

Low Law and Low Courts: Reconstructing the Work of Minor Tribunals

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Low law and high law emerged concurrently out of centralizing efforts to stem social conflict and impose the King's peace in late medieval England.ⁱ High law used the royal courts to determine disputes among the propertied. High court judges were royal councillors and their common law progressively ousted the law of manorial and other sectional courts. Low law relied on members of the local gentry to keep the peace among the lower orders, manage county and parish affairs, and mediate relations with the central authorities. Low law was overwhelmingly statute law administered by part-time lay officials.ⁱⁱ Both as judges and as county governors, the justices of the peace exercised a good deal of autonomous discretion attributable both to the central government's reluctance to alienate the volunteer peacekeepers upon whom it relied to maintain local order, and to the high courts' reluctance to engage in a supervisory capacity over the enormous volume of petty disputes decided by the JPs.ⁱⁱⁱ This characteristic autonomy and discretion enabled the justices to preserve and promote local institutions and interests – including their own proprietary interests – even in the face of central government policy. Not until the mid-nineteenth century, when increasingly large slices of the justices' former authority were parcelled out to agencies, boards and commissions, did English justices of the peace lose their capacity to manage local affairs in what they took to be the interests of the local community.^{iv}

Similar institutions were recreated in the British North American colonies (and elsewhere in the empire) and with similar results.^v High court judges sat on the colonial governors' executive councils until well into the nineteenth century, while the great bulk of petty judicial and administrative business was managed by part-time lay magistrates and other local officials. Two features in particular distinguished low law in these colonies. First, in the absence of a substantial educated landlord class imbued with a tradition of governance, the colonial commission of the peace was drawn from a relatively shallow pool of more-or-less respectable, more-or-less propertied inhabitants, often with little social distance from the neighbours over whom they were placed. Second, while in England the justices were the Janus-faced guardians of the boundary between local and central versions of law and order, in the colonies they managed local relations with both provincial and imperial governments, sometimes playing one off against the other in furtherance of local interests.

I have been exploring the world of colonial low law from a vantage point near the intersection of King and Water streets in Saint Andrews, New Brunswick, the shire town of Charlotte County. Located in the south west corner of the province and sharing a long disputed border with the state of Maine, the county was populated initially by a series of Loyalist group settlements. Charlotte's original magistracy was made up largely of worthies who had served in similar public capacities in the American colonies.^{vi} Despite their Loyalist origins and their continuing competition with Americans over territory and resources, they retained close business and social ties across the international boundary. This included organizing a flourishing cross-border trade which the imperial customs administration stigmatized as smuggling, and which was alternately weakly defended and half-heartedly suppressed by the provincial government at Fredericton.^{vii}

Although Charlotte was a geographically large and, by New Brunswick standards, populous county, its low law administration was dominated by the magistrates of St Andrews parish, who in lay life were the leading merchants, bankers and shipowners of the town. Their hegemony was contested by two competing groups of businessmen within the county – the merchants and proprietors of the island parishes (Campobello, Grand Manan and West Isles) and the shipbuilders and lumbermen of St Stephen and Milltown, border communities further up the St Croix river. The St Andrews businessmen-magistrates were also locked in regional competition with their counterparts in the much larger port city of Saint John. One central dimension in my research has been to understand the extent to which these various business associations and conflicts shaped the magistrates' conduct as local administrators and judges.

Unlike justices of the peace in England and in many of its colonies, the New Brunswick magistrates had exclusive civil jurisdiction in actions under five pounds. A subset of these magistrates were also appointed to the court of common pleas, which shared concurrent jurisdiction with the supreme court in civil actions up to ten pounds. In the credit-based economy of a nineteenth-century trading community, there was an enormous volume of petty civil litigation arising out of disputes about dishonoured notes, overdue accounts, trespasses (for example, cutting trees on land one didn't own), unpaid wages, and other everyday incidents. Because of the overwhelming number of cases and a reluctance to sit in judgment over (and thereby risk alienating) their own customers and suppliers, the leading businessmen-justices tried to avoid the exercise of this part of their jurisdiction. At St Andrews they solved this dilemma by encouraging one member of the commission, a retired half-pay officer without commercial involvements, to take on the bulk of the justicing business. For their part, they continued to dominate county administration and filled most of the county's seats in the provincial assembly and legislative council.

Much of the material for my research about petty civil and criminal justice in Charlotte consists of dockets, examinations, trial notes, writs and other documents produced by Charles Reid Hatheway as the *de facto* town magistrate of St Andrews. Despite his noninvolvement in commercial business and the ineffectiveness of his attempted forays into provincial politics, Hatheway's career was indelibly marked by the county, regional, provincial and imperial competition that shaped magisterial conduct in New Brunswick. He began in the service of the county's leading landlord, Campobello proprietor David Owen, but they had a profound falling out when Hatheway took the side of the St Andrews businessmen-magistrates in opposition to Owen's highly idiosyncratic, even tyrannical, management of his island parish and the cross-border trade in gypsum which he dominated and they coveted. Owen pursued a vendetta against Hatheway at Fredericton and in a voluminous correspondence with the imperial authorities in London, resulting eventually in a mass of litigation and a rare, although ultimately unsuccessful, attempt by the provincial government to prosecute Owen for misconduct as a magistrate.

Already tainted by his involvement in the Owen affair, Hatheway's reputation came under attack in Fredericton again a few years later when tensions between the St Andrews magistrates active

in the cross-border trade and the imperial officers at that port spilled over into public recriminations and the charge by the county's most prominent businessman-cum_justice of the peace-cum-provincial politician that HM Collector of Customs had challenged him to a duel. The charge was heard at the bar of the Assembly, where Hatheway was called as a witness and denounced as a perjurer. At about the same time, a provincial commission on judicial reform produced a statistical report identifying Hatheway as the most active magistrate in the colony. His detractors stirred up rumours that he promoted unnecessary litigation in order to line his own pockets, and the newly-arrived governor, who apparently did not understand the extensive civil jurisdiction of New Brunswick magistrates but was well-versed in the contemporaneous English denunciations of 'trading justices,' promptly removed Hatheway from the commission of the peace. It took seven years and a change of governors before his St Andrews colleagues managed to have him restored.

The 'sessions system' of county governance by appointed justices came under increasing attack from the mid-1840s. Although the Charlotte magistrates and their supporters successfully resisted the pressure for municipal incorporation, provincial enactments for elected parish officers and for grand jury oversight of county finances limited their administrative autonomy to some degree. More importantly, the county's heavy indebtedness for public works, including the new jail and courthouse at St Andrews, and the tax burden imposed on local ratepayers by the province's efforts to download the cost of pauper immigration, made for a shift in the justices' relations with the provincial assembly. Where they had once dominated the county's seats in the legislature and insisted on appropriating Charlotte's share of provincial revenues to their own projects, they now faced electoral competition from taxpayer advocates as well as from newly-minted officials appointed by Fredericton to oversee areas of administration, for example emigrant arrivals, that had formerly been their exclusive concern.

The sessions system fell into further decline in the 1850s with the emergence of party politics at the provincial level.^{viii} Not only did the enlarged provincial stage offer new opportunities for prominence, but the partisan rewards system generated new justices of the peace by the dozen while the increasing centralization of provincial administration undermined the scope and authority of the county bench. The justices' role in local governance was steadily lessened; the decline of St Andrews was epitomized by the appointment of a St Stephens lawyer as the county's clerk of the peace. These reforms did not immediately diminish the justices' judicial role. Nevertheless, the increasing encroachment of legal professionals in the lay magistrates' courts weakened their claim to provide expeditious substantive justice in contrast to the drawn out, expensive and procedural justice dispensed by the high courts. Within a few years of Confederation, both local governance and the administration of petty justice in New Brunswick were transformed.

This broad-brush overview of low law in colonial Charlotte County underscores its thematic similarity to events elsewhere. The significant merit of local research, however, is its capacity to demonstrate in compelling detail the ways in which social and institutional change are shaped by the purposive interactions of people pursuing their own affairs, and by the often unintended and unanticipated consequences of their activity. All history, even legal history, is local history.

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- i. Robert C. Palmer, *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law* (1993).
- ii. Norma Landau, *The Justices of the Peace, 1679-1760* (1984).
- iii. Douglas Hay, 'Dread of the Crown Office: The English Magistracy and King's Bench, 1740-1800,' in Norma Landau, ed., *Law, Crime and English Society, 1660-1830* (2002).
- iv. David Eastwood, *Government and Community in the English Provinces, 1700-1870* (1997).
- v. For example, Donald Fyson, *Magistrates, Police and People: Everyday Criminal Justice in Quebec and Lower Canada, 1764-1837* (2006); Susan Lewthwaite, 'Law and Authority in Upper Canada: The Justices of the Peace in the Newcastle District, 1803-1840,' Ph.D. thesis, Toronto, 2001; David Murray, *Colonial Justice: Justice, Morality, and Crime in the Niagara District, 1791-1849* (2002).
- vi. Roger Nason, 'Meritorious but distressed individuals: The Penobscot Loyalist Association and the settle_ment of the township of St Andrews, New Brunswick, 1783-1821,' MA thesis, University of New Brunswick, 1982.
- vii. Joshua Smith, *Borderland Smuggling : Patriots, Loyalists, And Illicit Trade In The Northeast, 1783-1820* (2006).
- viii. Gail Campbell, "'Smashers' and 'Rummies': Voters and the Rise of Parties in Charlotte County, New Brunswick, 1846-1857,' *Historical Papers*, 21:1, 1986.