

Lives in the Law:

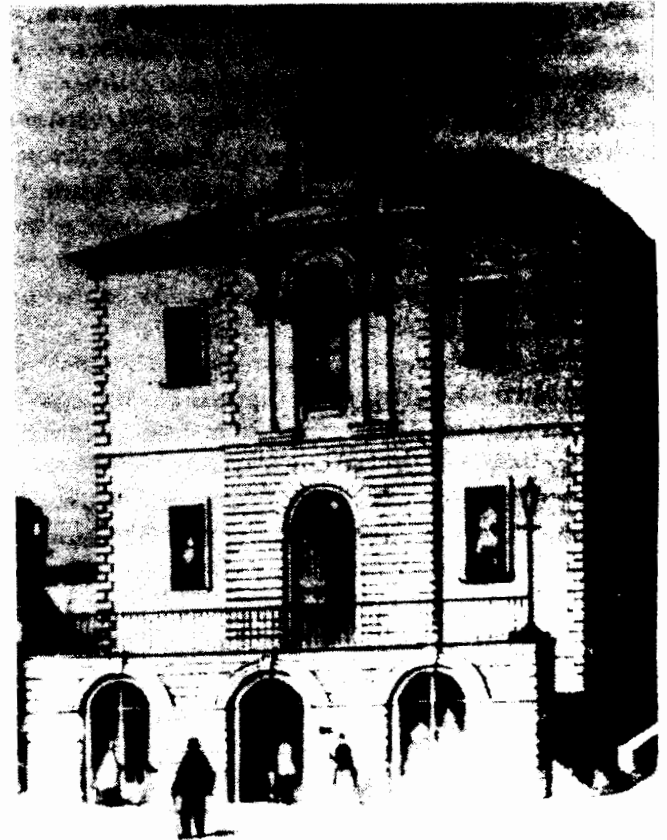
Informal Legal and Social Sketches of the Chief Justices of Newfoundland, 1791 to 1847

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THE FIRST JUDGES in Newfoundland were those justices of the peace appointed in 1729 (known as "winter magistrates") who presided outside the fishing season. Fishing admirals were responsible for dispensing justice during the fishery's prosecution; as they had been since the 16th century, if not earlier. In the same year construction of Newfoundland's first courthouse, on what is now Duckworth Street at the foot of Cathedral Street, was commenced. It was also in 1729 that the first police force in English Canada was established, comprised of part-time constables throughout inhabited portions of the Island. The Royal Newfoundland Constabulary was not organized until 1871.

One form or another of District Court functioned in Newfoundland from about 1890 until merged in the Supreme Court on 2 September 1986. What is now known as the Supreme Court of Newfoundland was established in 1791 as "The Court of Civil Jurisdiction of our Lord the King at St. John's, in the Island of Newfoundland." In 1792 this court was given jurisdiction over criminal cases in addition to its original responsibility for civil justice. At the same time, the Court was renamed "The Supreme Court of Judicature of the Island of Newfoundland." By virtue of an 1824 Act of the British Parliament and a Royal Charter in 1825, the Court became known as the "Supreme Court of Newfoundland" in 1825. There were several other courts, including vice-admiralty and surrogate courts, whose responsibilities were eventually assumed by what are now the Provincial or Supreme Court of Newfoundland or by the Federal Court of Canada. Effective from July 1975, the Court was reorganized (under 1974 Newfoundland legislation) into Trial Division and Court of Appeal. In 1979, the Unified Family Court began sitting (under 1977 Newfoundland legislation) as a division of the Court.

Until 1825, the Court had one judge, the Chief Justice, originally referred to as "the Chief Judge,"



The old courthouse

assisted by two assessors. Besides the most visible function, judging, the largely unwritten job description of Chief Justice requires an administrator's skills; a psychologist's prudence; lobbyist's guile; politician's wiles, and a diplomat's tact — all to serve the welfare of the Court. In addition, a Chief Justice is the Lieutenant Governor's understudy.

Authority to appoint the Chief Justice has, by law, always resided outside Newfoundland: from London, England until Newfoundland joined Confederation on 31 March 1949, and from Ottawa since then. The outside appointment of a Chief Justice is required even if selected from among sitting justices of the Court of Appeal or Trial Division.

John Reeves
C.J.N. 1791 - 1793

Born: London, England; 20 November 1752

Died: London, England; 7 August 1829

John Reeves, Newfoundland's first Chief Justice, was a graduate of Eton College and Oxford University. He was legal advisor to the trade committee of the Privy Council in London when appointed Chief Justice. At 39 years old, he was among the youngest to be appointed the Court's first minister. His tenure was the shortest as Chief Justice: less than two years. In fact, he tried cases in the Court only from September to early November 1791 and in September and October 1792.

Until 1809, the Act authorizing the Supreme Court of Newfoundland had to be annually renewed and the Chief Justice reported annually to the British Government — to justify renewal of the Act authorizing, and to recommend improvements to, the Court. Reeves' testimony in London before a committee of the British House of Commons in 1794, after he retired as Newfoundland's Chief Justice, included the following:



John Reeves

Without Counsel or attorneys [in Newfoundland] to make points or defend them, the argument is nothing, and justice is everything; to the accomplishing of which the Court is able to proceed without the usual formalities and delays.¹

Although there is evidence that a solicitor resided temporarily in St. John's in about 1701, the earliest records of the practice of barristers pleading in Newfoundland courts are dated in the early 1800s.

History's judgment of Chief Justice Reeves is that he spurred a reform movement of lasting impact in the Newfoundland justice system. Reeves, arguably, spent more time writing the first comprehensive history of Newfoundland, *History of the government of the island of Newfoundland*, than he spent as Chief Justice. Another judge, however, is better known for that subject. Daniel Woodley Prowse, Q.C., a native of Port de Grave who served as a magistrate and, later,

a District Court judge, published *A History Of Newfoundland* in 1895.

In 1800, Reeves became Queen's Printer in Britain. Later still he was a Bencher of the Inns of Court, London. He died a bachelor in 1829.

D'Ewes Coke
C.J.N. 1793 - 1798

D'Ewes Coke came from Britain to Newfoundland for a tour of duty as surgeon with the Royal Navy. Following Navy service, he settled in Trinity where he practiced medicine until about 1789. To supplement his meagre earnings from practice there, he undertook employment as Scrivener (a description, historically, for Notary Public); Justice of the Peace, and Keeper of Rolls (tax records).

Around 1789, he moved from Trinity to St. John's and was appointed, by the Governor of the day, chief judge of a court the Governor had established, a civil court of common pleas, to replace justices of the peace. Some sources report that he served as a magistrate. This may have been either another description for the chief judge's position which he held in the civil court or a separate judicial posting which he undertook in Newfoundland.

When the Supreme Court was created in 1791 he was named one of the two assessors on the Court to assist the first chief justice, John Reeves. He was appointed Chief Justice in 1792 and retired from the Bench in 1797 because, he said, he was unhappy with the requirement of the British Governor that, as Chief Justice, he remain year round in Newfoundland.

Richard Routh
C.J.N. 1798 - 1801

Little is known of Coke's successor. A native of Bristol, Richard Routh had been a deputy customs collector in Salem and Marblehead, Massachusetts for seven years. In 1778 he returned to England to work in the business of the merchant who then did a flourishing private trade between Britain and Newfoundland. That merchant, in 1782, arranged employment for Routh as customs collector in Newfoundland.

At least partly due to his lobbying of Newfoundland merchants and the local Governor, Routh was appointed Chief Justice in 1798 by the British Government. His qualifications for appointment as Chief Justice are not apparent. While he served as Chief Justice, from 1798 to 1800, he continued his employment as customs collector.

Although the British Government required Chief

Justice Routh to remain in the Colony while on the Bench, Routh persuaded the local Governor to grant him several sabbaticals in England. The last of these sabbaticals was in November 1800 when he sailed from Newfoundland for England. The vessel was lost at sea with no survivors. His widow later received a small pension.

Jonathan Ogden C.J.N. 1802 - 1803

Jonathan Ogden was the second surgeon to fill the position of Chief Justice. Born in Nova Scotia, he came to Newfoundland in 1784 in the service of the Royal Navy. Ten years later he was appointed the magistrate for St. John's. In 1798 his magisterial jurisdiction was expanded to the entire Island of Newfoundland. Ogden was serving as a surrogate judge in Newfoundland when Chief Justice Routh was lost at sea and offered to replace him. He was appointed acting Chief Justice in 1801 and Chief Justice in May 1802.

The position took its toll. Within a year of appointment, he complained of ill health, was incapacitated by a stroke, and resigned. Several months later, he took a cruise in search of his health. The ship went down and all were lost.

Thomas Tremlett C.J.N. 1803 - 1813

Born: Dartmouth, Devon, England; 1770
Died: August, 1830

The next Chief Justice, Thomas Tremlett, was, by all accounts, one of the most intemperate to preside in the position. He had been a merchant in his parents' business in Poole, England and accompanied them to St. John's and Little Bay, Fortune Bay. When the business in Little Bay was declared insolvent in 1789, he moved to St. John's where he was a commissioned merchant. From 1801, although not trained in law, he held positions in the Vice-Admiralty court. (The Vice-Admiralty court was established in 1744 to deal with legal matters in Newfoundland concerning the sea and shipping.)

As Chief Justice from 1803 to 1813, historians' consensus is that he knew little law and frequently rendered unfair decisions. His family's earlier commercial misadventure in Newfoundland may have

been reflected in his judgments; often favourable to debtors in insolvency cases and adverse to successful mercantile enterprises on the Island. That he lasted as Chief Justice for ten years is testimony to his strong backing from the local Governor and the British Government.

Newfoundland merchants and other elements of the public grew increasingly angry with the Chief Justice's bench deportment and decisions. They petitioned Britain for his removal; on grounds of (i) incompetence; (ii) venality, and (iii) partiality. The Chief Justice denied the allegations and no legal grounds for his dismissal were found by Britain. Public protest against the Chief Justice nonetheless continued and became more vehement. In 1813, the British Government appointed Tremlett Chief Justice in Prince Edward Island. The equally unpopular Chief Justice of Prince Edward Island, in turn, was sent to Newfoundland to fill the position of Chief Justice here. If, in the public's view, Chief Justice Tremlett did not always wisely deploy his oars, his successor occasionally appeared not to possess any.

Caesar Colclough C.J.N. 1813 - 1815/1816

Born: Wexford, Ireland
Died: Ireland; 1832

Caesar Colclough practised briefly as a barrister in Ireland. As a reward for his services to the British Government during the Irish rebellion of 1798 (whether with the sword or the pen is unclear), he was appointed Chief Justice of Prince Edward Island before being sent to Newfoundland in 1813 in exchange with Chief Justice Tremlett.

As Chief Justice of Newfoundland from 1813 to 1815/1816, historians rate him a "very sorry administrator".² Parlour conversation contended that a jury in a criminal case in which he presided returned after several days of deliberation and announced, as its verdict, that "we've decided we don't want to get involved." Colclough requested every person to remove his (her) headwear when passing the door of his residence at Rawlins Cross, St. John's. Not infrequently, his poor judgment off the Bench mirrored his inadequacy on the Bench. A situation in point was his reaction to a letter anonymously addressed to him in 1815. Conciliatory in tone, the letter was posted on the Court House gate at St. John's and read:

...the poor of St. John's are very much oppressed by different orders from the Court House, ... [concerning] the killing ... [of dogs], without the least ... [sign of them] being sick or mad. ... [This operates against] the Interest of the poor Families, ... [because] their dependence for their Winter's Fuel is on their Doggs, and likewise several single men that is bringing out Wood for the use of the Fishery,³

The Chief Justice's response to the letter was to immediately post a declaration offering a £100 reward for the discovery of the person who wrote or who posted the letter. No one claimed the reward. Shortly after this event, Chief Justice retired to Ireland. In the wake of Newfoundland's experiences with Chief Justices Tremlett and Colclough, Britain enacted legislation that required candidates for Newfoundland Chief Justice, in future, to have at least seven years experience as a barrister. Previously, there had been no minimum. (In 1995 the minimum requirement for any appointment to the Court is ten years at the Bar.)

Francis Forbes C.J.N. 1816 - 1822

Born: Bermuda; 1784

Died: Sydney, Australia; 9 November 1841

Chief Justice Frances Forbes was born in Bermuda. He went to London where he qualified as a barrister at the Bar of England (Lincoln's Inn) in 1812. In 1811, he returned to Bermuda to be Attorney General (before his admission to the Bar of England). Later, he was senior Crown counsel in Bermuda's Vice-Admiralty Court. He was appointed Chief Justice of Newfoundland on 24 August 1816, however, he was not sworn in until 15 July 1817. He was exceedingly able and popular as Chief Justice. Many of his decisions are published in *Select Cases From The Records of The Supreme Court of Newfoundland* (1829).

On at least three occasions, Forbes was required to resolve disputes over the use of church pews. In *Newman v. The Church-Wardens*, the plaintiff had erected curtains in his church pew. When the defendants removed them, the plaintiff sued to determine whether church wardens were legally permitted to do so,

... the owners of pews have not an absolute, but only a qualified, right to them; and ... they cannot, consequently, make any alteration in them which has the remotest tendency to in-

jure the appearance of the church, or to annoy any member of the congregation, ...⁴

A power to remove any fixtures placed in the church by an individual, being ..., vested in the Church-wardens ... it is not for this Court to say whether or not they have exercised this power [in removing the curtains and the like erected by the Plaintiff in his church pew] with discretion ...⁵

More significantly, Chief Justice Forbes decided a person was entitled to own real property on the Island whether (*R. v. Row*, 11 November 1818) or not (*R. v. Kough et al.*, 23 August 1819) it was dedicated to use in connection with the fishery.⁶

Since the Newfoundland Supreme Court heard both trials and appeals, often the Court considered appeals from decisions of the surrogates appointed by the Governor and having jurisdiction to hear certain cases including some criminal prosecutions. Although Forbes determined in 1820, on appeal, that a sentence of 36 lashes imposed on each of two fisherman for contempt of court was excessive, he regretted he was powerless to entirely rescind the sentence in order that the fisherman be spared any lashes. The Governor disliked Forbes' support for "going slow" with political reform in Newfoundland; a course diametrically opposed to the Governor's views. The public, on the other hand, admired Forbes. His portrait was hung in the Court House but destroyed, with the Court House, in the 1846 St. John's fire.

While Chief Justice, Forbes took ill with stomach problems. In 1820 he sought permission for a leave of absence. The Governor declined. The Chief Justice repeated his request in 1822, this time supported by his doctor's letter. Again, the Governor declined. When Forbes threatened resignation, the Governor relented. Forbes left Newfoundland, on leave, with his wife and three children on 7 May 1822. Chief Justice Forbes never returned to Newfoundland.

On 30 September 1822, Forbes resigned as Chief Justice of Newfoundland. By August, 1823 he had accepted what he regarded as a less health-taxing judicial appointment: as first Chief Justice of the Supreme Court of New South Wales, Australia. But his health continued to decline. In July 1837 he permanently resigned from the Bench.

Forbes is perhaps best remembered for writing *The Banks of Newfoundland*, a piece which was regarded as Newfoundland's national anthem until the introduction, in 1902, of the "Ode To Newfoundland." It has endured as an anthem of the St. John's Regatta, where it is known as "Up the Pond."

Richard Alexander Tucker
C.J.N. 1822 - 1833

Born: Bermuda; 1784

Died: Clapton, England; 11 December 1868

The next Chief Justice, Richard Alexander Tucker, like Francis Forbes, was native to Bermuda and had qualified as a barrister in London (the Inner Temple). He was appointed Chief Justice on 1 October 1822 but did not take his seat until 5 May 1823. He was first Chief Justice of the Colony of Newfoundland (previously, Newfoundland was regarded by Britain as a seasonal fishing station).

Until Tucker's appointment, the Chief Justice was the only judge of the Newfoundland Supreme Court. In January 1826, two assistant judges were added to the court as a result of legislation enacted in Britain the previous year. These assistant judges were sometimes referred to as *puisne* judges (after the French, meaning "subordinate" or "associate"). The first two appointees were Augustus Wallet Des Barres and John William Molloy. Molloy was removed from the Bench and supplanted by Edward Brabazon in September 1826.

At this time, when the Governor of Newfoundland left the colony for London, the practice was that the Chief Justice would take over as the Colony's administrator. Chief Justice Tucker served in that role from 12 October 1827 to 12 August 1828 and in the winter of 1831-32. During these times one of the two assistant judges of the Court was acting Chief Justice.

One of Tucker's legacies to Newfoundland law was his introduction of law reporting; the publishing, with summaries, explanatory notes and, sometimes, commentaries, of decisions of the Newfoundland Supreme Court. He was editor of the first Newfoundland law reports, a single volume entitled, *Select Cases From The Records Of The Supreme Court of Newfoundland*, published 1829 in St. John's and London.⁷ The publication incorporated cases the Chief Justice selected from 1817 to 1828 together with Rules of Court, documents important to the Court's establishment, and the names of the 14 members of the Bar in 1829.

In 1833, Chief Justice Tucker accepted the British Government's invitation to resign after he informed the Government's Colonial Office, in London, that if the local House of Assembly authorized taxation of wines and spirits (a challenge to the authorizing tax legislation came before the Supreme Court) he would allow the challenge and declare the revenue statute a nullity. Shortly after resigning, he left New-

foundland, never to return, for Kingston, Upper Canada where he took a senior civil service appointment.

Henry John Boulton
C.J.N. 1833 - 1838

Born: Kensington, England; 1790

Died: Toronto, Ontario; 18 June 1870

Chief Justice Henry John Boulton became known in media and among the public as "the hanging judge." A native of England, he had commenced practicing law in Toronto in 1807 (at 17 years of age). He was Solicitor General and then Attorney General of Upper Canada before coming to Newfoundland. He served as Newfoundland's Chief Justice from 1833 to 1838.

Although his sentences were harsh, sometimes because the law afforded him no alternative, Boulton does not appear to have been unfair in his conduct of trials. The moniker "hanging judge" most likely derived from events in January 1834. At 7:30 p.m. on 3 January, following a day-long trial, a jury convicted two men of murder and Chief Justice promptly sentenced both to hang. One of them hanged two days later. The other was reprieved principally because of unfair police tactics: they had promised him a pardon if he cooperated with them in their murder investigation. On 10 January, following another day-long trial, a jury convicted three accused of murder and Chief Justice sentenced them to hang. Only two of them hung within 72 hours because the third convict was a pregnant woman. She was hung six months later after her child was delivered and her health had improved sufficiently to execute her. She was the last woman to hang in Newfoundland.



H.J. Boulton

In 1834, Boulton drafted a Bill which, when brought into force later the same year, had the effect of incorporating the Law Society of Newfoundland and regulating admission of persons to the Newfoundland Bar. His contribution to this legislation and his efforts to reform the jury system (among other reasons) made him unpopular in quarters of the Island. The Newfoundland House of Assembly complained to the Privy Council, London, that the Chief Justice was "a political Partisan, a corrupter of Justice, and a magistrate who endangered the constitution and peace of the community".⁸ Whether the

reference to "magistrate" indicates he was a magistrate before becoming Chief Justice or was intended by the House as effrontery is unclear. The latter interpretation seems more reliable. Magistrates were then generally, although unfairly, regarded in some quarters as significantly inferior to Supreme Court judges both in status and intellect. The Privy Council recommended to the British Government the removal of the Chief Justice. The recommendation was carried out in 1838. After leaving the Bench in Newfoundland, he entered law practice in Toronto.

Boulton was not new to rejection. In 1833, before coming to Newfoundland, he was dismissed as Attorney General of Upper Canada because of his opposition, there, to the growing reform movement.

John Gervasse Hutchinson Bourne C.J.N. 1838 - 1844

Baptised: Eastwood, Nottinghamshire, England; 1 July 1804

Died: London, England; 21 November 1845

John Bourne, an Oxford educated lawyer, was baptised in 1804. If born after 1799, he was Newfoundland's youngest Chief Justice; because that would have made him younger than the shortest-serving (John Reeves) and the longest-serving (William Henry Horwood) Chief Justices; both of whom were appointed first minister of the Court at 39 years of age. As Chief Justice from 1838 to 1844 he was principled and scholarly. He was, however, in the opinion of one historian, "cursed with a violent temper."⁹

Bourne's decisions, in legal proceedings that derived from allegations of defamation and from as-

saults during political riots, made him unpopular with those advocating political reform. He was equally unpopular with the newly-hatched House of Assembly because he accused that body of appointing certain people to public office on account of the Governor owing them money. Mounting political and public pressure forced him from the Bench in 1844. The attorney general, James Simms, became acting Chief Justice from June to November 1844.

Thomas Norton C.J.N. 1844 - 1847

In November 1844 Thomas Norton was sent by the British Government to Newfoundland to become the next Chief Justice. Native to Ireland, he was Newfoundland's first Roman Catholic Chief Justice. However, his life is not well-documented — even the dates of his birth and death are unknown.

Norton presided from 1844 to 1847. Judge Prowse's *History* reports he was "an able, impartial judge, [who was] a most humorous and fascinating companion off the bench" and who "loved gay society."¹⁰ After resigning from the Bench, he went to London and there established a law practice.

Notes

1. 3 *The Book Of Newfoundland* 519: "The Legal Profession in Newfoundland" by Rupert W. Bartlett, Q.C., at p. 521]
2. Prowse, at p. 390.
3. Prowse, at p. 401
4. Forbes C.J. (on 09 June 1823)
5. *Select Cases From The Records of The Supreme Court of Newfoundland* (1829), pp. 353, 354.
6. *Select Cases From The Records of The Supreme Court of Newfoundland* (1829), at pp. 144, 195.
7. In 1979, this volume was republished by The Carswell Company Limited, Toronto.
8. 1 *Encyclopedia of Newfoundland and Labrador*. p. 231.
9. Prowse, at p. 457.
10. Prowse, at p. 457.

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