declined as profits to the company were used up in the constant provision of equipment, livestock and wages. Guy decided to remain in Bristol in the

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[26] See "planter" in the *Dictionary of Newfoundland English* as well as Cadigan, *Hope and Deception*, xi. Note that 'family fishermen' did not become common inhabitants until the nineteenth century.

[27] "London and Bristol Company's Charter", in Prowse, *History of Newfoundland*, 122 - 125.

[28] "Instructions to John Guy from the Associates of his Company, 1610", in Prowse, *A History of Newfoundland*, 94 - 96.

[29] *Ibid.*, 99.

winter of 1613 and in fact, never returned to Newfoundland.[30]

A proprietary charter for a colony on the Avalon Peninsula was also granted to Sir George Calvert, later Lord Baltimore, in 1623.[31] By the charter, Calvert was given the power to make any law public or private [32]although such laws were to be as close to English law as would "conveniently be agreeable".[33]

The charter awarding David Kirke a proprietary grant in 1637 prohibited settlement within six miles of the shoreline.[34] The visiting fishermen were guaranteed their freedom from the control of the patentees and Kirke was restrained from making laws that would restrict the fishery. However, the charter recognized the right of settlers to fish "as other our subjects have and enjoy" and gave Kirke control over the fish exported by settlers.[35] How colonists would select their fishing rooms so that visiting fishermen would not be

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30 Cell, *English Enterprise in Newfoundland*, ch. 4.

31 Charter granted to Sir George Calvert, Lord Baltimore, 1623, in Matthews, *Collection and Commentary*, 39 - 63.

32 *Ibid.*, 46.

33 *Ibid.*, 48.

34 According to the Charter, inhabitants "shall not fell, cutt downe, root up, mast, or destroy any trees, or woods whatsoever. Nor erect, or build any houses whatsoever. Or plant or inhabite within six miles of the sea shore of any part of Newfoundland." Grant to David Kirke, 1637, in Matthews, *Collection and Commentary*, 87.

35 "The Grant to the Duke of Hamilton, Sir David Kirke, and others, of the Island of Newfoundland", November 13, 1637, in Prowse, *History of Newfoundland*, 143.

denied the best beaches was not specified.[36] Since colonists had to fish to survive on the island, they needed access to fishing rooms which, in effect, broke the terms of the Charter that allowed them there in the first place.[37] The colonies eventually failed and the legal rights of the charter holders lapsed with the end of each colony.

By the 1630s, Newfoundland was home to inhabitants and, in addition, thousands of west of England fishermen arrived during the summer to carry out their annual fishery. Building the facilities they needed, such as stages, flakes and wharves, caused considerable deforestation throughout the seventeenth century. The fishing facilities became increasingly valuable and caretakers were left behind to 'winter' on the island to have everything ready to begin fishing the following summer. They ensured that the owners maintained control of their own plantations because traditionally the choice of fishing rooms had been made each spring on a first come-first served basis.[38] Small pockets of settlement intended to serve the needs of the fishery gradually developed. The colonists were completely dependent on the shore fishery and relied on imports of supplies from

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[36] The intention was to establish England's claim to the island. Establishing title to specific land located beyond the first six miles from the shoreline was not as important as making certain that inhabitants did not interfere with visiting fishermen. For a recent interpretation of the significance of land grants, see Pope, "The South Avalon Planters", 158.

[37] Matthews, *Collection and Commentary*, 15. Matthews argues that despite the potential for conflict, for charter-holders such as Falkland and Baltimore, there were no complaints from visiting fishermen. This was not the case, however, for David Kirke who received a charter to colonize Newfoundland in 1637. Kirke was accused of taking the best fishing rooms on the Avalon Peninsula and forcing visiting fishermen to pay rent for their fishing rooms. In 1652, Kirke was recalled to England although his colony continued. Matthews, *Lectures*, 68.

[38] Shannon Ryan, *Fish Out of Water: The Newfoundland Saltfish Trade, 1814 - 1914.* (St. John's: Breakwater, 1986): 32.

England.[39] By 1650, there were approximately 1500 European residents on the island.[40]

The English government recognized that the existence of proprietary colonies did not guarantee law and order on the island. Colonists had been under the authority of governors, but as colonies floundered, the government had to face the issue of visiting fishermen and planters living in Newfoundland without benefit of law, and no means of resolving fishing disputes, for example, between seasonal visitors and permanent residents.[41] In 1634 the King issued the Western Charter[42], which Keith Matthews referred to as the "first law" directly given to Englishmen in Newfoundland by the Crown. The Charter, and others that followed, incorporated John Guy's laws. These western charters were not laws for a colony but a set of rules for English fishermen "beyond the seas"[43] and could be used to settle disputes as they occurred.[44]

Most of the clauses of the Charter of 1634 were designed to keep law and order. Following the law and custom of the sea, one clause appointed the captain of the first ship

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[39] Ryan, "Fishery to Canadian Province", 12.

[40] Shannon Ryan, "Fishery to Colony: A Newfoundland Watershed, 1793 - 1815", in P.A. Buckner and David Frank, (eds.) *Atlantic Canada Before Confederation.* (Fredericton: Acadiensis Press, 1985): 133.

[41] Matthews, *Collection and Commentary*, 68.

[42] A copy of the Western Charter of 1634 is found in Matthews, *Collection and Commentary*, 71 - 75.

[43] *Ibid.*, 6.

[44] See "the case of the furriers' boats" which involved the theft and vandalism of property belonging to the French by several planters on the English shore in 1679. Furriers were fur trappers of European origin. Pope, "The South Avalon Planters", 84 - 90.

to arrive annually in each harbour as the admiral of that harbour, thereby making custom in Newfoundland official.[45] The second captain became the vice-admiral and the third the rear-admiral. The admiral, assisted by the two others, became the official law enforcement officer charged with upholding the clauses of the charter which included settling disputes and bringing back to England those charged with capital offenses.[46] The fishing admirals had complete authority in the harbours. Though there was no distinct legal right to coastal premises, few disputes arose regarding possession and when they did, fishing admirals acting as arbitrators would settle the issue. Planters were required to take only the fishing rooms that they would be using and to situate their rooms close to each other so there would be no wastage of ground. Planters were also forbidden to construct dwellings on shore land that was suitable for drying fish.[47]

In 1653 the Council of State in England issued a set of "Rules and Ordinances" to govern Newfoundland.[48] John Treworgie was appointed the sole and permanent commissioner for Newfoundland in 1653 and these rules became the basis of his authority

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[45] A copy of the Western Charter of 1634 is found in Matthews, *Collection and Commentary*, 73. For a further explanation of the fishing admiral system, see Cell, *English Enterprise*, ch. 7.

[46] The Western Charter of 1634 in Matthews, *Collection and Commentary*, 72.

[47] *Ibid.*, 74.

[48] A copy of the "Laws, Rules and Ordinances whereby the Affairs and Fishery of the Newfoundland are to be governed untill ye Parliament shall take further order" is found in Matthews, *Collection and Commentary*, 123 - 126.

on the island.[49] Most of the rules had been taken from the Western Charter but an increase in the number of resident fishermen and in the number of fishing rooms they were using required some regulations regarding the use of fishing rooms.[50] Planters were not permitted to keep any more stage room than they required and were to consolidate their stages and fishing rooms, rather than scatter them throughout the harbour, wasting room that might be made available for other fishermen.[51] They were not allowed to "build any dwelling house, store house, courtledge, or garden, or keep any piggs or other Cattle upon or near the ground where fish is saved or dried."[52]

By 1640 shipowners and operators, many of whom had become bankrupt, became small boat operators known as bye boat keepers.[53] They invested in a fishing boat, hired four or five men and came to Newfoundland annually as passengers on board those fishing ships still operating. In the fall, they sold their catches to sack ships or other fishing ships

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[49] Prowse, *History of Newfoundland*, 163.

[50] Matthews, *Collection and Commentary*, 120.

[51] "Laws, Rules, and Ordinances", section 10, 125. Matthews argues that these rules recognized settlement and for the first time the right of inhabitants to permanently own fishing rooms on the shoreline as long as they did not waste the land and its resources, but again, the rights of inhabitants were not reconciled with those of visiting fishermen. Matthews, *Collection and Commentary*, 120.

[52] "Laws, Rules and Ordinances" in Matthews, *Collection and Commentary*, s. 11, 125.

[53] Matthews, "A History of the West of England Newfoundland Fishery", 162. In the bye boat system, a fishing vessel owned by a migratory fisherman was left in Newfoundland during the winter, while its owner and crew travelled to and from annually on the fishing ships. The peak of the bye boat fishery did not occur until 1771 - 1779 when the total number of bye boat keepers averaged 525. Ryan, "Fishery to Colony", 132.

which brought the fish directly to market.[54] However, wars continued to play havoc with the migratory fishery because fishermen were in danger of being captured by enemy ships and of being pressed into service in the Royal Navy. From 1640 to 1660, English policy towards Newfoundland focused on three features: the protection of the fishery through the enforcement of the Navigation Acts, the defence of the fishery by convoys and the fortification of certain harbours, and the administration of the island by commissioners.[55]

The Western Charter was re-issued in 1660 with an additional clause which forbade the transportation of people to Newfoundland unless they were members of a ship's crew or intended to settle.[56] The intention was to keep bye boat keepers out of the fishery because they travelled as passengers and therefore received no training as sailors capable of manning naval vessels.[57]But the attempt to exclude the bye boat keepers from the fishery was unsuccessful because it was difficult to distinguish between the bye boat keepers and the planters who spent part of the year in England. In addition some ship owners were making money from passengers. There was nothing to prevent bye boat keepers from claiming to go to Newfoundland to settle and changing their minds at the end of the fishing

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[54] Ryan, *Fish Out of Water*, 32.

[55] Cell, *English Enterprise*, ch. 7.

[56] Matthews, *Collection and Commentary*, 131.

[57] The bye boat keepers were neither settlers nor members of the traditional West Country fishing ship crews. They and their servants lived in the West of England but left their boats and equipment "by" during the winters in Newfoundland. They took passage on the West Country ships, fished in the summer and returned home in the winter. To the West Country ship owners, they were competition. *Ibid.*, 129.

season using a lack of success as their excuse for returning home.[58] The Crown's further attempts to revise the charter to prevent people who were not members of fishing crews from travelling to Newfoundland also failed and the prohibitory clauses were repealed.

The recognized failure of the concept of developing Newfoundland by private charter led to the Western Charter becoming the territorial fishing law for the island.[59] The Committee for Trade and Plantations decided that the island's only value was its migratory fishery.[60] As in Kirke's charter earlier in the century, clause three of the Western Charter of 1671 forbade settlement of any land within six miles of the shore. The method of enforcing law was put into a full-fledged fishing admiral system in which three admirals, Admiral, Vice-Admiral and Rear-Admiral had definite jurisdictions. Fines could be levied on offenders. The Charter also formally announced the value of Newfoundland as a nursery for British seamen.[61] Matthews has argued that while the Charter reflected the triumph of the West Country influence, it also signalled a growing determination on the part of the English government to develop definite policies towards Newfoundland.[62] The government, for example, specified the area of Newfoundland which it claimed, the area between Cape Race and Bonavista. A clause banned settlement near the coast and restricted

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58 *Ibid.*, 142.

59 *Ibid.*, 7.

60 Matthews, "A History of the West of England Newfoundland Fishery", 206 and 216.

61 Matthews, *Collection and Commentary*, 152 - 157.

62 *Ibid.*, 150.

the transportation of men to and from the island. A Minute appended to the Charter encouraged inhabitants to go to the West Indies.[63]

Another Western Charter issued in January 1675 ignored the Charter of 1671 and referred only to the charters of 1634 and 1661. The new Western Charter continued to discourage settlement as much as possible.[64] When convoy commanders refused to enforce its provisions, the fishing admirals took the law into their own hands and tried to remove settlers from coastal areas. The result was a petition from settlers arguing the benefits of settlement. Many were convinced that without settlement, the fishery would be taken over by the French. Furthermore, settlers were there because of the earlier encouragement of royal patents. The result was the issuing of the Order of 1677 which marked a turning point in government policy and an end to attempts to abolish settlement.[65] Clauses ending the transportation of people to Newfoundland were suspended. The system of allocating fishing rooms was left to a first-come, first-served basis, an unsatisfactory condition for it meant that those who were there first had access to the best fishing grounds. Fearing the consequences of future war and the subsequent lack of law and order, settlers petitioned for a governor. The Committee for Trade and Plantations agreed but the government did not comply. A decision was made to send a Governor in 1689 but, again, was not carried out.[66] Until 1699 the inhabitants who remained in Newfoundland did so without the

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63 *Ibid.*, 150, 161.

64 *Ibid.*, 171, 180.

65 A copy of "An Order restraining the Enforcement of Certain Clauses in the Western Charter", is found in Matthews, *Collection and Commentary*, 193.

66 *Ibid.*, 194.

benefit of formal laws or government. In Matthews' words,

> While other colonies developed under either private charters or direct Crown rule, Newfoundland became unique as the only part of the Empire which had no government at all.[67]

The migratory fishery declined after 1625 because of wars with France and Spain, piracy, civil war, the Anglo-Dutch wars and a decline in the attention given to the Royal Navy.[68] After the 1650s, a naval convoy was sent annually to Newfoundland to protect the fishing fleet. England and France went to war between 1689 and 1698. By 1697, most of the dwellings constructed by the English in Newfoundland had been destroyed. The obvious need for greater protection encouraged the English government to act. In 1697 a military garrison was established in St. John's and fortifications built around the harbour and two years later the King William's Act marked an important step in property rights on the island.

The beginning of statutory regulation

On May 4, 1699, King William's Act,[69] which was designed to regulate trade and fisheries at Newfoundland, was given royal assent in England. The Act incorporated many of the clauses of Guy's laws and those of the western charters, as well as adding new ones. The provisions of the Act indicate that it was not the intention of the English Parliament to settle Newfoundland, but rather to reserve it without cultivation for the use of

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[67] *Ibid.*, 3.

[68] Ryan, "Newfoundland: Fishery to Canadian Province", 13. Wars include: the English Civil War: 1642 - 1649; King William's War: 1689 - 1698; Queen Anne's War: 1701 - 1713; War of Spanish Succession: 1702 - 1713.

[69] (1699) 10 & 11 Wm. III, c. 25.

the fishery carried on by English fishermen. Ships rooms, stages and beaches were to continue to be used on a first-come, first-served basis.

Private land was distinguished from public land which was designated for the use of visiting fishing ships. Those inhabitants who had built fishing rooms before 1685 were not to be interfered with. Secondly, those who had built fishing rooms since 1685 on the coast in places which fishing ships had not been using could "peaceably and quietly enjoy the same without any disturbance from any person whatever".[70] Thirdly, inhabitants who had built fishing rooms since 1685 in places frequented by migratory ships at any time between 1685 and 1699 were to remove them.[71] Any fishing ship room in a harbour left vacant in any given year could be used temporarily by an inhabitant for that summer but he had to wait a reasonable length of time before setting up his operation and he would have to acquire the consent of a fishing admiral.

For resident planters the Act ensured more certainty of possession of land. They made their fish on rooms that they claimed for their own "use".[72] "King William's Act" in a limited way recognized a property right, and more importantly, security of tenure, in Newfoundland. More than 125 years later, the Act was still being interpreted by judges in court cases pertaining to property held in Newfoundland. For example, in 1828, Chief Justice Forbes in the case of *R.v. Kough* made the point:

> The statute of William does not define the quantity or quality of estates; but it fully recognizes the right of quiet possession, which supposes property of some

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[70] *Ibid.*, s. 7.

[71] *Ibid.*, s. 5.

[72] "Use" refers to the employment, enjoyment and long-term possession of property. *Ballentine's Law Dictionary*, (3rd ed.): 1325.

kind...[73]

By 1699 the English government realized that its concerns about the growth of settlement could not be resolved because settlement could not be controlled without a government presence. Yet, the presence of government would only lead to a further infrastructure that would make settlement more attractive. For example, when the French withdrew from Placentia in 1713, planters could not be prevented from occupying the newly vacated fishing rooms because the ship fishery had not been used in Placentia since 1685.[74] The expansion of settlement into all the harbours along the coast continued to be related to developments in the migratory fishery, rather than to the extension of colonization. The migratory fishery had been environmentally destructive. Each spring, trees were cut for building purposes and other trees were "rinded" to acquire sheets of rind or bark for roof coverings and coverings for fish flakes. In the autumn the stages, flakes and shacks were torn apart as fishermen took the best of the dry timber back to their home ports.[75] Building new structures every spring became increasingly difficult as crews were forced farther inland for timber and rinds. After 1713 migratory fishermen developed a

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[73] *R.v. Kough*, (1819), 1 Nfld. L.R. 172. Prowse, writing in the late nineteenth century, denounced King William's Act and attributed its passage to bribery and corruption with the English government. He felt that the only reasonable clause in the Act was the seventh. Prowse claimed that the statute was simply "declaratory and directory" as it did not contain any penalties nor did it award any jurisdiction to authorities acting under it. Prowse, *History of Newfoundland*, 225. Matthews later argued that the limited recognition of the right to private property was given by the Act only as was necessary to ensure continued English possession of the island. Matthews, *Collection and Commentary*, 176.

[74] Matthews, "A History of the West of England Newfoundland Fishery", 323.

[75] Archibald Buchanan, "Concerning Landed Property in Newfoundland", (1786), MF 012, Centre for Newfoundland Studies Archives, Memorial University. [A photocopy of the original in the British library, manuscript, additional 38347 F.373 et seq.]

bank fishery to complement the traditional fishery and the bye boat fishery. Resident planters began to diversify from the salt cod fishery to subsistence farming near St. John's and throughout Conception Bay. They also engaged in sealing and the salmon fishing.[76] By 1716, a thin line of settlement stretched from Placentia Bay in the south to Bonavista in the north, with a total population of 3,295.[77]

The gradual growth of settlement in the eighteenth century created a need for a more structured system of justice. In 1729, after many complaints from planters, fishing captains, and convoy commanders about the destruction of property, drunkenness and general lawlessness during the winter, the convoy commander's position was upgraded to that of naval governor.[78] Captain Henry Osborne, commander of the summer naval fleet, appointed sixteen justices of the peace and thirteen constables to a number of populated centres. Osborne's commission authorized him to perform civil functions, divide the island into districts and to erect prisons and stocks.[79] Osborne was warned that neither he nor his justices were to do anything contrary to King William's Act nor to interfere in any way with the privileges of the Admiral as defined by that Act.[80] Therefore, justices of the peace

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[76] Ryan, "Fishery to Canadian Province", 16.

[77] *Encyclopedia of Newfoundland and Labrador*, "Census", 393.

[78] Matthews, "A History of the West of England Newfoundland Fishery", 358.

[79] Ralph Greenlee Lounsbury, *The British Fishery at Newfoundland, 1634 - 1763.* (Archon Books, 1969): 275.

[80] Lord Vere Beauclerk acted as commodore of the convoy and administered the fishery regulations of King William's Act. *Ibid.*, 276.

had to contend with the power and influence of the fishing admirals.[81] In 1710 the first permanent Court of Vice Admiralty was created to adjudicate cases of prize and to resolve commercial disputes arising from maritime trade.[82] In 1750 the governor was given a commission to establish a Court of Oyer and Terminer, and a Customs House was built in 1763.[83] Local authorities received regular instructions to rid the communities of individuals who were idle or disorderly. Proof of misconduct was sufficient to send them back to their native country. Such was the fate of a widow, Mary Bond, found guilty of disorderly conduct in Fogo in 1771, and sent back to England in compliance with the instructions of Governor John Byron.[84]

The settlement of Newfoundland was aided by the Seven Years' War which broke out in 1756. Bye boat keepers sought to avoid the dangerous trans-Atlantic journey by settling on the fishing rooms.[85] Thus the resident population grew, helped by the

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81 E.M. Archibald, *Digest of the Laws of Newfoundland.* (St. John's: H. Winton, 1847): 44.

82 The earliest attempt to erect a Court of Vice Admiralty outside England was in Newfoundland. In 1615 Sir Richard Whitbourne was sent out with a commission as vice admiral by the High Court of Admiralty in England to establish a court for the sole purpose of settling disputes among local fishermen. The Court failed when the Privy Council issued an order prohibiting the Court of Vice Admiralty from interfering in the fisheries. David R. Owen; Michael C. Tolley, *Courts of Admiralty in Colonial America: The Maryland Experience, 1634 - 1776.* (Durham, N.C.: Carolina Academic Press, 1995): 26.

83 Archibald, *Digest of the Laws*, 44.

84 PANL, GN 2/1/A, Colonial Secretary's Office, Outgoing Correspondence, v. 5 and 6, box 2, Governor Byron to fishing admirals in Fogo, August 28, 1771.

85 Matthews, "A History of the West of England Newfoundland Fishery", 388.

introduction of the potato. In 1763, the population reached 13,112 including 4,226 children. Even with a post-war decline, the population never again fell below 11,000 and totalled 16,835 in 1790.[86] By this time, inhabitants enjoyed more security of life and property.

The outbreak of the American Revolution coincided with the passage of Palliser's Act[87] in 1775. It was Britain's last attempt to discourage and restrict settlement on the island. The Act permitted seasonal use of land that was not being used in the fishery but, in contrast to King William's Act, it did not specifically provide for quiet possession.[88] The war had a significant impact on developments in Newfoundland. A trade embargo imposed by the Thirteen Colonies cut off Newfoundland's supplies including flour, livestock, vegetables, molasses and rum. Britain established other sources for Newfoundland including Quebec and the British Caribbean. One result was the growth of a local mercantile community around the Caribbean trade.[89] Shipowners in St. John's sent cargoes of inferior fish to the British Caribbean for molasses, sugar and rum. Since ships could no longer be purchased from the American colonies, a local ship building industry grew up. A further result was the westward extension of the French Shore boundary in 1783, from Cape St. John to Cape Ray. After the war ended in 1783, the British

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[86] *Encyclopedia of Newfoundland and Labrador*, "Census", 393.

[87] (1775) 15 Geo. III, c. 31: *An Act for the Encouragement of the fisheries carried on from Great Britain, Ireland, and the British dominions in Europe, and for securing the return of the fishermen, sailors, and others employed in the said fisheries to the ports thereof, at the end of the fishing season.* ("Palliser's Act").

[88] *Ibid.*, s.2.

[89] Matthews, "A History of the West of England Newfoundland Fishery", 466.

government allowed the independent United States to supply Newfoundland under certain restrictions.[90]

By the late eighteenth century, most of the population could receive "quiet and peaceable possession" of property by petitioning the governor. Possession was granted as long as fences were kept up and the property was occupied and properly maintained. In 1759, Governor Richard Edwards awarded property in Greenspond, Bonavista Bay, to William Keen of Teignmouth, Devon, because he had "cleared the land so diligently." It was the first time this particular piece of land had been owned by anyone. It was granted to encourage inhabitants to "improve His Majesty' plantation" and to encourage "the trade and fishery of Newfoundland." The property was declared the "sole right" of William Keen, thereby making it inheritable property.[91] Governors' grants in the eighteenth century included the provision, "to heirs and assigns forever". For example, Mrs. Elizabeth Gobbett's grant of a plantation in Ferryland by Governor Francis Drake in 1750 included this provision.[92]

Owners were assured possession without interference from others as long as they agreed to carry out the fishery according to the provisions of King William's Act. This condition was paramount and the importance of enforcing the "Fishing Act", as it was often referred to, was repeated regularly in the Governor's commissions. Despite the gradual

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[90] Matthews, *Lectures*, 119.

[91] PANL, GN 2/1/A, Colonial Secretary's Office, Outgoing Correspondence, v. 1 - 4, 1749 - 1779, October 6, 1759.

[92] PANL, GN 2/1/A, Colonial Secretary's Office, Outgoing Correspondence, v. 1 - 4, 1749 - 1779, August 31, 1750.

evolution of the legal system and administration on the island throughout the eighteenth century, all land, which had been turned to use, could be categorized as either a public ships-room or private property. In most harbours, given the few people and the availability of space, encroachments rarely occurred. The only exception was St. John's, where too few ships rooms led to many disputes and discord among some of the residents.[93]

By the closing years of the eighteenth century, a sufficient amount of what had been considered public property had been taken over by individuals for private use. Property that had been granted for possession was considered to be owned by those who cleared it, lived on it and used it to carry on the fishery and subsistence farming. The situation drew the attention of authorities. In 1786, Archibald Buchanan wrote a report on landed property in Newfoundland which provides valuable insight into the position of local authorities on the issue of property on the island. Buchanan was an officer of the Royal Navy in St. John's who reported annually to London. In 1787, Buchanan's authority was extended to the whole of Newfoundland. He was appointed a judge of the Court of Oyer and Terminer in 1788 and a judge of the Court of Common Pleas in 1789 as well as Justice of the Peace in St. John's.[94] Buchanan was among several magistrates who called for improvements in the administration of justice on the island. In his report on property, he identified four ways in

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[93] *Ibid.* For further discussion on fishing rooms in St. John's, see Sean Cadigan, "The Role of the Fishing Ships' Rooms Controversy in the Rise of a Local Bourgeoisie: St. John's, Newfoundland, 1775 - 1812", (St. John's: Unpublished paper, Memorial University, 1992).

[94] Archibald Buchanan's report on landed property does not contain any references, reasons why he wrote this report or evidence to suggest how he arrived at his conclusions. I am grateful for the biographical information on Buchanan which has been researched by Bert Riggs, Archivist with the Centre for Newfoundland Studies Archives, Memorial University.

which public property had gradually become private property.[95] First, as we have seen, governors had granted the right to individuals to build houses upon ships-rooms, as long as such buildings did not interfere with the fishery. Secondly, small areas of the ships-rooms had been converted into gardens. The man who owned the house and garden would continue to live there, and after some time of quiet and peaceable possession, he claimed ownership of the property. In this way, possessory claims became the basis of a substantial number of land titles in Newfoundland.[96] A third way in which public land became private occurred when proprietors of ground contiguous to ships-rooms extended their property beyond its limits in the process of building or repairing flakes. Fourthly, the space between the flakes and the water's edge was claimed as property because the ground had never been occupied by the fishery.

Buchanan felt that encroachments on ships-rooms were useless and hurtful to the fishery. Since the passage of King William's Act in 1699, encroachments and disputes over property had increased significantly as the population on the island grew. He found this breach of law inexcusable but blamed the Act itself which, while not expressly allowing these encroachments, certainly opened the door to them.[97] Therefore, he recommended that under certain regulations and restrictions, such areas should be converted into private property so that those who owned them would be obliged to employ them in the business of the fishery. Did those who received property by quiet possession

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95 Buchanan, "Concerning Landed Property", 4 - 5.

96 McEwen, "Newfoundland Law of Real Property", 21.

97 Buchanan, "Concerning Landed Property", 5.

have the right to pass it on to their rightful heirs? According to Buchanan, the property, once established and marked, could be conveyed to heirs, devised by will or disposed of by sale, let to tenants or judged to creditors as payments of debts, but in all cases, engaged in the fishery.

To support his claim that fishing rooms were indeed private property, Buchanan pointed to the intention of "King William's Act" of 1699. According to his interpretation of the Act's provisions, fishing rooms which had been used by crews of fishing ships "before the year 1685 were reserved as common property belonging, without distinction, to the fishermen who arrived each year from England". Those areas which had not been used by fishing ships but had been cleared by individuals after that time, were to be considered as the "certain and indisputable property of those who cleared them". [98] According to Buchanan, there was no question that these fishing rooms could be passed from one generation to the next. In his view, heirs always succeeded to the "fishing estates" of their parents. Such estates were frequently sold and the legality of transferring them from one person to another had not been questioned. In disputes over property, the opinions of lawyers and decisions of the courts of England, Buchanan pointed out, had rested on the belief that fishing rooms were subject to the same rules of law as real property in England.

As contemporary governors assumed, so Buchanan argued that King William's Act granted the right to inheritable fishing rooms. Individuals who were supposed to be encouraged by the Act would never have engaged in the fishery had they understood that their fishing rooms were for their lifetimes only. According to Buchanan, they would not have built on the property if they were not confident that their families would enjoy the

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[98] *Ibid.*, 2.

benefits of their improvements.[99]

Buchanan was especially critical of the fishing admiral system which he called a "whimsical institution". He found the admirals unqualified, and ignorant of the nature of the fishery and the customs of the island. His report boldly asked: "What confidence can be placed in the judgement of an illiterate master of a fishing vessel?" [100] Buchanan felt that statutes such as King William's Act which bestowed benefits and privileges ought to be interpreted liberally. While there were no lawyers in Newfoundland at the time and the solemnities and forms usually observed in England in the conveyance of real property were not observed, he did not doubt that private fishing rooms, lands with private dwellings and other buildings were to be considered real property. He praised local justices of the peace although he acknowledged their limited qualifications. At the same time, he hoped that practitioners of the law would "never be suffered to make their appearance" on the island.[101]

The Judicature Acts

From 1750 to 1791 criminal matters were administered by local magistrates and the Court of Oyer and Terminer, and civil matters, concurrently by the Governor and his surrogates, the Courts of Sessions and the Court of Vice-Admiralty.[102] As the migratory

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[99] Buchanan was primarily concerned with the right of members of the family to inherit the fishing rooms. He did not refer to the practice of primogeniture.

[100] Buchanan, "Concerning Landed Property", 7.

[101] *Ibid.*, 8.

[102] Archibald, *Digest of Laws*, 44.

fishery declined and the fishery became increasingly Newfoundland-based, the jurisdiction of these courts was challenged. In 1787, a court case brought the administration of law in Newfoundland to the attention of British authorities. When Richard Hutchings,[103] a merchant from Devonshire, appealed a ruling on a local commercial dispute to a judge of Quarter Sessions in Devonshire, the judge decided that the surrogate in Newfoundland had no legal authority to hear the case. Despite an increasing demand for legal decisions, surrogates refused to hear civil cases on the basis of the uncertainty of the legality of their judgements.[104] Between 1788 and 1791 over 1200 writs for debt collection were issued.[105]

As a result, John Reeves, legal adviser to the Board of Trade, was sent to Newfoundland to report back to the British government on the state of the legal system on the island.[106] His recommendations were incorporated in imperial statutes to provide for a legal infrastructure that could more effectively enforce a local jurisdiction to settle disputes. In 1791 a bill was presented to the British House of Commons under the direction of the Lords of the Committee for the Plantations which passed into law an Act designating a

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103 Keith Matthews, "Richard Hutchings", *DCB*, V, 443 - 444.

104 English, "From Fishing Schooner to Colony", 74.

105 *Ibid.*

106 John Reeves was appointed Chief Judge of the Court of Civil Jurisdiction in 1791 and became the first Chief Justice of the Supreme Court of Newfoundland in 1792. His book, *History of the Government of the Island of Newfoundland*, was published in 1793. Peter Neary, "John Reeves", *DCB*, VI, 636 - 637.

"Court of Civil Jurisdiction".[107] While the Judicature Act formally established English courts and law, there remains little doubt that English law had been in effect on the island since the earliest days of the migratory fishery. 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.

This first Judicature Act constituted a court with the power "to hear and determine all pleas of debt, account, contracts respecting personal property, and all trespass committed against the person or goods and chattels."[108] The court was presided over by Chief Justice Reeves, appointed by the Crown, and two assessors appointed by the Governor. It sat during the fishing season of 1791, and was to continue for one year.

The Judicature Act of 1792 created a Supreme Court of Judicature and added a criminal jurisdiction. A court of record presided over by the Chief Justice, was

> ...to hold plea of all crimes and misdemeanours committed within the island of Newfoundland...and also with full power and authority to hold plea, as hereinafter mentioned, of all suits and complaints of a civil nature, according to the law of England, as far as the same can be applied.[109]

The qualification that matters were to be decided in accordance with English law "as far as same can be applied" recognized the importance of local realities, custom and usage.

For the purpose of administering civil justice in the outlying regions of the island,

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[107] For a summary of the Judicature Acts of 1791, 1792, 1809, 1824 and the Royal Charter, see Newfoundland Law Reform Commission, *A History of the Newfoundland Judicature Act, 1791 - 1984.* (St. John's, 1989).

[108] (1791) 31 Geo. III c. 29: *An Act for Establishing a Court of Civil Jurisdiction in the Island of Newfoundland for a limited time.*

[109] (1792) 32 Geo. III, c. 46, s. 1. The Court of Vice-Admiralty was given jurisdiction to hold plea of maritime causes and causes of revenue. (1792) 32 Geo. III, c. 46, s. 12.

the Act of 1792 made use of the earlier practice of "surrogating".[110] The Governor of the island, with the advice of the Chief Justice, could institute Surrogate Courts of civil and criminal jurisdiction where needed. The Act was annually renewed until 1809 when the resident population was sufficient to make permanent a Court of Criminal and Civil Judicature.[111]

With the passage of the Judicature Act of 1792, the Supreme Court administered both common law and equity. For example, the statute granted the power and authority to grant administration of the effects of intestates and the probate of wills:

> That the said chief justice, or any person or persons appointed by him for that purpose, under his hand and seal, shall have power to grant administration of the effects of intestates, and the probate of wills; and that the effects of deceased persons shall not be administered within the island of Newfoundland, or on the islands and seas aforesaid; or on the banks of Newfoundland, unless administration thereof, or probate of wills respecting the same, shall have been duly granted by such authority as aforesaid.[112]

The Judicature Act of 1792 offered the full extent of English law but allowed the courts to decide what laws were locally appropriate. In Archibald's view, jurisdiction meant "the power or authority to minister and execute the law, without reference, in particular, to *what* law shall be administered."[113] In essence, the jurisdiction to apply the laws of England to

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110 Ibid., s. 2.

111 (1809) 49 Geo. III, c. 27: *An Act for establishing Courts of Judicature in the Island of Newfoundland and the island adjacent; and for re-annexing part of the coast of Labrador and the Islands lying on the said coast to the government of Newfoundland.*

112 (1792) 32 Geo. III, c. 46, s. 10.

113 Archibald, *Digest of Laws*, 37.

local circumstances, not the actual laws, was being extended to Newfoundland.[114]

With a larger permanent population on the island by the beginning of the nineteenth century, residents required the security of title to property.[115] In 1803 Governor Gambier granted leases to twenty portions of land for agriculture in the vicinity of St. John's.[116] His successor, Governor Gower, extended the practice of leasing land for growing vegetables and for building lots along a road 200 yards from the high water mark on the north side of the harbour in St. John's.[117] The British government had instructed Gower "not to allow any possession as private property to be taken of, or any right of property whatever acknowledged in, any land whatever, even beyond that distance" of 200 yards.[118] Gower responded that there was not a single harbour on the island in which lands were not held

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[114] English, "The Official Mind and Popular Protest in a Revolutionary Era", 300.

[115] English, "From Fishing Schooner to Colony", 82. By the Napoleonic era, Newfoundland had a substantial resident fishery and trade and by the end of the wars in 1815, a population of 40,568. Ryan, "Fishery to Colony", 130.

[116] Governor Gambier argued that making land available in St. John's would be a "very useful measure" since the British fishery by this time had blended with the resident fishery. C.O. 194/43, f. 175.

[117] Gower required the owners of the building lots to keep the road open across their property and to build their houses facing the harbour. C.O. 194/44, ff. 38 - 39. The area referred to by Gower is currently Duckworth Street.

[118] The government did not approve of residents taking possession of land and claiming it as their own private property through "pretended grants or permissions given by former Governors". C.O. 194 45/69.

contrary to that instruction.[119] He recommended that the restrictions on property rights should be rescinded or at least changed to accommodate custom.[120] The legislative initiative began in 1811 with an imperial statute that marked the end of the provisions of "King William's Act" which reserved the island exclusively for the fishery. [121] Recognizing that some ships rooms at the western end of St. John's harbour were not being used for the fishery, the statute granted private title to property in St. John's which, according to Prowse, was in the form of leases.[122] A registry of deeds was established by statute in 1824.[123] The colonial legislature followed with its own act in 1837.[124]

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[119] Gower stated that it had always been the practice of the courts of law to acknowledge property by possession as if the parties had an "indefeasible title." C.O. 194/45, f. 78. See also C.O. 194/45, ff. 75 - 78, 256 - 257.

[120] As far as Gower was concerned, King William's Act had given residents the right to own property. C.O. 194/45, ff. 69 - 70, 253 - 255. Gower's recommendations were rejected and his successors, Governor John Holloway (1807 - 1810) and Governor John Thomas Duckworth (1810 - 1812) discontinued the practice of leasing land for farming and rejected applications for building and repairing houses. Yet by 1813, the number of "private houses" was 4,444. Patrick O'Flaherty, "The Seeds of Reform: Newfoundland, 1800 - 1818", *Journal of Canadian Studies*, 23, 3 (fall, 1988): 45.

[121] (1811) 51 Geo. III, c. 45: *An Act for taking away the public use of certain ships rooms in the town of St. John's, in the Island of Newfoundland; and for instituting Surrogate Courts on the Coast of Labrador, and in certain islands adjacent thereto.*

[122] Prowse noted that these were thirty-year leases which was likely a customary practice since the statute did not include such a provision. Prowse, *History of Newfoundland* , 386.

[123] (1824) 5 Geo. IV, c. 67: *An Act for the Better Administration of Justice in Newfoundland, and for other purposes.*

[124] (1837) 1 Vict. c. 5 (Nfld.): *An Act to repeal part of an Act in the Parliament of Great Britain in the Fifth year of the reign of his Majesty King George, the Fourth, entitled, "An Act for the Better Administration of Justice in Newfoundland, and for other*

The question of ownership of private property became a matter for the courts in November, 1818. Thomas Row was taken to court when he built a fence near the water on the south side of St. John's harbour.[125] He claimed the enclosed land was his private property but the Crown contended that it was a public cove, a landing place that had been used as such for some time. In his decision, Chief Justice Forbes[126] admitted he was not anxious to enter into a discussion on the nature of real property in Newfoundland, an issue, he argued, that had been carefully avoided by his predecessors. Nevertheless, he singled out King William's Act of 1699 as having authorized persons to establish themselves on any part of the shore which had not been used by fishing ships.

The defendant, Thomas Row, based his arguments on the same statute. In 1768 an individual simply referred to as a "predecessor" to the defendant had erected a fishing room in that same place and had received written permission from the Governor to build as near as twenty feet from the naval yard. A document the following year confirmed the defendant's right to carry on the fishery from this spot. Forbes decided that these documents were not to be considered royal grants; nevertheless, they did show the intention of the Governor at the time to allow the defendant to have possession of the property. The defendant had erected a "summer flake" over the disputed ground occasionally over a period of 29 years, the last being built in 1811. This was enough, the

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purposes," and to make further provisions for the Registration of Deeds in this Colony.

[125] *R. v. Thomas Row*, November 1818, 1 Nfld. L.R., 126 (Supreme Court).

[126] Sir Francis Forbes (1784 - 1841) served as Chief Justice of the Supreme Court of Newfoundland from 1816 to 1822 and had a particular interest in adapting English law to the local circumstances in Newfoundland. Patrick O'Flaherty, "Sir Francis Forbes," *DCB*, VII, 301 . For a complete biography of Forbes, see C. H. Currey, *Sir Francis Forbes.* (Sydney: Angus and Robertson, 1968).

defendant argued, to support his claim to long and peaceable possession.

The Crown did not agree, stating that in 1804 a survey taken of fishing rooms in St. John's harbour showed this area to be an open cove, offering evidence of an anchor from a sinking merchant ship which had been placed on the ground in 1812 in an attempt to salvage the ship.

Forbes found for the defendant. The two arguments put forward by the representative of the Crown were not sufficient to prove it was public ground. First, the statute which had given title required no registration to make it valid. "Possession peaceably acquired and used in the fishery are the best title-deeds which can be produced in Newfoundland." Secondly, the anchor had been laid there to help a distressed ship not to mark a boundary of property. Therefore, the defendant was permitted to claim the protection of King William's Act to "peaceably and quietly" enjoy the property without disturbance.

In August 1819, Chief Justice Forbes ruled on the case of *R.v. Kough*[127] which involved the defendant's claim via adverse possession[128] of property adjacent to Fort William in St. John's. Forbes ruled in favour of the defendant's claim thereby, in effect, recognizing the "right of quiet possession" of property, and the statute passed in 1811[129] confirming the right of private property. The statute designated certain fishing rooms in St. John's to be private property "in like manner as any other portions of land in

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127 *R.v. Kough*, (1819), 1 Nfld. L.R. 172.

128 Adverse possession: A method of acquisition of title to real property by possession for a statutory period under certain conditions. *Black's Law Dictionary*, 5th ed. (1979): 49.

129 (1811) 51 Geo. III, c. 45.

Newfoundland may be..."

Forbes' concern over the law of property and its application to circumstances in Newfoundland is expressed quite dramatically in his ruling on the case. He stated,

> Of all evils in society uncertainty in the law is amongst the greatest, and there cannot be any uncertainty more distressing than that of the right by which a man holds his habitation.[130]

The uncertainty to which the Chief Justice referred was caused by the designation of Newfoundland historically as a fishing grounds. As a result, he held that,

> The right to the soil rests in the King, as the Sovereign of the State, by whose means the possession is supposed to have been acquired and is, in fact, maintained. In all the other plantations this right is preserved to the Crown, and in virtue thereof, royal grants and other alienations are made; but in this Island, it has been conveyed away to the exclusive uses of the fishery. It is this circumstance which has created the peculiarity in the tenure of the soil of Newfoundland, and caused all the difficulty in the discussions about property.[131]

Once again, King William's Act was cited in the court's ruling. Forbes described the Act as

> the great title of all the valuable fishing establishments in this island, and which creates a facility of acquiring and transferring property in Newfoundland altogether unknown to any other portion of the King's dominions.[132]

The strength of Forbes' convictions was demonstrated a short time later in a letter which he wrote to Governor Sir Charles Hamilton. The letter, written in 1821, simply stated, "It is too late to dispute the general right of private property in the soil of this

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[130] *R. v. Kough*, (1819), 1 Nfld. L.R., 174.

[131] *Ibid.*

[132] *Ibid.*

island."[133]

A third Judicature Act[134] passed on June 17, 1824 came into effect in January of 1826. The Act signalled changes in the system of courts and rules of practice. It instituted a Court with wide-ranging jurisdiction as exercised by the various courts of England.[135] Building on its predecessor, the Act and its accompanying Royal Charter instituted a "Superior Court of Judicature" having as a Supreme Court,

> all civil and criminal jurisdiction whatever in Newfoundland, and in all lands, islands and territories dependent upon the Government thereof, as fully and amply, to all intents and purposes, as His Majesty's Courts of King's Bench, Common Pleas, Exchequer and High Court of Chancery, in that part of Great Britain called England have, or any of them hath; and the said Supreme Court shall also be a Court of Oyer and Terminer thereof; and shall also have jurisdiction in all cases of crimes and misdemeanours committed on the banks of Newfoundland or any of the seas or islands to which ships or vessels repair from Newfoundland for carrying on the fishery.

The broad jurisdiction provided the Supreme Court with the English laws to be applied as local circumstances dictated.

The Supreme Court consisted of a Chief Justice and two assistant judges. It had exclusive jurisdiction to resolve disputes over "title to any lands, tenements, right of

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133 Patrick O'Flaherty, "Sir Francis Forbes," *DCB*, VII, 301 - 304. Hamilton, a naval officer who was appointed Governor in 1818, often disagreed with Forbes' legal decisions. Philip Buckner, "Charles Hamilton", *DCB*, VII, 376 - 377.

134 (1824) 5 Geo. IV, c. 67. This Act was made perpetual by act of the British Parliament, (1832) 2 & 3 Wm. IV, c. 78.

135 English, "From Fishing Schooner", 80. By section 4 of the Judicature Act of 1824, the Supreme Court shared jurisdiction with the Court of Vice Admiralty in matters of trade and revenue. Section 4 also provided for appeals from the Supreme Court to the High Court of Admiralty in England.

fishery, annual rent or other matter". [136] It had the power to administer the effects of intestates and the probate of wills as in 1792. Where it became apparent that the effects of a deceased person might be neglected and made liable to waste because the executor of any will refused or neglected to take out probate, or the next of kin was absent, the Court had the power to authorize the registrar, clerk of the Court or other appropriate person to dispose of them as the Court directed.[137]

Apart from the Supreme Court sitting in St. John's, the island was divided into three districts and Circuit Courts were instituted to replace the surrogate courts established in 1792. The three districts were: the Central Circuit Court, located in St. John's, the Northern Circuit Court, centred in Harbour Grace, and the Southern Circuit Court, located at Ferryland.[138] These Courts were courts of record with the same jurisdiction, power and authority as the Supreme Court with the exception of matters pertaining to: treason,

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136 (1824) 5 Geo. IV, c.67, s. 19.

137 *Ibid.*, s. 5. A statute pertaining to probate of wills was passed by the colonial legislature in 1859 and a statute to amend the law regarding wills was passed in 1864. (1859) 22 Vict. c. 6 (Nfld.): *An Act to amend the Practice and Mode of Procedure in Granting Probates and Letters of Administration, and for other purposes.* (1864) 27 Vict. c. 13 (Nfld.): *An Act for the Amendment of the Law with respect to Wills in this Island.*

138 (1824) 5 Geo. IV, c. 67, s. 7.

misprision of treason,[139] felonies not within the benefit of clergy,[140] breach of acts respecting trade and revenue. These were solely in the jurisdiction of the Supreme Court of Newfoundland. All crimes and misdemeanours were to be heard by judge and jury "according to the rules and course of the law of England, as far as the situation and circumstances of the ...colony will permit". The Judicature Act also provided for Courts of Session which would meet at times determined by the Governor. These courts were given jurisdiction over suits involving the payment of debts not exceeding forty shillings

> except the matter in dispute shall relate to the title to any lands or tenements, or to the taking or demanding of any fee of office or annual rent and to award costs therein...[141]

Among its other provisions, the Act called for the registration of all

> deeds, wills and other assurances whereby any lands or tenements therein situate may be granted, conveyed, demised, mortgaged, charged or otherwise affected...[142]

The judges of the Supreme Court were given complete jurisdiction over the registration of

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[139] Misprision of treason: Everyone who knows that any other person has committed high treason, and does not within a reasonable time give information thereof to a judge of assize, or a justice of the peace, is guilty of misprision of treason. *Stroud's Judicial Dictionary*, (5th ed.) v. 3: 1609.

[140] The privilege of exemption from capital punishment known as "benefit of clergy" was historically allowed to clergymen only, but later to all who were connected to the church and still later to those who could read, whether clergy or laymen. The privilege was claimed after an individual's conviction. Upon reading a psalm correctly, the individual was turned over to the ecclesiastical courts to be tried by the bishop or a jury of 12 clerks. This privilege operated to mitigate the extreme judgements of the criminal laws but was so abused that Parliament enacted certain crimes to be felonies "without benefit of clergy". It was abolished by the Criminal Law Act of 1827. *Black's Law Dictionary*, (5th ed.): 158.

[141] (1824) 5 Geo. IV, c. 67, s. 22.

[142] *Ibid.*, s. 28.

deeds. Every deed, conveyance and assurance pertaining to land and tenements was required to be registered and any deeds that had not been registered would be considered null and void.[143] The Judicature Act confirmed the equitable jurisdiction of the Supreme Court by giving the court the power to administer the estates of intestates and *a parens patriae* power over infants and lunatics.[144]

The Royal Charter accompanied the Judicature Act in 1824 and gave the Supreme Court and its circuit courts their jurisdiction.[145] The Supreme Court was given the power to grant probates of last wills and testaments and to

> commit letters of administration, under the seal of the said Supreme Court, of the goods, chattels, credits, and all other effects whatsoever of the persons aforesaid who shall die intestate, or who shall not have named an executor resident within the said colony...

The Royal Charter also bestowed colonial status on Newfoundland. The General Rules and Orders of the Supreme Court of Newfoundland instituted a set of procedural guidelines for the court system. It also provided that rules pertaining to probate of wills and letters of administration would be passed to a new Probate Court.[146]

"The Wants of a Population so Peculiarly Situated": Applying English Law

The year 1832 marked the beginning of representative government in

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[143] *Ibid.*, s. 32.

[144] *Ibid.*, s. 5 and s. 6.

[145] A copy of the Royal Charter for Establishing the Supreme and Circuit Courts of Newfoundland is found in R.A. Tucker, *Select Cases of Newfoundland, 1817 - 1828.* (Toronto: Carswell, 1979): 559 -574.

[146] General Rules and Orders of the Supreme Court of Newfoundland and General Rules and Orders of the Circuit Courts of Newfoundland follow the Royal Charter. The provision regarding the powers of the Supreme Court in probate is found in section vii. *Ibid.*, 575 - 602.

Newfoundland. According to Chief Justice Forbes in *R. Yonge v. James Blaikie* in 1822[147], the beginning of a local legislature also designated the end of the applicability of English domestic statutes in Newfoundland.

> It has fallen within my experience to learn that the colonial courts date the discontinuance of English statute laws, not from the time of the colony being settled, but from the institution of a local legislature in the colony.[148]

Forbes had been asked to resolve the question of whether English revenue laws were in force in Newfoundland. The court ruled that the law pertaining to justice's licences for the retail of liquor had been received in Newfoundland but the law pertaining to excise licences was inapplicable to circumstances in Newfoundland. Thus, while settlers had carried with them the English law and the courts had the jurisdiction to apply it, all English domestic statutes were not necessarily received. As we shall see in Chapter 5, English law including the law of property and matrimonial property would apply in light of local circumstances and needs which were likely to change.

For most of the period of English contact, the Newfoundland fishery had been conducted under minimal formal government. This unique position and the need for authorities to make adjustments accordingly is demonstrated in correspondence between the Governor and the Colonial Secretary. In 1826, Colonial Secretary Lord Bathurst admitted

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147 *Yonge v. Blaikie* brought into question the jurisdiction of local justices to authorize licences for the sale of liquor and the penalties liable to those who sold liquor without a licence. The debate included two issues: the justice's licence, which had the intent of policing alehouses, and the excise licence which was a matter of public revenue. In his ruling, Forbes cited Reeves' *History of the Government of Newfoundland* in which Mr. Fane, legal advisor to the Board of Trade, argued that the laws of the parent country ceased to apply when a new country was settled and it was important, therefore, to determine when Newfoundland was considered a settlement. *The Mercantile Journal*, St. John's, February, 1822.

148 *Yonge v. Blaikie* (1822), 1 Nfld. L. R. 277 at 283.

in correspondence to Governor Thomas John Cochrane[149] that the inhabitants of Newfoundland lived in conditions unparalleled elsewhere. He cited the "singular occupation of the people, the deficiency of internal communications, the ignorance among the lower classes, and the absence of qualified legal professionals" as the reasons why the introduction of new principles of law and judicial proceedings would be exceptionally difficult in Newfoundland. Therefore, he advised the judges to amend their rules and regulations whenever the changing state of society warranted it.[150] This advice assigned considerable discretionary power to local judges, a point on which his successor as Colonial Secretary, Lord Goderich, concurred in a dispatch sent to Governor Cochrane in 1833 to be read at the first session of the first colonial legislature on January 9, 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". [151] He found no problem with the practice of the local judiciary assuming legislative functions and undertaking to determine "not so much what the Law actually was,

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149 Sir Thomas Cochrane (1789 - 1872) was governor of Newfoundland from 1825 to 1834. Cochrane's nine-year commission saw the beginning of a colonial legislature although Cochrane argued the colony was not ready for it. In 1832 Cochrane was empowered to create a legislature with an executive council of seven members and a fifteen member elected assembly. He was removed from office in 1834. Frederic F. Thompson, "Cochrane, Sir Thomas John", *DCB*, X, 178.

150 C.O. 195/17, f. 233, Bathurst to Cochrane, April 10, 1826.

151 *Journal of the Legislative Council*, 1833.

as what in the condition of Newfoundland it ought to be."[152] Nevertheless, in the Legislative Council in 1834, Henry John Boulton[153], the Speaker, cautioned judges not to assume to have legislative authority in the colony: they should apply the law, not as they think it should be applied, but as it could be enforced.[154]

Edward Archibald later wrote that by the beginning of the nineteenth century and particularly with the passage of the Judicature Act of 1809, a more liberal and extended application of English law by local judges was needed. The reasons included the growth and diversification of trade in the colony, an increasing population and difficulties arising from the possession and transfer of both real and personal property.[155] In that sense they combined a legislative power with their judicial function.[156] As McLintock suggests, the island's inhabitants were used to substituting local usages and customs in the absence of written laws.[157]

Throughout the eighteenth century, the administration of justice was in various

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152 *Ibid.*

153 Henry John Boulton (1790 - 1870) served as Chief Justice in Newfoundland from 1833 to 1838. Hereward and Elinor Senior, "Henry John Boulton", *DCB*, IX, 69 - 72.

154 *The Newfoundlander*, St. John's, February 27, 1834.

155 Archibald, *Digest of Laws*, 42.

156 McLintock is quoting correspondence of Lord Goderich to Governor Cochrane in 1832. McLintock, *The Establishment of Constitutional Government in Newfoundland*, 172.

157 *Ibid.*, 171.

hands. A product of the royal prerogative and the early charters, the system was given a slight statutory framework by King William's Act in 1699. Seasonal fishing admirals settled fishing disputes in their own harbours. Their authority was complete in that they could settle all local disputes and bring back to England for trial people charged with theft, murder and other felonies. By the Act, appeals could be made to the convoy commanders if either party was unhappy with the fishing admiral's verdict.[158] Beginning in 1729, seasonally resident governors, their designated surrogates, and year-round justices of the peace, carried out their commissions and instructions. The system of justice which developed through those years was described by Archibald as "perhaps more extraordinary (especially in the mode of selecting judges) than any in the British dominions".[159] For the most part, it was "peculiar and unique", a system which worked "well, cheaply and quickly" to solve cases.[160] In short, many of the hallmarks of the practice of law in England were missing from legal process on the island and in their absence, customary practice and consensus governed. The passage of the Judicature Acts beginning in 1791 reflected the changing legal needs of a permanent population. The Acts offered the extent of English law and jurisdiction to the Supreme Court but also made it clear that the laws should be applied only as local circumstances would permit. Thus, while a structure for the legal system was emerging, how English common law and statutes would be applied remained in question. The result was an uncertainty about which English laws were in effect, an uncertainty which affected the way in which the law, and certainly property law,

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158 (1699) 10 & 11 Wm. III, c.25, s. 15.

159 Archibald, *Digest of Laws*, 44.

160 Matthews, *Lectures*, 44.

was interpreted and applied in the early nineteenth century.

English policy regarding Newfoundland had a direct impact on the way property was defined and acquired. Buchanan's report in 1786 showed how public property gradually became private property. Leases were available to the residents of St. John's while, for the most part, residents around the island acquired their property through quiet and peaceable possession. For those whose families had lived on the same piece of land and had fished from the same fishing room for several generations, possession gradually came to mean ownership and the right to leave it to sons and daughters. When fishing rooms were registered in the early nineteenth century, claimants indicated how they came to acquire the room by one of several means: purchase, lease, grant, inheritance, or "by the wife's right".[161]

Complexity surrounding the nature of property on the island would have a direct and immediate impact on the means by which real and personal property could be conveyed and inherited. In wrestling with these matters, the colonial legislature, shortly after its inception, attempted to pass legislation which would remove any doubts respecting the introduction of English law into Newfoundland and establish a date for its reception. In the same session, early in 1834, members of the legislature passed a short piece of legislation ostensibly to clarify the definition of property. Unfortunately, the clarification they sought gave rise to further uncertainty and considerable litigation.

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161 The "wife's right" means that the claimant had taken possession of the fishing room because his wife had inherited it from her family. *Register of Fishing Rooms in Bonavista Bay, 1805 - 1806.* (Glovertown Literary Creations).

Chapter 5: "Usages Incident to our Present Condition": Settling the Reception Issue

By the end of the eighteenth century the growth of a permanent resident population in Newfoundland was accompanied by institutions to serve that population.[1] With the granting of colonial status in 1824 and representative government in 1832, the new colonial legislature[2], as foreshadowed by *Yonge v. Blaikie* in 1818, was in a position to settle the reception question. As we have seen in Chapter 4, the issue of reception focused on whether English domestic statutes were received in the colonies. English marriage law is an example of a domestic statute that was not received; yet it was especially pertinent to matrimonial property because marriage established legitimate heirs to property.

To accommodate the growing permanent population and address the concerns of local church authorities about the custom of common-law marriages, the British government passed statutes early in the nineteenth century to regulate marriage in Newfoundland. In 1833 the new colonial legislature moved quickly to respond to local demands and set its own stamp on the issue. Within a year, it also attempted to formalize the definition of real property for purposes of inheritance by addressing the unique

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[1] 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 Newfoundland-based operation as the migratory fishery came to an end. The expanding seal fishery provided employment and the economic base of the island widened. Ryan, *Fish Out of Water*, 36 - 37.

[2] The colonial legislature under representative government consisted of a Legislative Council and a Legislative Assembly.

circumstances and customary practices on the island. To that end, the Chattels Real Act[3] in 1834 defined all property as "chattels real". As we shall see, this decision had implications which were contested in court throughout the century.

Marriage Law in Newfoundland

Church doctrine came to Newfoundland through the efforts of missionaries in the eighteenth century. The Church of England began foreign mission work in 1701 with its Society for the Propagation of the Gospel in Foreign Parts.[4] 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.[5] Through the efforts of the Society, the Bishop of London assumed responsibility for missionaries sent to English foreign plantations. The Bishop 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".[6]

The Judicature Acts of 1791, 1792 and 1824 did not make formal provision for

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[3] (1834) 4 Wm. IV, c. 18 (Nfld.): *An Act for declaring all Landed Property, in Newfoundland, Real Chattels.*

[4] The first meeting of the SPG in England was held on June 27, 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.

[5] 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*, v. 2, 572.

[6] *Ibid.*, 2.

ecclesiastical law in Newfoundland. In the absence of ecclesiastical courts, the civil courts were responsible for legal matters normally addressed by canon law. In Newfoundland, the celebration of marriage had been regulated by local custom and in the absence of clergy marriages were commonly 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 to perform marriages had not been questioned by governors.[7] Some Congregational ministers and Methodist clergy[8] conducted marriage services for their own members but usually in areas where there was no resident Anglican clergyman.[9]

In correspondence to Governor William Waldegrave in 1797, Reverend J. Harries, a Church of England minister in St. John's, expressed his concern about the frequency of clandestine marriages on the island.

> 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

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[7] For an early history of the Roman Catholic Church in Newfoundland, see C.J. Byrne, (ed.)*Gentlemen - Bishops and Faction Fighters: The Letters of Bishops O'Donel, Lambert, Scallan and other Irish Missionaries.* (St. John's: Jesperson, 1984).

[8] 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. *Encyclopedia of Newfoundland and Labrador*, "Methodism", 519 - 525.

[9] 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: McGill-Queen's University Press, 1993): 59. A petition from Dissenters on the island in 1824 to the Privy Council in Britain indicated that dissenting ministers had been solemnizing marriages "from time immemorial" in "every part of the Island". C.O. 194/68 at 475.

performed indifferently by all, at any place, and at any time.[10]

Harries complained that it seemed impossible for the local legal authorities to do anything about it.[11] The intervention of Reverend Jenner, missionary for the SPG, and Magistrate Charles Garland had not been successful. Therefore, Harries recommended that the Governor 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 for the Colonial Office, would act to "quickly eradicate the seeds of irreligion and immorality" on the island.[12]

In his reply to the Governor's letter on August 29, 1797, Chief Justice D'Ewes

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[10] PANL, GN 2/1/A/13, Colonial Secretary's Office, Outgoing Correspondence, v. 13, Harries to Waldegrave, August 25, 1797.

[11] Court records indicate that the practice of common-law marriages had been a problem for the courts for some time. In Ferryland court 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. PANL, GN 2/1/A, Colonial Secretary's Office, Outgoing Correspondence, v. 1 - 4, box 1, 1749 - 1770, August 27, 1750.

[12] PANL, GN 2/1/A/13, Colonial Secretary's Office, Outgoing Correspondence, Waldegrave to Harries, August 26, 1797. Waldegrave also received a similar letter from Reverend Jenner of the SPG complaining of "incestuous marriages" taking place throughout Conception Bay. He called for the Marriage Act to be passed in order that banns of marriage would have to be published and the relationship of couples established. This would enable the local legal authorities to take action *before* the ceremonies took place. PANL, GN 2/1/A/13, Colonial Secretary's Office, Outgoing Correspondence, Jenner to Waldegrave, August 26, 1796.

Coke[13] recommended immediate action to "punish the delinquents". He noted that the English Marriage Act did not extend beyond the seas but the Supreme Court of Newfoundland 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 continued practice of clandestine marriages would prevent the court from distinguishing the rightful owners to real and personal property on the island.[14]

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 law officers of the crown in London.[15] He consulted Chief Justice Thomas Tremlett[16] who confirmed that the English law of marriage 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

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[13] D'Ewes Coke served as Chief Justice from 1792 to 1797. *Encyclopedia of Newfoundland and Labrador*, "D'Ewes Coke", 476.

[14] PANL, GN 2/1/A/13, Colonial Secretary's Office, Outgoing Correspondence, Chief Justice D'Ewes Coke to Waldegrave, August 29, 1797.

[15] C.O. 194/52, Governor Duckworth to the Earl of Liverpool and a copy to the law officers of the Crown, April 14, 1812.

[16] Thomas Tremlett was appointed Registrar of the Vice-Admiralty Court in 1801 and Chief Justice in 1803. *Encyclopedia of Newfoundland and Labrador*, "Thomas Tremlett", 413.

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?[17]

Tremlett, who was not legally trained, did not respond to these questions. Neither did the Law Officers. However, a response was finally forthcoming from the learned counsel practising at the bar of the Doctors' Commons. They reported on May 11, 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.[18]

While marriages solemnized by Roman Catholic clergymen were acceptable, the performance of the marriage ceremony by laymen, including justices of the peace, could

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[17] C.O. 194/52, Governor Duckworth to the Earl of Liverpool and a copy to the law officers of the Crown, April 14, 1812.

[18] C.O. 194/53, f. 79, Correspondence from Doctors' Commons, May 11, 1812. The Doctors' Commons was the bar founded in 1511 and ended in 1857. Its lawyers had three jurisdictions: admiralty, probate and ecclesiastical. 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: Clarendon Press, 1977).

only be justified out of necessity or by "peculiar customs of the place". It appears that the law officers 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.

The issue was raised again when a Methodist congregation was established in St. John's in 1815. George Cubitt, the Methodist minister, conducted marriages although he could not plead necessity in a place where Anglican and Roman Catholic clergy resided. The Congregational minister, James Sabine, was inspired by Cubitt's initiative. However, the Anglican rector, David Rowland, vehemently objected to what he considered a breach of the privileges of the Church of England. [19]

The issue came to a head as a result of a wedding that took place on September 25, 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.[20] The young couple likely did not know the repercussions of their decision to be married in the Methodist chapel at the time. Cubitt was, in fact, solemnizing the marriage of two young people from Rowland's congregation. They were underage, marrying without their parents' consent, and using assumed names. When he heard about the ceremony, Rowland took action and appealed to Governor Francis Pickmore. The Governor decided to forbid Cubitt and Sabine 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 Anglican clergymen,

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[19] Lahey, "Catholicism and Colonial Policy", 60.

[20] C.O. 194/59, f.6.

Pickmore declared, was illegal. However, the two ministers were clearly not intimidated by the Governor's ruling. They continued to officiate at weddings and threatened legal action if the Governor interfered.[21] They appealed to the general public in a lengthy statement published in two issues of the *Mercantile Journal* in October and November of 1816.[22]

Governor Pickmore, unwilling to relent, decided to proceed with legislation as the only solution to curtail marriages by dissenting clergy, at least where Anglican clergy were available. As a result of his representations to London, 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 in Holy Orders. [23]

The Act prohibited the celebration of marriages by Methodist and Congregational clergy. All marriages contracted before January 5, 1818 were legitimized. Subsequent marriages were to be conducted, except in "circumstances of peculiar or extreme difficulty", by "persons in Holy Orders", or in their absence, by magistrates or other persons authorized by the governor. 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

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[21] Lahey, "Catholicism and Colonial Policy", 60.

[22] *The Mercantile Journal*, "Proclamation on the Solemnization of Marriage in Newfoundland", October 26, 1816 and November 2, 1816.

[23] (1817) 57 Geo. III, c. 51: *An Act to Regulate the Celebration of Marriages in Newfoundland.*

extension, to Catholic priests.[24] Angry dissenters saw the legislation as a way "to establish popery and to prosecute Protestantism".[25] As a result, Methodist and Congregational clergy found their congregations turning to either Anglican or Roman Catholic priests to be married.

In 1823 the issue was reopened when the Methodists suggested a new statute to give legal recognition to any minister of religion. At this time, former Chief Justice Francis Forbes was drafting a new Judicature Act. In response to demands for changes, Forbes added clauses regarding marriages to his new act.[26] However, when the bill reached Newfoundland from the Colonial Office, 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 even Catholics in larger centres such as St. John's from having their marriage ceremonies performed by Catholic clergy. Led by Bishop Scallan and supported by Governor Hamilton, Catholics flooded the Colonial Office with petitions. Anglicans 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

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[24] It also included clergy from the established (Presbyterian) Church of Scotland. Lahey, "Catholicism and Colonial Policy", 61.

[25] Raymond J. Lahey, "Bishop Scallan" in *DCB*, VI, 692.

[26] *Ibid.*

protests came from every Anglican missionary on the island. James Stephen[27], 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.[28] The Church of England's representations were powerful enough to win concessions. In the revised bill, 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.[29]

Correspondence containing questions and answers moved back and forth between Newfoundland and London. The issue inspired James Stephen to include lengthy remarks on the subject in a report in 1824 to Robert Wilmot Horton, a member of the British House of Commons and under-secretary of state for war and the colonies.[30] Stephen acknowledged that the Marriage Act of Britain 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 minister or teacher of religion to celebrate marriages, although this practice was not sanctioned by the common law of England. In Stephen's view, the Act of 1817 had not solved the issue; rather it led to "extreme confusion and difficulty". If by "persons

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[27] 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 to McLintock's *Constitutional History* as well as C.O. 194/82, December 19, 1831.

[28] Lahey, "Catholicism and Colonial Policy", 62.

[29] *Ibid.*

[30] C.O. 194/68, James Stephen to Robert Wilmot Horton, March 12, 1824.

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. Furthermore, the provision referring to "cases of peculiar and extreme difficulty" was not clearly defined. How much difficulty, for example, would be an acceptable excuse? Stephen proposed that the new Act eliminate these problems and that all marriages which had taken place in Newfoundland be considered valid as though the Act of 1817 had never taken place. The Bill of 1824 should treat the 1817 Act as a "nullity", leaving the common law of England or the customs of Newfoundland to decide the validity of marriage.[31] As far as Stephen was concerned, all marriage ceremonies would have to be celebrated by Church of England clergy. There could only be 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 which applied when the residence of a woman was at least twenty 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.[32]

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[31] C.O. 194/68, f.126.

[32] C.O. 194/68, Josiah Butterworth to Robert Wilmot Horton, May 7, 1824.

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 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. For the Methodists, the first draft was unacceptable for it provided an alternative only when it was "inconvenient" to have an official from the Church of England. However, in the end their position had deteriorated. Their missionaries held an inferior status to the Church of England and Roman Catholic priests. They were not even acknowledged as clerics and they required civil licences. Even the condition of licensing narrowed as the bill went through changes. For example, a licence was considered valid only if the woman could not go from her residence to an Anglican church "without *extreme* inconvenience" and the marriage certificate was to be delivered to an Anglican clergymen. Only after strenuous objections by influential Methodists was the word 'extreme' removed.[33]

Clauses pertaining to marriage law which Forbes had intended to be included in the 1824 Judicature Act were left out. The provisions are found in the actual Bill that reached the British House of Commons. In the end, separate Judicature and Marriage Acts were

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[33] Lahey, "Catholicism and Colonial Policy", 62.

passed.[34] Unfortunately, the Newfoundland Marriage Act of 1824[35]did not end the sectarian debate. First, it placed Roman Catholic clergy on an equal footing with Anglican clergy by allowing all marriages to be celebrated by "Persons in Holy Orders". Then it sought to clarify the previous Act of 1817 by stating that the marriage rites must be those of the Church of England.[36] The period for automatic legitimization was extended to March 25, 1825. Two exceptions were allowed by the Act. Because of inaccessibility to many of the Church of England clergy, 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. In the absence of a teacher or preacher, two credible persons could act as witnesses. 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. The Act was to run for nine years.

When it was set to expire in 1833, Wesleyan Methodists pressed to be included in a new statute. The new colonial legislature received a series of petitions from Methodists in St. John's, Carbonear, Harbour Grace, Port de Grave, Brigus and the North Shore of Conception Bay. Bishop Fleming of the Roman Catholic Church supported their cause and asked the legislature to extend to Dissenters and Methodists of the island "the privilege of

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34 C.O. 194/69, 345.

35 (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.*

36 *Ibid.*

solemnizing marriages in their own congregations".[37] 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.[38]

By these provisions, the legislature resolved long-standing problems arising from local circumstances and responded to the demands of the community. It did not, however, provide for a right of remarriage. 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.[39]

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 bringing English marriage law to Newfoundland, church officials and legal authorities were forced to address customary practice and adapt the law to suit the needs of the local community. The reception of English law continued to be a priority of the local legislature.

The "English Law" Bill

Early in the first session of the colonial legislature, the government attempted to

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[37] *Journal of the House of Assembly*, 1833.

[38] (1833) 3 Wm. IV, c. 10 (Nfld.): *An Act to repeal the Laws now in force concerning the celebration of Marriages and to regulate the future celebration of Marriages in this Island.*

[39] A copy of the Instructions to Governor Sir Thomas John Cochrane, 1832, is found in the appendix of *The Consolidated Statutes of Newfoundland* (1916) 3rd series, (St. John's: Robinson and Co., 1919). The reference to divorce is found in section 20.

settle the issue of reception by proposing in 1834, "A Bill for Removing Doubts Respecting the Introduction of the Law of England into Newfoundland", in the Legislative Council.[40] Much of what we know about this important, though obscure, bill is found in a local newspaper, *The Newfoundlander*, which published the speech of Henry John Boulton, the Speaker, and the member who introduced the Bill. Boulton had also been appointed Chief Justice in 1833. The newspaper reported that there were two purposes to this bill: to fix some period at which the law of England should be regarded as in force in Newfoundland; and to introduce several improvements which had recently been made in the law by the English Parliament.[41]

Boulton argued that the law of England, which included the statute law up to the passage of the Judicature Act of 1824, so far as it affected property and civil rights, already constituted the law of Newfoundland as far as it could be enforced on the island. Nevertheless, in Boulton's view further refinements were needed.[42] For example, although the law of Britain was the law of Newfoundland, with the establishment of a local legislature it was appropriate to establish a fixed and permanent date of the enforcement of English laws. Furthermore, there were a number of technical amendments that needed to be made particularly in the area of criminal law.

Boulton had a great deal to say in his remarks about the role of judges. He strongly objected to giving them legislative authority as this enabled them to base their decisions on their own principles rather than on strict principles of law, and placed litigants at a decided

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[40] *Journal of the Legislative Council*, 1833- 1841, February 18,1834.

[41] *The Newfoundlander*, February 27, 1834.

[42] *Ibid.*

disadvantage when it came to understanding on which principles a case was being determined. Furthermore, he argued, while a judge's role should call upon the "principles of equity and good conscience", this too might lead to arbitrary rules determined by each judge's assessment of what was equitable. He was of the opinion, therefore, that the laws of England would be introduced generally, not so far as judges might think them applicable, but as far as they could be enforced in Newfoundland. If it were left entirely to a judge's discretion, then he would be acting upon his own notions of expediency. His preference, therefore, was to simply fix the point at which English law was regarded as the "rule of decision" and leave additional provisions and changes to the legislature as the state of the colony required.[43]

On February 18, 1834, debate on the bill began in the Council. James Simms[44], the Attorney-General and like Boulton, an English-trained lawyer, commented on one aspect of the reception of English law, namely the law pertaining to property on the island.

> With respect to the civil [law], especially as it regarded real property, primogeniture, and the rule of descent, the bill before the House would go to putting down of all those rules which hitherto governed our right to property. The first point for consideration under the law of real property was that of primogeniture which had not prevailed here since the creation of the earliest laws. It might do well perhaps where it was interwoven with the existence of a country and the institution of it - but it was seen that it had become a bone of contention even in the parent state, where the law of gavelkind or borough England, formed an exception to the

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[43] *Ibid.*

[44] James Simms (1779 - 1863) came to Newfoundland in 1809 and was appointed acting attorney-general in 1825. His appointment was made permanent in 1827 and he served until 1846. Simms served as a member of the Legislative Council and was made acting Chief Justice after the retirement of Richard Alexander Tucker in 1833. He also served on the Newfoundland Supreme Court from 1846 to 1858. David Davis, "James Simms", *DCB*, IX, 720 - 721.

general rule - a law not altogether dissimilar from that which had obtained here.[45]

Simms' suggestion that the law of gavelkind or something very similar to it had been adopted in Newfoundland is significant. Gavelkind was a special custom whereby land on intestacy descended to all sons equally rather than to the eldest son alone.[46] The Attorney-General went on to warn the members of the Legislative Council that the laws they introduced would seriously affect the tenure of real property in Newfoundland because

> for now and for years passed [sic] there had been real property distinguished from that connected with the Fishery. If the law of primogeniture were made to apply here, how would it be with the fishing rooms for a large portion of real property was divested and involved in the carrying on of the fishery.[47]

Simms' position clearly distinguishes Newfoundland practice from real property law in England. He disagreed with Boulton who had argued that English law of inheritance applied in Newfoundland as far as it could be to local circumstances. In Simms' view, the passage of this new statute would mean the enforcement of all English law, including those pertaining to property and inheritance. These were not necessarily compatible with current laws which were based on years of custom and usage.

When the bill was read a second time on February 21, 1834, Simms argued further that the bill was "one of the most important that could be introduced, and would go largely to affect the general interests of the inhabitants". Regarding the application of English law generally, he felt that while English law had not been always applicable to local

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[45] *The Newfoundlander*, February 27, 1834.

[46] Coparcenary is also a term generally used to refer to the equal division of property among sons. In Kent it was called "gavelkind" until 1926. Baker, *An Introduction to English Legal History*, (3rd ed.): 303.

[47] *Ibid.*

circumstances, this did not imply an absence of laws.

> If we had no laws already among us, there would be no difficulty in deciding what portion of the English law would be applicable; but there was a code of laws among us, made up of usages incident to our present condition, as well as respecting the jurisprudence as well as the judicature but still there were many evils which ought to be remedied.[48]

In defence of the bill in the Legislative Council, Boulton argued that as far as civil law was concerned, the passage of this bill simply meant that whenever there was a question to be decided, the judge should consider the state of the laws in England, and decide in Newfoundland accordingly.

> With regard to the law of attachment, could there not be a proviso to the bill that it should not extend to that or any other rule? The Honourable gentleman (attorney-general) had said that if the bill were to pass, it would uproot all the principles regarding real property - he had gone further and said that the law of primogeniture was not the law in Newfoundland, and that the state of society at home was the only state in which it might be convenient. The law of primogeniture is in force in Newfoundland; but if there were any doubt about it, it were better to have it settled. If they did not like that law, they could say so by a proviso to the Bill.[49]

The newspaper noted that the Speaker referred to Blackstone to show that the law of primogeniture, as well as the other laws of England, were still in force in colonies where they had not been repealed. It went on to report Attorney-General Simms' response to Boulton's comments. He had replied that the introduction of the principles of the English law generally would be upsetting to laws already established on the island. In response to the Speaker's question as to "how the bill would conflict with the descent of real property", Simms responded that the bill had resulted "from the construction of our courts, and from custom". The inhabitants had been satisfied in the case of intestate property that two-thirds

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[48] Simms noted that the most important evil was the want of justice outside of St. John's as regards judicature and jurisprudence. *Ibid.*

[49] *The Newfoundlander*, March 6, 1834.

should pass to the children and one-third to the widow. Simms further argued that the bill would "annihilate the rules and practice of the present proceedings".[50]

On March 13, 1834, the Legislative Council passed "An Act for Removing Doubts Respecting the Introduction of the Law of England into Newfoundland" and sent it to the House of Assembly for concurrence. The Bill received third reading in the House of Assembly on June 5, 1834 and returned to the Legislative Council with amendments. Unfortunately, no record of this bill has survived and only the accounts of debates from local newspapers remain to suggest its contents. However, records of the Legislative Council for 1834 provide the amendment that the House of Assembly wanted. The revised bill was given first reading on June 5, 1834 in the Legislative Council. The amendment reads:

> After the word "extend" in the fourth line, expunge the remainder of the Section, and insert instead the words following - "to introduce into this Island the English Law of Inheritance, nor any part of the Statute Law of England not expressly relating to Newfoundland, or not by the express terms thereof made applicable to His Majesty's Colonies generally, which previous to the first day of January 1833, had not been adopted by the Superior Courts of Judicature on this Island; nor to introduce any part of the Statute Law of England which has been enacted since the said first day of January 1833: nor to alter, vary, or affect any custom or usages of this Island, which have heretofore been established by the decisions of the said Courts". Expunge the last section of the Bill.[51]

Although we do not have access to the complete text of the statute, it appears from the amendment that they had decided not to receive English statutes passed since 1833 and not to alter any custom established by case law. It is also reasonable to assume from the wording of the amendment that they wished to exclude the English law of inheritance. Regardless of what was intended, the Legislative Council did not accept the proposed

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[50] *Ibid.*

[51] *Journal of the Legislative Council*, June 5, 1834.

amendments. It chose, instead, to order "that the same be read a second time this day three months". In other words, debate on the bill was suspended and with the closing of the third session of the General Assembly on June 12, 1834, the fate of the bill was sealed. No successor bill was introduced.

The Legislature concluded nineteen weeks of sitting on June 12th, and royal assent was given to twenty-six bills. In proroguing the houses, Governor Cochrane regretted that no measure had met his acceptance regarding what he considered the two most important subjects that could have come before members of the Council and Assembly, namely, jurisprudence and judicature of Newfoundland. He expressed his dissatisfaction with the failure of the members to pass the bill regarding the introduction of English law. His particular concern was for the application of English criminal law but his remarks were as applicable to the issue of what comprised real property.[52] He stated:

> The uncertainty as to the Laws applicable to this Island, and the diversity of opinion in those who administered them, as to what portion of the Laws of the Parent State (particularly of the Criminal Law) was operative in this Country, has been a theme of long and constant animadversion; and the impunity with which perpetrators of the most atrocious crimes have, in consequences, escaped the just rewards of this deeds, rendered it most desirable that some enactment should have removed all doubts upon the subject.[53]

Cochrane was also concerned for the general application of justice, the need to settle the reception issue, including the law regarding property and inheritance.

> If the Laws have been ill-defined, the administration of them, under the existing Judicatory Act, is equally open to complaint. For several years, there has been no

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[52] The issue of criminal law was addressed by a statute in 1837 passed by the colonial legislature to extend the criminal laws of England to Newfoundland. (1837) 1 Vict., c. 4 (Nfld.): *An Act to extend the Criminal Laws of England to this Colony, under certain modifications.*

[53] *Journal of the Legislative Council*, June 12, 1834.

> difference of opinion as to the Act 5th Geo. IV, commonly called the Judicatory Act, having failed to attain the great object of legislation; that of bringing justice home, and with moderate expense, to the poor man's door; and it is therefore to be lamented that one of the great objects which a Local Legislature was sought for and obtained, has yet to be accomplished.[54]

Despite their failure to pass the "English law" bill, as it was called, the legislature was still very concerned for property and went on to pass a short and concise piece of legislation, the Chattels Real Act, which defined landed property on the island for the purposes of inheritance.

The Chattels Real Act

The first written indication of a formal designation of property as chattels real is found in a draft of the Judicature Act of 1824. The draft cited the customary recognition of all property as chattels real and proposed legislative confirmation of custom. The argument was based on the governor's authorization to dispose of ships rooms as private property around St. John's harbour according to the statute of 1811. The writer of the draft is unidentified but it was likely Chief Justice Forbes.[55] The writer felt that it was time that all other fishing rooms on the island be disposed of in a similar manner. The provision reads:

> Be it further enacted that the Governor of Newfoundland for the time being shall have power, and he is hereby authorized to sell, lease, or dispose of all such places within the said Island of Newfoundland, commonly called "ships rooms"...to be held in the same manner as other property in Newfoundland. Provided, however, that nothing therein contained shall extend to the prejudice of any private right of any person whatever, which may be lawfully claimed in any of the said places.

Furthermore, the writer pointed out that it was time to declare as law the custom that

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[54] *Ibid.*

[55] The comments reflect Forbes' decision in *Williams v. Williams* in 1818 which is described in this chapter beginning on page 146.

regarded such property and all other property on the island as chattels real.

> And whereas it hath been customary to consider fishing rooms and other places wherein right of property have been acquired in Newfoundland as chattels real. And whereas, to prevent future doubts and disputes in respect of such property, it is expedient to declare such custom to be good. Be it further enacted and declared that fishing rooms and other property in land in Newfoundland, or any part of its dependencies, shall be considered as chattels real, and liable to such rules and considerations of the law of England in respect of that species of estates as can be applied thereto in Newfoundland.[56]

However, when the "Bill for the Better Administration of Justice in Newfoundland" was presented to the House of Commons in 1824, there were no provisions referring to the definition of property or the designation of property as chattels real. There is no indication why these were dropped. While London may have not been interested in solving the issue, the colonial legislature acted on it ten years later when the proposal to designate property as chattels real resurfaced, this time in the colonial legislature.

In the Legislative Council, on March 10, 1834, John Bingley Garland introduced a bill entitled, "An Act for declaring all landed property, in Newfoundland, Real Chattels".[57] Such a statute would lay to rest the question of the application of English laws, particularly inheritance laws, in the colony. Unlike the 1824 draft, the bill did not refer to customary practices in the colony. The Legislative Council and the Legislative Assembly agreed on the following preamble to the statute.

> Whereas the Law of Primogeniture, as it affects Real Estate, is inapplicable to the condition and circumstances of the people of this Island: And whereas the partibility of small Estates, by Descent in Coparcenary, or otherwise, would tend to diminish the value thereof, and would, in its application, be attended with much expense and

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[56] C.O. 194/69, A draft of a *Bill for the Better Administration of Justice in Newfoundland and for consolidating and amending the Laws relating to the said Colony.*

[57] (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.

inconvenience: Be it therefore enacted...[58]

The bill stated that primogeniture did not apply in Newfoundland and partibility of small estates was inappropriate as it would needlessly diminish the value of the property. For these two reasons, "all lands, tenements, and other hereditaments" in Newfoundland which had been regarded as real property would be designated as chattels real. An amendment designed to protect the rights and claims before the passing of the Act was attached:

> Provided always that nothing therein contained shall extend to any right, title, or claim to any lands, tenements,or hereditaments[59] derived by descent and reduced into possession before the passing of the Act.[60]

On May 5, 1834, the Legislative Assembly attempted to protect claims already in progress which would be affected by the Act but the Legislative Council did not concur.[61]

The Act directly affected the manner in which land would be inherited in Newfoundland. Chattels real in English law carried with it a specific set of legal characteristics, distinguishable from real property. Chattels real included interests in land

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[58] The complete statute is found in Appendix A.

[59] Tenements: property of a permanent and fixed nature, including both corporeal and incorporeal property. Hereditaments: anything that can be inherited; not just property a person has by *descent* from an ancestor, but also that which he has by purchase, and which his heirs can inherit from him. The term applies to both real and personal property. There are two kinds of hereditaments: corporeal, tangible things such as land and houses, and incorporeal, less tangible things such as rights connected to land, such as the right to rent.

[60] *Reports of the Legislative Council*, April 30, 1834.

[61] The Assembly had suggested that the following phrase would be inserted into the bill between the words, "possession" and "before": "unless the person or persons in possession shall have notice of the claim of the adverse party or parties".

for a fixed term of years, referred to as leasehold. Like personal property (goods and money), chattels real were subject to absolute ownership. Land would devolve at law in the same manner as personal property.[62] Successive interests could not exist, as they could within the English law of real property.[63] Primogeniture was irrelevant. In intestacy chattels real passed to the next-of-kin which would include all surviving children.[64]

Like real and personal property, chattels real gave the husband entitlement to property possessed by his wife at the time of their marriage or acquired by her during their marriage. As we have noted above, he was entitled to the profits from her chattels real and could dispose of them as he wished, including to pay his debts. If his wife predeceased him, the property became his absolutely although he could not dispose of it by a will. If he predeceased his wife, ownership of the property reverted to her.[65]

Why did the colonial legislature choose to classify all landed property in Newfoundland as chattels real? Shortly after the introduction of the Chattels Real bill, in correspondence dated April 12, 1834, James Stephen, now promoted to Assistant Under-Secretary in the Colonial Office, commented that the bill

> establishes, or rather recognizes, the Law of equal distribution of immovable property amongst the children of a person dying intestate and

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62 McEwen, "Newfoundland Law of Real Property", 112.

63 Cheshire, *The Modern Law of Real Property*, 87.

64 Next-of-kin refers to those who are most nearly related to the deceased by blood. *Black's Law Dictionary*, 941.

65 Manchester, *Modern Legal History*, 370.

supersedes in Newfoundland, the Law of Primogeniture.[66]

Stephen would have understood that the number of people dying intestate far exceeded those who left wills. Therefore, equal partibility was far more suitable to the population than the practice of primogeniture. The Chattels Act, he argued, simply provided legal affirmation of an existing condition and should merely be regarded as, "declaratory law".[67] Stephen's singular explanation for the Act was that it removed all doubts about real property in Newfoundland. Landed property, he argued, had always been treated and recognized by the courts as chattels real, although he admitted that the courts had not been explicit in establishing "that character as incident to real estate".

While Stephen felt that English inheritance laws were inapplicable to the colony, he objected to the expense resulting from the administration of estates of the deceased. As he pointed out,

> ...as often as an Executor has an occasion to raise money, by a sale or mortgage of his testators' land or even to grant a lease of it for the benefit of the widow or infant children of the deceased, an application of the Court will be necessary...[68]

The Act's provision requiring an executor of an estate not to transfer title or possession of the property for more than a year without the sanction of the Court, according to Stephen, would result in an unnecessary application to the court whenever a person died intestate.

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[66] C.O. 194/88, April 12, 1834. Stephen's comment regarding the inapplicability of the law of primogeniture is quoted by Lord Aberdeen in his correspondence to Prescott in 1835.

[67] *Ibid.*

[68] C.O. 194/88, April 12, 1834.

The legislature followed through on the recommendation to remove this provision[69] and the Act was amended accordingly in 1836.[70]

Edward Archibald, Registrar of the Supreme Court in 1832 and later Attorney-General, argued in 1847 that the Chattels Real Act adapted English law to the colony, making it more suitable to Newfoundland by allowing for the distribution of land to surviving kin.[71] For Archibald, Newfoundland was unique because of the "peculiar tenure under which real property was from the first held". The fisheries policy of the British government towards Newfoundland had prevented the successful application of

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[69] The clause read: "Provided always, that no Executor or Administrator shall bargain, sell, demise, or otherwise depart with any Estate or Interest therein, for a longer period than One Year, without the direction of the Supreme Court of this Island, first given for that purpose". (1834) 4 Wm. IV, c. 18: *An Act for declaring all Landed Property, in Newfoundland, Real Chattels*, s. 1.

[70] (1836) 6 Wm. IV, c. 5. (Nfld.)

[71] Archibald, *Digest of Laws*, 126. Archibald was a member of a Nova Scotian family prominent in the legal profession. His father had served as Attorney-General in Nova Scotia where equal division among the children of those who died intestate had existed since legislation to that effect was passed in 1758. The inheritance was subject to the eldest son's double share which was abolished in 1842. Archibald may have been influenced by the work of Beamish Murdoch who had written in 1832 that certain English common and statute laws were not as a whole suited to the circumstances in the colony of Nova Scotia. Murdoch noted that while it is understood that English laws are the birthright of every English subject, there are many restrictions on those laws. Colonists, he argued, carried with them only as much of the English law as was applicable to their own situation and conditions. He cited general rules of inheritance, in particular, as being unsuitable in the colonies. "Thus our law, by dividing the inheritance among all the children of an intestate and by abolishing most of the unnecessary and artificial distinctions between real and personal property, has relieved us from the unjust rules of primogeniture and from much subtilty of legal definition". Beamish Murdoch, *Epitome of the Laws of Nova Scotia* (1832 - 1833), 1971 ed. v. 1, section VII, 35.

English inheritance laws.[72] His argument supported the view of Lord Aberdeen, Secretary for War and the Colonies,[73] regarding "the inapplicability of the English rules of inheritance in a society composed almost exclusively of persons engaged in the fisheries".[74]

Several court cases before the passage of the Chattels Real Act addressed the meaning of property for the purpose of inheritance. Two cases, *Kennedy v. Tucker* in 1792 and *Williams v. Williams* in 1818, had posited that land in Newfoundland had always been considered as chattels real. They were precedents for rulings made after the passage of the statute. Archibald referred to the two court cases to confirm that up until the passage of the Chattels Real Act, land was considered chattels real and English inheritance laws did not apply.[75] He concluded that these early court decisions of Chief Justice Reeves and Chief Justice Forbes likely reflected custom at a time when Newfoundland was legally considered a fishing base when land was only intended for temporary use.[76]

The first case, *Kennedy v. Tucker* , occurred in 1792 in Ferryland and was decided by Chief Justice John Reeves. Mary Kennedy took her brother, William Tucker, to court

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[72] Archibald, *Digest of Laws*, 126.

[73] Lord Aberdeen was the Secretary for War and the Colonies, under Peel, from December 1834 to April 1835. *Dictionary of National Biography*, v. 8.

[74] C.O. 195/17, Aberdeen to Prescott, April 13, 1835. This dispatch may have been written by James Stephen.

[75] Archibald, *Digest of Laws*, 125.

[76] *Ibid.*

to recover £4 in rent owed to her from property she and her brother had inherited from their father. Their father had died intestate, leaving a plantation which his son had rented for £11 a year for several years, but for only £8 in the last year. Tucker had paid his sister half the annual rent. In 1791, Tucker decided to declare himself sole heir and stopped paying his sister half the rent. The Court ordered William to pay his sister half the rent of the previous year and additional rent money he had neglected to pay her for the current year. The plaintiff was given half the plantation to take possession of at her liberty. Reeves divided the property equally among the two surviving children because in his opinion, "lands and plantations in Newfoundland are nothing more than chattels interest, and should, in case of intestacy, be distributed as such".[77] He had decided that primogeniture did not apply in Newfoundland.

Williams v. Williams[78] also raised the question of whether land in Newfoundland was subject to English laws of inheritance. The action was brought to recover £120, rent for a house in St. John's. The plaintiff, John Williams, sought exclusive right to the premises in question as "heir at law" while the defendants, his siblings, argued that they were entitled to equal shares. The will of the maternal grandfather, John Monier, was admitted as evidence. Monier gave his house, gardens, and appurtenances in St. John's to "Mary Monier, his daughter, and her heirs forever". Mary Monier later married George

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77 PANL, GN 5/4/C/1, Ferryland Court of Sessions Minutes, Southern District, 1786-1838. By "chattels interest", Reeves meant that land in Newfoundland came under the classification of English property law known as chattels real. The case is also cited in Archibald, *Digest of Laws*, 125.

78 *John Williams v. Thomas Williams et al*, (1818) Tucker, 1 N.L.R, 120. This account of the court case is incomplete. A complete account is found in *Williams v. Williams and others*, "Decisions of the Supreme Court of Judicature, Newfoundland, 1817 - 1821, during the time of Francis Forbes". Microfilm, Mitchell Library, Sydney, Australia.

Williams and they had several children, the eldest of whom was the plaintiff in this case. Pleading primogeniture, John Williams claimed sole right to the property of his parents, Mary Monier and George Williams who had both died intestate.

The plaintiff argued that real property in Newfoundland was considered as chattels for the payment of debts; yet, under the laws of England, which were the laws of Newfoundland, for the purposes of succession, the land in question should be considered real property. Furthermore, John Williams argued, the property in question had been given initially by John Monier to his daughter, Mary, in contemplation of her marriage. It was Monier's intention that the property would descend to the plaintiff as heir at law, that is, to the eldest son. "That supposing the custom of this island to be well founded and universally understood, it must have been known to the testator." By giving the property to Mary Monier, the plaintiff's mother, and her heirs forever, the testator John Monier, in the plaintiff's view, must have intended the word "heirs" to operate as words of limitation to the eldest son of his daughter Mary.

The defendants contended that land in Newfoundland had always been held to be mere chattels, not subject to the English law of inheritance. They argued that "rules of real property as to succession were not in force and indeed had never been recognized on the island". In their view, the mother, Mary Monier, had intended that the land should be divided equally among all children.

In his decision, Forbes, like Reeves, held that the English law of inheritance did not apply. According to Forbes who seems to have been unaware of Reeves' decision in *Kennedy v. Tucker*, the law of inheritable succession had never been considered by Newfoundland courts. In its place, land within the fishery which had a house and garden on it was subject to customary local title. Forbes stated that

> the House and Gardens in dispute are situated in this harbour, and so contiguously to the water as to be capable at least of being employed in the fishery and consequently fall within the statute of William III, under which the fishing establishments in this Island are held. What the tenure under the statute is - what estate it allows, are questions which have never been determined here, and upon which the law advisors of the Crown in England appear never to have come to a conclusive opinion. Whatever it may be, it is certainly not heritable property, governed by the canons of descent, according to the English law.

Forbes held that the best source of law on this point was local usage under which fishing plantations were chattels real, which meant they were attachable for debt and subject to equal distribution on death.

> Possession quietly obtained and continued employment in the Fishery appear to have been the customary titles under the statute and fishing plantations have passed from holder to holder, and from father to children, without deed or testament, or any solemnity, beyond the fact of delivering, or leaving in possession.

Forbes argued that the "simple tenure" was best suited to the island and appeared to have grown out of "common exigencies" which are the best interpreters of laws and, in their absence, become laws themselves. He concluded:

> The common law of descent does not apply to property in the soil of Newfoundland, situated like the House in dispute - what law then shall I apply better than the usage of the place?

In the result, the eldest son of one who died intestate was not entitled to the entire property. He would have to share the property equally with his brothers and sisters.[79]

In the years that followed the passage of the Chattels Act, judicial opinions about the effect of the statute were mixed. A very different rationale for denying primogeniture was reached in the unreported case of *Blennerhasset v. Keen* before the Central Circuit

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[79] *Williams v. Williams and others*, "Decisions of the Supreme Court of Judicature, Newfoundland, 1817 - 1821, during the time of Francis Forbes". Microfilm, Mitchell Library, Sydney, Australia.

Court in 1840. Justice John Bourne[80] noted that only the passing of the Chattels Real Act six months before the death of an intestate proprietor prevented the eldest son from entitlement as sole heir at law to extensive real estate on the island.[81] Chief Justice Boulton concurred that prior to the passage of the Chattels Real Act, real estate in Newfoundland had been governed by the English law of inheritance.

Better known is the case of *Walbank v. Ellis*[82] in which it was held that until the passage of the Chattels Real Act, English inheritance law relating to primogeniture and entail was well entrenched in Newfoundland. Thus the earliest settlers brought English law governing inheritance of real property to Newfoundland which continued to operate fully until otherwise provided by statute, namely the Chattels Real Act.

The case, *Walbank v. Ellis*, involved the inheritance of Samuel S. Ellis, son of Nicholas and Anne Ellis. Samuel, as one of five children, inherited a fifth share of the land and premises belonging to his parents in 1777. When Samuel died in 1825, the property, as directed by his will, was left to be divided among his six children. The eldest son, the defendant in this case, claimed the property which he believed had been entailed upon him by his grandfather in a deed drawn up in 1777. The question before the court was whether Samuel Smith Ellis could dispose of his share of this property by will, which in the opinion of the court depended upon whether all estates and interests in land prior to the passage of

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80 John Gervas Hutchinson Bourne arrived in Newfoundland in 1838 and left in 1844. Phillip Buckner, "John Gervas Hutchinson Bourne", *DCB*, VII, 98 - 100.

81 *Blennerhasset v. Keen*, (1840), cited in Archibald, *Digest of Laws*, 125. Brief references to the court case are found in PANL, GN 5/2/A/C and GN 5/2/A/1, Central Circuit Court records, 1840.

82 *Walbank v. Ellis*, (1853) 3 Nfld. L.R., 400.

the Chattels Act were considered real property subject to the laws of real property. The court took the opportunity to deal at length with the issue of inheritance and the status of property in Newfoundland before the passage of the Chattels Real Act of 1834. The justices cited several sources to support their argument that in Newfoundland, as in other English settled colonies, settlers took with them English law as their birthright, including the general rules of inheritance. [83] Furthermore, they stated that

> unless there be then some special legislation which exempts Newfoundland from the ordinary operation of *British* law in colonies, settled as this has been, which has made this country an exceptional case, it would appear that the general laws which regulate the rights to landed property and real estate in the Mother Country would prevail here in relation to the same rights to property in this country.[84]

The judges made no reference to the provisions of the Judicature Acts of 1792 and 1824 which did indeed exempt Newfoundland from English laws that were not applicable to local circumstances.

Representing the plaintiff, Bryan Robinson[85] contended that land in Newfoundland had never been regarded as real property because of Britain's unique policy of preventing settlement, manifested in King William's Act. He also cited Reeves' decision in *Kennedy v. Tucker* and Forbes' ruling in *Williams v. Williams* to support his position.

The judges ruled that King William's Act did not affect the rights of property in general in Newfoundland nor the laws under which settlers held and transmitted such

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[83] *Walbank v. Ellis*, 402.

[84] *Ibid.*, 403.

[85] Sir Bryan Robinson began his legal career in 1831 in Newfoundland and was appointed master in chancery to the Legislative Council in 1834. He was appointed to the Supreme Court of Newfoundland in 1858 where he remained for 20 years. Phyllis Creighton, "Sir Bryan Robinson", *DCB*, XI, 760 - 762.

property. However, the statute did respect the rights of those who held ships-rooms.Those who had improved land since March 25, 1685, that had not been claimed for use by migratory fishermen, were entitled to peaceably and quietly enjoy the same. Did this right end when the individual died? The justices argued that it should not, that the property should descend to the individual's family according to the common-law rules of inheritance.

Furthermore, the court held that if the individual had owed money, his estate would be considered security for payment for that debt. In conclusion, the justices referred to the Chattels Real Act which they claimed was new law, not simply declaratory of pre-existing law.[86] They concluded that

> there was no written law prior to the last Act, nor any uniform invariable custom which could operate to exclude the lands of those who was settled in Newfoundland from the usual operation of the laws of the mother country respecting landed property, that as the country became settled from time, and as rights were acquired in the soil, the laws of England determining rights to real estate took effect there as in every other colony where British subjects settled.[87]

They conceded that English policy had been in the earlier days to discourage settlement but as that policy changed and interests in land were acquired, they became subject to the only

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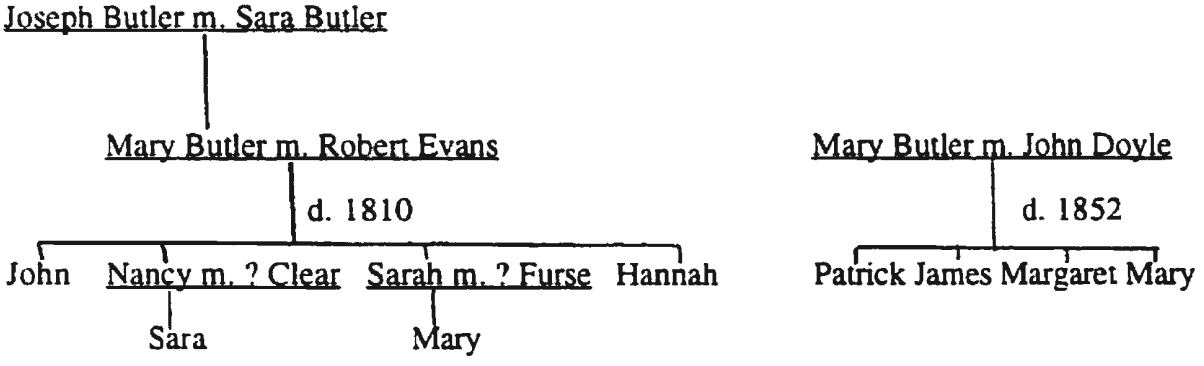
[86] *Walbank v. Ellis*, 409.

[87] Higgins summed up his assessment of the application of inheritance laws and the impact of the Chattels Real Act as follows: "...one would think that the peculiar, the very limited, tenure under which real property was held here and the policy of England in reference to Newfoundland would seem to imply that the general law of inheritance as it applied to England was not capable of applying here. But the decisions are such that one cannot surely lay down what would eventually have been decided but of the passing of the Real Chattels Act". CNS Archives, Col. 87, John G. Higgins collections, essay by Higgins entitled, "The History of Law and Legal Institutions in Newfoundland", 27.

law which existed to regulate property rights, namely the common law of England.[88] The estate of Samuel Smith Ellis, therefore, would be inherited by his eldest son as heir-at-law.

In 1860, *Evans v. Doyle*, revisited the application of the Chattels Real Act. The case involved the property of Joseph Butler, a labourer in St. John's. On July 17, 1793, Butler had a will drawn up indicating that the family dwelling and garden upon his death would pass to his daughter Mary.[89] The property, situated on the upper path of Sall Martin's Beach in St. John's, between Barter's Hill and Cuddihy's Lane, was actually conveyed to Mary in a deed of gift, a document entered as evidence in the case.[90]



According to the will, Joseph Butler and his wife, Sara, could occupy and enjoy the

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[88] The justices further concluded that Forbes' decision had been unsatisfactory but that of Bourne and Boulton in *Blennerhasset v. Keen* clearly showed that real property in Newfoundland was governed by English laws of inheritance.

[89] *Evans v. Doyle*, (1860) 4 Nfld. L.R. 432.

[90] In law, a "gift" is defined as "a voluntary transfer of property to another made gratuitously and without consideration". A "gift" is irrevocable. *Black's Law Dictionary*, 619.

house for the remainder of their lives, but upon their deaths, Mary would take possession of the home and land, including the contents of the house listed as: one feather bed and bedding, two tables, three chairs, four iron pots, one copper tea kettle, one boat's kettle, three chests, two looking glasses and sundry other wares. Mary Butler's husband, Robert Evans, died in 1810, leaving Mary with their one son, John, and three daughters, Nancy Clear, Sarah Furse and Hannah and they continued to live on the same property. Three or four months later, Mary married John Doyle, a fisherman. They had four children, Patrick, James, Margaret, and Mary.

According to court records, family members understood and fully accepted that the property belonged to Mary, solely and completely as she had received it as a gift. There is no mention of either husband having claimed sole possession of the property as certainly under the English common law system they were entitled to do. Furthermore, there is no indication of any assumption that upon coverture, the property immediately became the husband's. Mary's second husband, John, died in 1852 and Mary died in November of 1858. Her will, dated July 16, 1851, left the property equally to all of her children. However, John Evans, as the eldest son of Mary, claimed absolute title to the premises and the court was asked to determine John Evans' claim.

A copy of Mary's will was presented as evidence.[91] The land, according to the will, was to be divided into equal shares, the lower or southern part to be given to Mary's daughter, Mary Brooking. Another share was to be given to Margaret, one to Patrick, one to John Evans, and one each to two granddaughters, Sara Clear and Mary Hannah Furse (daughters of Mary's deceased children). In his claim, John Evans argued on the basis of primogeniture that the property should be given to him because it had been entailed upon

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91 *Evans v. Doyle*, 434.

him by his grandfather, Joseph Butler, in 1796. The executor of Mary's will resisted this claim on the grounds that the property was considered chattels real and was not the subject of an entail vested absolutely in Mary Evans.

Chief Justice Francis Brady, Justice Joseph Little, and Justice Bryan Robinson wrote separate and lengthy opinions.[92] Referring to the positions taken by counsel in *Kennedy v. Tucker* (1792) and *Williams v. Williams* (1818), Justice Robinson found that with respect to English inheritance laws, land in Newfoundland had never been defined as real property and the law of primogeniture was not in effect. Furthermore, regardless of the law before the passing of the Chattels Real Act, this particular case came within the confines of the statute. He concluded that the land described in the deed of Joseph Butler, which had been passed to Mary Butler, should be considered a chattels estate carrying with it the limitations of the deed. Therefore, Mary's will, in his view, should be upheld and the land divided as specified by Mary's will.

Justice Little did not concur. Citing *Walbank v. Ellis*, he ruled that the laws of primogeniture, as they had existed in England, were in force in Newfoundland until the passage of the Chattels Real Act in 1834. Therefore, at the time of Joseph Butler's will, lands on the island were "fee simple"[93] and regarded as real property. John Evans derived

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92 *Evans v. Doyle*, 435 - 444.

93 A fee simple is an estate of inheritance held in absolute ownership, which is free of any condition or restriction to particular heirs and is descendible to the heirs general, whether male or female, lineal or collateral. *Black's Law Dictionary*, 554. A fee tail is an estate which is inherited only by a lineal or direct descendent, such as a child to his/her natural parent. Megarry, *A Manual of the Law of Real Property*, 15. See also Alan M. Sinclair, *Introduction to Real Property Law*. 2nd ed. (Toronto: Butterworth, 1982): 13 - 19.

the land in question by descent[94] and the Act had no application in this case.

Chief Justice Brady reached the same conclusion as Justice Robinson but on different grounds. He decided that the estate of Mary Evans under the deed of 1796 was a fee tail descendible through her to her children. However, since Mary lived until 1858 and the Chattels Real Act was passed in 1834, the Act rendered her estate subject to the law which governed the distribution of chattels real. The property would descend equally to her next-of-kin. In Brady's words,

> I am also of opinion that as she lived until 1858, the Real Chattels Act, which was passed in 1834, operated upon the freehold estate then vested in her so as to render it subject to the law which governs the distribution of chattels real, of which a party dies possessed, and it would descend to her next of kin instead of the heir of her body.[95]

He referred to Blackstone's *Commentaries* to support his position and argued that the property was absolutely vested in her and she could do with it as she saw fit. John Evans would have had the right to the property had it not been for the Chattels Real Act. However, the court ruled that the land belonging to Mary Evans Doyle would be passed to her children equally as her will specified.

Ten years later the Act was at issue in the case of *Walbank v. Casey, Ex. Of Cuddihy*.[96]John Cuddihy of St. John's died in 1841, leaving his property to two nephews, Matthew and Richard. He intended to leave land to a third nephew, John, but as John was a mariner who had not been heard from in three years, he was presumed dead. John

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[94] According to the words in John Butler's deed, "her and the heirs of her body lawfully begotten", *Evans v. Doyle*, 439.

[95] *Evans v. Doyle*, 443.

[96] *Walbank, Admr. v. Casey, Ex. Of Cuddihy*, (1870) 5 Nfld. L.R. 363.

Cuddihy wished his real and personal property to be passed on to male relatives named Cuddihy. His will stated emphatically that none of it go to his female relatives. His desire was that Matthew and Richard inherit all the property and upon their deaths, it would descend to their male children. In the event there were no male children, John specified that the property would pass to two sons of his brother, Edward, who was living in Ireland.

Matthew had two daughters but no sons. Richard had both sons and daughters. The defendant in the case was one of Richard's sons, Michael, who claimed Matthew's half of John Cuddihy's land to the complete exclusion of Matthew's daughters. His argument was that John Cuddihy had intended by his will to leave his property to male relatives only.

The issue was whether the daughters of Matthew had any right to any or all of the land which their father held during his lifetime. The complainant representing Matthew's two daughters claimed that the girls were entitled to their father's property. The argument was that under John Cuddihy's will, Matthew took an "estate tail" in these lands. According to the Chattels Real Act, it was his absolute property and would be distributed along with the rest of his estate as he wished.

The case was ruled on by Chief Justice Hoyles and Justice Robinson. In Hoyles' opinion, the object of John Cuddihy's will was to give Matthew an "estate tail" in the properties mentioned in sections two and four of his will. Using the provision of the Chattels Real Act which declared real property to be chattels, Hoyles concluded that Matthew became the absolute owner of the lands and upon his death, they should be passed to his personal representatives for distribution among his next-of-kin. Therefore, Hoyles ruled that the daughters of Matthew would be given their father's property and that the provision in the will against females was inoperative.

Justice Robinson ruled on three specific questions arising from the case. First, as

he had argued consistently since *Walbank v. Ellis* in 1853, lands in Newfoundland were chattels and not the subject of entail. Therefore, Matthew held the lands bequeathed to him absolutely. Secondly, while John Cuddihy intended to create an estate tail in the lands he bequeathed, the law did not allow for such an estate. Therefore, the "rule is that the first possessor of a chattel bequest takes the whole property divested of those conditions and limitations, that, read in the case of realty, have created an estate tail". Thirdly, Matthew took the whole property until his death. Since he died intestate, the estate was to be divided among all next-of-kin, namely his two daughters.

The classification of land as chattels real in 1834 clearly created the potential for conflicting interpretations in subsequent court cases. Did English inheritance laws exist in Newfoundland prior to the passage of the Chattels Act? Some found that English law of inheritance had not applied in Newfoundland before the act while others held that the Chattels Act was a new law which made a significant difference in establishing that property in Newfoundland was chattels real but only after 1834. Depending on the interpretation, the colonial legislature either confirmed an existing situation or established a new one. For cases occurring after 1834 this was a key issue.

Those who decided that the Chattels Act was new law claimed that no statutes had been passed previously to alter common-law rules of real property and inheritance laws that had been brought to the island by English settlers as their birthright. In their deliberations, however, they neglected to consider that the Judicature Acts as early as 1791 did provide specifically for English laws only as they could be applied to local circumstances. The law of real property and inheritance laws, it was found by some individuals such as Justice Robinson, clearly were not applicable to the island and in their absence, custom and usage allowed for equitable distribution of all property among family members in intestacy cases.

Custom and usage played a significant role in the formation of laws pertaining to marriage, property and inheritance. Despite conflicting interpretations after 1834, the purpose of the Chattels Real Act was clearly to address the law of inheritance in Newfoundland. The land of those dying intestate would be inherited as personal property and equally distributed among the surviving spouse and children. Legislators decided that because of the limited size and value of estates the Act would accomplish two goals, namely, confirm the inappropriateness of both primogeniture and the impartibility of small estates. It would sanction the widely held customary practice of equitable distribution in intestacy in order to secure greater economic security for succeeding generations.

Chapter 6: "Share and Share Alike": Inheritance and Customary Practices

The inheritance system that evolved in Newfoundland to 1870 was intricately tied to the reception issue, to the definition of property and to customary practices. Matters of property tempered the restrictions of common law concerning coverture with far more important local considerations. The first was the support and maintenance of the family. For men who left wills, sufficient support and distribution of the estate would guarantee the welfare of the widow and children, particularly children under the age of twenty-one, and widowed and unmarried daughters. A second consideration was the acknowledgement by the community of an individual's ownership of property. This was especially important for real property used in the fishery since subsequent generations would rely on the same fishing rooms as their ancestors. As long as the fishery remained the primary occupation on the island, testators would ensure that their property was passed to what they considered its rightful heirs, namely, their descendants who would need it to support their families. In addition to the all-important fishing rooms, inhabitants felt that other property, regardless of its type or amount, was also important to keep within the family. Carefully itemized wills show clearly the attention given to ensuring all personal property, no matter how seemingly insignificant, was distributed among family members including immediate and collateral kin. In this respect, women played as important a role as men since they were indispensable members of the family and of the household economy which was the basis of its survival. This chapter briefly outlines women's place in the domestic economy and reveals the presence of married women in the court system. The primary focus of this chapter is to examine the various ways in which individuals inherited property and to

indicate the prominent place of customary practice in the inheritance system. The chapter concludes with an examination of the statutory reforms of married women's property which were modelled on the earlier British statutes.

The Domestic Economy

The economic responsibilities of planters' wives and daughters increased as permanent settlement grew throughout the seventeenth century. The presence of women in a planter household often enabled the family to keep more livestock. Several women were planters in their own right. Seventeenth-century censuses show that planter households headed by women, mostly widows, were generally significantly larger than the average plantation.[1] By the end of the Napoleonic Wars in 1815 and the accompanying economic decline in international markets, planters were relying more and more on household labour in the production of cod. At the same time, many planters began to diversify by becoming engaged in sealing, trapping, ship-building and logging to supplement their incomes.[2] Government policy permitted enough land to raise vegetables.[3]

Women played an important role in the transition from a migratory to a resident industry in Newfoundland. Women of resident families often married migrant fishing servants while other young women came to the island as domestic servants and stayed to

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[1] Pope, "The South Avalon Planters", 308. Widows who headed planter households employed on average thirteen servants as opposed to the nine servants employed typically by planters.

[2] Cadigan, *Hope and Deception*, 38.

[3] Sean Cadigan, "Whipping Them into Shape: State Refinement of Patriarchy among Conception Bay Fishing Families, 1787 - 1825", in Carmelita McGrath, Barbara Neis, and Marilyn Porter (eds.), *Their Lives and Times: Women in Newfoundland and Labrador, a Collage*. (St. John's: Creative Press, 1995): 50.

marry resident fishermen. As the resident shore fishery grew in the eighteenth century, women became vital participants in the fisheries and continued to carry on their domestic chores of baking, cleaning, cooking and caring for children as well as their shore work. Many also engaged in subsistence activities which included making clothes, gardening, raising poultry, pigs, cattle, and sheep.[4] Some married women were paid to wash clothes for single men in their community. This work was regarded not as independent of their husbands' efforts but as their contribution to the family's survival. Wills of this period indicate that the concern to provide for the family was a recurring theme from late eighteenth century to the late nineteenth century.

By the early nineteenth century, the family fishery was established. Women and children became a valuable part of the shore crew who unloaded the fish, split and salted it and spread it on the flakes for drying. The quality of the fish depended to a large extent on the women's ability to cure it, to decide when it needed to be turned or covered and when it could be taken up and stored or carried to the local merchants. They were also responsible for subsistence agriculture, made all the more challenging by the climate and poor soil. This seasonal work took many hours of the day; yet, women continued to carry out their domestic responsibilities as well.[5] Merchants paid for fish according to its quality. Only the best quality of fish would ensure the highest prices from the merchant.

The production of cod, subsistence farming and in a few areas, commercial

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[4] Cadigan, *Hope and Deception*, 79.

[5] For a further description of the gender division of labour in the fishing economy of Newfoundland as well as the changing role of women in Newfoundland history see McGrath, Neis, and Porter (eds.),*Their Lives and Times: Women in Newfoundland and Labrador, A Collage* ; Marilyn Porter, "'She was Skipper of the Shore Crew': Notes on the Sexual Division of Labour in Newfoundland", *Labour/Le Travail*, 15 (1985): 105 - 123.

farming, brought together husbands and wives in a joint effort to sustain their households in the face of fluctuating markets and uncertain fishing seasons.[6] In fishing communities where there was a heavy dependence on the shore fishery, actual title to property was not as important to married couples as the public recognition of their possession of land on which to build a house near the shoreline, close to fishing rooms, stages, flakes and wharves. They needed only a small plot of land on which to cultivate a few vegetables or pasture domestic animals.

The population remained predominantly rural throughout the nineteenth century. By 1884, the total population on the island reached 197, 335.[7] The largest centre, St. John's, had a population of only 29,007 by 1891.[8] In St. John's and the communities of Conception Bay, residents were mostly dependent on the seal fishery and the Labrador fishery.[9] These were also important for residents living on the northeast coast and in the Ferryland district. Unlike residents who engaged in the shore fishery, they did not need to live along the shoreline. Many others engaged in substantial subsistence farming and even commercial farming where women also played a vital role.

Married Women and the Courts

Both the courts and the legislature demonstrated their protective function in

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[6] Cadigan, "Economic and Social Relations of Production on the Northeast Coast of Newfoundland, with Special Reference to Conception Bay, 1785 - 1855", 195.

[7] *Encyclopedia of Newfoundland and Labrador*, "Census".

[8] *Ibid.*, "St. John's".

[9] Cadigan, *Hope and Deception*, 25.

nineteenth-century Newfoundland. Husbands generally acted on behalf of their wives in court actions. Common-law rules provided that husbands were responsible for their wives' debts incurred before and during their marriage. Husbands were equally responsible for trying to recover money owed to their wives even if the debt was incurred before their marriage. On January 19, 1818, Samuel G. Carter took John Power to court to recover payment for goods sold and delivered to Margaret Neile Power before her marriage to the defendant. The debt was proved and it was also determined that Margaret owned property at the time of her marriage. Power was ordered to pay the debt and gave a feather bed that belonged to his wife.[10] The rule was that a husband was answerable for a woman's debts before they entered into marriage, but it was not always enforced in light of individual circumstances. Surrogate Thomas Coote ruled in *Renouf v. Cooney* in 1818, for example, that the husband was only responsible for the debts of his wife incurred since their marriage. John Renouf, the plaintiff, had taken Robert Cooney to court to recover the sum of £9/12/6 for sundry articles delivered by Renouf to Mrs. Cooney. Most of the articles were delivered before her marriage, when she was only fifteen. It appears that because of her age, the court ruled that the plaintiff, John Renouf, would recover from Cooney only the value of the articles received since the marriage.[11]

Money owed to married women was most often for household tasks that women provided for single men in the community. Husbands went to court to recover money owed to their wives. Thomas White of Harbour Grace, a fisherman, unmarried, was summoned

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[10] PANL, GN 5/1/C/6, Ferryland Surrogate Court Correspondence, Southern District, January 19, 1818.

[11] PANL, GN 5/1/A/1, Surrogate Court Minutes, Central District, box 2, file 1, January 1817 - July 1818, *John Renouf v. Robert Cooney*, February 16, 1818.

to appear before the Sessions Court in Harbour Grace on Saturday, December 15, 1831. He was answering the complaint of Timothy Toole who stated that his wife, Margaret, had not received payment of £1/ 5 due her for washing done for White since September of 1831.[12]

While husbands commonly acted on their wives' behalf in court cases, on some occasions married women took the initiative. Women's indispensable role in the production of cod, to some extent, limited male authority in the household. The frequent absence of husbands involved in the fishery left many wives responsible for the household and, when necessary, for making court appearances. For example, married women complained when strangers trespassed on the couples' property. In 1751, Mrs. Brooks, on behalf of her husband, Nathaniel, of Bay Bulls complained that Captain John Lang had encroached on their plantation situated on Burst Heart Hill.[13] Mary Gosse, the wife of John Gosse, went to Surrogate Court in Harbour Grace in 1822 to complain that Michael Farrell had trespassed on her husband's fishing room in Back Cove, Spaniard's Bay.[14]

Beyond trespassing, a second reason for their court appearances was to demand payments owed to the married couple or to another member of the family. On March 20, 1843, Bridget Davis appeared in Surrogate Court in Harbour Grace to take an oath that James Hookey was in debt to her and her husband, Samuel Davis, in the amount of £4/17/

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12 PANL, GN 5/3/B/19, Magistrates Court records, Harbour Grace, box 57, file 2, Civil Process, 1830 - 1839.

13 PANL, GN 2/1/A, Colonial Secretary's Office, Outgoing Correspondence, v. 1 - 4, box 1, 1749 - 1770, *Brooks v. Lang*, September 9, 1751.

14 PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, March - April 1822, April 13, 1822.

3, an account that had been drawn up on January 18, 1842, when Bridget was still single.[15] In an interesting extension to the law, a mother could act on behalf of her child. Catharine Delahunty of Ferryland took Thomas Norris to court in 1830 to recover wages due her son when he worked for Norris during the previous summer.[16] There is no indication of her son's age or whether he was absent from the community at the time.

Third, married women petitioned the courts on criminal matters. In March 1750, Ann Lake went to court in Placentia and explained that her husband had a plantation and fishery in Paradise where he employed several servants. She accused four of his servants, while her husband was away, of beating and abusing her "in a barbarous manner". The four accused, Patrick Conroy, Morris Francis, John Coor and John Francis, were summoned to appear in court on August 30, 1750.[17] Married women also appeared in court to act as witnesses in criminal proceedings. In the case of *Howell v. Howell* in 1847, Ann Taylor, wife of Jonathan Taylor, a planter in Carbonear, gave evidence in an assault case committed by John Howell and Benjamin Howell on Mrs. Sarah Howell.[18] Wives also went to court on behalf of their husbands when property ownership was in dispute. The same Sarah Howell returned to Magistrates Court in Harbour Grace only a few months

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[15] PANL, GN 5/3/B/19, Magistrates Court Records, Harbour Grace, Civil Process, 1820 - 1869, box 61, file 3, March 20, 1843.

[16] PANL, GN 5/4/C/1, Court of Sessions Minutes, Southern District, Box 1, 1829 - 1838, November 15, 1830.

[17] PANL, GN 2/1/A, Colonial Secretary's Outgoing Correspondence, v. 1-4, 1749-1779, f. 435.

[18] PANL, GN 5/3/B/19, Harbour Grace Magistrates Court, Box 56, f. 5, 1840 - 1849, May 8, 1847.

later to claim "quiet and peaceable possession of property" disputed by her husband's relatives. [19]

When marital relations broke down, married women appeared in court to complain that their husbands had deserted the family. In 1825, Cebelia Dunphy took her husband Matthew to court to recover £49 for maintenance of herself and a child.[20] Jane Simmons of Harbour Grace, wife of Moses Simmons, a seaman, took an oath in 1877 that her husband had left her without any intention of supporting her.[21] Deserted wives were entitled to some government relief by the legislation passed during the nineteenth century. One of the first pieces of legislation of the new colonial legislature was designed to protect married women and children, a responsibility which the courts had by custom held for many years.[22] The Act[23] gave deserted wives the right to sue for support. The courts were empowered to apprehend any parent who had abandoned his or her child and in certain cases appropriate an individual's property or wages to support the deserted wife or children. The Act also provided that where a husband would not work to support his

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19 PANL, GN 5/3/B/19, Harbour Grace Magistrates Court Records, box 61, f. 3, 1840 - 1849, November 1847.

20 PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, box 5, May 1825 - September, 1825, September 8, 1825.

21 PANL, GN 5/3/B/19, Harbour Grace Magistrates Court Records, box 64, f. 5, 1870 - 1879, October 15, 1877.

22 For examples of the courts' protection of deserted wives and acting as *parens patriae* of children see English, "The Reception of Law in Ferryland District".

23 (1834) 4 Wm. IV, c. 8 (Nfld.): *An Act to afford relief to wives and children deserted by their husbands and parents.*

family, or where he spent the family earnings on liquor, he could be sentenced to hard labour for two weeks. The statute expired in 1856 and was replaced in 1858. The new Act[24] included a procedure for attaching the wages of a deserting husband or father. Thus a man's employer could be ordered to pay part of the employee's wages to the wife and children. The Act was replaced in 1865 with an added provision for the maintenance of elderly and infirm parents. [25]

The depth of financial and emotional despair of some married women is apparent in several letters sent to local authorities pleading for assistance. A petition from Mary Barry to Judge Tucker in 1828 illustrates this point. She asked to have her husband released from prison so that he might "extend his assistance to his children" that they might no longer be exposed to "the poverty and insults of a world of misery".[26] Women and children also sought the assistance of the courts when their lives or physical security were threatened by husbands, fathers, or other family members. Correspondence dated August 29, 1854, from James LeDrew of Hants Harbour to Robert Pinsent of the Magistrates Court in Harbour Grace illustrates the desperation of these women.

> Mrs. Ann Champion came to me this afternoon complaining that her husband threatens to take her life and also that of her children, she says that she is not safe to be where he is as she don't know the moment he may take her life - she also thinks its quite useless to bind him over to the peace, for she is sure he will not keep it, he having drank so freely of spiriting liquors that his sense appears to be taken from him.

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[24] (1858) 21 Vict. c. 13 (Nfld.): *An Act to afford relief to wives and children deserted by their husbands and parents.*

[25] (1865) 28 Vict. c. 6 (Nfld.): *An Act to make provision for wives and children deserted by their husbands and parents, and for aged persons deserted by their children.*

[26] PANL, GN 5/3/B/19, Harbour Grace Magistrates Court Records, Miscellaneous, Box # 72, July 28, 1828.

> We have no lock up house on this shore, therefore we cannot confine him and the only thing that I can do is to send the constable John Pawley with him to you, for the purpose of your making an enquiry into the cause of his bad conduct and to beat him according as you think he deserves.[27]

Surrogates and justices of the peace were familiar with the serious consequences of desertion by husbands and expressed in letters to the Colonial Secretary their desire to "have the widows and orphans cared for".[28] They had deliberated on the pleas of many letters from desperately poor wives and mothers who faced winters of starvation in the absence of husbands and fathers. Letters to court officials illustrate the depth of this problem. For example, another letter to Magistrate Pinsent from his colleague, Charles Walsh, in 1854 states:

> The wife of John Lynch applies to me for a note for meal. I do not like to refuse the poor woman, at the same time, I desire not to hold out any encouragement towards getting relief from the court to families in general where their husbands are home. She tells me that John Lynch is endeavouring to get something by rinds that he has but that they are not yet dry for sale. She is, I believe, a woman whose word is to be depended upon.[29]

The courts gave more concessions to married men with families than to single men. In 1817, John Webb, a single man, was told by Surrogate Reverend Frederic Carrington that his request for land on the south side of Carbonear would have to wait until the Governor's arrival, at which time he could apply for a land grant. A married man, however, was permitted to fence in as much land as he needed to grow vegetables for his

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[27] CNS Archives, col. 003, Magistrates Office, Harbour Grace, f. 25, Miscellaneous Communities, August 29, 1854.

[28] PANL, GN 5/3/B/19, Magistrates Court Records, Harbour Grace, Box # 64, file 4, 1860 - 1869.

[29] CNS Archives, col. 003, Magistrates Office, Upper Island Cove, f. 24, 1854.

family.[30] When David Meehan's house burned down in 1832 he received a sympathetic response from the Chief Justice Alexander Tucker. Meehan, a carpenter in Harbour Grace, requested approval to rebuild his house on property he had held for some time. He proposed to build a shed which would "cover a wife and seven children from the inclemency of a long, cold winter".[31]

A wife could not be convicted of any "larceny, burglary, wounding, forgery, or uttering forged notes" if the offence was committed in the presence of her husband with his coercion and participation. She could be convicted of "treason, murder, perjury or robbery", however, regardless of her husband's presence. A husband and wife could be jointly convicted for every offence punishable under summary conviction of which they had been found jointly guilty. Furthermore, the husband was often held responsible for his wife's behaviour.[32] Both the husband and wife went to court to protect the good reputation of the married woman. In 1824, two married couples appeared before Surrogate Oliver St. John in Harbour Grace in the case of *Colbert v. Fitzgerald*. The plaintiffs, Maurice Colbert and his wife, accused the wife of Patrick Fitzgerald of defaming the character of Mrs. Colbert. The defendant denied the charges and several witnesses were called. The court ruled that

in the absence of a husband, if a wife commits a wilful act whereby another has

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30 PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, box 2, October, 1816 - October 1818.

31 PANL, Magistrates Court Records, Civil Process, 1830 - 1839, box 56, file 1, correspondence dated October 20, 1832.

32 D.W.Prowse, *Manual for Magistrates in Newfoundland.* (St. John's: J.C. Withers, 1877): 44.

> suffered within a civil action to claim compensation, that the husband shall make that compensation good as far as the injury deserves, but if a wife committed a rash and wilful deed comprising a criminal offence, then the wife's person is called upon only, for to make retaliation for that criminal offence. In the present case, the defendant's wife committed herself by slandering and vilifying the reputation of a Married Woman by using such language as was unbecoming any modest woman to express, that such language was the cause of bringing great disorder, disquietude and unhappiness between the plaintiff and his wife.

The Surrogate felt that it was unfair to require the defendant to pay heavy damages for the words of his wife but he had no alternative but to fine the defendant £5 and the costs of issuing the writ.[33]

In 1822, Lawrence Shehan and Johanah Shehan appeared before Oliver St. John in Harbour Grace Surrogate Court to accuse Dennis Mangan of defaming Johanah's character when he publicly stated that she had run away from her husband and was living with another man. The incident, according to witnesses, had detrimentally affected the couple's marriage. Dennis Mangan, the defendant, explained that he was drunk when he made those observations and that he was ready to acknowledge before the court that he had no grounds for accusing Mrs. Shehan of adultery and apologized accordingly. Interestingly, in giving judgement, the court observed that Lawrence Shehan, by his brutal treatment of his wife, had compelled her to leave their home and seek refuge with her nearest neighbour. The court ruled that

> the husband, who as her first and most natural protector, should have proved her dearest safeguard in every danger, had unlike a man, driven his wife without the slightest apparent cause from his bed and from his house, during a stormy night and this obliged her to seek shelter and for to preserve life itself, within the walls of another man's hut, thus that husband owed all that had occurred to his own unfeeling unnatural conduct...
>
> It is his wife alone, whom this court has thought it proper to protect from a recurrence of those insults, by giving judgement against the defendant with five

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[33] PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, box 4, f. 1823 - 1824, November 27, 1824.

shillings damage and costs of the suit.[34]

Inheritance Practices

Real and personal property was passed on to the next generation of the family by at least five means: deed of gift, deed of conveyance, intestacy, will, and marriage settlement. The size and nature of bequests were determined by considerations such as custom, duty, affection, fairness and the need to provide some measure of economic security to the immediate family and to acknowledge past and future contributions by family members. In the absence of or ignorance of a local authority, property boundaries in small fishing communities were arbitrarily drawn according to need, consensus and compromise. Documentation was not always required to convince local authorities of ownership. Occasionally, individuals simply relied on the support of members of the community or the reputation of the family to sanction ownership of property. For example, Mrs. Elizabeth Gobbett (formerly Elizabeth Pigeon) of Ferryland petitioned Governor Drake in 1750 for the right to the property known as Pigeon's Plantation, which consisted of three ships rooms in Ferryland. Although Mrs. Gobbett had mislaid the original patent, possession was granted to "her and her assigns forever" by virtue of her family name. [35] Similarly, in 1771 Governor Byron granted quiet and peaceable possession of property to Mrs. Anne Williams. She claimed property which originally belonged to her grandfather, Major John Jenkins before 1685 and long after, but the property had been unoccupied since his death. Community recognition of Mrs. Williams' relationship to Major Jenkins was sufficient for

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[34] PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, box 6, 1821 - 1822, January 18, 1822.

[35] PANL, GN 2/1/A, Colonial Secretary's Office, Outgoing Correspondence, Ferryland, August 31, 1750.

her to receive possession of the property.[36]

The most important piece of property to inherit was the fishing room. Vital to their source of livelihood, fishing rooms, stages, flakes, boats and gear were bequeathed by fishermen to sons and daughters, or in their absence, to collateral kin, regardless of gender. It was so important that the property remain in the family that many fathers and widows protected its ownership from sons-in-law in their wills, fearing it would, at some future date, move outside the family. Both men and women distributed property on a equitable basis to family members. As in Gagan's third model,[37] in families where the son inherited the all-important property required to execute the fishery, he was expected to provide for the economic security and maintenance of other claimants, including the widow, who had legally inherited by means of common law at least one-third of the estate. In Newfoundland, this often meant that unmarried children and the widow would remain in the family home regardless of who held title to it.

Deed of Gift

In English law property may be the subject of a gift. The property is retained by the person who received the gift and, unlike a will which a testator can change as he wishes, the gift is irrevocable. Gifts of land are usually termed voluntary conveyances. Among the ways in which real and personal property can be gifted are: by deed or instrument in writing; by delivery where the subject of the gift admits delivery; and by declaration of

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36 PANL, GN 2/1/A, Colonial Secretary's Office, Outgoing Correspondence, v. 5 & 6, October 22, 1771.

37 Gagan, *Hopeful Travellers*, 51.

trust, which is the equitable equivalent of a gift.[38] No particular form is necessary for a gift of land by deed. It can be made between two individuals or by the person giving the gift alone.[39] Where there is an absolute gift of real or personal property, there can be no conditions made on the recipient of the gift.[40]

Table 6.1: Distribution of Deeds of Gift

Deed of Gift	Number	Percentage
Conveyed property from parent to child	15	68. 2 %
Conveyed property between collateral kin	4	18. 2 %
Conveyed property to others	3	13.6 %
Total number of deeds	22	100%

Sources: CNS Archives, MF 236, Col. 150; PANL, GN 2/1/A, GN 5/4/B/1, GN 5/1/B/1, GN 5/2/A/9, GN 5/1/C/1, GN 5/1, Registry of Wills, v. 1, MG 382, MG 399. See Appendix B for a complete description of relationships and sources of deeds of gift.

In Newfoundland, the deed of gift was a convenient and inexpensive method of conveying land, houses, fishing rooms and property connected to prosecuting the fishery, such as stages, nets, and boats. It was most often used to convey property from parent to child, or to collateral kin, and occasionally to parties that were not related. As illustrated in Table 6.1, research uncovered 22 references to a deed of gift scattered throughout the court

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38 Halsbury, *Laws of England*, v. 15, "Gifts" at 708.

39 *Ibid.*, v. 15, 709.

40 *Ibid.*, v. 15, 728.

records and wills. Approximately 86% of the deeds conveyed property from one family member to another, most often from parent to child.

A typical deed of gift was made in 1803, Mary Horton, a widow, gave a fishing room in Harbour Grace to her daughter and son-in-law, Mary and Philip Pollo.[41] By a deed of gift in 1812 William Miller gave his stages, flakes, dwelling house and fishing room in New Bonaventure to his son Samuel.[42] The gift of property from parent to child ensured that important fishing rooms remained in the family. This was the intention of Phillip Adams, a planter in Twillingate in 1828 when he gave property as a gift to his daughter Jane. The deed stated:

> Know ye that I Phillip Adams of Twillingate, planter, do give over to my daughter, young wife of Phillip Young of Twillingate, part of my fishing room or plantation to be for her benefit or advantage as long as she or any of her family may live or whom she or her husband may leave it, at their decease and which part of the said room is marked by a shore on each side.[43]

Sarah Harris of St. John's received considerable property from her father Nicholas Gill through a deed of gift. This was an exceptionally large estate located in present-day east end of St. John's. The deed drawn up by Gill, a judge of the Court of Vice-Admiralty, placed the property in trust for the use of his daughter. In 1803, the surrogate court in St. John's appointed John Rendall as trustee of the estate. The court's decree stated:

> for in consideration of the natural love and affection which he hath and beareth unto his daughter Sarah Gill, now Sarah Harris, and for and in

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[41] PANL, GN 5/2/A/9, Supreme Court Central District, book 3, 1803 - 1807.

[42] PANL, GN 5/1/B, Trinity Surrogate Court minutes, Northern District, 1805 - 1821.

[43] CNS Archives, col. 150, Peyton Family, box 1, f.1.07, wills and documents.

> consideration of five shillings of lawful money of Great Britain to him in land paid by the said Sarah Gill, at or before the ensealing and delivery of these presents...all the dwelling house, outhouses, lands, tenements, and premises commonly known by the name of "New Forest" with all the rights, members, and appurtenances thereunto belonging situate, having and being on the South Quidi Vidi pond in St. John's containing twenty acres of land and all singular edifices, buildings, common of pasture, ways, paths, passages, waters, water courses, easement, profit...[44]

In 1834, Sarah's will described the property "...conveyed to me and my heirs by Deed of Gift from my late father Nicholas Gill bearing date the 27th of November, 1792, to have and to hold...".[45] She left equal shares of property designated "New Forest" in St. John's to her two daughters and one son.

Although by rule of law, gifts of real or personal property could not carry conditions to the recipient, there are several examples of gifting with conditions in the Newfoundland records. In a deed of gift in 1833, Michael O'Neill of Fermeuse gave a fishing room and plantation that he had inherited from his father to his eldest son, Constantine. By a second deed of gift on the same day, he gave his own fishing room, plantation and houses to his four remaining sons, John, Michael, Owen, and James with the condition that they support their mother, Mary O'Neill, for the rest of her life. In his will, O'Neill bequeathed £100 to his wife, Mary, for her "sole use and benefit" and £100 to each of his daughters as long as they remained "under the control of their mother and were directed by her in the selection of husbands".[46]

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[44] *Ibid.*

[45] PANL, MG (Manuscript Group) 399, Hugh Bastow collection.

[46] PANL, GN 5/1, Registry of Wills, v. 1, Will of Michael O'Neill, April 16, 1833.

Conveying property through a deed of gift was occasionally challenged in court but consistently ruled to be valid means of conveying property. In 1754, a petition from Joseph Bowles was delivered to John Lloyd, Commander of the *Arundell* at the Court of Sessions in Trinity. Bowles, a merchant in Trinity, claimed that James Bayley was in illegal possession of land belonging to Bowles' estate known as "Harvey's Plantation" in Trinity. To prove his title to the property, Bowles produced a deed of conveyance from the original owner, Edward Hill, to William Harvey, dated September 7, 1699. He also produced a deed of gift made by William Harvey's widow to her son-in-law, Philip Sweet. His two sons, Philip and William, had conveyed the property to Joseph Bowles for £40 on October 18, 1738. The court supported Bowles' claim.[47]

In September 1750, a deed of gift enabled two sisters to claim property in Harbour Grace Surrogate Court. Mary Ford and her sister claimed a plantation in Carbonear that was occupied by Henry Abbott. The women produced a deed of gift for the property given to them by their late mother, Esther Burridge. Abbott was given twelve months to show what rights he had to the plantation. When he could not comply, the court awarded Mary Ford and her sister possession of the property.[48]

A further example of the use of a deed of gift in a property dispute occurred in 1821. Elizabeth Webber claimed the right to property in Caplin Cove belonging to Ebenezer Webber and Patience Sweetapple. The property had originally belonged to the late John Webber who in a deed of gift divided the property among his children. The court held that the deed of gift was valid and, furthermore, that the "respectability of John Webber had

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[47] PANL, GN 5/4/B/1, Trinity Court of Sessions Minutes, September 10, 1754.

[48] PANL, GN 2/1/A, Colonial Secretary's Office, Outgoing Correspondence, v. 1-4, September 19, 1750.

been fully proved". Although the eldest son, Henry, had taken a greater proportion of his father's property than either of his brothers or sisters, the Surrogate Court ruled that he was to share with them the number of yards he had more than the others according to the specifications of their father's deed.[49]

A deed of gift could override the provisions of a will. Three brothers, Saul, Joshua and John Collins contested the inheritance that their brother, Luke, received from their mother in 1818. They appeared before Surrogate Robert Rowley in Placentia to complain that Luke had refused to divide the property equally, keeping a large portion for himself. This action, they claimed, contradicted the terms of Ruth Collins' will. Investigation by the court revealed that the property Luke claimed had been given to him by his mother in 1812 by a deed of gift which he produced in court. The three brothers were denied equal portion of the property and were required to pay court costs.[50]

A deed of gift also became the focus of an intestacy case in Harbour Grace Surrogate Court in 1823. The case involved the equal distribution of property among children where both parents had died intestate. On October 30th, John Badcock, son of the late Francis and Mary Badcock of Bay Roberts, produced a document which stated that his mother, Mary Badcock, had inherited an equal share of the fishing room and plantation belonging to her father, the late Thomas Mercer. Mary had subsequently conveyed by deed of gift all title and interest to the room and plantation to her son, John.

The issue appeared simple so the Surrogate awarded John Badcock permission to

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[49] PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, box 3, 1821 - 1822, October 24, 1821.

[50] PANL, GN 5/1/C/1, Placentia Surrogate Court Minutes, Southern District, box 1, 1818-1823, 1806 - 1819, August 10, 1818.

claim the property. However, the property in question had been occupied for several years by Mary's brothers and their families. When they refused to acknowledge John's inheritance, John had no choice but to return to court the next day to gain the property he felt was rightfully his through his mother's deed of gift.[51]

Thomas Mercer had died forty years before and his widow had died thirty years ago. Both died intestate, leaving four sons (two of whom were deceased at the time of the court case) and two daughters, Mary and Ann. Since the death of their parents, the sons had lived with their wives and children on the premises and property, comprising land, houses, and fishing rooms. Both sisters lived there as well until Mary married Francis Badcock and moved out of the house. Their son, John, now claimed in full his mother's portion of the property in Mercer's Cove.

The defendants' attorney argued that the "long unmolested and uninterrupted possession" gave them legal title to the property. However, the court sought to protect the child of Mary Badcock and the deed of gift. The Surrogate ruled that "nearest kindred by blood between brothers and sisters shuts out any plea of this nature particularly in the first and second generation". Furthermore, the court said, it would be "a great wrong to preclude the child or children of just right of inheritance". The Surrogate ruled that the property in the possession of the Mercers be equitably divided according to the number of legal claimants by heirship. John Badcock was entitled to his portion of the property according to his mother's deed of gift as long as he agreed with the stipulation to carry out the fishery from the property given to him.

The notion of rightful inheritance, the use of a deed of gift and the importance of

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51 PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, *Badcock v. Mercer*, October 30, 1823.

fishing rooms to a family's economic security came together in a Harbour Grace court case in 1796. John LeGrove of Broad Cove died intestate in 1773, leaving several children including two daughters. On April 4, 1796, the husbands of the two daughters, Mr. Peppy and Mr. King, presented a petition to the Surrogate Court in Harbour Grace claiming their "wife's right", part possession of LeGrove's fishing room. They argued that LeGrove's three sons, Thomas, Peter and Simon had taken possession of the fishing room to the prejudice of the remaining children. On April 11, the defendant, Thomas LeGrove, appeared in court with several witnesses to prove that his father John LeGrove had given the fishing room to his sons as a gift. The Surrogate noted that the room had long been neglected so he appointed three local residents, James Curtis, Jonathan Moors and John Hudson, to place a value on the room by September 1st. They agreed on a value of £25. After £4 was deducted for court cases, Thomas LeGrove was ordered to give one-third or £7 to the widow and divide the remaining £14 equally among the surviving children. LeGrove remained in possession of the property while the others received financial compensation.[52]

A deed of conveyance was a second method of passing property from parent to child. Sarah March received property from her parents in this manner in 1807 with the condition that her parents would be taken care of for the rest of their lives. The deed of conveyance was recorded by Surrogate John Clinch at the Trinity Surrogate Court on October 19, 1807.

> This Deed of Conveyance made the 24th of August, 1806, that I, William Minton, fisherman of Perlican, do make over to my daughter, Sarah, now married to John March, of Perlican, fisherman, for the consideration of one

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52 PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, file 1793 - 1797, April 4, 1796, *Peppy and King v. Thomas LeGrove*.

> shilling of lawful money of Great Britain, to me in hand paid at the sealing and delivering hereof of my right, title and interest in and to a certain dwelling house of mine now occupied by the said John March together with three gardens, five dogs, cotterels[53] and sundry earthen ware to be hers and hers forever, any deed, wills, or otherwise notwithstanding. To have and to hold the said dwelling house, gardens etc. free of any let or hindrance for her own sole use and benefit and for the benefit of her heirs, executors, administrators and assigns, the same being at this time my own unincumbered property...John March and Sarah, his wife, upon their being kept in quiet possession of the above premises, are to maintain me during my life.[54]

The deed of conveyance was brought to the court by Sarah's husband, John March, who was legally acting on her behalf.

Intestacy

Many inhabitants of Newfoundland in the eighteenth century and early nineteenth century died intestate. A combination of rules and accepted practices governed intestate succession.[55] The division of personal property followed the provisions of the Statute of Distribution (1670) which specified equal division.[56] When a husband/father died intestate, his estate was divided among the surviving family. If his wife survived him, she received one-third of the estate while any children inherited the remaining two-thirds, divided equally among them. As we have seen, the Chattels Real Act in 1834 confirmed the

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[53] A cotterall [cotterel] is a metal bar with notches on which a pot is hung in a fireplace. *DNE*, 115.

[54] PANL, GN 5/1/B, Surrogate Court Minutes, Northern District, 1805 - 1821, October 19, 1807.

[55] As mentioned in chapter 4, the Judicature Act in 1792 gave the Supreme Court the power to administer effects of intestate and to issue letters of probate.

[56] The Statute of Distribution is explained in Chapter 3 on page 57.

equitable distribution of real property among the next-of-kin in cases of intestacy.

In the few intestacy disputes which have come to light, the eldest son typically claimed more than an equal share. In 1792, for example, Charles Webber, finding himself in debt to Thomas Lewis of Harbour Grace, used land left by his late father to satisfy the debt. In Surrogate Court on September 20, Elizabeth Webber, the widow, petitioned the court stating that her husband had died intestate leaving her with eight children. She had no knowledge of the land being sold or mortgaged to satisfy Charles' debts. The court ruled that according to the rules of intestate succession, the widow, Mrs. Webber, had sole right to one-third while her son, Charles, had a right to only one-eighth part of the two-thirds of the land left to the children.[57]

When a widow remarried, her new husband could have access only to the one-third due his wife from her previous marriage. Matthew Whalen went to court in Harbour Grace in 1795 to claim property of James Cole of Colliers. Whalen had been married to Cole's widow for sixteen years and had brought up six children from her first marriage. He claimed that this was much "trouble and expense" and now that they were older he claimed the right to their late father's fishing room as compensation. However, the court did not concur and ruled that the fishing room be divided with one-third allowed to plaintiff's wife and the remaining two-thirds divided equally among the six children.[58]

Testation Practices

Three features dominated testation practices in the eighteenth and nineteenth

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[57] PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, box 1, Book of Common Pleas.

[58] PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, box 1, file 1793 - 1797, April 15, 1795, *Matthew Whalen v. the children of the late James Cole.*

centuries. First, most men who left wills sought to provide continued support for their widows, and for their children who were single or dependent. Secondly, most parents were anxious to protect their daughters' inheritance from sons-in-law (current or future) as a way of ensuring that property would not leave the family should the sons-in-law claim ownership upon marriage. Thirdly, fathers and mothers were also concerned that sons should be economically secure through their inheritance since they would be the future providers for families.

A total of 423 wills were used to analyze inheritance practices. The earliest will belonged to John Bole in 1759 and the latest was the will of John Leary written in 1899. Table 6.2 shows the distribution of wills by decades. No significant changes in testation practices occurred during this period. Eighty-one wills belonged to women, the majority of whom were widows. Table 6.3 shows the distribution of wills by men and women.

Table 6.2: Distribution of Wills by Decade

Decades	Number	Percentage
1750 - 1759	1	.2%
1780 - 1789	2	.5%
1790 - 1799	3	.7%
1800 - 1809	6	1.4%
1810 - 1819	17	4.0%
1820 - 1829	79	18.6%
1830 - 1839	125	29.9%
1840 - 1849	40	9.4%
1850 - 1859	62	14.6%
1860 - 1869	17	4.0%
1870 - 1879	18	4.2%
1880 - 1889	23	5.4%
1890 - 1900	11	2.6%
No date given	19	4.5%
Total	423	100%

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections. All tables which follow in this chapter are based on these sources.

Table 6.3: Distribution of Wills by Gender

	Number	Percentage
Men	342	80.9 %
Women	81	19.1 %
Total	423	100 %

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

The wills reflect an economy based primarily on the fishery. The testators represent eighty-five communities on the island from St. John's in the east to Port aux Basques in the west, as far north as Twillingate and as far south as Trepassey.[59] Thirty-five percent of the male testators were fishermen and planters. Their wills generally included land, stages, flakes, fishing rooms, seines, nets, boats, as well as personal items. The small number of farmers on the island left their land, equipment, poultry, cattle and horses to their families. For example, in 1851 Edward Hayes divided his farm between his wife and only son. They also inherited the animals, wood, and potatoes. Hayes' wife also received eight loads of cods heads.[60] Other testators' occupations include artisans who provided services to the community, such as carpenters, blacksmiths, coopers, masons, and shopkeepers.[61] Of the eighty-one wills by women, only one included an occupation, that of Bridget Flannery of St. John's who was a dealer.

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[59] See Appendix D for the places of residence of testators.

[60] PANL, GN 5/1, Registry of Wills, Will of Edward Hayes, January 3, 1851.

[61] See Appendix C for a list of occupations of male testators.

Not all testators had immediate families to inherit their property. In such cases, collateral kin such as nephews, nieces, brothers and sisters inherited property. Table 6.4 shows the distribution of property by male testators to family members, friends, and community organizations.[62] John Peckham, a planter in Trinity left his "fishing rooms, house, stages, stores, boats, punts, seines" equally to his two nephews on the condition that they take care of Peckham's sister, Elizabeth.[63] Charlotte Keating, a spinster who lived in Stamford, England at the time of her will in 1858, left property known as "Sudbury Hall" and "Woodbine Place" in St. John's to her two nieces. Keating's property on Water Street was divided among her nephews.[64]

Most wills by men list property such as land, houses, fishing rooms, farms, money and boats and carefully designate the beneficiaries. Remaining personal effects and goods were generally left to widows and children, on an equitable basis. Where there was no immediate family, testators divided the property among collateral kin, and occasionally, to friends and community organizations such as the church. For example, William Munden of Brigus left his land, house, and moveable property to his wife, Olivia, and their children. A piece of land and a small portion of money was left to the Wesleyan Missionary Society and to his grandchildren.[65] John Barnes, a fisherman in Greenspond, for example, left his

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[62] See Appendix E for the distribution of property by each male testator.

[63] PANL, GN 5/1, Registry of Wills, v. 2, Will of John Peckham, Trinity, May 9, 1853.

[64] PANL, GN 5/1, Registry of Wills, v. 3, Will of Charlotte Keating, Stamford, England, December 2, 1858.

[65] PANL, GN 5/1, Registry of Wills, v. 2, Will of Robert Munden, Brigus, November 13, 1851.

house to his sister, Prescilla Blake, and his fishing room, land, and stores to his nephews, Peter Blake and George Blake. His money was divided among his nieces and nephews.[66]

Table 6.4: Distribution of provisions in wills by male testators

	Number of Wills*
Wife	219
Children	222
Grandchildren	33
Collateral kin**	81
Friends	19
Community/church***	18
Relationship of beneficiaries not specified	12
Total number of wills	342

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

* Note that these provisions are not exclusive. More than one may appear in a will; therefore, the total number of observations do not add up to 342.

** = other relatives, including mothers, fathers, nieces, nephews, aunts, uncles, cousins
*** = churches, missionary societies, orphanages, convents, schools

[66] PANL, GN 5/1, Registry of Wills, v. 4, Will of John Barnes, Greenspond, December 3, 1880.

The simple will of Charles Tucker, a planter in Ship Cove, was typical of those made during this period. He left his property to his wife, Mary, for use throughout her life and at her death, the property was divided among their sons and daughters.[67] One variation of this type of will was to give the widow discretion to divide the property among the children as she wished. In 1832, for example, Michael Stack left all real and personal property to his wife, Margaret, for her to share with the children "in such a way as she may conceive most beneficial for herself and the children".[68] Other wills stated precisely what was left to the widow and what was designated for each of the children. In wills where the husband mentioned both a surviving wife and children, the widow's inheritance commonly reverted equally to the children upon her death, that is, whether the widow had received her husband's full estate or only a portion of it.[69] Table 6.5 shows the distribution of real and personal property to widows by male testators who had included widows and children as beneficiaries of their estate.

Some wills included conditions of inheritance for widows. Table 6.6 illustrates the types of special conditions pertaining to widows and children. For example, several men left property to their wives under the assumption that although she had ownership, the property would actually be used by their sons and grandsons for the fishery. In 1829, Thomas Cooper left his fishing rooms in Lower Island Cove to his wife, Jane, with the

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[67] PANL, GN 5/1, Registry of Wills, v. 1, Will of Charles Tucker, planter, Ship Cove, January 27, 1832.

[68] PANL, GN 5/1, Registry of Wills, v. 1, Will of Michael Stack, planter, Torbay, March 13, 1832.

[69] See Appendix F for the division of real property and personal property among widows, sons and daughters of male testators.

condition that the rooms would be used by their two sons and grandsons and that they were to take care of Jane for the rest of her life.[70] Thus, while the wife assumed ownership, the family understood that the sons and grandsons would use the property for the mutual benefit of all concerned.

Table 6.5: Bequests to widows in wills by male testators who had widows, sons and/or daughters included as beneficiaries

Bequest	Number	Percentage
Widows who inherited real property only	9	3.3 %
Widows who inherited personal property only	23	8.3 %
Widows who inherited both real and personal property	176	63.8 %
Wills which do not mention a widow	68	24.6 %
Total number of wills	276	100 %

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

[70] PANL, GN 5/1, Registry of Wills, v. 1, Will of Thomas Cooper, Lower Island Cove, December 25, 1829.

Table 6.6: Special provisions pertaining to widows and children in wills by male testators

Provision	Number *	Percentage *
Widows cared for by child(ren)	35	12.7 %
Widows lost inheritance upon remarriage	60	21.7 %
A "share and share alike" division among children	64	23.2 %
Daughters' inheritance protected from current/future husbands	21	7.6 %
Daughters lost inheritance upon marriage	6	2.2 %
Remaining wills by married men with/without children (no conditions)	133	48.2 %
Total number of wills by married men with/without children	276	

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

* Note that these provisions are not exclusive. More than one may appear in a will; therefore, the total number of observations do not add up to 276 and 100%.

Widows who inherited equal shares of their husbands' fishing rooms and plantations with their children sometimes gave up title immediately to a son or daughter. The mother was permitted to remain in the home "for her use and benefit"[71] for the rest of her life. The inheritance of some children was also contingent upon the financial support they gave to their mother. In 1829 John Green distributed property among his children but required them to support their mother for the remainder of her life, and should she leave them, they were to provide her with £20 a year for the rest of her life.[72] Henry Garland of Lower Island Cove left all his property, including a plantation and a fishing room, to his wife and upon her death, divided the property between their two sons, James and John, while his personal effects were divided equally among the younger children. However, James and John were required to remain with their mother in the family home during her life and provide for her and the two younger children.[73]

Another condition governed the prospect of the widow remarrying. Almost twenty-two percent of men who left wills in which widows are mentioned included a 'remarriage clause' in their wills to keep property within the family. This provision was expressed by such phrases: "as long as she keeps in my name"[74] and "as long as she continues to be my

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71 PANL, GN 5/1, Registry of Wills, Will of John Pittman, Duricle, Placentia Bay, March 29, 1831.

72 PANL, GN 5/1, Registry of Wills, v. 1, Will of John Green, Placentia, March 30, 1829.

73 PANL, GN 5/1, Registry of Wills, v. 1, Will of Henry Garland, Lower Island Cove, May 17, 1823.

74 PANL, Registry of Wills, v. 1, Will of William Harnett, Carbonear, January 23, 1830.

widow".[75] If the widow remarried, the property that she had inherited from her deceased husband reverted to the children of her first marriage, and, in the absence of children, to their collateral kin. There are a few variations. Some widows lost their inheritance completely when they remarried. Charles Fagan's will was typical of this category.

> In the first place I give and bequeath to my beloved wife, Susan...all I possess with the dwelling house that I am now living in and the dwelling house in Foxtrap Head, also stable, cellar, cultivated and uncultivated land including the land on Foxtrap Head, also horse, cart, harness, fishing boat, flakes, stages, herring net, two grapnels and fishing gear. My said wife, Susan, is to have and to hold all above mentioned and by her to be freely possessed as long as she lives and remains in my name.[76]

For some husbands the prospect of their widows remarrying must have appeared less daunting, as widows simply had their inheritance reduced if they remarried. Such was the case of Charlotte Parsons whose husband Jonathan left most of his real and personal property to her with the condition that

> in the event of my said wife Charlotte Parsons again marrying she shall from the period of such marriage be entitled to one-third only of such my estate and effects, the remainder being reserved for my children respectively until they become of age.[77]

Other husbands stated clearly what would happen if their wives married again. In 1815, Joseph Burrage of Trinity instructed the trustees of his will to

> allow the widow, Susanna Burrage, to reside with her family at Heart's Content and to have good and sufficient meat, drink, and wearing apparel

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[75] PANL, GN 5/1/B/9, Trinity Surrogate Court, estate matters, 1816 - 1825, Will of Joseph Burrage, 1815.

[76] CNS Archives, col. 103, Francis Morris, Will of Charles Fagan, Foxtrap.

[77] PANL, GN 5/1, Registry of Wills, v. 1, Will of Jonathan Parsons, St. John's, May 9, 1831.

> (in the discretion of the said trustees) so long as she continues my widow, but if she should marry again, she is then to take only her clothes and nothing after.[78]

Many testators clearly were not comfortable with the prospect of another man stepping into their place.[79] Susan Fagan was not to take "any article of furniture out of the house only her own clothing".[80] Peter Healey of Carbonear expressed strong feelings towards the notion of his wife remarrying. He left Jane, his wife, the house, part of the plantation, money, goods and chattels. However,

> these presents also provide that if my wife should marry again or otherwise disgrace herself by a companion she is to be paid only one shilling and all money, goods, and chattels to be divided between my beloved daughter, Mary, and the children of my beloved daughter, Margaret (Healey) Hamilton.[81]

Jordan Henderson, a merchant in Harbour Grace, was also quite clear in his will that he did not approve of the possibility of his wife's remarriage. His will gave

> to Elizabeth, my dearly beloved wife, the sum of £50 yearly for her maintenance to be raised and levied out of my estate and paid her annually by my executor for and during the full term of her widowhood and no longer and in case she should again enter into wedlock I do hereby revoke the said grant and order that from thenceforth

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[78] PANL, GN 5/1/B/9, Trinity Surrogate Court, estate matters, 1816 - 1825, Will of Joseph Burrage, 1815.

[79] For a study of the re-marriage of widows in English society, see Barbara Todd, "The Remarrying Widow: A Stereotype Reconsidered", in Mary Prior (ed.), *Women in English Society, 1500 - 1800.* (London: Methuen, 1985): 54 - 92.

[80] CNS Archives, col. 103, Francis Morris, Will of Charles Fagan.

[81] PANL, GN 5/1, Registry of Wills, v. 1, Will of Peter Healey, February 28, 1826.

she shall not be entitled to any part of the property whatever.[82]

Similarly, William Bragg, a fisherman in Port aux Basques, left his wife, the "partner of my joys and sorrows for 36 years", his land, house, furniture, stages, flakes, and boats. If she remarried, she forfeited her inheritance "unless the children were inclined to share". Bragg's son, Nelson, was also required to be a "good boy" and stay with his mother.[83] Robert Sheppard, a planter in Cupids, required his wife Sarah to remain a Protestant in order to receive her inheritance.[84]

Many of these restrictions suggest that the testators were concerned for two future circumstances: that family property would become the property of another man and that the widow would "disgrace" herself by remarrying or at the very least, being seen in the company of another man. From the husband's point of view, giving over one's property to the widow without this restriction made way for the possibility that another man would indeed have everything he had worked for and ever owned. This was an unacceptable prospect. The property that the widow sacrificed when she remarried was usually divided equally among their children. Children were also the beneficiaries of their mother's property when she died. She had the right as a widow to make other provisions but the wills of widows generally concur with the husbands' wishes for their children.

The inheritance received by children also demonstrated the partibility of the

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[82] PANL, GN 5/1, Registry of Wills, v. 1, Will of Jordan Henderson, merchant, Harbour Grace, December 10, 1818.

[83] PANL, GN 5/1, Registry of Wills, v. 4, Will of William Bragg, Channel, Port aux Basques.

[84] PANL, GN 5/1, Registry of Wills, v. 4, Will of Robert Sheppard, Cupids, January 24, 1878.

inheritance system. Most children who received real and personal property from their fathers and mothers through a will did so in an equitable way. As indicated by Table 6.6, this provision is specifically stated in 23.2% of the wills by the common expression "share and share alike". A substantial portion of the remaining wills containing bequests to children reflects the equitable practice although the phrase is not specifically used. "Share and share alike" did not require that the estate be distributed equally among the children because estates consisted of different types of property with different monetary and sentimental values. Instead, the practice implied that each child would receive so much of the estate in more or less equal value and more importantly, according to their needs. Such was the case of John Bishop of Hibbs Cove who left a portion of his real and personal property to his widow, Rachel, and the remainder divided equally among his sons and daughters.[85] Other wills list each type of property and amount specifically for each child. For example, Richard Rideout, a planter in Long Pond, Conception Bay, left a will with the following provisions:

> to my eldest sons, Richard and Edward, all waterside premises;
> to my wife, Susan, 1/2 of my farm and 1/2 divided among our four youngest sons: Apollos, Reuben, Robert and Samuel;
> to my wife, Susan, land in Long Pond - with four youngest sons, it will become theirs when they reach the age of 21, to be divided equally;
> to my only daughter, Susan, wife of Benjamin Squires, the sum of £5 and two sheep and remainder of flock to be divided among wife and six sons;
> to sons, Edward, Apollos, Reuben, Robert, Samuel: 4 guns and watch (1 item each);
> to my eldest son, Richard, suit of long clothes, coat, waistcoat and trousers of superfine broad cloth;
> to my wife, Susan, and four sons, horse and cart and harrow for the use of the farm; along with boats, punts, purchase books, nets, seines, anchors, implements of husbandry, household furniture
> to my wife, Susan, the eastward end of my dwelling house to reside in until she has

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[85] PANL, GN 5/1, Registry of Wills, v. 1, Will of John Bishop, Hibbs Cove, April 11, 1834.

time to provide some place for herself[86]

In his will as with several others, the bequests depended on the place of the child in the family in the case of the sons and marital status in the case of the daughters.

Sons and daughters inherited both real and personal property. Incidences of the eldest son receiving real property to the exclusion of his siblings are quite rare. Some testators were aware that property distribution in England which favoured primogeniture differed from practices on the island. On February 4, 1843, Jane Comer of Harbour Grace, widow of William Smith Comer, petitioned the court regarding her husband's property. Her petition indicates that she expected his property in Newfoundland to be equally distributed among their seven children but noted that some property situated in London should be inherited by their eldest son.[87]

Similarly, the practice of ultimogeniture, the practice of leaving real property exclusively to the youngest son, was a rare occurrence. In 1826, Thomas Brenton, a boatkeeper in Burin, left his house, stages, flakes, boats, nets and seines to his youngest son, Henry, with the condition that he would look after his mother and not deprive her of a home. Thomas' money was left to his wife and on her death, to all their children equally.[88] Since the will is the only record of the circumstances of the Brenton family, there is no

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[86] PANL, GN 5/1, Registry of Wills, v. 1, Will of Richard Rideout, Long Pond, Conception Bay, March 17, 1834.

[87] PANL, GN 5/3/B/19, Magistrates Court Records, Harbour Grace, box 61, file 3, Civil Process, 1840 - 1849, Petition of Jane Comer to the Honourable Chief Justice Bourne of the Supreme Court of Newfoundland.

[88] PANL, GN 5/1, Registry of Wills, v. 1, Will of Thomas Brenton, October 23, 1826.

indication why Henry inherited property to the exclusion of his siblings. Had the elder brothers already established themselves, with less or no need for the property? The youngest son was occasionally given preference over his siblings although each inherited a portion of property. Nathan Clarke of Brigus left his house to his youngest son, Samuel, and personal property to his remaining sons. One condition to Samuel's inheritance, however, was that his mother, Jane, be permitted to live in the house as long as she lived, provided she did not remarry. Nathan's money was left to his wife but if she remarried, the money was to be divided equally among the children with his daughter receiving only one-half as much as her brothers.[89]

The type of property which children inherited depended primarily on their age and marital status. Children who were under the age of inheritance tended to inherit personal property immediately but provision was made for them to take their rightful inheritance when they reached twenty-one years. Sons were more likely to inherit fishing rooms, boats, nets, seines and other items pertaining to the operation of the fishery if their sisters were married. Table 6.7 demonstrates that for men who left at least one daughter as a beneficiary, 64.5% inherited both real and personal property. For male testators with at least one son, the percentage increased to 81.7%. Personal property including clothing, furniture and household effects was divided equally or kept in the family home for the use of the children or widows who survived their husbands.

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[89] PANL, GN 5/1, Registry of Wills, v. 1, Will of Nathan Clarke, Brigus, December 6, 1851.

Table 6.7: Wills by male testators where there is at least one daughter included as a beneficiary

Bequest	Number	Percentage
Daughters who inherited real property only	6	3.9 %
Daughters who inherited personal property only	48	31.6 %
Daughters who inherited both real and personal property	98	64.5 %
Total number of wills	152	100 %

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

Table 6.8: Wills by male testators where there is at least one son included as a beneficiary

Bequest	Number	Percentage
Sons who inherited real property only	20	10.4 %
Sons who inherited personal property only	15	7.9 %
Sons who inherited both real and real property	156	81.7 %
Total number of wills	191	100 %

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

Table 6.9: Wills by male testators where there are bequests of real property for at least one son and one daughter

Bequest	Number	Percentage
Wills where only the son(s) received real property	32	28.3 %
Wills where only the daughter(s) received real property	2	1.8 %
Wills where both son(s) and daughter(s) received real property	79	69.9 %
Total Number of Wills	113	100 %

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

Table 6.10: Wills by male testators where there are bequests of personal property for at least one son and one daughter

Bequest	Number	Percentage
Wills where the son(s) received personal property	2	1.7 %
Wills where the daughter(s) received personal property	8	6.8 %
Wills where both received personal property	108	91.5 %
Total Number of Wills	118	100 %

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records,Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

Daughters also received gardens, land, or houses. Those who inherited fishing rooms and other fishing-related property did so either in the absence of brothers or equally with their brothers. Wills in which daughters received land, houses, or fishing rooms to the exclusion of the brothers are quite rare. As shown in Table 6.9, there were only two

instances where a daughter inherited real property and her brother did not. One belonged to John Hartery of St. John's whose will was drawn in 1826. Hartery left a watch, tools and a tool chest to his son, Harret; a bed, bedding and a chest to his second son, George; and land situated in Bay Bulls, household furniture, dogirons, and a looking glass to his only daughter, Mary.[90] A second example is the will of Michael Mara who at the time of the writing of his will in 1827 had been living in St. John's for fifty-nine years. Mara left his wife Mary the house they had lived in along with "the two other tenements", the furniture, four feather beds, bedding and bedsteads. His son, Thomas Mara, inherited one bed and bedding, six silver tablespoons, one silver watch and all the linen. Mara's daughter, Mary, who was married, received one bed, bedding, and bedstead along with the fishing room that her father owned in Magady Cove, which according to the will, had been a grant from a former governor, James Webb. Michael Mara insisted that Mr. Burn, his daughter's husband, was not to have any claim whatever on this property and that Mary should not sell it or dispose of it in any way. After her death, the income from the property would be given to the children of Thomas Mara. [91] Table 6.9 and Table 6.10 illustrate the distribution of both real and personal property between sons and daughters by male testators.

Those daughters who did not inherit real property were compensated by receiving additional money or other personal property that was left for their "sole use". Only in a few cases did fathers deny their daughters an inheritance. In such instances, they allowed them

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[90] PANL, GN 5/1, Registry of Wills, v. 1, Will of John Hartery, St. John's, May 24, 1826. The will does not reveal the ages or marital status of the children.

[91] PANL, GN 5/1, Registry of Wills, v. 1, Will of Michael Mara, St. John's, April 2, 1827.

the right to stay in the family home or claimed that they would be taken care of by someone else. While Amos Blackler, a planter in Back Harbour, Twillingate, left his house, furniture and effects to his wife, Catherine, his fishing rooms, gardens, stores and flakes were left to his two sons, James and Arthur, to 'remain in the family and not to be mortgaged". It was Blackler's expressed wish that the same property, would descend to his male heirs. Blackler's daughters, Mary Anne and Martha, retained "right of residence" with their mother.[92]

Many wills left by men place conditions on their children's inheritance. These conditions fall into three categories: provisions to keep the property in the family; provisions to protect the inheritance of their widows, and their single, married, and widowed daughters; and conditions which directed the behaviour of family members. The all-important fishing rooms were divided among sons and sons-in-law as they would require these to support their families. Richard Taylor, a planter in Carbonear, left his fishing room to his son in a will in 1827. In the event that his son died without children and his widow married "anyone other than a Taylor", the property in question would devolve to surviving brothers equally.[93]Occasionally, this restriction pertaining to marriage extended to the children who were not permitted by the will to have claim on the house if they married and had houses of their own. John Chaytor of Chamberlains ended his will with the condition, "if my wife marries again she shall have no further claim on my House, or anything of furniture in it, also when either of my children marries and has a house of their

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92 CNS Archives, col. 150, Peyton Family, f. 107, wills and documents, 1838 - 1910, Will of Amos Blackler.

93 PANL, GN 5/1, Registry of Wills, v. 1, Will of Richard Taylor, November 17, 1827.

own, they shall have no further claim on my house". [94]

The second category of conditions on behaviour applied to the inheritance of single, married and widowed daughters. Some wills acknowledged the contribution of unmarried daughters to the family economy. Their inheritance was contingent upon their behaviour and their contribution of work. Elizabeth Wrapson of Jenkins Arm, Twillingate, bequeathed her property to Edward and Ann Slade (no relationship provided) and upon their deaths to their sons, James and Edward. The Slade's two daughters, Mary Anne and Elizabeth, were encouraged to live with their brothers "as long as they remain unmarried" and do "all such reasonable work as it is customary for women to do".[95] Simon Jacobs of Twillingate left his property to his wife Mary Ann in 1852, as long as she remained unmarried. Upon her death, the property was to be passed to their two sons, Jonathan and Solomon. Their unmarried daughters, Lydia and Phoebe, were given the right to live in the house while they remained unmarried, "rendering reasonable assistance as may be in their power and to receive a maintenance therefrom".[96] Furthermore, Charles Warr of Little Harbour ended his lengthy will by stating that his wife, Elizabeth, could enjoy the use of his property and was required to "maintain decently" their daughters, Emily and Fanny. The daughters in return could enjoy their inheritance "as long as they remain unmarried and behave themselves virtuously and dutifully...doing all such work as women are

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[94] CNS Archives, col. 103, Francis Morris, Will of John Chaytor, Chamberlains.

[95] CNS Archives, col. 150, Peyton Family, Will of Elizabeth Wrapson.

[96] PANL, GN 5/1, Registry of Wills, v. 2, Will of Simon Jacobs, Twillingate, May 21, 1852.

accustomed to do in this country".[97]

The greatest variation in inheritance practices pertains to provisions for married daughters. Unlike their brothers, the inheritance of daughters depended on whether they were single, married, or widowed. Their treatment ranged from receiving somewhat less than their unmarried male and female siblings to having the property placed in their names with the understanding that their husbands would use it and their children would inherit it. They were generally not excluded from their fathers' wills. Fathers would assume that their daughters would be provided for by their husbands, current or future. However, some fathers who were likely aware of the possibility of desertion by husbands were not willing to take that risk. Many married daughters, therefore, received money or personal items. In some instances, unmarried daughters maintained their inheritance only until such time as they married and became the legal responsibility of another man. Other unmarried daughters had their inheritances protected from future husbands by their fathers placing the property in trust.

Several wills contain conditions which were only applicable to daughters, both single and married. Some daughters lost their inheritance when they married while others had their inheritances protected for their sole and separate use. Both widows and fathers included a clause which specified "sole use" of their daughters to protect the inheritance from sons-in-law who were legally in the position to take advantage of property bequeathed to their wives. Property left to married daughters frequently carried the stipulation that it remain free of the debts and use of their present or any future husbands. This practice was often expressed by such phrases as, "notwithstanding her coverture" or "or her sole and

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[97] CNS Archives, col. 150, Peyton Family, f. 1.04, Register, wills, and other documents, 1858 - 1892, Will of Charles Warr, Little Harbour, June 1, 1869.

separate use". James Cowan, like many other fathers, included a clause in his will to ensure that his daughter's inheritance would be "at all times absolutely free from the control, debts, agreements or interference of her present or any future husband".[98] Robert Howell, a planter in Carbonear, left land to his married daughter, Ann. The will designated the property as "the spot of ground" on which Ann's husband's, John Snook, was building a house. It would remain hers as long as she did not remarry. If she did, the property would pass to Robert's wife (Ann's mother) along with the rest of the property which his wife had inherited.[99] In 1830, John White, a planter in Twillingate, divided his estate between his two married daughters, although the division was unequal. Elizabeth, wife of James Moore, received five shillings while Anne, wife of William Short, inherited her father's fishing room, house, household goods, furniture, goods, chattels, seines, craft[100], gardens, and lands. [101] William Murray, a mariner, left property in Ferryland to his married daughter, Mary Barron for the remainder of her life and after her death, to her children "share and share alike".[102]

It is likely that certain property, such as fishing rooms, when left to married

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[98] PANL, GN 5/1, Registry of Wills, v. 1, Will of James Cowan, Harbour Grace, June 25, 1827.

[99] PANL, GN 5/1, Registry of Wills, v. 1, Will of Robert Howell, Carbonear, November 7, 1823.

[100] a fishing boat

[101] PANL, GN 5/1, Registry of Wills, v. 1, Will of John White, Twillingate, September 9, 1830.

[102] PANL, GN 5/1, Registry of Wills, v. 1, Will of William Murray, August 17, 1833.

daughters would be used by their husbands. Many fathers, however, took steps to ensure that their married daughters inherited the property and that it would pass on to their children. In 1828, Isaac Richards, a planter in Bareneed, left most of his estate to his wife, Elizabeth, for the rest of her life. A fishing room in Bareneed was divided between two sons, William and John. Upon Elizabeth's death, the house, gardens, flakes and stages were to pass to their two sons as well, and money was to be divided among their six daughters. Another fishing room in Port de Grave was also left to the two sons, except for a stage occupied by son-in-law, Thomas Liston. The stage was left to Isaac and Elizabeth's daughter, Amy, and upon her death, to her son. Household furniture and other personal effects were divided by Elizabeth at her discretion.[103]

Special provisions also applied to widowed daughters. Thomas Tizzard of Twillingate willed his property in Back Harbour to his family. The "dwelling house, outhouses, stages, flakes, gardens, boats, skiffs and netts" were bequeathed to his sons, John and Robert, while his daughter, Susan, was given "the right of residence on the room and maintenance therefrom so long as she continues unmarried and as long as she rendered such reasonable assistance to her brothers". A second daughter, Jane Warr, widow of James Warr, inherited part of her father's fishing room and garden as long as she remained unmarried. Upon her marriage or death, the property would pass to her sons and daughters for their mutual benefit.[104]

A third type of condition found in wills relates to the future behaviour of family

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[103] PANL, GN 5/1, Registry of Wills, v. 1, Will of Isaac Richards, Bareneed, November 20, 1828.

[104] CNS Archives, col. 150, Peyton Family, Will of Thomas Tizzard, April 16, 1845.

members. Some inheritors were required to take care of family members while others were expected to behave in a certain manner and cooperate with family members. Michael Henesy, a planter in Carbonear, left his land, plantation and dwelling house to his son while his personal effects and household effects were divided among his other children with the stipulation that the daughters take possession of their property until they were lawfully married. They were also required to "conform to the rules of the Church and their sex".[105] No indication is given as to how this unique condition on behaviour would be enforced. In 1829, Samuel Hollett of Adams Cove left three-quarters of his fishing room, boat, and fishing equipment divided equally among his three sons, Joseph, John, and Samuel, on the condition that they stay with their mother as long as she lived.[106] According to the will of Nicholas Wall of St. John's, Catherine Wall, his daughter, was obligated to agree with her mother if she wanted to receive any benefit from the property she inherited from her father.[107] In 1812, William Coughlan, a farmer in St. John's, left one-third of all property, goods and chattels to his wife, Catherine Brazil Coughlan, and two-thirds to his son, Patrick, and two unmarried daughters, Mary and Elizabeth on a "share and share alike" basis. Two married daughters, Catherine Coughlan Burke and Alice Coughlan Murphy received £5 each. Coughlan included instructions in his will that should Patrick, Mary and Elizabeth act "incorrigibly" to their mother, then their mother was

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[105] PANL, GN 5/1, Registry of Wills, v. 1, Will of Michael Henesy, November 25, 1827.

[106] PANL, GN 5/1, Registry of Wills, v. 1, Will of Samuel Hollett, February 4, 1829.

[107] PANL, GN 5/1, Registry of Wills, v. 1, Will of Nicholas Wall, St. John's, 1833.

empowered to deny them their inheritance and give it instead to the most deserving of the children.[108]

Conditions sometimes extended to reflect on the behaviour of collateral kin. William King of Broad Cove expressed concern for the behaviour of his daughter-in-law in his will of February 22, 1823. King left his fishing room which he had procured through a deed of gift from William Walden, to his sons. John would receive one-half while three sons. Joseph, James and Henry would divide the remainder. King added the condition that

> if my son, James, in consequence of his matrimonial union with his present wife, Hannah Butt, cause a discord or disagreement on the premises, James loses his right to the property and must leave so the remaining children can live in quiet and peace.[109]

The need for family members to get along with each other is another indication of the importance of the family economy. In 1824, John Penny of Brigus left his land to be divided among his three sons, John, Thomas, and Joseph on the condition that they "maintain my dearly beloved wife and furnish her with what little necessary this world requires. If they do not agree to maintain her, she is to have use of the land undisturbed and unmolested".[110] In 1831, James Stapleton left two-thirds of his farm and house to the four children of his late son Bartholomew and the remaining one-third to the two children of his late son, James. In the absence of the direction of their fathers, James Stapleton implored

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[108] PANL, GN 5/1, Registry of Wills, v. 1, Will of William Coughlan, St. John's, February 18, 1812.

[109] PANL, GN 5/1, Registry of Wills, v. 1, Will of William King, Broad Cove, February 22, 1823.

[110] PANL, GN 5/1, Registry of Wills, v. 1, Will of John Penny, Brigus, February 26, 1824.

his grandchildren to "manure, cultivate and till the said plantation and farm for their mutual use and benefit without quarrelling or dispute". He placed his two daughters-in-law in charge of the remaining quantity of rum and molasses to be peaceably disposed of for the support of themselves and their families. Stapleton's widow, Elizabeth, received the furniture, bed and bedding from the house for her own use and the right to stay in the house for the rest of her life.[111] Similarly, James Gould left one-half of his house and farm to his son James, Jr. on the condition that he support his mother, Catherine Gould, and his siblings. He was directed to keep the ground and fence in perfect order and the ground was not to be measured while Catherine was alive. His children were directed to "aid and assist each other without any disturbance or contradiction in cultivating the ground" and to give excess produce from the ground to Catherine Gould for her disposal. A second son, Michael, was to take possession of the other half of the house and land and to have it measured as the family wished. James Jr. was "to finish the new house at his own expense, keep up the horses, and give half of what he earns to his mother".[112]

Patrick Stafford, a shoemaker in St. John's, was concerned that his family behave properly after his death. He included a provision in his will of 1838 which gave friends the power to correct his children when necessary. Stafford had four children, William, Terence, Michael and Elizabeth, each of whom received £150 in his will. The remainder of his property was held in trust by friends for the maintenance of his wife, Mary, and the four children, and to be divided equally among the children at Mary's death. The clause

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[111] PANL, GN 5/1, Registry of Wills, v. 1, Will of James Stapleton, Harbour Grace, April 19, 1831.

[112] PANL, GN 5/1, Registry of Wills, v. 1, Will of James Gould, Sr., June 13, 1831.

included in Stafford's will states:

> And I entreat my confidential friends that they may take the trouble to act in my behalf in these matters for my beloved wife and children as they would for their own in every respect and as far as I can give them power and authority it is my will that they do punish any or either of my children as they would their own if they should become wayward or refractory.[113]

Remarkably, there are no indications of the recourse open to family members who felt that the conditions were not being met but their very inclusion in wills indicates how important it was to testators that their family members act in a socially acceptable manner.

Property in trust

Under the rules of equity, a child's inheritance could be put in trust by one of several means.[114] A common method of holding property in trust in Newfoundland was through the provisions of a will. In 1808, William Mackay left his estate to his cousin, William Henebury, to hold in trust until his daughter married. His wife was to be taken care of for the rest of her life.[115] While John Boyd of St. John's left most of his property to his wife in his will, he also included a £50 yearly annuity for his two married daughters, Ann Pearson and Margaret Baird, free of control of their present or future husbands.[116] Another married woman, Mary Pike of Carbonear, received £100 from her father's will in 1834. Robert Parsons, a planter from Harbour Grace, had left most of his property to his

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[113] PANL, GN 5/1, Registry of Wills, v. 1, Will of Patrick Stafford, shoemaker, St. John's, January 1, 1838.

[114] Holcombe, *Wives and Property,* 40.

[115] Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810, Will of William Mackay, April 24, 1808.

[116] PANL, GN 5/1, Registry of Wills, v. 2, Will of John Boyd, St. John's, June 30, 1851.

wife, Jane, in his will in 1834. His schooner and money were bequeathed to his sons, Tobias and Frederick. Parsons was determined that his married daughter, Mary Pike, would receive her inheritance for her own use and that of her children so £100 was placed in trust for her.[117] Similarly, George Goff of Portugal Cove left his entire personal and real estate in trust to Peter Weston Carter for Goff's daughter, Elizabeth, who was married to Thomas Blackler. Upon her death, the property was to be shared equally among Elizabeth's children.[118]

Trusts were frequently created to provide for children who were under the age of inheritance at the time of the will. William Harnett of Carbonear left his property in trust for his only child Michael in 1830. Michael was underage at the time so William's wife, Margaret, was required to support the child until he reached the age to inherit property, as long as she did not remarry. In the event that Margaret remarried and Michael died, the property would pass to William's brothers and sisters.[119] Furthermore, Patrick Shelly, a shopkeeper in St. John's, left all "landed property, goods, chattels and effects" in trust for his infant son, Edward, and any other children he and his wife, Mary, may have. If Edward died before he reached 21 years of age, the property was to be inherited by the "nearest male relative born in wedlock of the testator".[120]

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[117] PANL, GN 5/1, Registry of Wills, v. 1, Will of Robert Parsons, August 1834.

[118] PANL, GN 5/1, Registry of Wills, v. 1, Will of George Goff, Portugal Cove, December 13, 1834.

[119] PANL, GN 5/1, Registry of Wills, v. 1, Will of William Harnett, Carbonear, January 23, 1830.

[120] PANL, GN 5/1, Registry of Wills, v.1, Will of Patrick Shelly, St. John's, January 18, 1831.

Francis Belbin of Musquitto, Conception Bay left his house and land in trust for his daughter Elizabeth who was 2 1/2 years old at the time. She would receive her inheritance at the age of eighteen. Belbin's wife, Sarah, was allowed to remain in the house for the rest of her life as long as she remained a widow.[121] Similarly, James Oakley, a physician residing on Bonavista Island, left all "lands, tenements, hereditaments, personal and real estates, effects, money, stocks and securities" in trust for his daughter, Ariana Elizabeth Gill Oakley. She was to remain under her mother's care, "handsomely clothed", until she inherited the property at the age of twenty.[122] Why did some husbands bypass their wives and leave either all or most of the property to a child? It is likely that at least some wives were consulted by their husbands when the wills were drawn up and couples mutually agreed that the property would pass to the children as long as the mother was maintained. In those few cases where the widow's inheritance was completely overlooked by a will, a child (or children equally) or, secondarily, brothers and sisters of the deceased received the inheritance. The widow remained in the family home and was responsible for the care of her children or other relatives.

A second equitable alternative was to place property in trust through a marriage settlement. A wife could maintain a separate estate, independent of her husband, through a trust set up by her father in anticipation of her marriage. Several marriage settlements have survived intact while there are numerous references to others in court records and private papers. A marriage settlement dated May 29, 1821 was drawn up to protect £400 belonging

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[121] PANL, GN 5/1, Registry of Wills, v. 1, Will of Francis Belbin.

[122] PANL, GN 5/1, Registry of Wills, v. 1, Will of James Oakley, May 5, 1819.

to Mary Still, widow of Charles Still, and about to marry Samuel Garland:[123]

> whereas a marriage is intended to be shortly had and solemnized between Mary Still and Samuel Garland, and Mary Still is possessed of certain property in monies funded and unfunded to the amount of about £400 which she wishes to secure to herself and her offspring both during the lifetime and after the death of Samuel Garland, should he die before she.

Both parties agreed to a number of conditions including the appointment of John Bingley Garland and William Furnell as trustees. The money would be invested and the interest would be placed at the disposal of Mary, Samuel and their offspring if any. Upon Mary's death, the interest and the principal would go to Samuel and their offspring and if Samuel predeceased Mary, the whole of the property would revert back to her and upon her death be divided equally among their sons and daughters.

Marriage settlements occasionally became the object of contention in court cases involving property. In 1822, *Hailey v. Grant* in Surrogate Court in Harbour Grace focused on a mislaid document concerning property located in Riverhead. The plaintiff, Thomas Hailey, had been married to the defendant's stepdaughter for many years. A document in the form of "articles of marriage" had been drawn up in which Hailey was given a certain portion of the property. Although the document had since been mislaid, Hailey brought two witnesses to testify to the contents of the agreement. Richard Hailey testified that he witnessed an agreement between Thomas Hailey and his wife's stepfather, John Grant, in which Hailey was given half the plantation upon the marriage of Hailey and Grant's stepdaughter, and the other half of the plantation at the death of Grant and his wife, Catherine. A second witness, John Hailey, the plaintiff's uncle, concurred that the property was understood to be a "marriage gift". The Surrogate was convinced and ruled that

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[123] PANL, GN 5/1/B/9, Trinity Surrogate Court, estate matters. No indication is given of who initiated the marriage settlement.

Thomas Hailey was entitled to half the property at that time and the remainder at the death of his wife's parents.[124]

Women's Wills

Under the law, women were placed in one of three categories: spinsters (single women); married women and widows (or relics). With rare exceptions, the appropriate designation is found next to the woman's name in the court records. In a letter addressed to John Stark, Clerk and Registrar of the Northern Circuit Court in 1833, Edward Archibald stated:

> Enclosed I return you the will and affidavits in the matter of the Estate of Bridget Byrne alias Gorman - upon which the Court declines taking steps, considering the will void - Mrs. Gorman being a feme covert at the time of the making of the will and of her death.[125]

When a woman became a widow, her legal identity changed. Widows were often appointed to administer their late husbands' estates. They went to court to claim payment of debts owed to their late husbands and to complain of trespassing on their husbands' property. Occasionally they had to go to court to recover items taken by other relatives or members of the community who tried to take advantage of them. Mary Shepherd, for example, successfully petitioned the court on September 25, 1787, to obtain a feather bed and a silver watch that had been her husband's property but had been taken by the wife of their eldest son.[126] In 1823 Governor Hamilton received a petition from Mrs. Elizabeth

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[124] PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, box 3, March, 1822 - April, 1822.

[125] CNS Archives, col. 003, Magistrates Office, Harbour Grace, f. 2.

[126] PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, box 1, 1787 - 1788.

Halfyard stating her intention of carrying on the fishery in her late husband's fishing room in Oakerspit Cove. Hamilton denied the rival application of Samuel Bowlin and John Inkpen and informed the Surrogate, Oliver St. John, of the widow's right to the fishing room.[127]

Table 6.11: Distribution of provisions to beneficiaries in wills by women

Beneficiaries	Number
Children	48
Grandchildren	15
Collateral kin	29
Friends	11
Church/community	4
Total number of wills	81

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections: Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

The wills of women and men are similar in their concern for partibility of inheritance. Table 6.11 indicates the variety of inheritors who received property from female testators.[128] Wills left by women illustrate a concern for women's economic vulnerability in a domestic economy so dependent on men's work and success in the fishery. The loss of a husband/father would likely mean a woman's total dependence on her family or the charity of the community. Like men, widows who left wills were

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[127] PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, Governor Hamilton to Oliver St. John, September 4, 1823.

[128] See Appendix G for the complete distribution of property among beneficiaries by each female testator.

concerned for an equitable distribution of property among family members. In 1836, Frances Wills of Bread and Cheese Cove left land to her three married daughters, Rachel Smith, Catherine Landmaid and Julia Smith, and the remaining land in Bread and Cheese Cove left to her by her late husband, Richard, to their grandchildren. Her son Thomas received land in Carbonear and Spaniard's Bay.[129]

Widows held a more emotional attachment to personal property,[130] likely because the home and its contents were the woman's domain. The wills left by men which contain itemized personal effects focus on the inheritance of members of the nuclear family rather than collateral kin. Husbands and fathers were clearly more concerned about holding real property within the family than they were about the fate of personal items upon their deaths. Women's wills, on the other hand, often provide detailed descriptions of each item and are likely to be more widely spread among various family members. Included in an extensive list of personal property, Mary Stretton, a widow in Harbour Grace, bequeathed:

> to Sarah Pike, my wedding ring, purple silk gown, my own bed and bedstead, and bedding, one sheet, two blankets, one counterpane, two pillow cases, one bolster case, two towels and my light striped cotton gown, also a small round table, a looking glass;
> to my brother, Charles Parsons, a pair of silver sleeve buttons and to his wife, Susannah Parsons, my large table cloth;
> to nieces, Susannah Parkin, a gold diamond ring set and spice box, Julia, a small black portmanteau, and Louisa, the looking glasses in the small room;
> to nephew, William, son of Jonathan Parsons, two backed and four Windsor chairs, the small square painted table and one brass candlestick;
> to nieces, daughters of Jonathan Parsons: Mary, wife of William Parsons, cable

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129 PANL, GN 5/1, Registry of Wills, v. 1, Will of Frances Gosse, Bread and Cheese Cove, September 7, 1836.

130 Maxine Berg reached a similar conclusion in her investigation of women's wills and the treatment of women in men's wills in eighteenth and nineteenth-century Great Britain. She draws attention to the precise description women assigned to each item while men tended to be more general and vague in their description of personal property. Berg, "Women's Property and the Industrial Revolution", 246.

laid gold ring, Emma, a counterpane, Ann, a chest of drawers, Rachel, a bed quilt, Mrs. Roe, a plaid;
and finally to niece and executrix, Mary Parsons, a blue silk petticoat, cloth cloak, and painted knife box.[131]

In 1834, Jane Furneaux, a widow in Port de Grave, provided a long list of personal items lovingly bequeathed to sons, daughters, and granddaughters. Her primary concern was for her female relatives. Rents arising from her premises at Cupids were divided equally among daughters, Lucinda, Amelia, Anne, and Harriet and one share each of property given to granddaughters, Amelia, Jane and Harriet.[132] She also placed conditions on the children's inheritance.

To my son, Joseph Furneaux, the dwelling house, garden, and eastern half of potato garden, large family Bible, nine silver tea spoons, and to assist his sister Lucinda should she stand in need of it;
To my son, William, the interest held in Andrew's room at Ship Cove, the whole of the remaining part of Snow's room at Port de Grave, and household furniture;
My daughter Harriet shall be supported by my sons, Joseph and William in a manner suited to her station in life, as long as she remains unmarried and in the event of their not doing so agreeably...half the property will become Harriet's.

Her sons, John and William, were expected to support John Snow, whose relationship to the family is not identified in the will. A list of bequests of personal items concluded the will:

to my four daughters, Lucinda, Amelia, Anne and Harriet, all my wearing apparel to be divided into four lots, Lucinda taking the first choice and so on in rotation according to their age.
to my daughter, Harriet Furneaux, one pair of silver sugar tongs, one half dozen large silver teaspoons; one volume of encyclopedia; one pearl ring and broach with gold chain and one mourning broach
to my daughter Amelia Freeman, one mourning ring, one locket and one black broach

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131 PANL, GN 5/1, Registry of Wills, v. 1, Will of Mary Stretton.

132 PANL, GN 5/1, Registry of Wills, v. 1, Will of Jane Furneaux, February 23, 1834.

to my daughter Lucinda Macpherson, money to buy a silver spoon
to my daughter, Anne Baird, one silver teaspoon
to my granddaughter, Jane Bursell, one silver teaspoon and one plain gold ring
to my granddaughter, Amelia Bursell, one mourning broach
to my granddaughter, Agnes Macpherson, one twisted gold ring
to my granddaughter, Caroline Macpherson, one plain gold ring
to my son, Robert Furneaux, one mourning ring, one pair silver sleeve buttons, one silver tablespoon and two volumes of Encyclopedia
to my son, William Furneaux, one silver tablespoon, one mourning ring and one plain ring.[133]

Lucretia Hoyles Dickson was a wealthy spinster living in St. John's during mid-century. Her lengthy will indicates that her wealth came from her mother's family. She took great care to provide for her female collateral kin. Most of her estate was left to her grandmother and her three cousins, Anna Cooke, Harriet Hoyles, and Fanny Wilson and their heirs. Rents and profits from the property were to be paid to each cousin annually until their respective marriages at which time, the rents, interest, and profits were settled on them for their "sole and separate use". Upon the deaths of the three women, each share of the estate passed to their children or grandchildren, but if none existed, the estate was to be divided equally among the "next of kin by my mother's side". Personal property was itemized as follows:

my piano to Anna Cooke;
twelve spoons, jug and basin and two dessert spoons, eighteen tea spoons, jug and basin, one tablespoon, three dessert spoons and sugar tongs to Fanny Wilson;
two dessert spoons and the mustard pot to Harriet Hoyles;
soup ladle, gravy ladles and pearl ring to Susan Rennie;
the toast rack to Mary Wilson;
the casters to Anne Row;
the work box to Jean Hoyles;
the watch chain to Bertha Cooke;
the book case to Sarah Row;
Blunt's sermons to Grandmamma;
the chest of drawers, bed, mattress, blankets etc. after Grandmamma's death to Kitty Drew;

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133 *Ibid.*

my books between Hugh and William Hoyles.[134]

Sarah Heaney, a widow in St. John's, was adamant about keeping her property in the family. Sarah had one son, Hugh, who inherited £70 and one-half of the garden. Her daughter, Margaret, received £100, one-half of the garden and the family house.The rents rising from a second house were to be put in trust for her board and education. Sarah also specified that if the house should burn down before Margaret came of age, then £30 was to be taken from Hugh's inheritance to be given to support Margaret. The intention of the will was to exclude in-laws from the inheritance that their spouses would receive.

> In the event of her getting married the property entails on her issue if any but in default of issue it becomes the property (immediately after her death) of my son, Hugh, or his lawful issue, in order to exclude her husband from any right or title whatsoever to any part thereof and it is my express will and desire that her husband or Hugh's wife shall on no account either before or after their death have any right or claim on the property and if it shall happen that she survive her brother Hugh she is to have his share at his death provided he has no issue, but in the event of his having lawful issue his share is entailed to his lawful issue, and if neither my said daughter or son shall have issue the whole of the property is intended and hereby given to my nearest relation (Hugh's wife and Margaret's husband excepted) the rents of the garden with the interest thereon is also to be reserved until my children become of age.[135]

Widows left their property, carefully itemized, to sons and daughters, grandchildren, nieces, nephews and friends.[136] Like their husbands, they included specific conditions regarding behaviour or provisions to protect their children's inheritance. As

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[134] PANL, GN 5/1, Registry of Wills, v. 1, Will of Lucretia Hoyles Dickson, March 10, 1851.

[135] PANL, GN 5/1, Registry of Wills, v. 1, Will of Sarah Heaney, St. John's, July 30, 1832.

[136] See Appendix H for a complete list of the distribution of real property and personal property to sons and daughters by each female testator.

shown in Table 6.12, 17% of the wills include a provision which protected property from current or future husbands of their daughters.

Table 6.12: Special Provisions in wills by women who had children

Provisions*	Number	Percentage
Protected daughters' inheritance at marriage	9	17.0 %
A "share and share alike" distribution	14	26.4 %
Remaining wills	30	56.6 %
Total Number of Wills	53	100 %

Sources: PANL, Registry of Wills, GN 5/1, Court Records, GN 5, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

* Note that 5 wills contain both provisions.

The will of Elizabeth Codner, a widow residing in Dartmouth, in the county of Devon, protected the inheritance of her daughter, Elizabeth Ford, with the inclusion of the phrase, "notwithstanding her present or any future coverture".[137] In 1823, Susannah Warne, a widow living in St. John's, had a will drawn up to place all her property, real and personal, in trust for the "sole and separate use" of her daughter, Susannah. Mrs. Warne was the widow of James Warne, a mariner from Poole, England. Her will stated that her daughter's "present or future husband shall not intermeddle therewith, neither shall the same be subject or liable to his control, debts or engagements". Furthermore, upon her daughter's death, the residue of property was to be divided among the female children of

[137] PANL, GN 5/1, Registry of Wills, v. 1, Will of Elizabeth Codner, June 9, 1823.

Susannah Weston Haire and her present husband, Alexander Haire.[138] The anticipation of a young woman's marriage was also enough to encourage the testator to protect her future inheritance. Martha Butt of Crokers Cove, Conception Bay, left her property including a plantation, fishing room, dwelling house, outhouses, to her niece, Jane Parsons, with the provision that in the event that Jane married, her husband "shall have no claim, act or part in the disposal of the said premises".[139]

If a widow married again, she was then entitled legally to convey property which she held from her first marriage. In her will dated May 14, 1814, for example, Mary Neill, formerly the wife of Constantine Neill but at that time the wife of James Dalton, left to her two sons, Owen and Constantine, her "house, meadows, and gardens, boat and craft, netts and sains" in equal shares.[140] Wills by women in their second marriage are rare, probably because they had surrendered their inheritance from their first marriage to their children or collateral kin.

Inheritance Cases

Two court cases in the eighteenth century revealed two important issues concerning inheritance and the interpretation of inheritance law by local legal authorities. *Durson and*

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[138] PANL, GN 5/1, Registry of Wills, v. 1, Will of Susannah Warne, February 6, 1823.

[139] PANL, GN 5/1, Registry of Wills, v. 1, Will of Martha Butt, November 30, 1811.

[140] PANL, GN 5/1/C/6, Ferryland Surrogate Court Records, correspondence, May 24, 1814.

Keats v. Richards [141] was held in St. John's before Governor Bridges Rodney on September 20, 1749. John Richards, originally from Bristol, petitioned the court for possession of property situated in Bay Bulls. An investigation revealed that the property had belonged to James Durson who died intestate in Newfoundland in 1731, leaving "a house, eight plantations or boats' rooms". To support Richards' claim, his attorney, Thomas Lyde, presented a document signed by John Byng, Commodore of the Convoy for protecting the fishery in 1742, which gave possession of the property to Richards. However, in 1743, Thomas Smith who had succeeded Byng as Commodore of the Convoy had reversed Byng's decision in favour of George Durson.

Also in court on that day were Michael Ballard, attorney for George Durson, and Charles Walley, who represented John Keats. Keats claimed the property on behalf of his wife, Mary Durson, formerly the wife of the late James Durson. The court proceeded with an inquiry into the rightful ownership of the disputed property. An added complication to the case was that James Durson had one sister "of the whole blood", Edith Sully, one sister "by the half blood", Eleanor England, and one nephew, George Durson, who was the son of James' half brother, George. Given these circumstances, the court had to decide whether "the whole blood by the female side, or the half blood by male, should inherit the property". The issue was put aside for one year and the case resumed on September 26, 1750.

On that day, the evidence revealed that John Richards had purchased the property from Edith Sully, the only surviving full sister of James Durson. Richards' position was that he had legally purchased the property from its rightful heir. Michael Ballard, Durson's

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[141] PANL, GN 2/1/A, Colonial Secretary's Office, Outgoing Correspondence, v. 1 - 4, 1749 - 1770, box 1, 58, 252 - 256.

attorney, however, argued that the decree of Thomas Smith giving Durson's nephew by half blood full possession of the property was a valid ruling. At that point a second issue was raised. Would the present court reverse the ruling of one commodore over another? All parties had to wait another year for a ruling which was finally made on September 2, 1751. Assembled in the courthouse that morning were the present Commodore, George Bridges Rodney, his assistant and Commander of His Majesty's ship "Boston", Francis William Drake, three Justices of the Peace for St. John's, William Keen, Michael Gill and William Wigmore, and the Vice-Admiral for the harbour for that year, John Sang.

Surprisingly, neither Durson nor his legal counsel were present despite the fact that notification of the case had been posted around St. John's and Bay Bulls in advance. John Keats and his attorney, Charles Walley, did appear but as in the previous year, the court noted, neither had anything to add to the case. Their position remained that the widow of the late James Durson was entitled to the property.

After considerable deliberation, the court ruled that the original decree of John Byng bearing the date September 28, 1742, would be upheld and the property would return to the possession of John Richards, having lawfully purchased it from the full sister of James Durson, Edith Sully. Those tenants who were in possession of the property at the time were ordered to give "quiet and peaceable possession" to John Richards and to pay all the arrears of rent due. However, the court upheld the intestate rule and ruled additionally that one-third of the income from rents was to be given to Mary Durson Keats, the widow of the late James Durson, "during her natural life and no longer". [142]

The foundation of the inheritance system remained the customary means of

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[142] PANL, GN 2/1/A, Colonial Secretary's Office, Outgoing Correspondence, v. 1, 58, 252 - 256.

acquiring property through quiet and peaceable possession. On July 13, 1784, William Bevil Thomas of Dartmouth petitioned for title of a plantation located in Bennet's Cove. An investigation of the title to the property revealed that it was originally granted to William Bennet by King Charles II and granted to Thomson Reeves and Margaret Landsdale, granddaughters to Mrs. Bennet, by Captain Hempthorn in 1715. Thomson Reeves later gave her share of the estate through a deed of gift to her sister, Margaret Landsdale who, in turn, left the property by will to her daughter Mary Shapley and her heirs. William Bevil Thomas was the grandson of Mary Shapley. In his decision of 1784, Governor John Campbell granted William Bevil Thomas the right to "quiet and peaceable possession" of the property, which according to the Governor, he rightfully inherited from his grandmother.[143]

The custom of giving use but not title to property is illustrated in *Cole v. Danson* in 1818. In court in Harbour Grace, the plaintiff William Cole explained that the he had allowed his son and son-in-law to build cabins upon his rooms. In return, they agreed to support him in his old age. Cole had not actually given them title to the land. In its ruling, the court acknowledged this custom as "a species of property peculiar to this Island" which required "the application of peculiar rules of law".[144]

In 1825, the Harbour Grace Surrogate Court drew the distinction between possession of property in Newfoundland and occupancy in Britain and summarized the circumstances under which property in Newfoundland was held. In *Coughlan v. Hearn*,

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[143] PANL, GN 2/1/A, Colonial Secretary's Office, Outgoing Correspondence, v. 10, St. John's, *Re: Thomas*, July 13, 1784.

[144] PANL, GN 5/1/B/1, Harbour Grace Supreme Court Minutes,*William Cole v. Thomas Danson*, October 9, 1818.

the court ruled that

> landed property in our mother country varies widely from that in this Island, lands in the former are occupied by leases subject to certain rents where by all persons claim equally their rights, tillage or no tillage, meadows or common grazing pasturage - being all under the denomination of title.
>
> The right of occupancy in this country dwells principally upon the faith of the fisheries throughout such as stages, flakes, merchants' stores, and so forth and in any manner otherwise where the trade of the country only is concerned and involved, all depending upon the fish and oil caught and manufactured for exportation to our markets home and foreign ones abroad.[145]

The role of the fishery in the economic development of the island had indeed created circumstances which encouraged family members to provide for each other's security. The dominant feature of the inheritance system was to keep property within the family and to find the most convenient means of ensuring this. They did so with the immediacy of the moment uppermost in their minds. The result was a partible inheritance system framed by custom. Widows and children of those men who died intestate shared their real and personal property generally on a one-third, two-thirds basis. Some husbands and fathers offered more certainty by conveying land and fishing rooms through a deed of gift or conveyance. Those men and widows who left wills addressed the needs of family members by dividing both their real and personal property on a "share and share alike" basis.

Carrying out a successful cod fishery and maintaining subsistence farming depended on the participation of family members. Women completed domestic duties as well as shore work for the fishery. Keeping family property, especially ships-rooms, houses, stores, stages, within the family was vital in a society where residents made a living from the sea and generation after generation grew up in the same community. The family home, which legally belonged to the husband, was maintained for the lifetime of the

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[145] PANL, GN 5/1/B/1, Harbour Grace Surrogate Court Minutes, May 1825 - September 1825.

parents, and inherited by the child or children who needed it, often with the understanding that the remaining parent, whether father or mother, would remain in the home in their care. These practices, as reflected in wills throughout this period, were the basis of a matrimonial property system already established by the time statutory reforms were introduced in the late nineteenth century.

Statutory Reform, 1876 - 1895

Legislation to reform matrimonial property rights was passed throughout the English common law world in the second half of the nineteenth century. In Great Britain the campaign to reform married women's property rights began in the 1850s with a network of feminists primarily in the north of England. Many of the women became members of the Married Women's Property Committee which undertook an extensive campaign of writing letters and collecting petitions. A petition drawn up in 1856 by the Committee expressed their underlying philosophy and goals:

> The law expresses the necessity of an age, when the man was the only money-getting agent; but...since the custom of the country has generally changed in this respect the position of the female sex...since modern civilization, indefinitely extending the sphere of occupation for women, has in some measure broken down their pecuniary dependence upon men, it is time that legal protection be thrown over the produce of their labour, and that in entering into the state of marriage, they no longer pass from freedom into the condition of a slave, all of whose earnings belong to their master and not to herself.[146]

John Stuart Mill was a prominent supporter of the cause for reform of married women's property laws in Britain. His work, *The Subjection of Women*, was published in 1869 and argued for the legal affirmation of the human right to legal equality. According to Mill, the law placed women in an impossible position. "The law, not determining her rights, but theoretically allowing her none at all, practically declares that the measure of

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[146] Holcombe, *Wives and Property*, 86.

what she has a right to, is what she can contrive to get."[147]

On August 9, 1870, the Married Women's Property Act[148] was passed at Westminster and served as the model for the Act[149] passed in Newfoundland by the local legislature on April 24, 1876. Sections one and two of the English statute and Newfoundland statute are similar. They specify that the wages and earnings that a married woman received in any employment, occupation, or trade acquired after the passage of the Act became her separate property.[150] A married woman was required to make a special application to have her savings bank deposits registered as her separate property.[151] A proviso in the Newfoundland statute states that a married woman was required to publish a notice in the *Royal Gazette* and one other local newspaper for one month to show that she intended to carry on a business or trade separately from her husband.[152] By section three of the English statute, married women could apply to the Governor of the Bank of England

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147 John Stuart Mill, "The Subjection of Women", reprinted in Alice S. Rossi, (ed.) *The Feminist Papers: From Adams to de Beauvoir*. (New York: Columbia University Press, 1973): 212

148 (1870) 33 & 34 Vict. c. 93: *An Act to Amend the Law relating to the Property of Married Women.* A consolidation act was passed in 1882. (1882) 45 & 46 Vict.c. 75: *An Act to Amend the Law Relating to the Property of Married Women.*

149 (1876) 39 Vict. c. 11 (Nfld.): *An Act to Amend the Law Relating to the Property of Married Women.*

150 *Ibid.*, s. 1.

151 (1870) 33 & 34 Vict. c. 93, s. 2, and (1876) 39 Vict. c. 11 (Nfld.), s. 2.

152 *Ibid.*, s. 1.

or the Bank of Ireland to invest not less than £20 in her own name as separate property provided that she had received her husband's consent if the money had come from him.[153] In the corresponding section three of the Newfoundland statute, married women were required to apply to the Receiver General of the Colony and the minimum investment designated by the act was two hundred dollars.[154] Section four in both statutes has a similar provision for married women's shares in joint stock companies.[155] Section five in the English statute designates as separate property, investments by a married woman in a "friendly society, benefit building society, or loan society" while the Newfoundland statute refers only to investments in joint stock companies and includes the proviso added to section four of the English statute, that if a married woman used her husband's money without his consent, the Supreme Court could order the interest and profits to be transferred to the husband.[156] Section six is identical in both statutes and states that the act does not apply to investments made in fraud of creditors.[157] Section seven of both statutes refers to the property inherited by married women. The English statute gives married women the right to "personal property not exceeding £200" which they inherited as next of

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153 (1870) 33 & 34 Vict. c. 93, s. 3.

154 (1876) 39 Vict. c. 11 (Nfld.), s. 3.

155 (1870) 33 & 34 Vict. c. 93, s. 4 and (1876) 39 Vict. c.11, (Nfld.) s. 4.

156 (1876) 39 Vict. c. 11 (Nfld.), s. 5.

157 (1870) 33 & 34 Vict. c. 93, s. 6 and (1876) 39 Vict. c. 11 (Nfld.), s. 6.

kin of an intestate or by deed or will.[158] In the Newfoundland statute, section seven includes all property which the married woman receives without any restriction on its value. No distinction is made between the inheritance of real and personal property. Furthermore, the Newfoundland statute adds that the married woman may receive this property by gift, thus acknowledging a common practice on the island.[159] Section eight of the English statute refers to rents and profits which a married woman may receive from "freehold, copyhold and customaryhold property".[160] There is no corresponding provision in the Newfoundland statute. Section nine of the English act and Section eight of the Newfoundland statute are identical. They refer to the right to apply to the courts to settle disputes between husbands and wives regarding any property designated by these acts.[161] Both statutes permitted a married woman to acquire a life insurance policy on her life or that of her husband for her separate use. A married man could take out a life insurance policy for the benefit of his wife and children and it was deemed as a trust for their benefit, not subject to the claims of her creditors.[162] The English statute and the Newfoundland statute granted married women the right to sue for the recovery of "wages, earnings, money and

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[158] (1870) 33 & 34 Vict. c. 93, s. 7.

[159] (1876) 39 Vict. c. 11 (Nfld.), s. 7.

[160] (1870) 33 & 34 Vict. c. 93, s. 8.

[161] (1870) 33 & 34 Vict. c. 93, s. 9 and (1876) 39 Vict. c. 11 (Nfld.), s. 8.

[162] (1870) 33 & 34 Vict. c. 93, s. 10 and (1876) 39 Vict. c. 11 (Nfld.), s. 9 and s. 10.

property". [163] Section twelve of both statutes stated that a husband was not liable for the debts incurred by his wife before their marriage. The Newfoundland statute added, however, that if the married woman had attempted to defraud creditors by assigning her property to her husband, then the husband was liable to the creditors for the value of the property. The Newfoundland statute of 1876 ends with that provision but the English statute had also imposed obligations on married women with respect to property. They were, for example, subject to poor law liability, which meant that they were liable for the support of their husbands and children.[164]

Legislators in England in 1870 were cautious. While the married women's property acts permitted married women the right to separate property as a single woman, English society still determined the economic and social parameters in which married women functioned. Members of Parliament chose not to give married women the same property rights as a single woman; they simply designated married women's property as separate property. In doing so, they made litigation more complex and raised questions as to the precise liabilities of the married woman.[165] Neither the English statute nor the Newfoundland statute that followed made married women liable for payment of debts incurred after their marriage by using their separate property, even though they were entitled to sue with respect to their separate property. Not only were married women able to avoid creditors because they could not be sued but husbands could designate certain

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[163] (1870) 33 & 34 Vict. c.93, s. 11 and (1876) 39 Vict. c. 11 (Nfld.), s. 11.

[164] *Ibid.*, s. 13.

[165] Holcombe, *Wives and Property*, 182.

property as belonging to their wives and therefore avoid the responsibility for debts resulting from the use of that property as well. From another perspective, this provision served to disadvantage women in the workforce who were trying to establish their credit and credibility in trade and business because creditors were reluctant to make advances on credit knowing it might be difficult to recover the money owed to them.

A successor statute, the Married Women's Property Act of 1882[166] designated all property of a married woman acquired before and during marriage as separate property as if she were a *feme sole*. The Act spelled out precisely what, in the absence of a marriage settlement, was to be treated as a married woman's separate property.[167] Married women were permitted to acquire, hold and dispose of their property by will or contract. In Newfoundland an act to amend the Married Women's Property Act was passed in 1883.[168] Like the English statute, it granted married women the legal status of a single woman in owning property by eliminating the distinct category of separate property. Married women were given the right to acquire, hold, and dispose of by will or otherwise any real or personal property in the same manner as single women.[169] They were allowed to enter into

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166 (1882) 45 & 46 Vict. c. 75: *An Act to Amend the Law Relating to the Property of Married Women.*

167 *Ibid.*, s. 2.

168 (1883) 46 Vict. c. 11 (Nfld.): *An Act to Amend the Married Women's Property Act of 1876.* See Appendix J for a copy of the statute.

169 *Ibid.*, s. 1.

contracts and had the rights of a single woman to sue.[170] They could also carry on a trade separately from their husbands. Every woman who married after April 21, 1883 was entitled to hold property acquired by her employment or exercise of any skill and her property was held liable for her debts. Property included bank deposits, shares, stocks and debentures.[171] Like the 1882 English statute, this act was a major step in eliminating the husband's role as trustee over his wife's separate property. This legislation granted married women formal legal equality with men and single women regarding the ownership of property.[172]

A third Act [173] was passed in Newfoundland in 1895 to amend the act of 1883. It includes some of the provisions of the English statute of 1882 that had not been included in the Newfoundland Act of 1883. It provided that a contract would be considered binding to a married woman's property whether or not she possessed the property at the time of entering into the contract.[174] Legislation covering wills in Newfoundland was extended to married women whether or not they possessed any separate property at the time of the

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[170] *Ibid.*, s. 2.

[171] *Ibid.*, s. 6.

[172] A similar statute was passed in Ontario in 1884. See Chambers, *Married Women and Property Law in Victorian Ontario*, 137 - 147.

[173] (1895) 59 Vict. c. 17 (Nfld.): *An Act to Amend the Married Women's Property Act of 1883*. See Appendix K for a copy of the statute.

[174] *Ibid.*, s. 1.

making of the will.[175]

In England, the married women's property acts were welcomed reforms. They were passed in the midst of a society being transformed by the forces of industrialization and in the context of other reforms of particular importance to married women such as the Matrimonial Causes Act in 1857 and the Child Custody Acts in 1873 and 1886.[176] In so far as the laws, once enacted, improved the legal status of married women and to the extent that the issue drew the attention of the British Parliament and many colonial legislatures, it is reasonable to admit that even in a strong patriarchal society, or perhaps in spite of it, progress had been achieved by those women with property who had been disadvantaged.

These reforms in England in the late nineteenth century encouraged the colonies under British jurisdiction to copy or adapt the legislation. In British North America, the first statute to deal with married women's property rights was passed in New Brunswick in 1851. The Act entitled, "An Act to Secure to Married Women Real and Personal Property Held in Their Own Right", allowed a married woman who had been deserted to sue for debts or damages in her own name. She could retain the property she had accumulated as the result of her own efforts, free from her husband or his creditors. The legislature of Prince Edward Island followed with similar legislation in 1860. Nova Scotia in 1866 followed the English model rather than that of the other two Maritime provinces. Legislation in Ontario in 1872 allowed a married woman to keep her earnings separate from her husband's control and in 1882, a married woman in Ontario was given the right to own her property and do with it as she pleased. British Columbia followed Ontario's legislation

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[175] *Ibid.*, s. 3.

[176] These statutes were not copied in Newfoundland.

in 1873, Manitoba in 1875, the Northwest Territories in 1886, Saskatchewan in 1907 and Alberta in 1922.[177]

In Newfoundland the three statutes were passed without parliamentary or press debate or public demand for reform or response to their passage. We can assume that legislators made the minor changes to the statutes before they were passed in an attempt to address local circumstances as they might arise. One example is the broader provision regarding inheritance and separate property in the Act of 1876. Otherwise, the Newfoundland Act of 1876 copied the English Act of 1870 and the 1883 Act in Newfoundland followed the English statute from the previous year. Clauses that had not been included in the Newfoundland Act of 1883 were placed in a separate statute in 1895.

While the English and Newfoundland married women's property acts were similar, the societies in which they were passed were not. In Newfoundland where residents depended primarily on a domestic economy, the provisions of the acts had little relevance for the majority of married women. Few would have benefitted from the right to protect their wages as separate property, to make bank deposits, invest in joint stock companies, own a business or enter into a contract. As Chambers argues regarding the 1884 statute in Ontario, the ownership of a significant amount of property gained through wages or inheritance was unlikely for most married women. Those who did receive wages or inherit property would use it to improve the family's circumstances. Those who were trapped in abusive situations were limited to work within the home and most lacked the financial independence to leave their abusive husbands.[178]

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[177] Backhouse, "Married Women's Property Law", 218. See also Chambers, *Married Women and Property Law in Victorian Ontario.*

[178] Chambers, *Married Women and Property Law in Victorian Ontario*, 11.

At the time of their passage, the statutes, which followed the English model, largely refined Newfoundland's existing matrimonial property system which was the product of custom and the adaptation of English law. The system had been shaped by several features: the meaning of property from the earliest days of English settlement, the passage of the Chattels Real Act to govern inheritance upon intestacy, judicial interpretation even before 1834 that land in Newfoundland had been customarily considered to be chattels real, and customs that grew out of local needs. Thus by the time the married women's property acts were passed, a matrimonial property system was already firmly in place which reflected the needs of the community. It was formed by early statute in 1834, the common law and the ways in which the law was received, and customary practices arising from economic and social circumstances.

Chapter 7: Conclusions

Recent research into matrimonial property rights has questioned the application of the restrictions of coverture in English common law jurisdictions and suggested that local conditions made these rules unworkable and impractical. When English common law was uncertain, inapplicable or inappropriate, communities may have found alternatives or made adjustments to meet their needs. These jurisdictions were also noted for the absence of a reform movement which in England and in several colonies demanded changes to married women's property rights in the late nineteenth century. The absence of a reform movement in Newfoundland raises the question as to whether the rules of common law were simply inappropriate to the community or whether individuals had found ways to circumvent the rigidity of the common law. My research has attempted to determine the factors which contributed to the formation of a matrimonial property system prior to the passage of legislation in the second half of the nineteenth century. It has revealed that the value of the cod fishery to England directly affected settlement, the formation of a legal system and the legislative and judicial definition of property on the island. Customary practice with regards to wills, deeds, and trusts, contradicting judicial decisions interpreting property law, and the designation of property for the purpose of inheritance as chattels real distinguished the matrimonial property regime in Newfoundland. The married women's property acts recognized and refined a long history of adaptive and experiential practice. They resolved the ambivalence and contradiction of decided court cases and confirmed the existence of a distinctive legal regime. The legislation expanded the definition of married women's property but did not redefine property for the purpose of inheritance. Future generations of

married women would benefit from the statutes but at the time of their passage only a small minority of married women would appreciate their provisions.

Several factors shaped the evolution of matrimonial property rights in Newfoundland. The first was the reception of English law of property, marriage and inheritance. The study of the reception of the law has revealed a recurring theme. English law, although a birthright of English settlers, did not automatically fit local conditions and it had to be adjusted. This had been recognized as early as 1578 in the grant given to Sir Humphrey Gilbert. In the early seventeenth century, charter-holders were given the power to make laws which would be "conveniently agreeable" to English law, and the Judicature Acts in the late eighteenth century gave criminal and civil jurisdiction to the Supreme Court "as far as the same can be applied".

In the early nineteenth century the custom of common-law marriages and the absence of English marriage law led local church authorities to demand statutes from the British Parliament to regulate marriages in Newfoundland. Concerned for establishing the legitimate heirs to property, the government responded with statutes in 1817 and 1824, and the new colonial legislature passed its own marriage act in 1833. The new colonial government after 1832 sought to regulate rights to private property via the passage of legislation. The following year it defined property for purposes of inheritance.

Inheritance was another area where the English government's policy regarding Newfoundland mitigated against the automatic reception of English law. Judicial decisions had been conflicting as to whether land on the island was chattels real and for the purposes of inheritance would be distributed as such. The debates which led up to the Act itself clearly demonstrated that English inheritance law did not fit well into the circumstances of the colony of Newfoundland.

A second factor which affected the development of matrimonial property rights was the legislative and judicial definition of property in a fishing economy. In the early seventeenth century, the use of the island for the English fishery meant that land, except for fishing purposes, remained unimportant. When planters chose to stay during the winter to protect fishing facilities for the next season, property, whether private or public, assumed greater importance. Those who remained on the island claimed use of the land. King William's Act in 1699 marked an important step in the evolution of property rights as it ensured more certainty of possession of land for the inhabitants. Although the intention of the statute was to encourage the migratory fishery, it also distinguished between private land and public land which was designated for the use of visiting fishing ships. Individuals who had cleared land for their own use were assured of possession as long as they did not interfere with the fishery. Would the land that they cleared be inherited? Buchanan's report in 1786 clearly indicated that it would. Moreover, governors' grants throughout the eighteenth century ensured possession to "heirs and assigns forever".

For most of the eighteenth century, seasonally resident governors, their surrogates and year-round justices of the peace carried out their commissions and instructions as a part of the royal prerogative. Fishing admirals seasonally administered fishing matters in their harbours. The English government's policy regarding settlement, the distinction between private and public land and the growing practice of possessory title left legal authorities uncertain as to how English law of property could be applied. Custom and consensus operated in the absence of many of the features of English law. The gradual growth of settlement in the eighteenth century led to a more structured system of justice. Beginning in 1791, Judicature Acts confirmed the existence of English law.

As more residents took over a substantial amount of public property for their private

use, they petitioned the governor for land near their fishing rooms on which to build a house and maintain a small vegetable garden. The right to build and live on a particular piece of property was sanctioned by the rest of the community. Possession was assured without interference as long as the property was occupied and properly maintained. Owners had to agree to carry out the fishery according to the provisions of King William's Act. By the beginning of the nineteenth century, a permanent population sought more certainty of title. The potential for disputes over possession and title increased. In 1811, an imperial statute granted private title to property in St. John's. A registry of deeds for the whole island was created in St. John's in 1824.

The passage of the Chattels Real Act added to the complexity of the nature of property on the island and sparked a series of conflicting interpretations in succeeding court cases. The debate focused on the type of property which existed in Newfoundland before the passage of the Act. Some legal authorities later cited the rulings by Chief Justice Reeves in *Kennedy v. Tucker* in 1792 and Chief Justice Forbes in *Williams v. Williams* in 1818 as confirmation that English inheritance laws had not applied in Newfoundland before the passage of the Chattels Real Act. Others argued that English inheritance laws had applied and that the Act was making new law. Those who argued that the Chattels Real Act was new law rested their claim on the notion that English settlers had brought the law of property and law of inheritance to the island and that no statutes had been passed subsequently to adapt those laws to local circumstances. The Judicature Acts, however, had declared that English laws would apply in light of local circumstances. Forbes' views in *Williams v. Williams* reflected this important qualification and would appear to be the better law.

A crucially important third factor in the evolution of matrimonial property rights

was the prominent place of customary practice in the conveyance and inheritance of property. The dependence of the population on the fishery had three implications that directly affected the ownership and conveyance of property. First, the fluctuating success of the fishery year after year added to the economic vulnerability of the residents. Secondly, fishing rooms, boats, flakes and stages were essential for economic survival and therefore a primary concern of inheritance and conveyance. Thirdly, women's role in the domestic economy of the fishery was vital to the continued survival of the family and the community.

The inheritance system reflected the custom of possessory claim, the highly variable nature of the fishery and the social expectations of parents. Newfoundland families relied on the concerted efforts of members in order to survive. The desire to protect the family and its possessions motivated family members to keep both real and personal property in the family. Property was conveyed to family members through gifts, deeds of conveyance, trusts, wills, or by intestacy. The male line of descent, a dominant feature of inheritance practices in English common law, was subordinated to the immediate and long-term needs of the family. The land of those dying intestate was inherited as personal property and distributed equally among surviving family members. Widows received one-third of the estate and children inherited two-thirds. Practice reinforced the egalitarianism of the partible system of inheritance that had been shaped by an economy almost exclusively based on the cod fishery.

Inheritance practices up to the middle of the nineteenth century show a society that was concerned with providing for widows, sons, and unmarried daughters. A sentimental attachment to family property developed as succeeding generations had their own families and remained in the community. Motivated by affection and protectiveness, men who left

wills provided for the support of their widows and children. Wives were the principal beneficiaries of their husbands' estates. Daughters inherited property along with their siblings on a more or less equitable basis. Parents also ensured that their sons were in a position to provide for their families. On the death of both parents, children inherited property on an equitable "share and share alike" basis.

Parents expected that married daughters would be cared for by their husbands although those who feared the possibility that fishing rooms, land, and houses would be taken from the family protected their daughters' inheritance from their husbands. Trusts created by fathers protected married daughters' inheritance from possibly unscrupulous or greedy husbands. Others had their inheritance protected by a provision in their fathers' wills which designated the property for their daughters' "sole use". Widows inherited both real and personal property from their husbands. They were assured the support of the family and the right to reside in the family home as long as they wished whether or not the home legally belonged to them. For some, however, a decision to remarry might reduce or destroy their inheritance and testamentary freedom.

The common-law tradition brought to Newfoundland by virtue of England's imperial claim was often inapplicable to the circumstances of the new surroundings. This was clearly the case with regard to married women's property law. The statutes were copied from the earlier English statutes with only minor changes to suit local circumstances. At the time of their passage, the married women's property acts had little significance to the majority of married women in Newfoundland. The doctrines of marital unity and coverture in English common law were tempered by local experience and values which held that collective rights must prevail over those of the individual. Residents found ways to adapt or circumvent matrimonial property law to address the immediate and long-

term needs of their families. Although officially subject to the rules of English common law, those who settled in Newfoundland developed their own customary practices. They adapted English matrimonial property law to suit their own needs and those of succeeding generations. Through a partible inheritance system each generation ensured that those who were left behind to ponder the uncertainty of the future would find some security in their inheritance. That commitment became a part of their legacy.

APPENDIX A

ANNO QUARTO

GULIELMI IV. REGIS.

(2ND SESSION.)

CAP. XVIII.

An ACT for declaring all Landed Property, in Newfoundland, Real Chattels.

[12th June, 1834.]

Preamble.

WHEREAS the Law of Primogeniture, as it affects Real Estate, is inapplicable to the condition and circumstances of the People in this Island: And whereas the partibility of small Estates, by Descent in Coparcenary, or otherwise, would tend to diminish the value thereof, and would, in its application, be attended with much expense and inconvenience: *Be it therefore enacted*, by the Governor, Council, and Assembly, of Newfoundland, in Parliament assembled, that all Lands, Tenements, and other Hereditaments, in Newfoundland and its Dependencies, which, by the Common Law, are regarded as Real Estate, shall, in all Courts of Justice in this Island, be held to be Chattels Real, and shall go to the Executor or Administrator of any Person or Persons Dying seized, or possessed thereof, as other Personal Estate now passes to the Personal Representatives, any Law, Usage, or Custom to the contrary, notwithstanding: *Provided always*, that no Executor or Administrator shall bargain, sell, demise, or otherwise depart with any Estate or Interest therein, for a longer period than One Year, without the direction of the Supreme Court of this Island, first given for that purpose.

Lands, &c. which are regarded as Real Estate, to be Real Chattels.

Proviso.

Rights or Claims heretofore accruing, to be determined according to this Act.

II.—*And be it further enacted*, that all Rights or Claims which have heretofore accrued in respect to any Lands, or Tenements in Newfoundland, and which have not already been adjudicated upon, shall be determined according to the Provisions of this Act: *Provided always*, that nothing herein contained, shall extend to any Right, Title, or Claim to any Lands, Tenements, or Hereditaments derived by descent, and reduced into possession, before the passing of this Act.

Printed by RYAN & WITHERS, Printers to the King's Most Excellent Majesty.

APPENDIX B

Appendix B: Deed of Gift references

Date	Relationship	Source
1. 1717	sister to sister, Thomson Reeves to Margaret Landsdale	GN 2/1/A, Col. Sect'y's Outgoing Correspondence to Governor Campbell
2. 1724	Elizabeth Adams to Johannah Woodmason (no relationship)	GN 2/1/A, Colonial Secretary's Correspondence, petition of John Gale
3. 1742	sisters, Edith Sully and Eleanor England to John Richards (unrelated)	GN 2/1/A, Colonial Secretary's Correspondence
4. 1750	mother, Esther Burridge, to daughters	GN 2/1/A, Col. Sect'y's Outgoing Correspondence, petition by Mary Ford
5. 1754	widow of William Harvey to son-in-law	GN 5/4/B/1, Trinity Court of Sessions minutes, 1754
6. 1759	brother, John Bole, to sister, Elizabeth Searle and nieces, Mary and Elizabeth Bole	MF 236, CNS Archives, Will of John Bole
7. 1780	father, John Morgan, to son, William Morgan	MG 382, PANL
8. 1792	father, Nicholas Gill, to daughter, Sarah Gill	MG 399, PANL, Will of Sarah Harris, 1834
9. 1796	father, John LeGrove to sones, Thomas and Simon LeGrove	GN 5/1/B/1, Harbour Grace Surrogate Court minutes, *Peppy & King v. LeGrove*, 1796
10. 1803	mother, Mary Horton, to daughter/son-in-law	GN 5/2/A/9, Supreme Court Central District, "Estate Matters", 1803
11. 1805	unspecified relationship	GN 5/1/B/1, Trinity Surrogate Court
12. 1805	Thomas Newell to male relative	GN 5/1/B/1, Trinity Surrogate Court minutes, 1805
13. 1812	father, Henry Warford, to daughter, Susannah and son-in-law, William Bradbury	GN 5/1/B/1, Harbour Grace Surrogate Court minutes, *Bradbury v. Kearney*, 1821
14. 1812	William Harder to male (unspecified relationship)	GN 5/1/B/1, Trinity Surrogate Court minutes, 1812

Date	Relationship	Source
15. 1812	mother, Ruth Collins, to son, Luke Collins	GN 5/1/C/1, Placentia Surrogate Court minutes, *Collins v. Collins*, 1818
16. 1813	father, William Miller, to son, Samuel Miller	GN 5/1/B/1, Trinity Surrogate Court minutes, 1813
17. 1821	father, John Webber, to son, Henry Webber	GN 5/1/B/1, Harbour Grace Surrogate Court, *Webber and Sweetapple v. Webber*, 1821
18. 1823	mother, Mary Badcock, to son, John Badcock	GN 5/1/B/1, Harbour Grace Surrogate Court minutes, *Badcock v. Mercer*, 1823
19. 1824	father, Charles Shawna, to daughter, Mrs. Bussey	GN 5/1/B/1, Harbour Grace Surrogate Court minutes, *Shawna v. Wilshire*, 1824
20. 1828	father, Philip Adams, to daughter	Col. 150, CNS Archives
21. 1833	father to sons	GN 5/1, Registry of Wills, v. 1, Will of Michael O'Neill
22. 1861	father, John Puchase, to sons, Willis and Arthur Purchase	Col. 150, CNS Archives

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections

APPENDIX C

Appendix C: Occupations of Male Testators

Occupation	Number
1. planter	87
2. fisherman	33
3. farmer	18
4. merchant	15
5. master mariner	7
6. shopkeeper	7
7. cooper	6
8. clergy	6
9. doctor	5
10. carpenter	5
11. dealer	4
12. baker	3
13. boatkeeper	2
14. blacksmith	2
15. teacher	2
16. surveyor	2
17. labourer	2
18. shoemaker	2
19. lighthousekeeper	2
20. mason	2
21. yeoman	2
22. civil officer	1
23. publican	1
24. notary public	1
25. infantry	1
26. navy	1
27. accountant	1
28. bailiff	1

Occupation	Number
29. watchmaker	1
30. tailor	1
31. attorney	1
32. fish culler	1
No occupation given	117
Total	342

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

APPENDIX D

Appendix D: Place of Residence of Testators

Community	Number
1. Adams Cove	3
2. Aquafort	2
3. Bareneed	4
4. Bay Bulls	4
5. Bay de Verde	1
6. Bay of Islands	1
7. Bay Roberts	5
8. Bell Isle	1
9. Bird Island	1
10. Black Head	1
11. Bonavista	7
12. Bonavista Island	1
13. Bread and Cheese Cove	1
14. Brigus	18
15. Broad Cove	2
16. Burin	2
17. Cape Island	1
17. Carbonear	23
18. Carless Harbour	1
19. Catalina	1
20. Chamberlains	1
21. Channel, Port aux Basques	1
22. Change Islands	1
23. Chapel's Cove	1
24. Codroy	1
25. Collinet	1
26. Crokers Cove	1
27. Cuckold's Cove	1

Community	Number
28. Cupids	8
29. Duricle	1
30. English Harbour	1
31. Fermeuse	3
32. Ferryland	4
33. Flat Rock	1
34. Foxtrap	1
35. Freshwater	2
36. Gooseberry Cove	1
37. Grand Bank	1
38. Great Placentia	1
39. Greenspond	7
40. Harbour Grace	20
41. Heart's Content	1
42. Hibbs Cove	1
43. Holyrood	4
44. Indian Islands	2
45. Island Cove	2
46. Isle Valen	1
47. Jobs Cove	1
48. King's Cove	1
49. Little Harbour	1
50. Logy Bay	2
51. Long Pond	1
52. Loon Bay	1
53. Lower Island Cove	3
54. Merasheen	1
55. Mulleys Cove	1
56. Musquitto	3

Community	Number
57. New Bonaventure	2
58. Old Perlican	1
59. Petty Harbour	2
60. Pinchards Island	1
61. Placentia	1
62. Port de Grave	9
63. Portugal Cove	6
64. Quidi Vidi	1
65. Random South	1
66. Red Head Cove	1
67. Renews	1
68. Riverhead	3
69. Salmon Cove	1
70. Ship Cove	4
71. Sound Island	1
72. St. Jacques	1
73. St. John's	130
74. Tassa D'Argent	1
75. Tickle Cove	1
76. Tizzards Harbour	1
77. Torbay	6
78. Trinity	6
79. Turks Gut	2
80. Twillingate	20
81. Upper Island Cove	1
82. Western Bay	1
83. Wild Cove	1
84. Windsor Lake	1
85. Witless Bay	1

Community	Number
86. Outside Newfoundland	24
87. Residence not given	26
Total	423

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

APPENDIX E

Appendix E: Distribution of Property by Each Male Testator

Name	date	wife	children	g.child	col.kin	friends	church
1. Thomas Tracey	1824					*	
2. William Kennedy**	1825						
3. John Landers	1826	*	*		*		
4. Abraham Parsons	1812		*	*			
5. William Danson	1816	*	*				
6. Richard Taylor	1827	*			*		
7. Henry Webber	1826	*	*	*			
8. Charles Denning	1825		*				
9. Michael Mara	1827	*	*				
10. Philip Holmes	1826	*			*		
11. John Codner	1825	*	*	*			
12. Thomas Fennell**	1827						
13. William Coughlan	1812	*	*				
14. George Garland	1821		*	*			
15. Edward O'Donnell	1827				*		
16. John Dambrill	1819	*	*				
17. John Davis*	1827				*		
18. Thomas Green	n.d.	*	*	*			
19. William Searle	1827				*		
20. John Shanahan	1828				*		
21. James Dobie	1826				*		
22. Richard Underhay	1828		*	*			
23. Philip Riely	1827		*				
24. Robert Clarke	1827	*	*				
25. Richard Halfyard	1795	*	*				
26. Michael Ryan	1818	*					
27. William King (Sr.)	1823		*				
28. William Cole	1826		*	*			
29. Denis Sweeny**	1829						
30. Patrick Henley**	1826						

Name	date	wife	children	g. child	col. kin	friends	church
31. John Walsh	1829				*		
32. Peter Healey	1826	*	*	*			
33. John Cuthbert	1825	*	*				
34. John Griffiths	1828	*	*				
35. Charles Mercer	1824	*					
36. Newman Hoyles	1828				*		
37. Samuel Woodley	1824	*	*				
38. John Green	1829		*				
39. Isaac Richards	1828	*	*				
40. James Cross	1828		*				
41. Edward French	1829	*	*				
42. Thomas Nurse	n.d.	*	*				
43. Henry Garland (Sr.)	1823	*	*				
44. Henry Hitchcock	1805	*					
45. Michael Henesy	1827		*				
46. George Bussey	1830		*				
47. William Bartlett	n.d.	*	*				
48. George Dawe (Sr.)	1825		*				
49. Timothy Fogarty	1826	*					
50. Carbery Eagen	n.d.	*	*				
51. James Fewer**	1828						
52. Thomas Scallon	1824				*		*
53. Joseph Rose	1828	*					
54. Patrick Power	1830	*	*				
55. Samuel Hollett	1829	*	*				
56. Thomas Connel	1830	*					
57. Edward Walsh	n.d.	*	*				
58. John O'Brien**	1830						
59. John Kelly	1830				*		*
60. Thomas Handlon	n.d.	*	*				
61. William Johnson (Sr.)	1829	*	*				

Name	date	wife	children	g. child	col. kin	friends	church
62. Henry Parsons	1823	*			*		
63. William Gillespie	1829				*		
64. Michael Connelly	1816			*			
65. Francis Belbin	1830	*	*				
66. James Oakley	1819	*					
67. James Cowan	1827	*					
68. Thomas Brenton	1826	*	*				
69. Philip LeShano	1829		*				
70. Jacob Snow	1830	*	*				
71. John Edgar	1830	*	*				
72. Jacob Moors	1830	*	*				
73. Thomas Cooper	1829	*	*	*			
74. Robert Howell	1823	*	*				
75. Oliver Normore**	1829						
76. Michael Flemming	1831		*				
77. William Hartnett	1830	*	*				
78. Richard Tafe	1826	*					
79. Patrick Shelly	1831	*	*				
80. Bryan Feeney	1831		*				
81. William Donegan	1831				*	*	
82. Michael Mulcahy	1831			*			
83. Jonathan Parsons	1831	*	*				
84. Thomas Mercer	1830				*		
85. Richard Reed **	1824						
86. Charles Kickham	1831	*			*		*
87. John Terrington	1830					*	
88. John Pittman	1831	*	*				
89. Edward Hillier	1830				*		
90. James Gould (Sr.)	1831		*				
91. David Halliday	1831		*				
92. Patrick Foley	1828		*				

Name	date	wife	children	g. child	col. kin	friends	church
93. John Hartery	1826		*				
94. John McKinnon	1831		*				
95. Patrick Mullowney **	1832						
96. William Tuff (Sr.)	1829	*	*				
97. John White	1830		*				
98. Richard Cook	1832				*		
99. Thomas Anderson	1832				*		
100. James Stapleton	1831			*	*		
101. Jordan Henderson	1818	*	*				
102. Rev. Thomas Ewer**	1833						
103. Michael Stack	1832	*					
104. William Scott	1832				*		
105. Joseph Innott	1832	*					
106. Charles Tucker (Sr.)	1832	*	*				
107. Henry Warford	1831	*				*	
108. Martin Walsh	1833				*		
109. Henry Duggan	1833	*	*	*			
110.Timothy Dineen **	1832						
111. Samuel Holwell	1833	*					
112. John Badcock	1833	*	*	*			
113. Solomon Beadon	1832	*	*				*
114. John Walsh	1832	*					
115. Nicholas Wall	1833	*	*				
116. William Getheral (Sr.)	1833	*	*				
117. Nathaniel Woodley	1832	*					
118. William Hogan	1833		*				
119. Thomas McDonald	1833	*	*				
120. Abraham Martin	1833	*	*				
121. Simon Nowlan	1833	*					
122. Rev. Andrew Cleary	1829				*	*	
123. William Murray	1833	*	*	*			

Name	date	wife	children	g. child	col. kin	friends	church
124. Richard Rideout	1834	*	*				
125. William Quin	1834	*			*	*	*
126. William Hayward	1824	*					
127. Edward Reddy	1833	*	*				
128. John Ivamey	1834	*	*	*			
129. Robert Roach	1834		*				
130. Lawrence Murphy	1834	*	*				
131. William Payne	1833		*	*			
132. Thomas Miller	1833	*	*	*			
133. James Brine	1829				*		
134. Michael O'Neill	1833	*	*				
135. James Rennolls	1834		*	*			
136. James Neil	1834		*				
137. John Morris	1834	*	*				
138. Robert Brooks	1833	*	*				
139. Thomas Roberts	1825	*	*				
140. Matthew Toole	1830	*	*	*			
141. John Hanly	1823	*	*				
142. George Goff	1834		*				
143. Timothy Heagan	1832	*			*		
144. William Keating	n.d.	*	*				
145. William Hervey	1835				*		
146. George Meaden	1833	*	*				
147. John Fergus	1814	*	*		*		
148. Joseph Manuel	1834	*	*				
149. John Bishop (Sr.)	1834	*	*				
150. Robert Parsons (Sr.)	1834	*	*				
151. Charles Haley	1826	*	*				
152. John Broom	1834		*				
153. Richard Prendergast	1827	*	*				
154. George Donding	1832		*		*		

Name	date	wife	children	g. child	col. kin	friends	church
155. William Hampton	1835	*	*				
156. Peter McKie	1836	*	*				
157. Richard Penney	1835	*					
158. George Wetch	1835	*	*				
159. Michael Condon	1831				*		
160. James Howell	1835	*	*				
161. James Over	1834		*	*			
162. Robert Brown	1836		*				
163. Thomas Colbourne	1820	*					
164. Arthur Brooking	1834	*	*				
165. Jonas Soper	1848	*	*				
166. John Stuckless	1844	*	*				
167. John Lewis (Sr.)	1849	*	*		*		
168. Nathaniel Munden	1850	*	*				
169. John Johnson (Sr.)	1845	*	*				
170. Edward Hayes	1851	*	*				
171. Thomas Leary	n.d.		*				
172. Samuel Langley	1850	*	*				
173. Robert Snook	1851		*				
174. George Ashman	1849	*					
175. Thomas Fleming	1835				*		
176. Patrick Power	1851				*		*
177. Michael Riley	1846	*	*				
178. John Quigley	1851	*	*				
179. William Munden	1851	*	*	*			*
180. Matthew Doyle	1851	*					
181. Alfred Mayne	1847	*	*				
182. John Forristall	1850				*		*
183. Matthew Cahill	1851	*	*				
184. Benjamin Bowring	1845	*	*				
185. Thomas Williams	1851	*	*		*		

Name	date	wife	children	g. child	col. kin	friends	church
186. John Boyd	1851	*	*				
187. Thomas Dunford	1851	*	*		*		
188. Henry Winsor	1849	*	*				
189. John Carter	1848		*				
190. Thomas Lyte	1847	*			*		
191. Thomas Baker	1843					*	
192. Joseph Brennock	1849	*			*		
193. Stephen Hunt	1850	*	*			*	
194. Henry Taylor	1851		*				
195. Thomas Quinlan	1836	*		*			
196. Thomas Sarell	1851				*	*	
197. Felix McCarthy	1851	*	*				
198. James Butler	1849		*	*	*		
199. John Neville	1845	*	*				
200. Michael Dineen	1850	*	*				
201. Thomas Nurse	1850		*				
202. James Delaney	1846	*	*				
203. Henry Pitts	n.d.	*	*				
204. Michael Dea	1849	*	*				
205. Denis McGrath	1851				*		*
206. James Churchill	1849	*			*		
207. Denis Sullivan	1851	*	*				
208. Robert Munden	1851	*	*		*		
209. William Doyle	1851	*	*		*		*
210. Michael Cullen	1851		*				
211. Robert Lovell	1852				*		
212. William Chafe	1843		*				
213. Francis Sheppard	1852		*				
214. Nathan Clarke	1851	*	*				
215. James Gale	1847	*	*				
216. Simon Jacobs	1852	*	*				

Name	date	wife	children	g. child	col. kin	friends	church
217. Thomas Payne	1847	*	*				
218. Patrick Mullowney	1852	*	*				
219. James Brian	1852	*			*		*
220. Joseph Sheppard	1851				*	*	
221. Abraham Bartlett	1852	*	*				
222. Samuel Hookey	1852	*	*				
223. Jonathan Miller	1851		*				
224. Michael Lahey	1852					*	*
225. George Holbrook	1831	*	*				
226. John Woodford	1852		*				
227. Richard Penney	1836	*					
228. William Cunningham	1850	*	*		*		
229. Michael Dealy	1853	*	*				
230. Patrick Dalton	1841	*	*				
231. John Deane	1853					*	
232. George Burton	1848	*					
233. William Evans	1845	*					
234. Charles Blackman	1852	*	*				
235. John Mackey	1868	*	*				
236. Charles Fagan	1887	*	*				
237. John Chaytor	1892	*	*				
238. James Leary	1899		*	*			
239. Daniel Moore	1898		*				
240. John Garland	1871	*	*				
241. John Bole	1759				*		
242. Thomas Tizzard	1845		*	*			
243. Thomas Manuel	1875		*				
244. Amos Blackler	n.d.	*	*				
245. John Spencer	1862	*	*				
246. James Roberts	n.d.		*				
247. Charles Warr	1869	*	*				

Name	date	wife	children	g. child	col. kin	friends	church
248. Samuel Keefe	1891	*	*				
249. Richard Penny	1836	*					
250. Michael Murphy	1829	*	*				
251. William Bartlett	1850	*	*				
252. Abraham Bartlett	1852	*	*				
253. Richard Nason	1818		*				
254. William Batten	1885				*		
255. Arthur Holdsworth	1874	*	*				
256. Arthur Holdsworth	1860	*	*				
257. William Sweet	1816				*		
258. Joseph Burrage	1815	*	*				
259. Richard Hodder	1817				*		
260.George Brian	1814	*			*		
261. Edward Pudnir	n.d.	*			*		
262. John Coombs	1843	*	*	*			
263. Samuel Hollett	1829	*	*				
264. George Hutchings	1786				*		
265. George Hutchings	1807	*					
266. Samuel Fowler	1808		*				
267. George Williams	1805	*					
268. William Mackay	1808	*	*		*		
269. John Barry	1808	*	*				
270. Thomas Slade	1817	*	*		*		
271. Nicholas Mahany	1831		*				
272. Edward Walmsley	1847		*		*		
273. Cornelius Linfield	1863	*	*				
274. George Every	1865	*					
275. John Spencer	1862	*	*		*		
276. John McLellan	1863		*				
277. John Cadwell	1862	*	*				
278. John Andrews	1865	*	*	*	*		

Name	date	wife	children	g. child	col. kin	friends	church
279. James Lynch	1866	*					
280. Charles Power	1864	*	*				
281. Joseph Keith	1867	*	*				
282. John Cutler	1878	*	*		*		
283. Richard Hatch	1877	*	*	*			
284. William Bragg	n.d.	*	*				
285. Thomas Spracklin	1878	*	*				
286. John English	1878	*	*				
287. Charles Renouf	1878	*	*				
288. Robert Sheppard	1878	*			*		
289. William Wills	1871	*					*
290. William Andrews	1879	*	*				
291. Daniel Blandford	1873	*	*	*			
292. Stephen Cleary	1861	*	*				
293. John Barnes	1880				*		
294. Samuel Penny	1880	*			*	*	*
295. William Parsons	1873				*		
296. Joseph Carew	1882	*					
297. Thomas Perry	1881	*			*		
298. Adam Martin	1885	*					
299. John Burke	n.d.	*	*				
300. Arthur Pitts	1885				*		*
301. Edward Cullen	1886	*	*				*
302. Charles Layton	1887	*					
303. John Allen	1886		*				
304. William Quigley	1887	*	*				
305. William Dyer	1880				*		
306. James Hayward	1886	*					
307. Joseph Colbourne	1838	*			*	*	*
308. William Elms	1851	*	*				
309. John Butler	1852		*				

Name	date	wife	children	g. child	col. kin	friends	church
310. Robert Carter	n.d.	*	*				
311. Lawrence Tobin	1848	*	*				
312. John Peckham	1853				*		
313. Moses Cullen	1853				*		*
314. William Drew	1840				*	*	
315. William Penny	1853	*	*	*	*		
316. William Randle, Sr.	1852	*	*				
317. Maurice Cummins	1852	*			*		
318. Benjamin Williams	1834				*		
319. Richard Nason	1818	*	*			*	
320. John LeDrow	1836	*	*		*		
321. Thomas Barter	1836	*	*				
322. John Pike	1836				*	*	
323. Francis Pike	1835	*	*	*		*	
324. John Janes, Sr.	1836	*	*				
325. John Deady **	1837						
326. John Hervey	1832		*	*			
327. John Wall	1832	*	*				
328. John Penny	1824	*	*				
329. James Hippisley	1833				*		
330. John Stewart	1832		*				
331. Robert Dobie	1837	*					
332. Benjamin Brooks	1836	*					
333. John Dunn	1837				*		
334. Patrick Phelan	1837	*			*		
335. John Gregory	1836	*	*				
336. Nicholas McKee	1837		*				
337. Robert Slade	1829	*	*				
338. Edward Walsh	1837		*				
339. Patrick Stafford	1838	*	*				
340. Richard Stewart	n.d.					*	

Name	date	wife	children	g. child	col. kin	friends	church
341. Samuel Emberley	n.d.	*	*				
342. Thomas Hunt	1836	*	*				

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

** = relationship of inheritors to the testators is not specified in the wills

APPENDIX F

Appendix F: Division of real property and personal property by Male Testators

	Real Property			Personal Property		
Name	widow	son(s)	daughter(s)	widow	son(s)	daughter(s)
1. John Landers	*	*	*	*	*	*
2. Abraham Parsons	-	*	*	-	*	
3. William Danson	*	*	-	*		-
4. Richard Taylor	*	*	*	*	*	*
5. Henry Webber	*	*		*	*	*
6. Charles Denning	-	*	*	-	*	
7. Michael Mara	*		*	*	*	*
8. Philip Holmes	*	-	-	*	-	-
9. John Codner	-	*	*	-		
10. William Coughlan	*	*	*	*	*	*
11. George Garland	-	*	*	-	*	*
12. John Dambrill	*	*	*	*	*	*
13. Thomas Green	-		-	-	*	-
14. Richard Underhay	*	*	*	*	*	*
15. Philip Riely	-	*	-	-		-
16. Robert Clarke	*	*	*	*	*	*
17. Richard Halfyard	*	*	*	*	*	*
18. Michael Ryan	*	-	-	*	-	-
19. William King (Sr.)	-	*	-	-	*	-
20. William Cole	-	*	-	-	*	-
21. Peter Healey	*	-	*	*	-	*
22. John Cuthbert	*	*	-	*	*	-
23. John Griffiths	*	*	*	*	*	*
24. Charles Mercer	*	-	-	*	-	-

the symbol (-) indicates that the wills do not mention a widow, son(s) or daughter(s)

	Real Property			Personal Property		
Name	widow	son(s)	daughter(s)	widow	son(s)	daughter(s)
25. Samuel Woodley	*	*	-	*	*	-
26. John Green	-	*	*	-	*	*
27. Isaac Richards	*	*	*	*	*	*
28. James Cross	-	*	-	-	*	-
29. Edward French	*	*	-	*	*	-
30. Thomas Nurse	*	*	*	*	*	*
31. Henry Garland (Sr.)	*	*	-	*	*	-
32. Henry Hitchcock	*	-	-	*	-	-
33. Michael Henesy	-	*	*	-	*	*
34. George Bussey	-	*		-		*
35. William Bartlett	*	*	-	*	*	-
36. George Dawe (Sr.)	-	*		-		*
37. Timothy Fogarty	*	*	*	*	*	*
38. Carbey Eagen	*	*	*	*	*	*
39. Joseph Rose	*	-	-	*	-	-
40. Patrick Power	*	*	*	*	*	*
41. Samuel Hollett	*	*	-	*	*	-
42. Thomas Connel	*	-	-	*	-	-
43. Edward Walsh	*	*	-	*	*	-
44. Thomas Handlon	*	*	*	*	*	*
45. William Johnson	*	*	*	*	*	*
46. Henry Parsons	*	-	-	*	-	-
47. Francis Belbin	-	-	*	-	-	*
48. James Oakley	-	-	*	-	-	*

	Real Property			Personal Property		
Name	widow	son(s)	daughter(s)	widow	son(s)	daughter(s)
49. James Cowan	-	*	-	-	*	-
50. Thomas Brenton		*	*	*	*	*
51. Philip LeShano	-	*		-	*	*
52. Jacob Snow	*	*	*	*	*	*
53. John Edgar	*	*	*	*	*	*
54. Jacob Moors	*	*		*	*	*
55. Thomas Cooper	*	-	-	-		-
56. Robert Howell	*	-	*	*	-	
57. Michael Fleming	-	*	-	-	*	-
58. William Hartnett	-	*	-	-	*	-
59. Richard Tafe	*	-	-	*	-	-
60. Patrick Shelly		*		*	*	
61. Bryan Feeney	-	*	-	-	*	-
62. Jonathan Parsons	*	*	-	*		-
63. Charles Kickham		-	-	*	-	-
64. John Pittman	*	*	-	*	*	-
65. James Gould (Sr.)	-	*	-	-		-
66. David Halliday	-	*	*	-	*	*
67. Patrick Foley	-	*	-	-	*	-
68. John Hartery	-		*	-	*	*
69. John McKinnon	-	*	*	-	*	*
70. William Tuff (Sr.)	*	*		*	*	*
71. John White	-	-	*	-	-	*
72. Jordan Henderson		*	*	*		

	Real Property			Personal Property		
Name	widow	son(s)	daughter(s)	widow	son(s)	daughter(s)
73. Michael Stack	*	*	-	*	*	-
74. Joseph Innott	*	-	-	*	-	-
75. Charles Tucker (Sr.)	*	*		*	*	*
76. Henry Warford	*	-	-	*	-	-
77. Henry Duggan	*	*	*	*	*	*
78. Samuel Holwell	*	-	-	*	-	-
79. John Badcock		*		*		*
80. Solomon Beadon	*	-		*	-	*
81. John Walsh	*	-	-	*	-	-
82. Nicholas Wall	*	-	*	*	-	*
83. William Getheral	*	*		*		*
84. Nathaniel Woodley	*	-	-	*	-	-
85. William Hogan	-	*	-	-	*	-
86. Thomas McDonald	*	*	*	*	*	*
87. Abraham Martin	*	*	-	*		-
88. Simon Nowlan	*	-	-	*	-	-
89. William Murray		-	*	*	-	*
90. Richard Rideout	*	*		*	*	*
91. William Quinn		-	-	*	-	-
92. William Hayward	*	-	-	*	-	-
93. Edward Reddy	*	*	*	*	*	*
94. John Ivamey	*	*	-	*	*	-
95. Robert Roach	-		-	-	*	-
96. Lawrence Murphy	*	*	-	*	*	-

	Real Property			Personal Property		
Name	widow	son(s)	daughter(s)	widow	son(s)	daughter(s)
97. William Payne	-	*		-	*	*
98. Thomas Miller		*	-	*	*	-
99. Michael O'Neill		*	*	*	*	*
100. James Rennolls	-	*	-	-	*	-
101. James Neil	-	*	-	-	*	-
102. John Morris	*	*	-	*	*	-
103. Robert Brooks	*	*	*	*	*	*
104. Thomas Roberts	*			*	*	*
105. Matthew Toole	*	*	*	*	*	*
106. John Hanly	*	*	*	*	*	*
107. George Goff	-	-	*	-	-	*
108. Timothy Heagan	*	-	-	*	-	-
109. William Keating	*	*	*	*	*	*
110. George Meaden	*	*	*	*	*	*
111. John Fergus		-		*	-	*
112. Joseph Manuel		*		*	*	*
113. John Bishop (Sr.)	*			*	*	*
114. Robert Parsons (Sr.)	*	*	*	*	*	*
115. Charles Haley		*	*	*	*	*
116. John Broom	-	*	*	-	*	*
117. Richard Prendergast	*	-	-	*	-	-
118. George Donding	-	*	-	-		-
119. William Hampton	-	*	*	-	*	*
120. Peter McKie	*			*	*	*

	Real Property			Personal Property		
Name	widow	son(s)	daughter(s)	widow	son(s)	daughter(s)
121. Richard Penney	*	-	-	*	-	-
122. George Wetch	*	*	-	*	*	-
123. James Howell	*		-		*	-
124. James Over	-	*	-	-	*	-
125. Robert Brown	-	*	*	-	*	*
126. Thomas Colbourne	*	-	-	*	-	-
127. Arthur Brooking		-		*	-	*
128. Jonas Soper	*	*	*	*	*	*
129. John Stuckless	-	*		-	*	*
130. Nathaniel Munden	*	*	*	*	*	*
131. John Johnson (Sr.)	-	*		-	*	*
132. Edward Hayes	*	*	-	*	*	-
133. Thomas Leary	-	*	*	-	*	*
134. Samuel Langley	*	-	*	*	-	*
135. John Lewis (Sr.)	-	*	-	-	*	-
136. Robert Snook	-	*	-	-	*	-
137. George Ashman	*	-	-	*	-	-
138. Michael Riley		*	-	*	*	-
139. John Quigley	*			*	*	*
140. William Munden	*	*	*	*	*	*
141. Matthew Doyle	*	-	-	*	-	-
142. Alfred Mayne	*			*	*	*
143. Matthew Cahill	*	-	*	*	-	*
144. Benjamin Bowring	*	*				*

	Real Property			Personal Property		
Name	widow	son(s)	daughter(s)	widow	son(s)	daughter(s)
145. Thomas Williams	*	-		*	-	*
146. John Boyd	*	-		*	-	*
147. Thomas Dunford	*	-	*	*	-	*
148. Henry Winsor	*	*	*	*	*	*
149. John Carter	-	*	-	-	*	*
150. Thomas Lyte	*	-	-	*	-	-
151. George Hutchings	*	-	-	*	-	-
152. Joseph Brennock	*	-	-	*	-	-
153. Stephen Hunt	*			*	*	*
154. Henry Taylor	-	*	-	-	*	-
155. Thomas Quinlan	*	-	-	*	-	-
156. Felix McCarthy	*	*	*	*	*	*
157. James Butler	-	*	-	-		-
158. John Neville	-	*		-		*
159. Thomas Nurse	-	*	*	-	*	*
160. James Delaney	-	*	*	-	*	*
161. Henry Pitts	*	*	*	*	*	*
162. Michael Dea	*	*	*	*	*	*
163. James Churchill	*	-	-	*	-	-
164. Denis Sullivan	*	*	*	*	*	*
165. Robert Munden	*	-		*	-	*
166. William Doyle	*	*	*	*	*	*
167. Michael Cullen	-	*	-	-	*	-
168. William Chafe	-	*	-	-	*	-

	Real Property			Personal Property		
Name	widow	son(s)	daughter(s)	widow	son(s)	daughter(s)
169. Francis Sheppard	-	-	*	-	-	
170. Nathan Clarke	-	*		-	*	*
171. James Gale	*	*	*	*	*	*
172. Simon Jacobs	*	*	-		*	-
173. Thomas Payne	-	*	-	-	*	-
174. Patrick Mullowney	*	*	*	*	*	*
175. James Brian	*	-	-	*	-	-
176. Abraham Bartlett		*		*		*
177. Samuel Hookey	*		-		*	-
178. Jonathan Miller	-	-	*	-	-	*
179. George Holbrook	*	*	*	*	*	*
180. John Woodford	-	*	-	-	*	-
181. Richard Penney	*	-	-	*	-	-
182. Wm. Cunningham	*	-	*	*	-	*
183. Patrick Dalton	*	-	*	*	-	*
184. George Burton	*	-	-	*	-	-
185. William Evans	*	-	-	*	-	-
186. Charles Blackman	*	-	-	*	-	-
187. John Mackey	*	-	*	*	-	*
188. Charles Fagan	*	*	-	*	*	-
189. John Chaytor	*	*	*			*
190. James Leary	-	*	*	-	*	*
191. Daniel Moore		*	-	*		-
192. John Garland	*	*		*	*	*

	Real Property			Personal Property		
Name	widow	son(s)	daughter(s)	widow	son(s)	daughter(s)
193. Thomas Tizzard	-	*	*	-	*	*
194. Amos Blackler	*	*	-	*	*	-
195. John Spencer	*	*	-	*	*	-
196. James Roberts	-	*	-	-	*	-
197. Charles Warr	*	*		*	*	*
198. Samuel Keefe	*	*	-	*	*	-
199. Richard Penny	*	-	-	*	-	-
200. Michael Murphy	*	-		*	-	*
201. William Bartlett	*	*	-	*	*	-
202. Abraham Bartlett	*	*		*	*	*
203. Richard Nason		-		*	-	*
204. Joseph Burrage	*	-	*	*	-	*
205. George Brian	*	-	-	*	-	-
206. Edward Pudnir	*	-	-	*	-	-
207. Samuel Hollett	*	*	-	*	*	-
208. Samuel Fowler	-	*	*	-	*	*
209. George Williams	*	-	-	*	-	-
210. William Mackey	-	-	*	-	-	*
211. John Barry	*	*	*	*	*	*
212. Thomas Manuel	-	*		-	*	*
213. John LeDrow	*	*		*	*	*
214. Thomas Barter	*	-	*	*	-	*
215. Francis Pike		-		*	-	*
216. John Janes (Sr.)	*	*	-	*	*	-

	Real Property			Personal Property		
Name	widow	son(s)	daughter(s)	widow	son(s)	daughter(s)
217. John Hervey	-	*	-	-	*	-
218. John Wall	*	*	*			*
219. John Penny	*	*	-	*	*	*
220. Robert Dobie	*	-	-	*	-	-
221. Benjamin Brooks	*	-	-	*	-	-
222. Patrick Phalen	*	-	-	*	-	-
223. John Gregory	*	*	*	*	*	*
224. Nicholas McKee	-		-	-	*	-
225. Edward Walsh	-	*	-	-	*	-
226. Patrick Stafford	*	*	*	*	*	*
227. Samuel Emberley	*	*	*	*	*	*
228. Thomas Hunt	*	*	-	*	*	-
229. Michael Dineen	*	*	-	*	*	-
230. Michael Dealy	*	*	*	*	*	*
231. Arthur Holdsworth	*	*	*	*	*	*
232. Arthur Holdsworth	*	*	*	*	*	*
233. John Coombs	*	*	-	*	*	-
234. Thomas Slade		*		*	*	*
235. Nicholas Mahany	-	*		-	*	*
236. Edward Walmsley	-		-	-	*	-
237. Cornelius Linfield	*	*		*	*	*
238. George Every	*	-	-	*	-	-
239. John Spencer	*	*	-	*	*	-
240. John McLellan	*	*		*	*	*
241. John Cadwell	*	-	*	*	-	*
242. John Andrews		*	*	*	*	*
243. John Stewart	*	*	-	*	*	-
244. Robert Slade	*	*	*	*	*	*

	Real Property			Personal Property		
Name	widow	son(s)	daughter(s)	widow	son(s)	daughter(s)
245. James Lynch	*	-	-	*	-	-
246. Charles Power	*	*	*	*	*	*
247. Joseph Keith	*	*	*	*	*	*
248. John Cutler	*	-	*		*	*
249. Richard Hatch	*	*	-	*	*	-
250. William Bragg	*	*	*	*	*	*
251. Thomas Spracklin	*	*	*	*	*	*
252. John English	*	-	*	*	-	*
253. Charles Renouf	*	*	*	*	*	*
254. Robert Sheppard	*	-	-	*	-	-
255. William Wills	*	-	-	*	-	-
256. William Andrews	*	*	*	*	*	*
257. Daniel Blandford	*	-	*	*	-	*
258. Stephen Cleary	*	*		*	*	*
259. Samuel Penny		-	-	*	-	-
260. Joseph Carew	*	-	-	*	-	-
261.Thomas Perry	*	-	-	*	-	-
262. Adam Martin	*	-	-	*	-	-
263. John Burke	*	*	*	*	*	*
264. Edward Cullen	*	-	*	*	-	*
265. Charles Layton	*	-	-	*	-	-
266. John Allen	-	*	-	-	*	-
267. William Quigley	*	*	-	*	*	-
268. James Hayward	*	-	-	*	-	-
269. Joseph Colbourne		-	-	*	-	-
270. William Elms		*	-	*		-
271. John Butler	-	*		-	*	*

	Real Property			Personal Property		
Name	widow	son(s)	daughter(s)	widow	son(s)	daughter(s)
272. Robert Carter	*	*	*	*	*	*
273. Lawrence Tobin	*	*		*	*	*
274. William Penny	*	*	*	*	*	*
275. William Randle, Sr.	*	*		*	*	*
276. Maurice Cummins	*	-	-		-	-

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

APPENDIX G

Appendix G: Distribution of Property by Each Female Testator

Name	date	m.status	children	g.child	col.kin	friends	church
1. Ann Snelgrove	1822	widow	*	*		*	
2. Bridget Flannery	1824	-	*				
3. Elizabeth Codner	1823	widow	*				
4. Mary Tucker **	1828	-					
5. Susannah Warne	1823	widow	*				
6. Eliza Pike	1816	spinster			*		
7. Mary Hedderson	1829	widow	*				
8. Mary Spracklin	1829	widow	*				
9. Mary Stretton	Nd.	widow			*	*	
10. Martha Butt	1811	-			*		
11. Elizabeth Creasy	1832	widow			*		
12. Margaret Griffith	1832	widow	*				
13. Jane Adams	1831	widow	*				
14. Margaret Aylward	1831	-		*			
15. Elizabeth Brine	1834	-	*				
16. Sarah Heaney	1832	widow	*	*			
17. Mary Undry	1832	widow	*			*	
18. Jane Furneaux	1834	widow	*	*			
19. Anne Batten	1835	widow	*		*		
20. Susanna Heighington	1830	widow			*		
21. Charlotte Bowring	1848	widow	*				
22. Ellen Bradbury	1851	-			*		
23. Lucretia Dickson	1851	spinster			*		
24. Susanna Cole	1845	widow	*				
25. Rachel Veitch	1851	-	*				
26. Mary Ferris	1850	widow			*	*	*
27. Margaretta Keating	1847	spinster			*		
28. Rebecca Fry	1850	widow		*			
29. Emelyn Hill	1844	widow	*				

Name	date	m. status	children	g. child	col. kin	friends	church
30. Catherine Dickson	1843	widow	*				
31. Eleanor Little	1850	widow	*				
32. Eunice Blainey	1852	widow			*	*	
33. Elizabeth Wiley	1850	widow	*				
34. Jane Taylor	1852	widow	*		*		
35. Emma Gaden	1841	widow	*				
36. Ruth Sydney Holbrook	1851	widow	*				
37. Mary Tobin	1890	widow	*		*		*
38. Edith Nicholson Brooks	1830	spinster			*	*	
39. Amelia Davis	1849	-			*		
40. Jane Cooke	1795	-			*		
41. Catherine Redmond	1890	widow		*			
42. Margaret Walsh	1898	widow	*	*			
43. Ann Lyte*	1874	widow					
44. Emma Porter	1873	widow	*				
45. Elizabeth Wrapson*	Nd.	-					
46. Elizabeth Tucker	1780	widow	*				
47. Lucretia Dickson	1860	spinster			*		
48. Sarah Harris	1834	widow	*				
49. Louisa Maria Lander	1892	spinster			*	*	
50. Elizabeth Roberts	1852	widow	*				
51. Jane Hally	1853	spinster			*		
52. Mary Power	1866	widow	*		*		
53. Charlotte Keating	1858	spinster			*		
54. Ann Flavin	1864	widow	*				
55. Theresa Dwyer	1879	spinster			*		
56. Bridget Kennawidge	1878	widow	*				
57. Margaret White	1878	widow	*	*			
58. Anstice Gorman	1828	spinster			*		
59. Mary Pudnir **	1821	-					
60. Mary Hedderson	1829	widow	*				

Name	date	m.status	children	g. child	col. kin	friends	church
61. Anne O'Brien	1807	widow		*			
62. Hannah Langman	1796	widow			*		
63. Frances Gosse	1836	widow	*	*			
64. Catherine McGrath	1831	widow		*	*		
65. Catherine Parsons	1831	widow	*				
66. Elizabeth Perrington	1842	spinster			*	*	
67. Susan Noble	1841	widow	*	*		*	
68. Catherine Parrott	1843	widow	*		*	*	
69. Julia Henley	1843	widow	*	*			
70. Elizabeth Tremils	1882	widow			*		
71. Mary Nuttall	1879	widow	*				
72. Catherine Walsh	1885	widow	*				
73. Jane Roberts	1886	widow	*	*			
74. Elizabeth Doyle	1885	widow	*			*	*
75. Mary Ryan	1882	widow	*				
76. Elizabeth Fry **	1888	spinster					
77. Mary Ann Hutchings	1881	widow	*				
78. Susan Humphries	1884	widow		*			
79. Ann Lynch	1887	widow	*		*		*
80. Mary Gatherall	1891	married	*				
81. Louisa Miller	1890	married	*				

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

** = relationship of inheritors to testators is not specified in the wills

APPENDIX H

Appendix H: Division of Real Property and Personal Property by Female Testators

	Real Property		Personal Property	
Name	son(s)	daughter(s)	son(s)	daughter(s)
1. Ann Snelgrove				*
2. Bridget Flannery	-	*	-	*
3. Elizabeth Codner	*		*	*
4. Susannah Warne	-	*	-	*
5. Mary Hedderson	*		*	*
6. Mary Spracklin	*	*	*	*
7. Margaret Griffith	*	*		
8. Jane Adams			*	*
9. Elizabeth Brine	*	-	*	-
10. Sarah Heaney	*	*	*	*
11. Mary Undry	*	-	*	-
12. Jane Furneaux	*		*	*
13. Anne Batten	*	-	-	-
14. Charlotte Bowring	*		*	*
15. Susanna Cole			*	*
16. Rachel Veitch	*		*	*
17. Emelyn Hill	*	*	*	*
18. Catherine Dickson			*	*
19. Eleanor Little			*	*
20. Elizabeth Wiley	*	*	*	*
21. Jane Taylor	*		*	*
22. Emma Gaden	*	-	*	-
23. Ruth Sydney Holbrook	-	*	-	*
24. Mary Tobin	*	-		-
25. Margaret Walsh	*	-	*	-
26. Emma Porter	*	*	*	
27. Elizabeth Tucker	*			*
28. Sarah Harris	*	*	*	*

	Real Property		Personal Property	
Name	son(s)	daughter(s)	son(s)	daughter(s)
29. Elizabeth Roberts				*
30. Mary Power	*		*	*
31. Ann Flavin	-	*	-	*
32. Bridget Kennawidge	-		-	*
33. Margaret White	*		*	*
34. Mary Hedderson	*			*
35. Frances Gosse	*	*	*	*
36. Catherine Parsons	*	-	*	-
37. Susan Noble	-		-	*
38. Catherine Parrott		-	*	-
39. Julia Henley		*		*
40. Mary Nuttall	-	*	-	*
41. Catherine Walsh	*	*	*	*
42. Jane Roberts	-	*	-	
43. Elizabeth Doyle			*	*
44. Mary Ryan	*	*	*	*
45. Mary Ann Hutchings	-	*	-	*
46. Ann Lynch	-	*	-	*
47. Mary Gatherall	-	*	-	*
48. Louisa Miller	*	-	*	-

Sources: PANL, GN 5/1, Registry of Wills, GN 5, Court Records, Collections; Registry of Deeds, Miscellaneous Deeds and Wills, 1744 - 1810; CNS Archives, Collections.

APPENDIX I

CAP. XI.

An Act to amend the Law relating to the Property of Married Women.

[Passed 26th April, 1876.]

BE it enacted by the Governor, Legislative Council and Assembly, in Legislative Session convened, as follows:— Enacting Clause.

I.—The Wages and Earnings of any Married Woman, acquired or gained by her after the passing of this Act, in any employment, occupation, or trade, in which she is engaged, or which she carries on separately from her husband, and also any Money or Property so acquired by her through the exercise of any literary, artistic or scientific skill, and all investments of such Wages, Earnings, Money, or Property, shall be deemed and taken to be Property held and settled Property acquired by a married woman to be deemed held to her separate use;

to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such Wages, Earnings, Money and Property: Provided that a notice be published in the *Royal Gazette* and one other Newspaper in this Colony, for One Month, setting forth that such Married Woman carries on or intends to carry on such employment, occupation, or trade, specifying the same, separately from her husband.

Her receipts a good discharge;

Proviso: Publication.

II.—Any deposit hereafter made in any Bank in this Colony, in the name of a Married Woman, or in the name of a Woman who may marry after such deposit, shall be deemed to be the separate Property of such Woman, and the same shall be accounted for and paid to her as if she were an unmarried Woman, provided that such deposit be made *bona fide* and not with intent to defraud Creditors.

Deposits in name of married woman separate property;

Proviso: *bona fides.*

III.—Any Married Woman, or any Woman about to marry, may apply to the Receiver General of the Colony, or other duly authorised officer, that any sum of Money forming part of the Public Debt of this Colony, and not being less than Two Hundred Dollars, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to and made to stand in the name or intended name of the woman as a Married Woman entitled to her separate use, and on such sum being so transferred, and the Debentures or other necessary documents made out in her name, the same shall be deemed to be the separate property of such woman, and shall be transferred, and the interest or dividend paid thereon, as if she were an Unmarried Woman.

Application to Receiver General for transfer of Debentures as separate property;

Payment of interest.

IV.—Any Married Woman, or any Woman about to be married, may apply in writing to the Directors or Manager of any Joint Stock Company, that any Stock of such Company to which the woman so ap-

Registration of Stock in Joint Stock Company, subject to Bye-laws.

plying is entitled, may be registered in the Books of the Company in her name or intended name, as a Married Woman entitled to her separate use; and it shall be the duty of such Directors or Manager, subject always to the Bye-laws of the said Joint Stock Company, to register such shares or Stock accordingly, and the same, upon being so registered, shall be deemed to be the separate property of such woman, and shall be transferred and the dividends and profits paid as if she were an Unmarried Woman.

Supreme Court may order re-transfer in certain cases.

V.—If any money so deposited in any Bank, any money so invested in the Public Funds of the Colony, or in any Joint Stock Company, as mentioned in the four preceding Sections, be made by a Married Woman by means of money of her husband, without his consent, the Supreme Court of this Colony may, upon an application under Section Eighth of this Act, order such investments, deposits in Banks, and the dividends, interest and profit thereon, or any part thereof, to be transferred and paid to the husband.

Act not to apply to investments made in fraud of Creditors.

VI.—Nothing herein contained in reference to monies deposited in Banks, or money invested in the Public Funds of this Colony, or in Shares or Stock of any Company, shall, as against Creditors of the husband, give validity to any deposit or investment of monies of the husband made in fraud of such Creditors, and any monies so deposited or invested may be followed as if this Act had not been passed.

Property acquired by will, deed, &c., separate property;

VII.—Where any woman, married after the passing of this Act, shall, during her marriage, become entitled to any property, as next of kin to an intestate, or under any deed, will or gift, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same; provided such bequest, gift

Proviso: *bona fides.*

or assignment, be made *bona fide*, and without intent to defraud Creditors.

Application may be made to a Judge of Supreme Court upon questions between husband and wife;

VIII.—In any question between husband and wife, as to property declared by this Act to be the separate property of the wife, either party may, on giving notice to the other party, apply to a Judge of the Supreme Court, and thereupon such Judge may make such order, direct such enquiry, and award such costs, as he shall think fit: Provided, that when any order is made by such Judge, either party shall be entitled to a re-hearing, as under Section Twenty-five, Chapter Twenty-eight, of the Consolidated Statutes, entitled "Proceedings in Equity," and the Judge may, if either party so require, hear the application in his private room.

Proviso.

Married woman may effect life policy.

IX.—A Married Woman may effect a policy of insurance upon her own life, or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall secure accordingly, and the contract in such policy shall be as valid as if made with an Unmarried Woman.

Policy effected for benefit of wife or children to be deemed a trust for separate use of wife or children;

X.—A policy of insurance effected by any married man on his own life and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall secure and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or his Creditors or form part of his Estate. When the sum secured by the policy becomes payable, or at any time previously, a Trustee thereof may be appointed by the Supreme Court or a Judge thereof, upon the motion of any persons interested therein, and the receipt of such Trustee shall be a good discharge to the assurers. If

Trustee may be appointed;

it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his Creditors, they shall be entitled to receive, out of the sum secured, an amount equal to the premiums so paid, with interest thereon. When effected in fraud.

XI.—A Married Woman may maintain an action in her own name for the recovery of any wages, earnings, money and property, by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, executed before marriage, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels and property, belong to her as an unmarried woman, and in any indictment or other proceedings, it shall be sufficient to allege such wages, earnings, money, chattels and property, to be her property. Married woman may sue in her own name; And have in her own name civil and criminal remedies. Allegation of property in indictments.

XII.—A husband shall not, by reason of any marriage which shall take place after this Act shall have come into operation, be liable for the debts of his wife contracted before marriage; but the wife shall be liable to be sued for such debts, and any property belonging to her for her separate use, shall be liable to satisfy such debts as if she had continued unmarried: Provided, that if it shall appear that she have made any assignment of her property to her husband with intent to defraud Creditors, the husband shall be liable to such Creditors to the extent of the property so assigned. Liability of husband for wife's debts; and of wife; Proviso.

XIII.—This Act may be cited as the "Married Woman's Property Act," 1876. Title.

APPENDIX J

This Act not to affect Title 23, Cap. 83, Con. Stat., or 36 Vic., Cap. 13.

XVII.—Nothing in this Act contained shall be construed to apply to, or in any way affect, Title XXIII., Chapter 83, of the Consolidated Statutes, entitled "Of Storing Gunpowder in the Towns of St. John's, Harbor Grace or Carbonear," or the Act passed in the Thirty-sixth year of the Reign of Her present Majesty, Chapter 13, entitled "An Act to regulate the Storing of Kerosene, Parafine, Petroleum, Naphtha, and other Inflammable Oils."

Governor may declare limits of Towns, &c.

XVIII.—The limits of Towns or Settlements in this Colony, other than St. John's, Harbor Grace and Carbonear, may, for the purposes of this Act, be declared and regulated by the Governor, by Proclamation, to be published in the *Royal Gazette*.

CAP. XI.

An Act to amend the Law relating to the Property of Married Women.

[PASSED 21ST APRIL, 1883.]

BE it Enacted by the Administrator of the Government, Legislative Council and Assembly, in Legislative Session convened, as follows :— Enacting Clause.

I.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing, by Will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any Trustee. Married women to be capable of holding property and of contracting as a *feme sole*.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of sueing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action, or other legal proceeding, brought by or taken against her, and any damages or costs recovered by her in any such action or proceeding shall be her separate property, and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shewn.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind, not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the Insolvency laws in the same way as if she were a *feme sole*.

Property of a woman married after this Act to be held by her as a *feme sole*.

II.—Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money or property gained or acquired by her in any employment, trade or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Loans by wife to husband.

III.—Any money or other estate of the wife lent or entrusted by her to her husband, for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his insolvency, under reservation of the wife's claim to a dividend, as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

Execution of general power.

IV.—The execution of a general power by Will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Property acquired after this Act by a woman married before this Act to be held by her as a *feme sole*.

V.—Every woman, married before the commencement of this Act, shall be entitled to have and to hold, and to dispose of, in manner aforesaid, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money and property so gained or acquired by her as aforesaid.

As to stock, &c., to which a married woman is entitled.

VI.—All deposits in any Savings' Bank, or in any other Bank, and all sums of money forming part of the Public Debt of this Colony, and all Government Debentures, and all Shares, Stock, Debentures, Debenture Stock, or other interests of, or in, any Bank, Corporation, Company, or Public Body, municipal, commercial, or otherwise, or of, or in, any industrial, provident, friendly, benefit, building, or loan Society, which, at the commencement of this Act, are standing in the sole name of any married woman, shall be deemed, unless and until the contrary be shewn, to be the separate property of such married woman, and the fact that any such deposit, sum or sums of money forming part of the said Public Debt, Share, Stock, Debenture, Debenture Stock, or other interest, as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Receiver General, and all Directors, Managers, and Trustees, of every such Bank, Corporation, Company, Public Body, or Society, as aforesaid, in respect thereof.

As to stock, &c., to be transferred, &c., to a married woman.

VII.—All sums forming part of the Public Debt of this Colony, and all such deposits as are mentioned in the last preceding Section, and all Shares, Stock, Debentures, Debenture Stock, or other interests of, or in, any such Bank, Corporation, Company, Public Body, or Society, as aforesaid, which, after the commencement of this Act, shall

be allotted to, or placed, registered, or transferred in or into, or made to stand in the sole name of any married woman, shall be deemed, unless and until the contrary be shewn to be her separate property, in respect of which, so far as any liability may be incident thereto, her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not: Provided always, that nothing in this Act shall require or authorize any Bank, Corporation, or Company to admit any married woman to be a holder of any Shares or Stock therein, to which any liability may be incident, contrary to the provisions of any Act of the Legislature of this Colony, or of any Charter, Bye-law, Articles of Association, or Deed of Settlement regulating such Bank, Corporation or Company.

Investment in joint names of married women and others.

VIII.—All the provisions hereinbefore contained as to deposits in any Savings' Bank, or in any other Bank, sums forming part of the Public Debt of this Colony, Government Debentures, Shares, Stock, Debentures, Debenture Stock, or other interests of, or in, any such Bank, Corporation, Company, Public Body, or Society, as aforesaid, respectively, which, at the commencement of this Act, shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to, or into, or made to stand in the sole name of a married woman, shall respectively extend and apply so far as relates to the estate, right, title, or interest of the married woman to any of the particulars aforesaid, which, at the commencement of this Act, or at any time afterward shall be standing in, or be allotted to, placed, registered, or transferred to, or into, or made to stand in the name of any married woman, jointly with any persons or person other than her husband.

IX.—It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the

transfer of any such deposits as aforesaid, or any sum forming part of the Public Debt of this Colony, or of any Government Debentures, or of any Share, Stock, Debenture, Debentnre Stock, or other benefit, right, claim, or other interest of or in any such Bank, Corporation, Company, Public Body or Society, as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married women, and any other persons or person, not being her husband.

As to stock, &c., standing in the joint names of a married woman and others.

X.—If any investment in any such deposit as aforesaid, or in any part of the Public Debt of this Colony, or in any Government Debenture, or in any Share, Stock, Debenture, or Debenture Stock, of or in any Bank, Corporation, Company, or Public Body, municipal, commercial, or otherwise, or in any Share, Debenture, benefit, right or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building or loan Society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Supreme Court, or a Judge thereof may, upon an application under Section Seventeen of this Act, order such investment, and the dividends thereof, or any part thereof to be transferred and paid respectively to the husband, and nothing in this Act contained shall give vaiidity, as against creditors of the husband, to any gift by a husband to his wife, of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of monies of the husband made by or in the name of his wife in fraud of his creditors; but any monies so deposited or invested may be followed as if this Act had not passed.

Fraudulent investments with money of husband.

XI.—A married woman may, by virtue of the power of making contracts, hereinbefore contained, effect a policy of assurance upon her own life, or the life of her husband, for her separate use, and the same, and all benefit thereof, shall enure accordingly. A policy of assurance, effected

Moneys payable under policy or assurance not to form part of estate of the insured.

by a man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favor of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the assured, or be subject to his or her debts; provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the assured, they shall be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid. The assured may, by the policy or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and, from time to time, appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the assured, and his or her legal personal representatives, in trust for the purposes aforesaid. If at the time of the death of the assured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee, or trustees, or a new trustee or new trustees, may be appointed by the Supreme Court or a Judge thereof. The receipt of a trustee or trustees duly appointed, or in default of any such appointment, or in default of notice to the Assurance Office, the receipt of the legal personal representative of the assured shall be a discharge to the office for the sum secured by the policy, or for the value thereof in whole or in part.

Remedies of married woman for protection and security of separate property.

XII.—Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil reme-

dies and also (subject, as regards her husband, to the proviso hereinafter contained), the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this Section, it shall be sufficient to allege such property to be her property; and in any proceeding under this Section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary, notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband, by virtue of this Act, while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert his wife.

Wife's ante nuptial debts and liabilities.

XIII.—A woman after her marriage shall continue to be liable in respect and to the extent of her separate property, for all debts contracted, and all contracts entered into, or wrongs committed by her before her marriage; and she may be sued for any such debt, and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property, and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in his Act shall operate to increase or diminish the liability of any woman, married before the commencement of this Act, for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may

become entitled by virtue of this Act, and to which she would not have been entitled for her separate use if this Act had not passed.

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

XIV.—A husband shall be liable for the debts of his wife contracted, and for all contracts entered into, and wrongs committed by her before marriage, to the extent of all property whatsoever belonging to his wife, which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bona fide* recovered against him in any proceeding at law, in respect of any such debts, contracts or wrongs, for, or in respect of which his wife was liable before her marriage, as aforesaid; but he shall not be liable for the same any further or otherwise, and any Court in which a husband shall be sued for any such debt shall have power to direct any enquiry or proceedings which it may think proper, for the purpose of ascertaining the nature, amount or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband, married before the commencement of this Act, for or in respect of any such debt or other liability of his wife as aforesaid.

Suits for ante-nuptial liabilities.

XV.—A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action, brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against the husband and wife jointly, if it appears that the

husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally, and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Act of wife liable to criminal proceedings.

XVI.—A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Questions between husband and wife, as to property, to be decided in a summary way.

XVII.—In any question between husband and wife, as to the title to or possession of property, either party, or any such Bank, Corporation, Public Body, Company, or Society, as aforesaid, in whose books any Stocks, Funds, or Shares of either party are standing, or in case of investment in the Public Debt of this Colony, the Receiver General for the time being may, on giving notice to the other party, apply to a Judge of the Supreme Court, and thereupon such Judge shall make such order, direct such enquiry, and award such costs as he shall think fit; provided, that when any order is made by such Judge, either party, or any such Bank, Corporation, Company, Public Body, or Society, as aforesaid, or such Receiver General, shall be entitled to a rehearing, as under Section Twenty-five, Chapter Twenty-eight, of the Consolidated Statutes, entitled "Of Proceedings in Equity," and any Acts in amendment thereof, and the Judge may, if either party, or any such Bank, Corporation, Company, Public Body, or Society, as aforesaid, or such Receiver General, so require, hear the application in his private room; provided also, that any such Bank, Corporation, Company, Public Body, or Society, as aforesaid, or such Receiver General, shall, in the matter of any such application, for the pur-

poses of costs or otherwise, be treated as a stake holder only.

Married woman as an executrix or trustee.

XVIII.—A married woman who is an executrix or administratrix alone, or jointly with any other person or persons, of the estate of any deceased person, or a trustee alone, or jointly, as aforesaid, of property subject to any trust, may sue or be sued, and may transfer, or join in transferring, any such deposit, as aforesaid, or any sum forming part of the Public Debt of this Colony, or any Government Debenture, or any Share, Stock, Debenture, Debenture Stock, or other benefit, right, claim, or other interest of, or in any such Bank, Corporation, Company, Public Body, or Society, in that character, without her husband, as if she were a *feme sole*.

Saving of existing settlements and the power to make future settlements.

XIX.—Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made, or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or hereafter to be attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before her marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Married woman liable for the maintenance of her children.

XX.—A married woman having separate property shall be subject to all such liability for the maintenance of her children and grand-children, as the husband is now by law subject to for the maintenance of her children and grand-children; provided always, that nothing in this Act

shall relieve her husband from any liability imposed upon him by law to maintain her children or grand-children.

Repeal of 39th Vic., Cap. 11.

XXI.—The "Married Woman's Property Act, 1876," is hereby repealed: Provided, that such repeal shall not affect any act done or right acquired while such Act was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued, under the provisions of the said repealed Act, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Legal representative of married woman.

XXII.—For the purposes of this Act, the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities, and be subject to the same jurisdiction, as she would be if she were living.

Interpretation of terms.

XXIII.—The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act, as to the liabilities of married women, shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman, being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Short Title.

XXIV.—This Act may be cited as "The Married Women's Property Act, 1883.

APPENDIX K

CAP. XVII.

An Act to amend the Married Women's Property Act, 1883.

[PASSED 4TH JULY, 1895.]

Enacting clause.

BE it enacted by the Governor, the Legislative Council and House of Assembly, in Legislative Session convened, as follows:—

Effect of contracts by married women.

1. Every contract hereafter entered into by a married woman, otherwise than as agent:

(a.) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(b.) Shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c.) Shall also be enforceable by process of law against all property which she may thereafter, while discovert, be possessed of or entitled to:

Provided that nothing in this section contained shall render available, to satisfy any liability or obligation arising out of such contract, any separate property which at that time or thereafter she is restrained from anticipating.

Costs may be ordered to be paid out of property subject to restraint on anticipation.

2. In any action or proceeding now or hereafter instituted by a woman, or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint or anticipa-

tion, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise, as may be just.

Will of married woman.

3. Section 14 of chapter 30, title V., of the Consolidated Statutes of Newfoundland, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or re-published after the death of her husband.

Repeal.

4. Sub-sections three and four of section one of the Married Women's Property Act, 1883, are hereby repealed.

Short title.

5. This Act may be cited as "The Married Women's Property Act, 1895."

BIBLIOGRAPHY

PRIMARY SOURCES

I. Manuscripts

A. Centre for Newfoundland Studies Archives

MF (Manuscript File) 012, Archibald Buchanan
Collection consists of a paper entitled, "Concerning Landed Property in Newfoundland", which surveys land usage and the laws as they were in the eighteenth century and affected the inhabitants of the island. Photocopied from the original: British Library. Manuscript. Additional 38347, f. 373 et seq. London, England.

MF 048, Will of John Guy
Collection consists of a photocopy of the will of John Guy, colonizer, dated February 21, 1625.

MF 049, Will of John Guy
Collection consists of a photocopy of the will of John Guy, son of the colonizer, and is dated January 4, 1639.

MF 135,Will of John Bingley Garland
Merchant of Poole, England, and of Trinity. Resident of Wimborne, England. Collection consists of probate copy of the will and codicils of John Bingley Garland, together with a typed manuscript.

MF 236, Will of John Bole
Planter of Ferryland, Newfoundland. The collection consists of the will of John Bole in which he devolves his estate to his sister, Elizabeth Searle, and nieces, Mary and Elizabeth Bole.

Collection 003, Magistrates Office collection, Harbour Grace
In 1824 an Act for the Better Administration of Justice in Newfoundland provided for annual circuit courts within each of three districts and thereafter Harbour Grace became the seat of the Northern District. This collection consists of approximately 3000 letters and documents, mainly 1825 to 1860, from Colonial Government officials, merchants, solicitors, and

private citizens in St. John's and the Northern Circuit District; draft copies of letters from the Harbour Grace Magistrates; applications for appointments, tenders, directives, and pardons from the Governor; bills of sale; correspondence regarding epidemics, famine, civil disorder, court actions, penal conditions, and fisheries. Documents are arranged by office and place of origin.

Collection 87, John G. Higgins

A collection of papers, dated 1878 to 1963, from John G. Higgins, lawyer and politician of St. John's, including a typed mansucript entitled, "The History of Law and Legal Institutions in Newfoundland". The collection includes papers from his professional career, Defence Arbitration Board, political career, affiliation with professional and service groups, personal records, correspondence, and papers of the law practice of Sir James Winter.

Collection 103, Francis Morris

A collection of papers, dated 1849 to 1933, from Francis Morris, a lawyer born in St. John's. The collection includes personal correspondence, wills, grants of land, deeds, indentures, and other paper from his law practice.

Collection 150, Peyton Family

A collection of records, dated 1806 to 1910, compiled by members of the Peyton family of Exploits and Twillingate. The collection includes legal records, accounts, voters' lists, census lists, diaries, navigational aids, recipes and cures.

Collection 170, The Baird Family

A collection of papers, dated 1790 to 1960, from the Baird family and its ancestors, Ash, Pynn, Heighington, who were early settlers and long-time residents of Trinity, Trinity Bay, Newfoundland. The collection includes correspondence, legal documents, photographs, wills, and family trees.

B. Provincial Archives of Newfoundland and Labrador (PANL)

MG (Manuscript Group) 22, Sarah Newhook (Lander) collection

The collection consists of letters, power of attorney, wills and accounts circa 1794 to 1909, diagrams of land in Harbour Grace, New Harbour and Ross's Island.

MG 27, John G. Higgins collection
The collection consists of legal documents from John G. Higgins, lawyer and politician.

MG 29, James MacBraire collection
The collection consists of documents, dated 1780 - 1835, belonging to James MacBraire, merchant in St. John's. Documents include agreements, bills of sale, deed of assignment, wills, notes, leases, accounts, and maps.

MG 32, Holdsworth family collection
The collection consists of legal documents, dated 1834 to 1860, from the Holdsworth family of Ferryland, St. John's, and Calvert. Documents include deeds of conveyance, land surveys, leases, wills, map and photographs.

MG 230, Benjamin Lester collection
The collection consists of diaries, correspondence, and ledgers for the estate of Benjamin Lester, 1805 and the estate of George Garland, dated 1829 to 1831.

MG 247, Carter (Benger/Nason) Papers
The collection consists of legal documents dated 1750 to 1860 from the Carter, Benger, and Nason families of Ferryland.

MG 275, Robert J. Pinsent collection
The collection consists of legal documents belonging to the practice of Robert Pinsent, lawyer, St. John's. Documents include bills of sale, power of attorney, assignments, conveyance, deed of gift, mortgages, grants, bonds, wills, indentures, letters, receipts, newspaper clippings and accounts.

MG 382, Tucker family collection
The collection consists of legal documents dated 1812 to 1921 belonging to the Tucker family. Documents include bills of sale, agreements and mortgages.

MG 399, Hugh Bastow collection
The collection consists of legal documents dated 1792 to 1845. Documents include wills, indentures and leases in St. John's.

MG 431, Butler family collection

The collection consists of legal documents dated 1804 to 1901. Documents include wills, and grants of property in Topsail and Peter's Arm.

MG 454, Batten collection

The collection consists of legal documents dated 1815 to 1917 from the Newell and Batten families. Documents include wills and probate papers.

II. Government Documents

A. Newfoundland Statutes

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

(1834) 4 Wm IV, c. 8: *An Act to afford Relief to Wives and Children deserted by their Husbands and Parents.*

(1834) 4 Wm. IV, c. 18: *An Act for declaring all Landed Property in Newfoundland Real Chattels.*

(1836) 6 Wm. IV, c. 5: *An Act to Amend the Law Declaring all Landed Property in Newfoundland Real Chattels.*

(1837) 1 Vict. c. 4: *An Act to Extend the Criminal Law of Enland to this Colony under Certain Conditions.*

(1837) 1 Vict. c. 5: *An Act to repeal part of an Act in the Parliament of Great Britain in the Fifth year of the reign of His Majesty King George, the Fourth, entitled, "An Act for the Better Administration of Justice in Newfoundland, and for other purposes," and to make further provisions for the Registration of Deeds in this Colony.*

(1858) 21 Vict. c. 13: *An Act to afford Relief to Wives and Children deserted by their Husbands and Parents.*

(1859) 22 Vict. c. 6: *An Act to amend the Practice and Mode of procedure in Granting Probates and Letters of Administration, and for other purposes.*

(1864) 27 Vict. c.13: *An Act for the amendment of the Law with respect to Wills in this Island.*

(1865) 28 Vict. c. 6: *An Act to make provision for Wives and Children deserted by their Husbands and Parents, and to aged Persons deserted by their Children.*

(1867) 30 Vict. c. 10: *An Act for the protection of Married Women in certain cases.*

(1876) 39 Vict. c. 11: *An Act to amend the Law Relating to the Property of Married Women.*

(1883) 46 Vict. c. 11: *An Act to amend the Married Women's Property Act of 1876.*

(1895) 59 Vict. c. 17: *An Act to amend the Married Women's Property Act of 1883.*

B. British Statutes

(1535) 27 Hen. VIII, c. 10: the Statute of Uses

(1540) 32 Hen. VIII, c. 1: the Statute of Wills

(1670) 22 & 23 Car. II, c. 10: *The Act for the Better Settling of Intestates' Estates.* (Statute of Distributions)

(1694) 6 & 7, Wm. and Mary, c. 6.

(1699) 10 & 11 Wm. III, c. 25: *An Act to encourage the trade to Newfoundland.* ("King William's Act")

(1753) 26 Geo. II, c. 33.

(1775) 15 Geo. III, c. 31: *An Act for the Encouragement of the fisheries carried on from Great Britain, Ireland, and the British dominions in Europe, and for securing the return of the fishermen, sailors, and others employed in the said fisheries to the ports thereof, at the end of the fishing season.* ("Palliser's Act")

(1791) 31 Geo. III, c. 29: *An Act for establishing a Court of Civil Jurisdiction in the Island of Newfoundland for a limited time.*

(1792) 32 Geo. III, c. 46: *An Act for establishing Courts of Judicature in the Island of Newfoundland and the islands adjacent.*

(1809) 49 Geo. III, c. 27: *An Act for establishing Courts of Judicature in the Island of Newfoundland and the island adjacent; and for re-annexing part of the coast of Labrador and the Islands lying on the said coast to the government of Newfoundland.*

(1811) 51 Geo. III, c. 45: *An Act for taking away the public use of certain ships rooms in the town of St. John's, in the Island of Newfoundland; and for instituting Surrogate Courts on the Coast of Labrador, and in certain islands adjacent thereto.*

(1817) 57 Geo. III, c. 51: *An Act to regulate the celebration of Marriage in Newfoundland and to make further provision for the Celebration of Marriages in the said Colony and its Dependencies.*

(1824) 5 Geo. IV, c. 67: *An Act for the Better Administration of Justice in Newfoundland, and for other purposes.*

(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.*

(1833) 3 & 4 Wm. IV, c. 105: Dower Act

(1857) 20 & 21 Vict. c. 85: Matrimonial Causes Act

(1857) 20 & 21 Vict. c. 77: Court of Probate Act

(1870) 33 & 34 Vict. c. 93: *An Act to Amend the Law Relating to the Property of Married Women.*

(1882) 45 & 46 Vict. c. 75: *An Act to Amend the Law Relating to the Property of Married Women.*

(1925) 15 Geo. 5, c. 23: Administration of Estates Act

C. Court Records

GN 2/1, Colonial Secretary's Office, Outgoing Correspondence, 1749 - 1770

GN 2/2, Colonial Secretary's Office, Incoming Correspondence, 1825 - 1891

GN 5, Court Records

GN 5/1, Surrogate Court records:

GN 5/1/A, Central district Circuit Court, 1802 - 1825
GN 5/1/A/1, Minutes, 1802 - 1825
GN 5/1/A/4, Writs

GN 5/1/B, Northern district Circuit Court, 1787 - 1826
GN 5/1/B/1, Minutes, 1787 - 1826
GN 5/1/B/4, Writs
GN 5/1/B/5, Complaints
GN 5/1/B/6, Correspondence
GN 5/1/B/7, Proclamations
GN 5/1/B/8, Cause lists
GN 5/1/B/9, Estate Matters
GN 5/1/B/14, Summons
GN 5/1/B/15, Oaths

GN 5/1/C, Southern district Circuit Court, 1806 - 1825
- GN 5/1/C/1, Minutes, 1818 - 1821
- GN 5/1/C/4, Writs
- GN 5/1/C/5, Complaints
- GN 5/1/C/6, Correspondence
- GN 5/1/C/7, Non-series
- GN 5/1/C/9, Estate Matters

GN 5/2, Supreme Court records:

GN 5/2/A, Central district Supreme Court, 1795 - 1900
- GN 5/1/A/0, Indexes
- GN 5/2/A/1, Minutes
- GN 5/1/A/2, Process Books
- GN 5/1/A/3, Judgements
- GN 5/1/A/4, Writs
- GN 5/1/A/6, Correspondence
- GN 5/1/A/7, Miscellaneous
- GN 5/1/A/8, Issues
- GN 5/1/A/9, Estate Matters, 1798 - 1900

GN 5/2/B, Northern district Supreme Court, 1826 - 1900
- GN 5/2/B/0, Indexes, 1826 - 1861
- GN 5/2/B/1, Minutes
- GN 5/2/B/2, Process Books
- GN 5/2/B/3, Judgements
- GN 5/2/B/4, Writs
- GN 5/2/B/7, Non-series
- GN 5/2/B/8, Causes
- GN 5/2/B/9, Estate Matters, 1805 - 1826

GN 5/2/C, Southern district Supreme Court, 1826 - 1900
- GN 5/2/C/1, Minutes, 1826 - 1889
- GN 5/2/C/2, Processes
- GN 5/2/C/3, Judgements
- GN 5/2/C/4, Writs
- GN 5/2/C/8, Causes

GN 5/2/D, Northern and Southern Circuit, Supreme Court
- GN 5/2/D/1, Minutes, 1887 - 1912
- GN 5/2/D/3, Judgements

GN 5/3, Magistrates Court records:

GN 5/3/A, Central district Magistrates Court, 1892 - 1900

GN 5/3/B, Northern district Magistrates Court, 1863 - 1900
GN 5/3/B/19, Magistrates Court, Harbour Grace Collection, 1820 - 1849

GN 5/3/C, Southern district Magistrates Court, 1881 - 1900

GN 5/3/F - R, Magistrates Court Records for Individual Communities

GN 5/4, Court of Sessions records:

GN 5/4/B, Northern district Court of Sessions
GN 5/4/B/1, Minutes

GN 5/4/C, Southern district Court of Sessions
GN 5/4/C/1, Minutes

D. Registry of Wills

GN 5/1, Registry of Wills, Supreme Court of Newfoundland, volumes 1 - 6, (microfilm) PANL.

Miscellaneous Deeds and Wills, 1744 - 1810, Registry of Deeds, Confederation Building, St.John's.

E. Colonial Office Records

(Great Britain) Colonial Office Records 194, v. 43, 44, 45, 52, 53, 59, 68, 69, 82,88

(Great Britain) Colonial Office Records 195, v. 17

F. Legislative Records

(Great Britain) Hansard, *Parliamentary Debates*, 3rd series.

Journal of the Legislative Council of Newfoundland, 1833 - 1933.

Journal of the House of Assembly of Newfoundland, 1833 - 1933.

The Consolidated Statutes of Newfoundland: As passed by the Legislature in the third session of the tenth General Assembly, 1872, on the report of the select committee of the House of Assembly, appointed to revise the consolidated statutes. St. John's: F.Winton, 1874.

The Consolidated Statutes of Newfoundland (second series): Being a consolidation of the statute law of the colony, down to and including the first session of the legislature in the year 1892. St. John's: J.W. Withers, 1896.

The Consolidated Statutes of Newfoundland (third series): Being a consolidation of the statute law of the colony down to and including the session of the Legislature in the year 1916. St. John's: Robinson and Co.,1919.

III. Other Published Records

Classified Digest of the Records of the Society for the Propagation of the Gospel in Foreign Parts, 1701 - 1892. London, 1895.

"Decisions of the Supreme Court of Judicature, Newfoundland, 1817 - 1821, during the time of Francis Forbes", Microfilm, Mitchell Library, Sydney, Australia.

Maritime Provinces' Reports: cases decided in the Supreme Courts of New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island. v. 23. Toronto: Carswell, 1931 - 1968.

Newfoundland Law Reports, Decisions of the Supreme Court. v. 1 - 7, 1817 - 1896. St. John's: J.W. Withers, 1817 - 1946.

Register of Fishing Rooms in Bonavista Bay, 1805 - 1806. Glovertown Literary Creations.

IV. Newfoundland Newspapers

Patriot and Terra-Nova Herald

Royal Gazette and Newfoundland Advertizer

The Newfoundlander

The Mercantile Journal

The Public Ledger

SECONDARY SOURCES

I. Books

Archibald, E.M. *Digest of the Laws of Newfoundland.* St. John's: Winton, 1847.

Armstrong, James. *Laws of Intestacy in the Dominion of Canada.* Montreal: J. Lovell, 1885.

Atkins, Susan; Brenda Hoggett. *Women and the Law.* Oxford: Basil Blackwell, 1984.

Backhouse, Constance. *Petticoats and Prejudice.* Toronto: The Osgoode Society, 1991.

Baker, J.H. *An Introduction to English Legal History.* (3rd ed.) London: Butterworths, 1990.

Baker, P.V. *Megarry's Manual of the Law of Real Property.* (5th ed.) London: Stevens and Sons, 1975.

Basch, Norma. *In the Eyes of the Law: Women, Marriage and Property in Nineteenth-Century New York.* New York: Cornell University, 1982.

Blackstone, William. *Commentaries on the Laws of England.* (1764) Buntingford: Layston Press, 1966.

Byrne, C.J. (ed.) *Gentlemen - Bishops and Faction Fighters: The Letters of Bishops O'Donel, Lambert, Scallan and other Irish Missionaries.* St. John's: Jesperson, 1984.

Cadigan, Sean. *Hope and Deception: Merchant-Settler Relations in Newfoundland, 1785 - 1855.* Toronto: University of Toronto Press, 1995.

Cell, Gillian. *English Enterprise in Newfoundland, 1577 - 1660.* Toronto: University of Toronto Press, 1969.

Cell, Gillian. *Newfoundland Discovered: English Attempts at Colonization.* London: Hakluyt, 1982.

Chalmers, George. *Opinions of Eminent Lawyers on Various Points of English Jurisprudence.* Burlington: C. Goderich, 1858.

Chambers, Lori. *Married Women and Property Law in Victorian Ontario.* Toronto: The Osgoode Society, 1997.

Cheshire, G.C. *The Modern Law of Real Property.* (10th ed.) London: Butterworths, 1967.

Cioni, Maria. *Women and Law in Elizabethan England with Particular Reference to the Court of Chancery.* New York: Garland, 1985.

Colby, James F. (ed.) *A Sketch of English Legal History by Frederic W. Maitland and Francis C. Montague.* New York: Putnam, 1978.

Conrad, Margaret. (ed.) *Intimate Relations: Family and Community in Planter Nova Scotia, 1759 - 1800.* Fredericton: Acadiensis Press, 1995.

Cross, Geoffrey; G.D.G. Hall, (eds.) *Radcliffe and Cross, The English Legal System.* (4th ed.) London: Butterworth, 1964.

Currey, C.H. *Sir Francis Forbes.* Sydney: Angus and Robertson, 1968.

Davidoff, Leonore; Catherine Hall. *Family Fortunes: Men and Women of the English Middle Class, 1780 - 1850.* Chicago: University of Chicago Press, 1987.

Dicey, A.V. *Lectures on the Relation between Law and Public Opinion in England in the Nineteenth Century.* London: Macmillan, 1914.

Ditz, Toby L. *Property and Kinship.* Princeton: Princeton University Press, 1986.

Dyhouse, Carol. *Feminism and the Family in England, 1880 - 1939.* Oxford: Basil Blackwell, 1989.

English, Christopher; Christopher Curran. *A Cautious Beginning: The Court of Civil Jurisdiction, 1791.* St. John's: Breakwater, 1991.

Erickson, Amy Louise. *Women and Property in Early Modern England.* London: Routledge, 1993.

Fifoot, C.H.S. *English Law and its Background.* London, 1932.

Flaherty, David H. (ed.) *Essays in the History of Canadian Law.* v.1. Toronto: The Osgoode Society, 1981.

Gagan, David. *Hopeful Travellers: Families, Land and Social Change in Mid-Victorian Peel County, Canada West.* Toronto: University of Toronto Press, 1981.

Geldart, William. *Introduction to English Law.* New York: Oxford University Press, 1991.

Glazerbrook, P.R. (ed.) *East's Pleas of the Crown*. (1803) London: Professional Books, 1972.

Grossberg, Michael. *Governing the Hearth: Law and Family in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press, 1985.

Guildford, Janet; Suzanne Morton (eds.) *Separate Spheres: Women's Worlds in the 19th century Maritimes*. Fredericton: Acadiensis Press, 1994.

Hakluyt, Richard. *The Principal Navigations Voiages and Discoveries of the English Nation*. (1589) Cambridge: Hakluyt Society, 1965.

Halsbury, (ed.) *The Laws of England*. (2nd edition) London: Butterworths, 1933.

Halsbury, (ed.) *The Laws of England* . (3rd edition) London: Butterworths, 1960.

Handcock, Gordon. *Soe Longe as there comes no Women: Origins of English Settlement in Newfoundland*. St. John's: Breakwater, 1989.

Head, C. Grant. *Eighteenth Century Newfoundland*. Toronto: McClelland and Stewart, 1976.

Hoff, Joan. *Law, Gender and Injustice*. New York: New York University Press, 1991.

Hoffer, Peter Charles. *Law and People in Colonial America*. Baltimore: Johns Hopkins University, 1992.

Hogg, Peter. *Constitutional Law of Canada*. (4th ed.) Toronto: Carswell, 1996.

Holcombe, Lee. *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England*. Toronto: University of Toronto Press, 1983.

Holdsworth, William. *The History of English Law*. London: Methuen, 1924.

Horwitz, Morton J. *The Transformation of American Law, 1780 - 1860.* Cambridge: Harvard University Press, 1977.

Horwitz, Morton J. *The Transformation of American Law, 1780 - 1860: The Crisis of Legal Orthodoxy.* New York: Oxford University Press, 1992.

Kanowitz, Leo. *Women and the Law: The Unfinished Revolution.* Albuquerque: University of New Mexico Press, 1969.

Kealey, Linda. (ed.) *Pursuing Equality: Historical Perspectives on Women in Newfoundland and Labrador.* St. John's: Institute of Social and Economic Research, Memorial University, 1993.

Kerber, Linda K. *Women of the Republic: Intellect and Ideology in Revolutionary America.* Chapel Hill: University of North Carolina Press, 1980.

Loo, Tina; Lorna McLean. (eds.) *Historical Perspectives on Law and Society in Canada.* Toronto: Copp Clark Longman, 1994.

Lounsbury, Ralph Greenlee.*The British Fishery at Newfoundland, 1634 - 1763.* Hamden: Archon, 1969.

Manchester, A.H. *A Modern Legal History of England and Wales, 1750 - 1950.* London: Butterworths, 1980.

Manchester, A.H. *Sources of English Legal History, 1750 - 1950.* London: Butterworths, 1984.

Mannion, John. *The Peopling of Newfoundland.* St. John's: Institute of Social and Economic Research, Memorial University, 1977.

Matthews, Keith. *Collection and Commentary on the Constitutional Laws of Seventeenth Century Newfoundland.* St. John's: Maritime History Group, Memorial University, 1975.

Matthews, Keith. *Lectures on the History of Newfoundland, 1500 - 1830.* St. John's: Breakwater, 1988.

McLintock, A.H. *The Establishment of Constitutional Government in Newfoundland, 1783 - 1832: A Study in Retarded Colonization.* London, Longmans Green, 1941.

Megarry, Robert; H.W.R. Wade. *The Law of Real Property.* (5th ed.) London: Stevens and Sons, 1984.

Murdoch, Beamish. *Epitome of the Laws of Nova Scotia (1832 - 1833).* 1971 edition. Halifax, Nova Scotia: J. Howe, 1833. (on microfilm at Queen Elizabeth II Library, Memorial University)

Newfoundland Law Reform Commission, *A History of the Newfoundland Judicature Act, 1791 - 1984, complete with a Table of Disposal.* St. John's: Law Reform Commission, 1989.

O'Donovan, Katherine. *Sexual Divisions in Law.* London: Weidenfeld and Nicolson, 1985.

Ogilvie, M.H. *Historical Introduction to Legal Studies.* Toronto: Carswell, 1982.

Okin, Susan Moller. *Justice, Gender and the Family.* New York: Basic Books, 1989.

Oosterhoff, A.H.; W.B.Rayner. *Anger and Honsberger Law of Real Property.* (2nd ed.) Aurora, Ontario: Canada Law Book, 1985.

Owen, David R.; Michael C. Tolley. *Courts of Admiralty in Colonial America: The Maryland Experience, 1634 - 1776.* Durham, N.C.: Carolina Academic Press, 1995.

Perkin, Joan. *Women and Marriage in Nineteenth-century England.* Chicago: Lyceum Books, 1989.

Plucknett, T.F.T. *A Concise History of the Common Law.* (5th ed.) London: Butterworths, 1956.

Poovey, Mary. *Uneven Developments.* Chicago: University of Chicago Press, 1988.

Potter, H. *Historical Introduction to English Law and its Institutions.* (4th ed.) London: Butterworths, 1958.

Prowse, D.W. *Manual for Magistrates.* St. John's: J.C. Withers, 1877.

Prowse, D.W. *A History of Newfoundland from the English, Colonial and Foreign Office Records.* London: Macmillan, 1895.

Prowse, D.W. *The Justices' Manual.* St. John's: 1898.

Reeves, John. *History of the Government of the Island of Newfoundland.* London: J. Sewell, 1793.

Rabkin, Peggy A. *Fathers to Daughters: The Legal Foundations of Female Emancipation.* Westport, Connecticut: Greenwood, 1980.

Rhode, Deborah. *Justice and Gender: Sex Discrimination and the Law.* Cambridge: Harvard University Press, 1989.

Ryan, Shannon. *Fish Out of Water: The Newfoundland Saltfish Trade, 1814 - 1914.* St. John's: Breakwater, 1986.

Salmon, Marylynn. *Women and the Law of Property in Early America.* Chapel Hill: University of North Carolina Press, 1986.

Shammas, Carole; Marylynn Salmon; Michael Dahlin. *Inheritance in America from Colonial Times to the Present.* New Brunswick, N.J.: Rutgers University Press, 1987.

Shanley, Mary Lyndon. *Feminism, Marriage and the Law in Victorian England, 1850 - 1895.* Princeton: Princeton University Press, 1989.

Simpson, A.W.B. *An Introduction to the History of the Land Law.* London: Oxford University Press, 1961.

Sinclair, Alan. *Introduction to Real Property Law.* (2nd ed.) Toronto: Butterworths, 1982.

Smart, Carol. *The Ties that Bind.* London: Routledge and Kegan Paul, 1984.

Squibb, G.D. *Doctors' Commons: A History of the College of Advocates and Doctors of Law.* Oxford: Clarendon Press, 1977.

Staves, Susan. *Married Women's Separate Property in England, 1660 - 1833.* Cambridge: Harvard University Press, 1990.

Stetson, Dorothy. *A Woman's Issue: The Politics of Family Law Reform in England.* Westport, Connecticut: Greenwood Press, 1982.

Stone, Lawrence. *The Family, Sex, and Marriage in England, 1500 - 1800.* New York: Harper and Row, 1979.

Thompson, Roger. *Women in Stuart England and America.* London: Routledge and Kegan Paul, 1974.

Trumbach, Randolph. *The Rise of the Egalitarian Family: Kinship and Domestic Relations in Eighteenth-century England.* New York: Academic Press, 1978.

Tucker, R.A. *Select Cases of Newfoundland, 1817 - 1828.* Toronto: Carswell, 1979.

Waddams, S.M. *Law, Politics and the Church of England: The Career of Stephen Lushington, 1782 - 1873.* Cambridge: Cambridge University Press, 1992.

Watson, Alan. *Society and Legal Change.* Edinburgh: Scottish Academic Press, 1977.

Weeks, Jeffrey. *Sex, Politics and Society.* London: Longham, 1981.

II. Theses/Papers

Cadigan, Sean. "Economic and Social Relations of Production on the Northeast Coast of Newfoundland, with Special Reference to Conception Bay, 1785 - 1855", Ph.D dissertation, Memorial University, 1991.

Cadigan, Sean. "The Role of the Fishing Ships' Rooms Controversy in the Rise of Local Bourgeoisie: St. John's, 1775 - 1812", Unpublished paper, Memorial University, 1992.

Chambers, Lori. "Married Women's Property Rights in Nineteenth Century Ontario", Ph.D dissertation, University of Toronto, 1994.

Matthews, Keith. "A History of the West of England Newfoundland Fishery", D. Phil. dissertation, Oxford University, 1968.

McEwen, Alexander. "Newfoundland Law of Real Property: The Origin and Development of Land Ownership", Ph.D dissertation, University of London, 1978.

Pope, Peter Edward. "The South Avalon Planters, 1630 to 1700: Residence, Labour, Demand and Exchange in Seventeenth-Century Newfoundland", Ph.D dissertation, Memorial University, 1992.

Veinott, Rebecca. "The Changing Legal Status of Women in Nova Scotia, 1850 - 1910", M.A. thesis, Dalhousie University, 1989.

III. Articles

Backhouse, Constance. "Married Women's Property Law in Nineteenth-Century Canada", *Law and History Review*, 6, 2 (fall, 1988): 211 - 257.

Backhouse, Constance. "Pure Patriarchy: Nineteenth-Century Canadian Marriage", *McGill Law Journal*, 31, 1 (March, 1986): 264 - 312.

Backhouse, Constance. "Nineteenth-Century Canadian Rape Law, 1800 - 1892", in David H.Flaherty, (ed.) *Essays in the History of Canadian Law.* v. II. Toronto: The Osgoode Society, 1983.

Bennett, Judith M. "Feminism and History", *Gender and History*, 1,3 (autumn, 1989): 251 - 271.

Berg, Maxine. "Women's Property and the Industrial Revolution", *Journal of Interdisciplinary History*, 24, 2 (autumn, 1993): 233 - 250.

Berkner, Lutz K.; F. Mendels. "Inheritance Systems, Family Structure and Demographic Patterns in Western Europe, 1700 - 1900", in Charles Tilly, (ed.) *Historical Studies of Changing Fertility*. Princeton: Princeton University Press, 1978.

Boyd, Susan; Elizabeth Sheehy. "Canadian Feminist Perspectives on Law", *Journal of Law and Society*, 13, 3 (autumn, 1986): 283 - 310.

Boyd, Susan. "Some Postmodernist Challenges to the Feminist Analysis of Law, Family and State: Ideology and Discourse in Child Custody Law", *Canadian Journal of Family Law*, 10, 1 (1991): 79 - 113.

Brandt, Gail Cuthbert. "Postmodern Patchwork: Some Recent Trends in the Writing of Women's History in Canada", *Canadian Historical Review*, 72, 4 (1991): 441 - 470.

Brophy, Julia; Carol Smart. "From Disregard to Disrepute: The Position of Women in Family Law", *Feminist Review*, 9 (autumn, 1991): 1 - 16.

Cadigan, Sean. "Whipping Them into Shape: State Refinement of Patriarchy among Conception Bay Fishing Families, 1785 - 1825", in Carmelita McGrath, Barbara Neis and Marilyn Porter, (eds.)*Their Lives and Times: Women in Newfoundland and Labrador, A Collage*. St. John's, Creative, 1995.

Chunn, Dorothy. "Maternal Feminism, Legal Professionalism and Political Pragmatism: The Rise and Fall of Magistrate Margaret Patterson, 1922 - 1934", in Wesley Pue and Barry Wright, (eds.) *Canadian Perspectives on Law and Society: Issues in Legal History*. Ottawa: Carleton University, 1990.

Chused, Richard."Late Nineteenth-Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures",*American Journal of Legal History*, 29, 1 (January, 1985): 3 - 35.

Clark, Elizabeth B."Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America", *Law and History Review*, 8,1 (spring, 1990): 25 - 54.

Côté, J. E."The Reception of English Law", *Alberta Law Review*, 15 (1977): 29 - 92.

Duncanson, Ian. "The Politics of Common Law in Theory and History", *Osgoode Hall Law Journal*, 27 (winter, 1989): 685 - 707.

English, Christopher. "The Development of the Newfoundland Legal System to 1815", *Acadiensis*, 20, 1 (autumn, 1990): 89 - 119.

English, Christopher. "The Reception of the Law in Ferryland District", a paper presented to the joint session of the CLSA and CHA, Brock University, St. Catharines, June 1986.

English, Christopher. "From Fishing Schooner to Colony: The Legal Development of Newfoundland, 1791 - 1832", in Louis A.Knafla and Susan W.S. Binnie, (eds.) *Law, Society, and the State: Essays in Modern Legal History.* Toronto: University of Toronto Press, 1995.

English, Christopher. "The Official Mind and Popular Protest in a Revolutionary Era: the Case of Newfoundland, 1789 - 1819", in Barry Wright and Murray Greenwood, (eds.) *Canadian State Trials*, v. 1. Toronto: Osgoode Society/University of Toronto Press, 1995.

Erickson, Amy Louise. "Common Law versus Common Practice: the Use of Marriage Settlements in Early Modern England", *Economic History Review*, XLIII, 1 (1990): 21 - 39.

Girard, Philip; Rebecca Veinott. "Married Women's Property Law in Nova Scotia, 1850 - 1910", in Janet Guildford and Suzanne Morton, (eds.) *Separate Spheres: Women's Worlds in the Nineteenth-Century Maritimes.* Fredericton: Acadiensis Press, 1994.

Girard, Philip. "Married Women's Property, Chancery Abolition and Insolvency Law: Law Reform in Nova Scotia, 1820 - 1867", in Philip Girard and Jim Phillips, (eds.) *Essays in the History of Canadian Law.* v. III. Toronto: The Osgoode Society, 1990.

Greenberg, Janelle. "The Legal Status of the English Woman in Early Eighteenth-Century Common Law and Equity", *Studies in Eighteenth-Century Culture*, 4 (1975): 171 - 181.

Gushue, Raymond. "The Law of Real Property in Newfoundland", *Canadian Bar Review*, 4 (May, 1926): 310 - 314.

Habbakuk, H.J. "Family Structure and Economic Change in Nineteenth-Century Europe", *The Journal of Economic History*, XV, 1 (1955): 1 - 12.

Harrison, Rachel; Frank Mort. "Patriarchal Aspects of Nineteenth-Century State Formation: Property Relations, Marriage and Sexuality", in Philip Corrigan, (ed.) *Capitalism, State Formation and Marxist Theory*. London: Quartet Books, 1980.

Holderness, B. A."Widows in Pre-Industrial Society", in Richard M. Smith, (ed.) *Land, Kinship and Life-cycle*. Cambridge: Cambridge University Press, 1984.

Horwitz, Henry. "Testamentary Practice, Family Strategies, and the Last Phases of the Custom of London, 1660 - 1725", *Law and History Review*, 2, 2 (fall, 1984): 223 - 239.

Hutchison, Lorna. " 'God Help Me for No One Else Can' ": The Diary of Annie Waltham, 1869 - 1881", *Acadiensis*, 21, 2 (spring, 1992): 72 - 89.

Kasirer, Nicholas; Jean-Maurice Brisson. "The Married Woman in Ascendance, the Mother Country in Retreat: From Legal Colonialism to Legal Nationalism in Quebec Matrimonial Law Reform, 1866 - 1991", *Canadian Legal History project*, Faculty of Law, University of Manitoba, May 1993.

Kerber, Linda. "Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History", *Journal of American History*, 75, 1 (1988): 9 - 39.

Lahey, Raymond J. "Catholicism and Colonial Policy in Newfoundland, 1779 - 1845", in Terrence Murphy and Gerald Stortz, (eds.) *Creed and Culture: The Place of English-speaking Catholics in Canadian Society, 1750 - 1930*. Montreal and Kingston: McGill and Queen's University Press, 1993.

Lewis, Jane. "Dealing with Dependency: State Practices and Social Realities", in Jane Lewis, (ed.)*Women's Welfare Women's Rights*. London: Croom Helm, 1983.

MacPherson, B.H. "Scots Law in the Colonies", (1995, Part 2), Reprinted from *The Juridical Review*, Edinburgh: W. Green.

Manchester, Anthony. "The Reform of the Ecclesiastical Courts", *The American Journal of Legal History*, 10 (1966): 51 - 75.

Matthews, Keith. "Historical Fence Building: A Critique of Newfoundland Historiography", *Newfoundland Quarterly*, 74, 1 (1978): 21 - 30.

McLaren, John. "The Canadian Magistracy and the Anti-white Slavery Campaign, 1900 - 1920", in Wesley Pue and Barry Wright, (eds.) *Canadian Perspectives on Law and Society*. Ottawa: Carleton University, 1990.

Mill, John Stuart. "The Subjection of Women", reprinted in Alice S. Rossi, (ed.) *The Feminist Papers: From Adams to de Beauvoir*. New York: Columbia University Press, 1973.

Nedelsky, Jennifer. "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law, 1880 - 1930", in David Flaherty, (ed.) *Essays in the History of Canadian Law*. vol. I Toronto: The Osgoode Society, 1981.

Newman, Louise M. "Critical Theory and the History of Women: What's at Stake in Deconstructing Women's History", *Journal of Women's History*, 2, 3 (winter, 1991): 58 - 68.

O'Donavan, Katherine. "Engendering Justice: Women's Perspectives and the Rule of Law", *The University of Toronto Law Journal*, 39, 2 (spring, 1989): 127 - 148.

O'Flaherty, Patrick. "Seeds of Reform: Newfoundland, 1800-1818", *Journal of Canadian Studies*, 23 (1988) : 39 - 59.

Ogilvie, M.H. "Recent Developments in Canadian Law: Legal History", *Ottawa Law Review*, 19, 1 (1987): 225 - 254.

Okin, Susan Moller. "Patriarchy and Married Property in England: Questions on Some Current Views", *Eighteenth Century Studies*, 17, 2 (1983/1984): 121 - 138.

Porter, Marilyn. " 'She was Skipper of the Shore Crew': Notes on the Sexual Division of Labour in Newfoundland", *Labour/Le Travail*, 15 (1985): 105 - 123.

Ryan, Shannon. "Newfoundland: Fishery to Canadian Province", in E.Boyde Beck et al, (eds.) *Atlantic Canada: at the dawn of a new nation, an illustrated history.* Burlington, Ontario: Winsor Publications, 1990.

Ryan, Shannon. "Fishery to Colony: A Newfoundland Watershed, 1793 - 1815", in P. A. Buckner and David Frank, (eds.) *Atlantic Canada Before Confederation.* Fredericton: Acadiensis Press, 1985.

Sachs, Albie. "The Myth of Male Protectiveness and the Legal Subordination of Women", in Carol Smart and Barry Smart, (eds.) *Women, Sexuality and Social Control.* London: Routledge and Kegan Paul, 1978.

Shammas, Carole. "English Inheritance Law and its Transfer to the Colonies", *The American Journal of Legal History*, 21, 2 (April, 1987): 145 - 163.

Shanley, Mary Lyndon. " 'One Must Ride Behind': Married Women's Rights and the Divorce Act of 1857", *Victorian Studies*, 25, 3 (1982): 355 - 376.

Sheehan, Michael. "The Influence of Canon Law on the Property Rights of Married Women in England", *Mediaeval Studies*, 25 (1963): 109 - 124.

Smart, Carol. "Law's Power, the Sexed Body and Feminist Discourse", *Journal of Law and Society*, 17, 2 (summer, 1990): 194 - 209.

Tilly, Louise A. "Gender, Women's History, and Social History", *Social Science History*, 13, 4 (winter, 1989): 439 - 461.

Todd, Barbara. "The Remarrying Widow: A Stereotype Reconsidered", in Mary Prior, (ed.) *Women in English Society, 1500 - 1800.* London: Methuen, 1985.

Wright, Barry. "Towards a New Canadian Legal History", *The Osgoode Hall Law Journal*, 22, 2 (summer, 1984): 349 - 374.

IV. **Reference Books**

Ballentine's Law Dictionary

Black's Law Dictionary

Dictionary of Canadian Biography

Dictionary of National Biography

Dictionary of Newfoundland English

Encyclopedia of Newfoundland and Labrador

Guide to the Archival Holdings of the Centre for Newfoundland Studies, Memorial University of Newfoundland

Stroud's Judicial Dictionary