

Wm. Excellency Sir  
J. F. Cochrane

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## REPORT OF THE JUDGES OF THE SUPREME COURT OF NEWFOUNDLAND, TO HIS MAJESTY'S GOVERNMENT, UPON THE JUDICATURE BILL.

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

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

The practicability of framing regulations, which are to be enforced within certain local limits, must chiefly depend upon the existing facilities of communication between the several places comprised in those limits; for, unless a tolerably free intercourse can take place between the different parts, separate establishments for each will become indispensably necessary. But the Climate of Newfoundland, where severe frost and snow prevail for a large portion of the year—the deep indentures of her numerous Bays, which render land travelling extremely circuitous and difficult—the state of her population, which, though considerable in the aggregate, is yet scattered, as thinly as the products of the earth, in distant harbours and coves—and the almost total want of roads to connect these settlements with each other—impede and obstruct communication in such a degree, that it would perhaps be more easy and feasible to put all our West India Islands under one Government, and create a Court which should exercise jurisdiction throughout the whole of them, than to contrive a system of Judicature by which the same Judge and ministerial officers should be enabled, without the aid of subordinate District Tribunals, to dispense Justice to all the Inhabitants of this Colony. Great, however, as the impediments to the erection of a good Judicature in this Island resulting from natural causes by themselves are, they are also much aggravated and increased by circumstances connected with the present condition of society here.—As the best, if not the only remedy for those defects in the existing Judicature, which spring from the difficulty of maintaining a due communication between the various settlements, the idea of establishing Courts in as many points as would enable their influence to extend, with suitable energy, to all of them, immediately suggests itself to the mind; but with it must arise the question; how are these Courts to be constituted? And now it is that obstacles proceeding from the state of society begin to present themselves in their full force. It will, we imagine, be readily admitted, that it is preferable for a Community to have no Court rather than a corrupt one: for though it may be strictly true that the worst Government is better than none, yet the same thing cannot be said of Courts, since greater injustice and oppression may certainly be exercised under cover of the Law, badly administered, than could possibly be practised by naked fraud and violence.—The essential requisite to a Court, therefore, is, SOUND INTEGRITY in the person who presides over it: and the necessary security for the existence of this indispensable qualification is, a total absence on the part of the Judge, of all INTEREST in the subject matter submitted to his determination. But whoever, is acquainted with the Out-harbours

of Newfoundland must be sensible, that a single Individual qualified to discharge the judicial functions, even in a Court whose jurisdiction should be in every respect confined and circumscribed, cannot be found in any one of them: for, without stopping to enquire, whether adequate talent and knowledge for such an office can any where be met with, it is abundantly evident, that there is not at this time one person residing in an out-harbour, who would not either directly or indirectly be strongly INTERESTED in the great majority of Cases that would be brought before him as a Judge. If, then, the want of communication between the numerous settlements in this Island does really call for, as we conceive it does, the creation of a number of District Courts, the state of society in those settlements equally requires, that the Judges who shall preside in such Courts shall be brought from some other place; and this we are aware will be attended with an expense which will, we fear, be deemed a powerful, if not an insuperable, objection to such a measure.—Nor can we omit to notice here the increased difficulty, in the way of a satisfactory administration of the Law in this Island, which is more particularly referable to the political views and intentions which the Government long cherished in relation to it. Under the policy that prevailed during a period of many years, it was the avowed and favourite object to prevent the formation of permanent settlements in Newfoundland; and every thing that could be done for the attainment of this object, by parliamentary enactments and Royal Instructions, was accordingly tried by the Legislature and the Government. But, in spite of all regulations of that sort, population gradually arose in the Island; and as persons who had thus planted themselves in opposition to the Law, were not disposed to comply with those rules of it which were designed to deter them from settling here, it naturally followed, that Law and Practice, instead of going hand in hand together, as they ought to do, were in several instances directly opposed to each other. From this conflict numerous questions have sprung which at this distance of time, are by no means of easy solution: and as the British Parliament would not make any Laws for a Community, which it refused to acknowledge as having a legitimate existence, the Members of it were compelled to substitute local usages and customs for written Laws. Of those usages a few have since been confirmed by Parliamentary enactments; others sanctioned it by judicial recognition; and some have become obsolete: but a large proportion of them remain unsettled up to this very hour; and as these constantly mingle themselves, in a variety of ways, in most of the Cases which are brought before the Courts, the Judges are frequently called on to examine them with great care, not only for the sake of distinguishing those which possess the genuine properties of a Custom, from irregularities and abuses of a partial and local nature; but also for the purpose of ascertaining, whether some of them, which might have been very salutary and beneficial in one stage of society, had not ceased to be so—or, indeed, might not have become positively noxious—under a very altered condition of it. The Law of England, too, is to be observed here only in as far as it is applicable to the circumstances of the Colony; and thus a sort of LEGISLATIVE POWER\* is blended with the JUDICIAL FUNCTIONS, which renders our Judicature painfully responsible to those who have to carry it into execution and a source of constant disquietude to those who fall under the influence of it.

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

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

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

The Judicature established in this Colony by the 5 Geo. IV., c. 67, seems to us to be exclusively contrived for the use of St. John's, and a few other populous settlements; and for them it may, with some alterations, be rendered sufficiently suitable and proper: but, as a mode of dispensing Justice, and imparting civil protection, to the great multitude of people who are diffused, in small bodies, along the whole margin of the shore, it is certainly more inefficient and perhaps less satisfactory to the Inhabitants of those distant parts, than the NAVAL SURROGATE SYSTEM to which it has succeeded. The visits of the Circuit Judge, are necessarily made at a season of the year when the whole mass of the population is actively engaged in the pursuits of the Fishery—the time of his arrival at any particular place is a matter of the greatest uncertainty—his stay at any harbour is limited to a few days, in order that he may go to as many as he possibly can within the period of a Circuit—and yet, even under this arrangement, he can only call at, comparatively, a small number of them—so that after having been tossed about for some months upon a very terrific coast; exposed to dangers of no trifling magnitude; and exhausted by hardships and sufferings for which his mode of life had furnished no kind of preparation; he at length returns to the seat of Government with a mortifying conviction strongly impressed upon his mind, that the voyage, which has been so fruitful of pain and misery to himself, has been of very little benefit indeed to the Public.—Nor is it, we firmly believe, possible to render the present system of Judicature, by any improvements which it is in its nature susceptible of, duly operative in the generality of the Out Ports, so long as the climate, the roads, and the habits of the people of Newfoundland, shall continue as they now are.—Nothing, therefore, as we have already hinted, short of the establishment of a number of LOCAL COURTS, under the presidency of RESIDENT DISTRICT JUDGES, will, in our opinion, ensure to the remote settlements in this Island the essential blessing of SPEEDY JUSTICE; and though such a plan must be attended with a degree of expense which may possibly occasion the rejection of it, we shall, notwithstanding, give a short sketch, or outline of its principal features; and afterwards venture to suggest a few arguments, drawn from a fair statement of the value of this Colony to the Mother Country, and of its consequent claims, upon her, in answer to any objections that may be argued to our proposition on the score of the expense which must accompany its adoption.

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

We would, then, very earnestly recommend, that FOUR DISTRICT COURTS of Record shall be erected; one of which shall possess jurisdiction throughout the whole of Conception and Trinity Bays; another in Bonavista Bay, and in all the settlements north of it to Cape John; a third from Bay of Buils, inclusive, to Cape Chapeau Rouge, comprising the whole of St. Mar's and Placentia Bays, with the several Islands contained therein; and the fourth from Cape Chapeau Rouge to Cape Ray.—That to each Courts there shall be attached the undermentioned Officers:

A Judge,  
A Deputy-Sheriff, or High Bailiff,  
And two Constables:

That the Courts thus constituted, shall move about continually, every year, in a suitable half-decked boat, which will belong to it, from the first of April to the last of October; in the course of which period it will visit every settlement in such a way that there shall not be an Individual in the District who shall not have Justice brought within twelve miles of his door once, at least, in every twelve months.—That the jurisdiction of these Courts shall be altogether of a CIVIL nature; extending to all Suits, whether originating in Tort or Contract, the subject-matter of which shall not exceed the sum of Fifty Pounds Sterling.—That parties shall be brought into Court by Summons; or where the cause of Action shall exceed Fifty Pounds, by Attachment of the Defendant's Goods; the former process issuing gratis, upon the Plaintiff's Affidavit of his belief that he has a just ground of Action; and the latter upon a similar Oath as to the validity of the demand, and upon the payment of a Fee,\* calculated always on a scale at the rate of five per cent. on the amount of the Writ.—That the only other Fees to which a Suitor shall be liable, for original process, are, an allowance of 1s. to the constable for the service of the summons on attachment, where the distance is less than a mile from the place in which the Court is held, and an extra shilling for every mile beyond it.—That the proceedings shall be altogether summary; and the determination of the case confined solely to the Judge, (who, for this purpose, shall be authorized to examine witnesses, and even the parties themselves, upon oath), unless either the Plaintiff or Defendant shall desire to refer it to a Jury, or to Arbitration; which may at all times be done by either of them on his advancing three pounds, currency, to be divided equally among twelve Juror, or thirty shillings, currency, to be divided between the three Arbitrators—one of whom shall be nominated by the Plaintiff; another by the Defendant; and the third by the Presiding Judge.—That the extra expense thus attending a trial by Jury, or Arbitration, shall ultimately be borne by that party, upon whom the Judge shall conscientiously conceive that it ought to fall upon a due consideration of the motives which apparently influenced the application for it.—That where a case has not been submitted either to a Jury or to Arbitration, the only costs that can be taxed and allowed by the Judge are—the fee for a writ of attachment; the little allowance for the service of process; a moderate compensation to witnesses for their loss of time; and, in very particular instances, a partial indemnification to an indigent Defendant for any loss or inconvenience, he may have sustained by having been dragged into Court by a litigious Plaintiff who had not even a probable cause of action against him.—That an Appeal from the Judgment of the District Court shall in all cases lie to the Circuit Judge, who, besides this Appellate Jurisdiction, coupled with a power of examining generally into the proceedings and conduct of the District Judge in every part of his duty, shall also possess, during the period of his Circuit, the same Original jurisdiction, both Civil and Criminal, which is now conferred on him by

\* The principal motive for coupling a Fee to the Process by attachment, is to deter parties from the use of it, by making it less expensive to them to commence their suits by Summons.