

4-1-2016

## High Freshets and Low-Lying Farms: Property Law and St. John River Flooding in Colonial New Brunswick

Jason Hall  
*University of New Brunswick*

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Legal History Commons](#)

---

### Recommended Citation

Jason Hall, "High Freshets and Low-Lying Farms: Property Law and St. John River Flooding in Colonial New Brunswick" (2016) 39:1 Dal LJ 195.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact [hannah.steeves@dal.ca](mailto:hannah.steeves@dal.ca).

---

Jason Hall\*

High Freshets and Low-Lying Farms:  
Property Law and St. John River Flooding  
in Colonial New Brunswick

---

*Although New Brunswick was founded on private land ownership, colonists who settled low-lying land along the St. John River found that the waterway's erratic flood cycle and ever-changing nature threatened their lives and farms, and thwarted their efforts to divide riverbanks and islands into fixed parcels of private property. This article draws upon colonial petitions, sessional court records, and colonial legislation in analyzing the response of the colonial legislature and of local governance to the challenge that the St. John River created for property rights and a private land management system dependent on static boundaries and fixed fences. In examining the colonists' attempts to adapt property law to foster appropriate responses to their changing environment and social needs, this article provides insight into the evolution of colonial law, local governance, the ecological knowledge of farmers, social conflict, and adaptations to flooding in early New Brunswick.*

*Même si le Nouveau-Brunswick a été fondé sur la propriété privée des terres, les colons qui se sont installés sur les terres basses le long du fleuve Saint-Jean ont constaté que l'imprévisibilité de ses crues et sa nature perpétuellement changeante menaçaient leur vie et leurs fermes et contrecarraient leurs efforts pour diviser les berges et les îles en parcelles fixes. L'auteur examine des pétitions déposées par des colons, des dossiers de la Cour des sessions et les lois coloniales pour analyser la réponse de la législature coloniale et des administrations locales au défi que présentait le fleuve Saint-Jean quant au droit de propriété et à un système de gestion des terres privées tributaire de limites statiques et de clôtures fixes. Tout en relatant les tentatives des colons d'adapter le droit de la propriété pour arriver à des réponses appropriées à leur environnement changeant et aux besoins sociaux, l'auteur donne un aperçu de l'évolution du droit colonial, de l'administration locale, des connaissances écologiques des agriculteurs, des conflits sociaux et de l'adaptation aux inondations au début du Nouveau-Brunswick.*

---

\* Dr. Jason Hall completed his dissertation on the cultural and environmental history of the St. John River last year at the University of New Brunswick. He currently works for the Maliseet Nation and teaches part time on the global history of rivers at St. Thomas University. The author wishes to thank the Social Sciences and Humanities Research Council of Canada for financially supporting this study, and Margaret McCallum for her editing advice.

The St. John River, the largest river system in Atlantic Canada and New England, has long been an important corridor of human settlement. Its drainage basin, which includes portions of northern Maine and the Gaspé Peninsula in Quebec as well as a large swath of western New Brunswick, has been the centre of the Wolastoqiyik (Maliseet) homeland for millennia. In the late 17th and early 18th centuries, small groups of French settlers established themselves along the lower waterway where they managed farms and traded with Wolastoqiyik.<sup>1</sup> The construction of Fort Frederick at the river's mouth in 1758 and the violent expulsion of Acadians from its lower reaches by British soldiers and New England Rangers in the years that followed opened the waterway to British settlers.<sup>2</sup> In 1784 the shores of the lower and middle reaches of the St. John became the political and population nucleus of the new colony of New Brunswick when it was carved out of Nova Scotia. Because of proximity to the river for transportation and drinking water for livestock, and the fertility of seasonally flooded islands and riverbanks, these lands were some of the most valuable available for the New England Planters and British Loyalists who arrived in the region during the 1760s and 1780s. The British Crown instructed Thomas Carleton, the governor of New Brunswick, to establish towns on navigable rivers and coasts, and ensure that properties did "not extend along the Banks of any River, but into the Main Land" so that all citizens could access rivers for transportation and other purposes.<sup>3</sup> Fredericton, the colonial capital that Carleton established, was bordered by water on three sides: by the St. John, and two small tributaries, Phyllis Creek and Mill Creek. This town was also located across the St. John from the mouth of the Nashwaak River, which offered fertile farmland along its

1. For Wolastoqiyik and Acadian settlement, see Marie Claire Pitre & Denise Pelletier, *Les Pays Bas: histoires de la région Jemseg-Woodstock sur la rivière Saint-Jean pendant la période française, 1604–1759* (Fredericton, NB: Société d'histoire de la rivière Saint-Jean, 1985); Jason Hall, *River of Three Peoples: An Environmental and Cultural History of the Wolastokw / Rivière St. Jean / St. John River c. 1550–1850* (PhD Dissertation, University of New Brunswick, 2015).

2. For Fort Frederick and the expulsion of Acadians, see Enoch Poor, *His Book: A Journal from Newbury to Saint John: 1759–1760, (1759–1760)*, Fredericton, UNB Loyalist Collection (MIC-Loyalist FC LMR .P6E5B6); John Knox, *An Historical Journal of the Campaigns in North America, for the years 1757, 1758, 1759, and 1760*, vol 1 (London: John Knox, 1769); "Brigadier General Monckton's Expedition to the River Saint John in September, 1758" in WO Raymond, ed, *Collections of the New Brunswick Historical Society* 3:8 (1907–1914) 113–165; Moses H Perley, *On the Early History of New Brunswick*, ed by WF Ganong (Saint John, NB: Barnes & Company, 1891); and Andrea Bear Nicholas, "Settler Imperialism and the Dispossession of the Maliseet, 1758–1765" in John G Reid & Donald J Savoie, eds, *Shaping an Agenda for Atlantic Canada*, (Black Point, NS: Fernwood Publishing, 2011) 21–57.

3. See Royal Instructions to Thomas Carleton, Provincial Archives of New Brunswick, online: <archives.gnb.ca/Exhibits/FortHavoc/html/Royal-Instructions.aspx?culture=en-CA>.

low-lying banks.<sup>4</sup> Clustering both rural holdings and urban centres near the St. John ensured that much of the environmental impacts of British colonization in the region centred upon the waterway's shores.<sup>5</sup> It also meant that the river's physical characteristics and habits had a profound influence on the new colony.

The advantages of living near the river came with a high price. The St. John River's powerful spring floods and erratic flood cycle threatened the lives and property of colonists who settled low-lying tracts along its banks, and the incompatibility of floods and fences led to conflicts amongst settlers, especially where multiple people claimed ownership of a flooded tract of land. In his study of the natural limits of property law, legal historian Theodore Steinberg noted that "every once in a while there comes a piece of earth that will not fit neatly into the square hole of property."<sup>6</sup> The riparian lands of the St. John River belong in this category. Nonetheless, landowners and legislators made innovative and successful efforts to adapt property laws to better contend with the waterway's dynamic and destructive nature. To reduce social conflicts among landowners, New Brunswick legislators expanded the definition of legal property boundaries to include water fences and the waters surrounding river islands, as well as created a local governance process that enabled owners of river islands to manage their pasture and crop lands collectively without building fences. As the tangle of legislation they developed attests, regulating property on a dynamic watershed in an agricultural society was no easy task. Nor, given conflicting land uses, could legislators hope to devise a legal regime that satisfied all riparian property owners, or provided a ready resolution of all property disputes. Nonetheless, as will be argued, the regime devised by New Brunswick legislators successfully adapted existing British property law to meet the significant challenges that the power and caprice of the St. John River posed to riparian landowners.

The St. John is a highly seasonal river. Winter blankets its banks with deep snow and turns its waters into a frozen mirror and patches of rough ice. Spring warmth and rain melt this snow and ice, forcing the river to overflow its low-lying banks and islands in an annual flood pulse or

---

4. See New Brunswick Court of General Quarter Sessions of the Peace (York County) Minutes, vol 1 (9 Jan 1799) Fredericton, UNB Loyalist Collection (MIC-Loyalist FC LPR .N4C6S4Y6).

5. For settlement's confinement to river banks in 1825, see Peter Fisher, *The First History of New Brunswick*, ed by William O Raymond (Saint John, NB: The New Brunswick Historical Society, 1921 [1825]) at 7.

6. See Theodore Steinberg, *Slide Mountain, or The Folly of Owning Nature* (Berkeley, CA: University of California Press, 1995) at 24. For the maladaptation of British colonial property law due to its insensitivity to local climatic and geographical conditions, see Nicole Graham, *Landscape: Property, Environment, Law* (New York: Routledge, 2011) at 124, 131-133, and 205-206.

“freshet.” The narrow tidal mouth that moderates its discharge into Saint John Harbour, the small gradient of its banks in the lower reaches, and the numerous bends that become clogged with ice, intensify spring flooding. Floodwaters, ice, and debris scour portions of the river’s shore each year, clearing trees, creating edge habitats, and sometimes destroying human lives and property. These freshets fertilize a broad flood plain below Fredericton and smaller stretches of low-lying banks further upstream with organic material, and create a complex riverine ecosystem of ponds, sloughs, and marshes. Conversely, sustained hot dry summer and autumn weather decreases the river’s size and flow velocity, exposing more rapids, sand bars, and other navigational obstacles along its course, and making the waterway easier for people and animals to ford or swim across.

The British colonists who settled on the banks of the St. John River discovered that learning how to manage the waterway’s distinctive characteristics was a challenge they could not ignore. The St. John in its entirety was an enormous and dynamic ecological system that dominated the landscape, and the agrarian and cultural experience that settlers had acquired in the Thirteen Colonies was of limited relevance along the waterway. The waterway was a far larger river than what most colonists had grown accustomed to further south. Moreover, it behaved differently: its mouth was more complex and dangerous to navigate than most rivers in eastern North America or Great Britain, its tidal estuary was exceptionally long, and some of the most powerful tides in the world influenced its flow as far as 140 kilometres upstream, all the way to Aukpaque Island, located roughly ten kilometres above present day Fredericton. The river and its tributaries also experienced more cold, snow, and ice build-up than rivers in New England and the British Isles. These factors limited settlers’ navigation and agricultural opportunities in ways that they did not foresee. The melting of so much snow and ice subjected the St. John to more extreme annual floods than occurred on most of the rivers that cradled other British settlements in North America. Indeed the great swelling of the waterway that brought thousands of tonnes of ice out of the north and kept riverside fields sodden late into the spring was a regular reminder of the vastness of the riverine ecological system.<sup>7</sup>

Lush St. John River islands and riverside meadows were among the most valuable sources of summer pasture and winter hay in the region

---

7. For an overview of the river’s physical characteristics, see Richard A Cunjak & Robert W Newbury, “Atlantic Coast Rivers of Canada” in Arthur C Benke & CE Cushing, eds, *Rivers of North America* (Amsterdam: Academic Press, 2005) 953; FK Dalton, “The Reversing Falls at Saint John, New Brunswick” (1960), 54 *Journal of the Royal Astronomical Society of Canada* 157; and JW Bailey, *The St. John River in Maine, Quebec, and New Brunswick* (Cambridge, MA: Riverside Press, 1894).

that became New Brunswick. The earliest recorded French gardens along the river were located on Caton's Island in the stretch of water known as Long Reach, and Acadians who settled further upstream near present day Fredericton in the late 17th and early 18th centuries pastured their pigs on river islands.<sup>8</sup> British engineer Robert Morse observed in 1784 that the Maugerville farmers, who were the vanguard of British settlement of the interior river in the early 1760s, worked only the *intervale* lands which were "easily cleared, and the soil inexhaustible."<sup>9</sup> Beamsley Glasier, the agent for the St. John River Society, the elite group of citizens who began settling the lower watershed a few years later, noted that Maugerville farmers followed the pattern of island pasturing that the French had introduced to the waterway in the 17th century. "Their Hogs and Sheep they keep on the Islands...overflowing Leaves these Islands so Rich that the Hogs Grow fatt by eating Ground nuts," small edible tubers sometimes known locally as "Indian potatoes." Glasier then boasted that the Society's grants contained several such islands.<sup>10</sup> Early New Brunswick historian Peter Fisher wrote a half century later that upland fields produced "one and a half tons [of hay] per acre, and the *intervale* from two to three tons."<sup>11</sup> The hay that settlers cut from the wild grasses and introduced species that grew along the river was key to their success, as it was the principle winter food supply of the livestock that they depended on for food and traction. Moreover, colonists easily travelled to and from St. John *intervales* and islands by barge and ice sled. Although Glasier's description of the river celebrated the extent and nutritional value of *intervale* grasses, the colonists he helped attract to the waterway often emphasized their scarcity.<sup>12</sup>

St. John farmers valued river islands and narrow necks of shoreline for pastures, but the waters that fertilized and insulated these lands created problems in establishing property claims to the islands.<sup>13</sup> Like other North

---

8. See Gabriel Marcel, ed, *Factum du proces entre Jean de Biencourt, Sr de Poutrincourt et Les Pères Biard et Massé Jésuites* (Paris: Maisonneuve et C Leclerc, 1887) at 24; Sieur Dièreville, *Relation of the Voyage to Port Royal in Acadia or New France*, ed by John C Webster, translated by Mrs C Webster (Toronto: the Champlain Society, 1933) at 108-109.

9. Robert Morse, "A General Description of the Province of Nova Scotia" in Douglas Brymer, ed, *Report on Canadian Archives, 1884* (Ottawa: Maclean, Roger & Co, 1885) at xxxiii; Fisher, *supra* note 5 at 32. The term *intervale* refers to low-lying lands bordering rivers.

10. Letter from Beamsley Glasier to Committee (15 December 1764) in WO Raymond, ed, "Old Townships on the River St. John: Papers Relating to the St. John's River Society," *Collections of the New Brunswick Historical Society* 2:6 (1899-1905) at 310 and 312.

11. Peter Fisher, *History of New Brunswick*, *supra* note 5 at 32.

12. For more on hay and its scarcity, see Hall, *supra* note 1 at 300-304.

13. For island pasturing in the Thirteen Colonies, see Virginia DeJohn Anderson, *Creatures of Empire: How Domestic Animals Transformed Early America* (New York: Oxford University Press, 2004) at 160.

American settlers, New Brunswick colonists preferred to pasture livestock in places where they could not damage crops and gardens, did not require time-consuming fencing, or would not fall easy prey to wolves and bears.<sup>14</sup> While the St. John offered many such tracts, regulating private property on a large river with dramatic seasonal fluctuations in volume proved problematic for settlers and lawmakers. Riparian residents knew that the St. John was constantly eroding and building up its islands and banks. Peter Fisher claimed that

The rapidity of the rivers, swoln by the melting of the snow in the spring, tears away the soil in some parts, and deposits it in others...courses are gradually altered—new islands are formed, and alluvial deposits accumulated in some parts of the rivers, while they are swept away in others; so that a person may have a growing estate, or he may see his land diminishing from year to year, without the power to prevent it.<sup>15</sup>

Owners of land along the St. John learned that the river could take away more in a single year than it had given over previous decades.

New Brunswickers understood that there was little they could do to stop flooding from affecting their riparian properties, and the river's size and its unique mouth appears to have dissuaded the colony from pursuing large scale flood control projects.<sup>16</sup> The unpredictability of freshets also thwarted peoples' attempts to plan for flooding. St. John River flooding resulted from a complex mix of seasonal and daily weather conditions, ice movements, snow packs, and tidal forces that defied the scope of colonial ecological knowledge—and confound weather experts and local residents today. Settlers became skilled in identifying risk-prone areas like Maugerville, but they had a harder time foreseeing the exact timing and extent of flooding and ice jams, and even more difficulty anticipating the extreme floods that inundated Fredericton and other high intervales every few decades.<sup>17</sup> In 1764, Beamsley Glasier noticed that the river sometimes briefly flooded and deposited rich manure over a tract of the St. John River

---

14. For black bears, free range cattle pasturing, and livestock's threats to crops on Prince Edward Island, see Rusty Bittermann & Margaret McCallum, "'One of the Finest Grass Countries I Have Met With': Prince Edward Island's Colonial Era Cattle Trade" (2016) 90:2 *Agricultural History* 173-194.

15. Peter Fisher, *Notitia of New-Brunswick for 1836 and extending into 1837* (Saint John, NB: Henry Chubb, 1838) at 12.

16. For more on British hydraulic engineering on the St. John, see Hall, *supra* note 1. For the 1832 Fredericton flood, see Maria R Audubon, ed, *Audubon and his Journals* vol 2 (New York: Charles Scribner's Sons, 1897) at 389.

17. For erratic flooding, see "Beamsley Glasier to Committee," *supra* note 11 at 309.

Society's land, but had not done so for "several years past."<sup>18</sup> Loyalist diarists recorded when icy freshets surged metres over previous high water marks, devastating farms and families that had considered themselves safe from floods. Reverend Frederick Dibblee watched the St. John destroy his improvements below Woodstock when the river rose ten feet in one day to heights unprecedented within local memory.<sup>19</sup>

Such dramatic and unpredictable flow changes left residents little time to secure properties and seek safety. In 1798, the prominent Loyalist, Edward Winslow, reported on an ice freshet that ravaged his riverside farm at Kingsclear:

Many others above me, lost every animal...I escap'd...by a hair's breadth. The water was up to my front door & 6 feet deep in my cellar. I...expected to lose my House. The mountains of ice were 40 feet high ...the stoutest of Elms & Maples were broke like pipestems—luckily... they took a direction just to avoid the buildings...they tore all before 'em. I detach'd my wife and all the Light Infantry part of my family, and stood ready with a boat to run like a lusty fellow for the Highlands....I sav'd all my cattle, and even my sheep and hogs—my fences of course went to the devil.<sup>20</sup>

*The St. John Gazette* reported that this large freshet displaced twenty families but did not kill any settlers. Winslow had lived on his land for over a decade, but never experienced a flood of this magnitude before. Thankfully, his positioning of farm buildings on a ridge saved them from damage, illuminating how local topographical features on properties could be the difference between safety and destruction for riverside residents.<sup>21</sup>

As the banks of the St. John River were the focal point of New Brunswick settlement, the development of the colony hinged on gaining practical knowledge of the waterway's physical characteristics and seasonality. Colonial officials quickly realized that they needed to understand the effects of the St. John's enormous spring freshets for their colonization plans to succeed. In 1762, Royal Engineer Captain R.G. Bruce told the chief administrator of the colony, Jonathan Belcher, that "the worst circumstances attending the River is that the most valuable of the Lands are overflowed every Spring and do not become dry enough

---

18. "Winslow's Journal," Edward Winslow Papers, Fredericton, UNB Loyalist Collection (MIC-Loyalist FC LFR .W5E3P3); Diary of Henry Nase (26 Dec 1776–15 May 1797), Fredericton, UNB Loyalist Collection (MIC-Loyalist FC LFR .N3H4D5).

19. Dibblee's Diary (7 May 1805 and 3-5 May 1807), "Extracts from Rev Frederick Dibblee's Diary," online: <gwydir.demon.co.uk/jo/genealogy/earlydib/frederickdiary.htm>.

20. Letter from Edward Winslow to Sir John Wentworth (29 April 1798), in WO Raymond, ed, *Winslow Papers AD 1776–1826* (Saint John, NB: The Sun Printing Company Ltd, 1901) at 429-430.

21. *The St. John Gazette* (20 Apr 1798).



for culture till late in the Summer,” a serious concern given the shortness of the growing season. Belcher responded by ordering more systematic mapping of the St. John to help identify viable settlement sites.<sup>22</sup> That same year, the military surveyor, Joseph Peach, mapped the entire river’s contours as well as intervalles and cleared land along its shores and islands.<sup>23</sup> His work complemented a series of maps that the colony’s chief surveyor, Charles Morris, drafted of the river’s lower reaches. To help officials understand the agricultural potential of the river and guide the expedient and efficient settlement of the waterway, Morris differentiated the riverbanks and islands into several categories, based on the extent of flooding and localized drainage patterns: sunken lands of lush marshes and meadows, seasonally flooded treed intervalles, and uplands that escaped most flooding. His maps and reports emphasized the extent of the freshet and its relationship to local agricultural conditions, as well as the location of British land grants.<sup>24</sup>

While professional surveyors charted the contours and intervalles of the St. John waterway, the earliest British settlers recorded the variations in the river’s flow from season to season and year to year, in order to understand agricultural potential and flood risk in their townships. Morris wrote to an absentee landowner who had extensive holdings on the St. John that “I measured the Overflowing in 1765, by the Marks the Inhabitants of Maugerville had set up, and I found the water had flowed above the common Height of the Water in Summer, near seventeen Feet and an Half; last Year twenty Feet.”<sup>25</sup> Like ancient Nile River farmers, St. John colonists systematically compiled freshet data and erected markers of the freshet’s extent to make historic flood patterns visible. British mapping of the St. John thus relied on both local and professional knowledge. Later generations of settlers continued recording flood data to aid settlement.<sup>26</sup>

Devastating floods discouraged officials from selecting frequently inundated regions as settlement sites and political centres. Seeing the damage done by the high freshet of 1783 to the lowland farms of

22. Letter from Bruce to Belcher (10 October 1762) and Letter from Belcher to Secretary of Lords of Trade (24 January 1763) in Raymond, *supra* note 10 at 297-298.

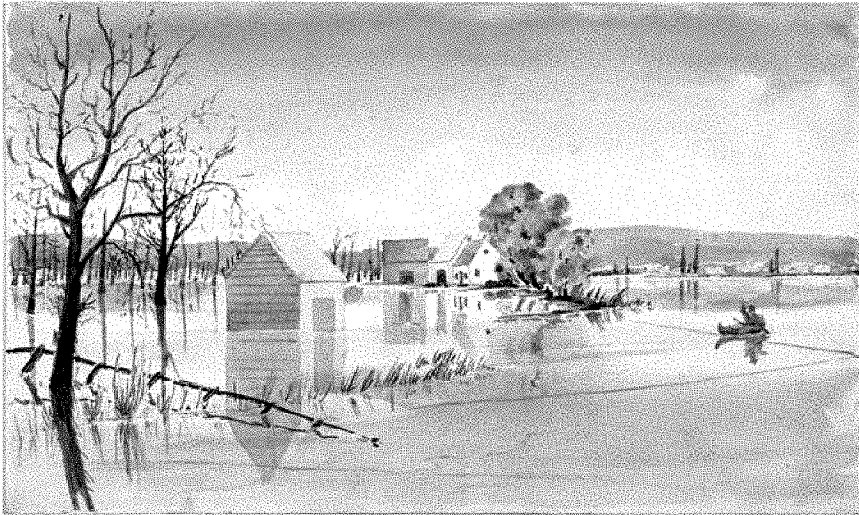
23. For maps, see Bear Nicholas, *supra* note 2; Joseph Peach, “Plan of the River of St. John’s from Fort Frederick in the Bay of Fundy to the River of St. Lawrence” (1762), Ottawa, Archives Canada (R12567-15-9-E).

24. Charles Morris, “A Plan of the River St. Johns and Passamaquoddy Bay done by Order of his Excellency Montagu Wilmot” (1765), Kew, UK, British National Archives (CO 700/NewBrunswick3); Letter from Charles Morris to William Spry (25 January 1768), online: <archive.org/details/cihm\_39602>.

25. Letter from Morris to Spry, *supra* note 24.

26. C Jarvis, “Flood-Stage Records of the River Nile” (1936) Transactions of the American Society of Civil Engineers 101, online: <www.waterhistory.org/histories/cairo>.

Maugerville, for instance, deterred Loyalist planners from making that community a county capital. Hannah Ingraham, reflecting on her family's first experiences in New Brunswick, recalled that her father bought one of the first cows in Fredericton from a Maugerville farm after the 1783 flood. "The cow was so poor and starved looking when he brought her that she could hardly walk home. You see Maugerville is mostly under water at the freshet season, and they have to stage up their cattle on scaffolds in the barns and they do still."<sup>27</sup> A British officer who reported on the river in 1783 observed that Maugerville farmers had "to go in canoes, from their Doors to the Barns, to feed the Cattle" during floods. Like Amazonian pastoralists, St. John River colonists fostered flood resilience with innovative architecture.<sup>28</sup>



***Photograph of William Smyth Maynard Wolfe's painting, "Maugerville on the St. John River, New Brunswick" (1853/1854), Ottawa, Library and Archives Canada (William Smyth Maynard Wolfe Collection, e010767825)***

---

27. The Narrative of Hannah Ingraham, Loyalist Colonist at St Anne's Point, PR Graham, ed, New Brunswick, Loyalist Women in New Brunswick, online: <[atlanticportal.hil.unb.ca/acva/loyalistwomen/en/documents/ingraham](http://atlanticportal.hil.unb.ca/acva/loyalistwomen/en/documents/ingraham)> at 7; Esther Clark Wright, *The St. John River and its Tributaries* (Wolfville, NS: Esther Clark Wright, 1966) at 125-126.

28. See Thomas Barclay, Description of the Lands on the River St. Johns, in the Bay of Fundy (1783) in Wentworth Papers MG 1 vol 939, Halifax, Provincial Archives of Nova Scotia (#13 1783/07/1). For Amazonian raised stables, see Ellen Wohl, *A World of Rivers: Environmental Change on Ten of the World's Great Rivers* (Chicago: University of Chicago Press, 2011) at 24.

Riverbank settlers realized that understanding and contending with the freshet was crucial to their survival. Many people attempted to avoid inundations by positioning their communities and farms on higher ground, rather than trying to cultivate flood resilience or resistance on lowlands. Loyalist planners thought that the upland plain of St. Ann's Point (present day Fredericton) was an excellent town site as it was "exalted above all Freshets and directly opposite to the beautiful River Nashwaagh" (Nashwaak River).<sup>29</sup> Isaac Allen, a future member of the New Brunswick Executive Council and Supreme Court, claimed that the flats of the Kennebecasis River, a major tributary of the St. John, were as fertile as Maugerville fields, but not as prone to destructive freshets.<sup>30</sup> Access to information about St. John flood patterns helped Loyalists understand freshet geography and locate their buildings on less risky elevations, but floods still washed torrents of tragedy over many fields, homes, and human lives throughout the 18th and 19th centuries.

Colonists adapted their lives and livelihoods to the St. John's annual overflow, and freshets fostered a unique seasonality to people's work and land use. Lumbermen used spring flood pulses to ferry thousands of bulky logs from remote locations to downstream mills.<sup>31</sup> Reflecting back on his life along the St. John, William T. Baird recalled that during freshets the river's current roared to "over eight miles an hour...rafts are run in the light of one day from Tobique to Fredericton," a distance of over 150 kilometres.<sup>32</sup> Farmers such as Edward Winslow learned to dismantle their rail fences and tie them to trees in the fall to keep spring floods from carrying them away.<sup>33</sup> They also planted imported large willow species to grow aquatic fences that could endure floods.<sup>34</sup> Moreover, colonists discovered that while they could safely plant their highland properties in May, lowland fields near the river did not usually dry out until June. To contend with the flood regime, they staggered planting and stratified their

29. Letter from Edward Winslow to Ward Chipman (26 Apr 1784) in *Winslow Papers*, *supra* note 20 at 194.

30. Letter from Isaac Allen to Edward Winslow (7 Aug 178) in *Winslow Papers*, *supra* note 20 at 117.

31. "Sketch of New Brunswick Society" *Hull Packet* (27 Jan 1829); Graeme Wynn, *Timber Colony: A historical geography of early nineteenth century New Brunswick* (Toronto: University of Toronto Press, 1981); Letter from merchants to Lord Hobart" (11 May 1804) in Hugh Gray, ed., *Letters from Canada* (Bedford, MA: Applewood Books, 2006 [1809]) at 386.

32. William T Baird, *Seventy Years of New Brunswick Life: Autobiographical Sketches, 1819-1897* (Saint John, NB: EG Day, 1890) at 17.

33. See "Dibblee's Diary," 4 May 1807, *supra* note 19; Winslow's Journal, *supra* note 18, 18 Apr 1800; and Fisher, *Notitia*, *supra* note 15 at 110.

34. See Thomas Baillie, *An Account of the Province of New Brunswick: including a description of the settlements, institutions, soil, and climate* (London: Printed for JG & F Rivington, 1832) at 45.

crops over different elevations based on the growing needs of particular plant species.<sup>35</sup> Some settlers migrated away from the flood plain or built their homes extra high to protect their families and possessions from inundations. In 1804 Lady Hunter wrote that residents of low-lying Long Island, near Hampstead, took “their departure every freshet, and return when the flood subsides.”<sup>36</sup> Other lowlanders adopted land use patterns that were aided by floods, rather than hindered by them. Many colonists, for instance, used the fertilizing capacity of freshets to provide lush hay, food crops, and pasture rather than trying to live on flood plains. When they did reside on seasonally flooded lands, they appear to have tried to position their buildings on high points on their properties as Winslow had done.<sup>37</sup>

Freshets stripped away the legal as well as the physical protection for island and shoreline property owners along the St. John. Without fences to hold them back, settlers’ domesticated livestock could browse and trample neighbouring lands, foiling plans to grow crops and souring relations among neighbours. Keeping cattle in place within an undivided landscape was a problem from the earliest days of Loyalist settlement. Cattle are social creatures. The cow that Hannah Ingraham’s father purchased from Maugerville, for instance, grew lonely on its first night in Fredericton and ran away and joined the government herd.<sup>38</sup> Although the Ingrahams recovered their cow peacefully, conflicts sometimes broke out amongst colonists over trespassing livestock; some led to fines, violent clashes, and even murder.<sup>39</sup>

New Brunswick’s early settlers and legislators realized that the property and trespass laws that the colony had inherited were ill-adapted to the environmental and social conditions of their new home. New Brunswick was founded on a private land management system of individual holdings that required landowners to enclose their properties with fences, but this property system was incompatible with the dynamic and often destructive nature of the St. John River. Riparian residents used their ecological knowledge to work with lawmakers to adapt the colony’s legal system to the natural circumstances that influenced their land use. The elected

---

35. See Fisher, *supra* note 5 at 26-27; “Diary of Henry Nase,” *supra* note 18, 31 May 1788 and 20 June 1788.

36. Diary of Lady Hunter (8 Aug 1804), Fredericton, UNB Loyalist Collection (MIC-Loyalist FC LPR .N4L5J6).

37. For image of higher elevated buildings during a flood, see William WSM Wolfe, “Maugerville on the St. John River, New Brunswick” (1853–1854), Ottawa, Archives Canada (1985-003 PIC 00037).

38. See Narrative of Hannah Ingraham, *supra* note 27.

39. For anger over a trespassing cow leading to murder, see *Carleton Sentinel* (10 Sep 1850).

members of the New Brunswick House of Assembly were responsible for developing legislation for the colony. These men usually convened once a year to formulate and amend laws in response to petitions from settlers, instructions from the Crown, and suggestions from Assembly members. Once a bill had passed in the Assembly and the Legislative Council, and received Royal Assent from the Lieutenant Governor, it was sent to London for the Crown to approve or strike down.<sup>40</sup> Most of the first generation of New Brunswick politicians and legislators lived near the St. John's banks, and many were involved with agriculture, timber harvesting, milling, commerce, or other occupations that depended on the river. Thus, they experienced the fluctuating flow of the St. John closely themselves, and were likely well aware of the dynamics of island flooding. Indeed, it appears that a significant percentage of river islands were owned by judges or justices of the peace, who sometimes used their positions to acquire these valuable riparian properties under questionable circumstances.<sup>41</sup>

The first statutes enacted by the New Brunswick legislature upon its creation in 1786 included an act dealing with trespass and property damage that had provisions for landowners to seek compensation for damages from trespassing livestock, as well as clauses governing the management of stray animals. Owners of pastured animals that sought the green grass on the other side of fences could reclaim their mobile property by paying a fine and rent to the county pound. *The Royal Gazette* advertised descriptions of impounded livestock throughout the colony, and if owners did not emerge with the appropriate fees within fourteen days, county officials auctioned off the wayward animals to pay expenses. The 1786 act, however, only protected fields enclosed with land fences, and so was of no assistance to landowners when others' livestock damaged their unfenced lands or lands protected by fences built within waterways. Moreover, farmers also appear to have been restricted from extending fences into waterways by colonial

40. See Kim Klein, "Paths to the Assembly in British North America: New Brunswick, 1786-1837" (2010) 39:1 *Acadiensis* 133-157. The New Brunswick Assembly sometimes convened bi-annually.

41. The chief justice of Nova Scotia received a grant to 800-acre Sugar Island above Fredericton, even though the island had already been deeded to a group of disbanded soldiers that included a Sunbury County magistrate, Frederick De Peyster. Subsequent litigation affirmed the soldiers' grants. See Letter from Edward Winslow to Ward Chipman (27 Mar 1785) in Winslow Papers, *supra* note 20 at 279-284; JW Lawrence, *Foot-prints; or Incidents in Early History of New Brunswick* (Saint John, NB: J&A McMillan, 1883) at 59-64. For neighbouring Aukpaque Island coming into the possession of Isaac Allen, a New Brunswick Supreme Court judge, under questionable circumstances, see Andrea Bear Nicholas, "The Role of Colonial Artists in the Dispossession and Displacement of the Maliseet, 1790s-1850s" (2016) 49:2 *J Canadian Studies* 31 at 36-37; "Suspect Sale of Eqpahak Reserve," *Wolustog Times* (Mar 2013) 1-7. For another Sunbury County magistrate who owned island property, see DM Young, "Miles, Elijah" in *Dictionary of Canadian Biography*, vol 6, online: <[www.biographi.ca/en/bio/miles\\_elijah\\_6E.html](http://www.biographi.ca/en/bio/miles_elijah_6E.html)>.

fisheries and navigation acts that made it illegal for colonists to impede the passage of fish and tow boat navigation with hedges, logs, and other obstructions placed within and along watercourses. Even when landowners could fence their land, floods that destroyed divisions between properties and enclosures also limited proprietors' ability to seek compensation for injuries done by wandering livestock.<sup>42</sup>

Lowlanders complained to sessional courts that freshets swept away their fences or forced them to spend valuable time dismantling and re-erecting them each fall and spring lest their lands become vulnerable to wandering livestock. Farmers even learned to predict the risk that different sized freshets posed to fences and fields. Samuel Bridges, for instance, reasoned that it was hard to secure lowland fences in moderate freshets and "Impossible to keep fences standing in a large one which makes it absolutely necessary...to secure his Improved lands with as little fence as possible."<sup>43</sup> Petitioners also lamented that it was especially difficult to replace fences directly after a freshet as they needed to pasture livestock and start planting crops as soon as the flood abated to take full advantage of the region's short growing season. Landowners asked legislators to let them erect water fences that extended into rivers along property divisions so they did not have to continually replace their rail fences. Where applicable, they also requested that the colonial government authorize

---

42. See "An Act for Preventing Trespasses," *Acts of the General Assembly of His Majesty's Province of New-Brunswick passed in the year 1786* (Saint John, NB: J Ryan, 1786) 26 Geo III, Ch 29. For amendment making negligent fence builders liable for damages to property incurred by their livestock, see "An Act to alter and amend an Act, passed in the twenty sixth Year of His Majesty's reign, intituled, 'An Act for Preventing Trespasses,'" *Acts of the General Assembly of His Majesty's Province of New-Brunswick passed in the year 1797* (Fredericton, NB: Christopher Sower, 1797) 37 Geo III, Ch 2. See also "An Act to prevent the malicious killing or maiming of Cattle," *Acts of New Brunswick passed in the year 1786*, *ibid*, 26 Geo III, Ch 35. For protecting fisheries and navigation, see "An Act for regulating and facilitating the Navigation of the River Saint John, and other rivers in this province" and "An Act to prevent nuisances by Hedges, Wears, Seines, and other incumbrances obstructing the passage of Fish, in the River, Coves and Creeks of this Province," *Acts of New Brunswick passed in the year 1789*, *supra*, Ch 13 and 31.

43. Petition of Samuel Bridges (22 Jan 1806), and Petition of Samuel Bridges (2 Jan 1800) in New Brunswick Court of General Quarter Sessions of the Peace (Sunbury County), Papers: 1785–1825, Fredericton, UNB Loyalist Collection (MIC Loyalist FC LPR .N4C6S4S8P3).

farmers to place gates on highways to keep animals away from fields that freshets stripped of wooden fences.<sup>44</sup>

St. John River colonists also learned that they had to govern seasonally flooded islands and riverbanks differently from other lands. In 1768, Charles Morris noted that the St. John River Society had left a tract of river bank known as Grimross Head, as well as 280-acre Middle Island and 400-acre Oromocto Island, undivided to provide proprietors with a common pasture until they had time to build mainland fences and enclose their private holdings.<sup>45</sup> Although proprietors later divided these islands into private lots of seven and one-half acres, the St. John's powerful annual spring floods forced the next generation of landowners to manage them in common.<sup>46</sup> Common management was facilitated by an act passed by the New Brunswick Assembly in 1787 "to Authorize the respective Proprietors of certain Islands in the River St. John, and other Rivers in this Province, to make rules and regulations for their better improvement and cultivation."<sup>47</sup> As the St. John's floodwaters impacted relatively small groups of landowners within several parishes, the Assembly had decided to address this issue at the community and county level. The act established a local governance process that empowered island property owners to conduct ecologically-sensitive collective land management and better contend with the influence of freshets upon their lands, using the existing sessional courts that met periodically (typically twice a year) in each county.<sup>48</sup>

---

44. See Petition of William Turner (11 Jan 1812), York County Sessional Court Minutes, vol 1, Jan 1789–June 1817. See also 17 Jan 1795 and 13 June 1829. For freshets, fences, and livestock, see Petition of W Wilmot, John Hazen and Lemuel Wilmot (26 June 1811). For planting and floods, see Petition of the proprietors of a peninsula of interval land (16 Oct 1789), Fredericton, Provincial Archives of New Brunswick (RS24, S4-P1). The term water fence encompassed both artificial ditches and wooden fences that extended into waterways. St. John River water fences appear to have been of the latter variety, and constructed to conform to the "four feet six inches high," legal standard for land fences. See Diary of Thomas Miles (29 Sep 1851), Fredericton, Provincial Archives of New Brunswick (M52-M57); York County Sessional Court Minutes, vol 1, 13 Jan 1810; and "Act for Preventing Trespass," *supra* note 43. For more on water fences, see Edmund Ruffin ed, *The Farmers Register: a monthly publication, devoted to the improvement of the practice, and support of the interests of agriculture* 2:1 (1834) at 450; William Marshall, *On the Management of Landed Estates: a general work for the use of the professional men: being an abstract of the more enlarged Treatise on Landed Property recently published* (London: Longman, Hurst, Rees, and Orme, 1806) at 193.

45. See Letter from Morris to Spry (25 Jan 1768), *supra* note 24.

46. For lots, see Winslow, "Sketch of the River St. John's," WO Raymond, ed, *Collections of the New Brunswick Historical Society* 2:5 at 157.

47. See "An Act to Authorize the respective Proprietors of certain Islands in the River St. John, and other Rivers in this Province, to make rules and regulations for their better improvement and cultivation," *Acts of the General Assembly of His Majesty's Province of New-Brunswick passed in the year 1787* (Saint John, NB: J Ryan, 1787), 27 Geo III, Ch 2 at 136-137.

48. For a brief discussion of the island regulation system, see FA McGrand, *Backward Glances at Sunbury and Queens* (Fredericton, NB: New Brunswick Historical Society, 1967) at 123-124.

Presided over by local magistrates, sessional courts were responsible for the regulation of many community activities. Historian Paul Craven's study of the sessional court system in Charlotte County, New Brunswick, argues that these courts provided "low justice," dealing with issues relating to petty crimes, rent, personal injury, the regulation of property and trespass, as well as the appointment of county and parish officials such as fence viewers, pound keepers, overseers of the poor, and overseers of fisheries. While Craven often emphasizes the "fractures" and tensions associated with the sessions system, including conflicts between the self-interests of office holders and those of other citizens, this analysis of property law and riverine flooding illustrates that local officials were sometimes highly responsive to public needs, and that their self-interests were not always at odds with the interests of their neighbours.<sup>49</sup>

The 1787 act authorized the proprietors of river islands to meet annually on the opening day of their sessional court's winter sessions to decide "by a major vote to make and pass orders, rules and regulations for the managing, improving, and better husbandry of the said islands." Whereas county magistrates managed common lands throughout the province in trust, river islands could now be managed in common by the individual property owners themselves. Sunbury County Sessional Court Papers from the late 18th and early 19th centuries show that landowners of Middle Island and Oromocto Island annually passed regulations for the collective management of their lands. Assembly records and sessional court minutes from York County also note regulations for Sugar Island, Keswick Island, Great Bear Island, and Coach Islands during this era.<sup>50</sup>

---

49. See Paul Craven, *Petty Justice: Low Law and the Sessions System in Charlotte County, New Brunswick, 1785–1867* (Toronto: University of Toronto Press, 2014) at 24–31, 7, 10–11 and 485; DG Bell, "Maritime Legal Institutions under the Ancien Régime, 1710–1850" (1995) 23 *Man LJ* 113–115. WS MacNutt claimed that most New Brunswick magistrates "were incapable of separating their private advantage from the public interest." See WS Macnutt, *New Brunswick: A history: 1784–1867* (Toronto: Macmillan, 1963) at 89.

50. See "Act to Authorize the respective Proprietors of certain Islands," *supra* note 47. See also "An Act to enable the Justices of the Peace, of the Several counties in this province for the time being, to receive, for public uses, Grants of Lands lying in their respective counties, and to regulate the Commons belonging to the Several townships or parishes within the same," *Acts of New Brunswick passed in the year 1786*, *supra* note 42, 26 Geo III, Ch 38; Gaps in the early sessional court records make it difficult to pinpoint when landowners first adopted island regulations. McGrand suggested that Oromocto Island regulations predated the 1787 act, and noted that Middle Island passed regulations as early as 1788, see McGrand, *Backward Glances*, *supra* note 48 at 123–124. For sample of island regulations, see Sunbury County Sessional Court Papers, 21 Jan 1812, 16 Jan 1811, 16 Jan 1810, 17 Jan 1814, and 20 Jan 1818. For Bear Island, Sugar Island, Keswick Island, and Coach Island, see York County Sessional Court Minutes, vol 1, 15 Jun 1807; 15 Jan 1823. The York County minutes provide less detail on island management than the Sunbury County papers.



The island regulation system appears to have drawn on centuries-old land management traditions evident in both European and colonial settings. Historian Brian Donahue, for instance, noted that common and private rights “frequently overlapped in functioning commons systems” in his consideration of 17th-century Concord settlers’ management of private properties as common fields to reduce the labour requirements of fencing.<sup>51</sup> As many early New Brunswick farmers and legislators had likely been accustomed to hybridized private and common land management practices in their former homes in the Thirteen Colonies, their employment of a similar regulatory system in the new colony is not surprising.

The governance mechanism created by the 1787 act enabled the people most knowledgeable about the islands, and the land use activities that affected them, to take charge of their governance, and to work together to regulate island use democratically, although some island proprietors were also magistrates with both incentive and opportunity to tailor the law in their favour. The island regulations provide insight into the local environmental and agricultural knowledge of landowners, while also shedding light on the challenges they faced in managing their lands. Although scholars have criticized colonial property laws for not fostering conservation of natural resources, proprietors of St. John River islands used their regulatory power to conserve their properties.<sup>52</sup> The highly nuanced rules they adopted reveal farmers’ keen understandings of stocking density and growing conditions, as well as their commitment to protecting their lands from overgrazing and other potentially damaging activities. Some regulations restricted livestock from pasturing on the islands until mid-fall, after proprietors had harvested one or two crops of hay, whereas others reveal that farmers carefully considered the relationships among cattle, oxen, pigs, sheep, and hogs of different ages and genders and the environmental impacts of these creatures upon the islands.<sup>53</sup> Middle Island proprietors, for instance, banned all livestock from the island between the break up of ice and 20 October although they allowed “one ram to each lot” after 1 September. The 1810 regulations specified that farmers could pasture either one three-year-old or older horse or “neat creature” (oxen or cattle) on each acre of improved land they owned, a two to three-year-old

---

51. See Brian Donahue, *The Great Meadow: Farmers and the land in colonial Concord* (New Haven: Yale University Press, 2004) at 121. See also 117-120 and 122-127. For more on mixed private and common land management in early modern Europe and North America, see Joan Thirsk, “The Common Fields” (1964) 29 *Past & Present* 3-25; Allan Greer, “Commons and Enclosure in the colonization of North America” (2012) 117:2 *American Historical Rev* 365-386.

52. For property laws encouraging unsustainable land use, see Graham, *Landscape*, *supra* note 6 at 129-130 and 133.

53. For Oromocto Island grazing dates, see Sunbury County Sessional Court Papers, 17 Jan 1815.

horse or “neat creature” for every three-quarter acres, or a younger animal of those species for every half acre. The regulations even accounted for the personalities and habits of particular animals with a rule that banned proprietors from using the island to pasture animals known to be “unruly” or “breachy.” The Middle Island resolutions for 1800 stipulated that if landowners cut hay later than usual, mowed twice, or had a poorer than average crop, they could adjust the number of livestock allowed on the island or restrict sheep pasturing to enclosures on an individual’s land. The later provision suggests that there was some flexibility within the management system for individuals to deviate from the collective will, if they were willing to spend the extra labour and time to segregate their land with fences.<sup>54</sup>

Island landowners sometimes set conditions that governed the rental of their lands and the sale of their animals. In 1811 and 1812 the proprietors of Oromocto Island agreed to rent eleven acres of undivided land on the island to an unrecorded individual, but in 1815 they specified that only island landowners could rent island property.<sup>55</sup> They also passed a new resolution in 1821 which mandated that “each proprietor give in the mark of his cattle with the number of acres of pasture,” and banned the company sale of animals.<sup>56</sup> The ear-marks likely made it easier for the proprietors to keep track of island stocking, and they would have helped ensure that animals could be identified and returned to the owner if they wandered from their island pastures, as required by colonial legislation governing the recovery of stray livestock. Marking individual cattle would have also helped protect the proprietors against the livestock rustling that posed a threat to common pastures within the region. Although the meaning of “company sale” is unclear in this context, proprietors may have wanted to ban the sale of the entire company of cattle on the island to make it more difficult for someone to sell cattle that did not belong to them.<sup>57</sup>

Island landowners sometimes delegated responsibility for managing the islands to small committees or individuals. In 1812, for instance, the proprietors of Oromocto Island appointed a three-person committee

---

54. For Middle Island pasturage, see 17 Jan 1809, 16 Jan 1810, 17 Jan 1814, and 21 Jan 1800. The freshets that continually renewed island fertility also helped insulate the islands from over exploitation.

55. For Oromocto Island, see Sunbury County Sessional Court Papers, 15 Jan 1811; 21 Jan 1812; 17 January 1815; and 16 Jan 1821.

56. For ear-marks and stray livestock, see “An Act to enable the Owners of Stray Cattle more easily to recover the same. Passed the 5th of March, 1807,” *Acts of the General Assembly of his Majesty’s Province of New-Brunswick passed in the year 1807* (Saint John, NB: John Ryan, 2907), 47 Geo III, Ch 8.

57. For butchers stealing animals from the Fredericton Commons, see York County Sessional Court Minutes, 2 Jan 1792, 12 June 1792.

to enforce their regulations. In 1807, the resolutions of Middle Island proprietors declared that captain James Taylor was “solely authorized to agree to regulations.” In 1809, the same year that Taylor was elected to the Assembly, the minutes of the Sunbury Sessional Court recorded that proprietors met in his house before arriving at the Burton Court at 11 am, and referred to him as the “overseer” of the Island.<sup>58</sup> Taylor was a merchant and lumbermen as well as a farmer, and in the early 19th century was one of the most powerful men in Sunbury County. Taylor’s biographer, D. M. Young, noted that the captain “accumulated a large number of mortgages on properties of his neighbours” and that “his sons became known in the countryside for their rough, intimidating ways.”<sup>59</sup> Sessional court records do not explain why the island proprietors gave Taylor these powers; they may have found the arrangement more efficient, or the captain may have used his influence over neighbours to control island management in his favour and increase his local authority. Taylor, however, did not retain his position as sole overseer for long, and the management system appears to have remained democratic. In 1811 two other proprietors presented the resolutions to the Sessional Court with him, and in 1818 a committee of four proprietors that excluded Taylor fulfilled this role.<sup>60</sup>

The 1787 act that provided for landowners to collectively regulate land use on St. John River islands also responded to petitioners’ complaints that the initial trespass laws of the colony had not addressed the problems of maintaining fences on islands or riverbanks. The 1787 act, noting the “many Islands lying in the River Saint John, and other rivers in this Province, owned in small rights or shares, and on which division fences are liable to be carried away by the current, and pressure of the water” during freshets, gave water itself the status of a fence.<sup>61</sup> The act defined “a lawful fence” to include waters that flowed around river islands, thus enabling island landowners to seek compensation for damage caused by livestock that waded or swam from the mainland and trespassed on their properties. This clause also exempted island proprietors from the provisions of New Brunswick trespass laws that required that neighbours share the responsibility for establishing and maintaining fences between improved properties. Island property owners were freed of the burdensome task of fencing their lands, and the collective management process enabled them

58. See Sunbury Sessional Court Papers, 21 Jan 1812, 17 Jan 1809, 1807 (the exact date is not recorded for this year).

59. DM Young, “Taylor, James” in *Dictionary of Canadian Biography*, vol 6, online: <[www.biographi.ca/en/bio/taylor\\_james\\_1761\\_1834\\_6E.html](http://www.biographi.ca/en/bio/taylor_james_1761_1834_6E.html)>.

60. See Sunbury Sessional Court Papers, 16 Jan 1811, 20 Jan 1818.

61. See “An Act to Authorize the respective Proprietors,” *supra* note 47, 27 Geo III, Ch 2 at 136-137.

to reduce land use conflicts with fellow island landowners over trespassing livestock.<sup>62</sup>

Granting unfenced islands legal protection against trespass appears to have been contentious, as two years after its passage the New Brunswick Assembly invalidated the section of the 1787 law that made the waters surrounding islands legal fences.<sup>63</sup> At the same time, the assembly passed new legislation governing trespass and property rights of riparian landowners. This act responded to other complaints about the trespass act, by including provisions for property owners to obtain permission from county officials to erect swing gates across roads and to construct water fences “on the shores of rivers” where they felt it was necessary for the security of their improved properties.<sup>64</sup> Sessional courts also permitted owners of low-lying lands to extend water fences into waterways and across creeks.<sup>65</sup> The gate and water fence legislation did not mention island properties, and although shoreline water fences would have helped

---

62. Abraham Gesner noted the cattle pastured along the St. John were “good swimmers, and from the bad state of the fences, are apt to become *breechy*.” see Abraham Gesner, *New Brunswick; with notes for emigrants. Comprehending the early history, an account of the Indians, settlement, topography, statistics, commerce, timber, manufactures, agriculture, fisheries, geology, natural history, social and political state, immigrants, and contemplated railways of that province* (London: Simonds & Ward, 1847) at 253. See also Petition of John Hazen (22 Jan 1817) Sunbury County Sessional Court Papers.

63. See “An Act for reviving and continuing and amending sundry laws that have expired and are near expiring,” *Acts of the General Assembly of His Majesty’s Province of New-Brunswick passed in the year 1789* (Saint John, NB: J Ryan, 1789), 29 George III, Ch. 8. For renewal of the act, see “An Act to Continue several Acts that are near expiring,” *Acts of the General Assembly of His Majesty’s Province of New-Brunswick passed in the year 1795* (Fredericton, NB: Christopher Sower, 1795), 35 Geo III, Ch 5; “An Act to continue sundry Acts of the General Assembly that are near expiring. Passed the 9th Day of February, 1798,” *Acts of the General Assembly of his Majesty’s Province of New-Brunswick passed in the year 1798* (Fredericton, NB: Christopher Sower, 1798), 38 Geo III, Ch 1.

64. For water fences, see “An Act to authorize the erection of Fences and Gates across certain roads in the several counties in this province where the same shall be found necessary,” *Acts of the General Assembly of His Majesty’s Province of New-Brunswick passed in the year 1789*, *supra* note 63, 29 Geo III, Ch 4; “An Act to continue an Act entitled, “An Act to authorize the erection of Fences and Gates across certain Roads in the several Counties in this Province where the same shall be found necessary,” *Acts of the General Assembly of his Majesty’s Province of New-Brunswick passed in the year 1791* (Saint John, NB: Christopher Sower, 1791), 31 Geo III, Ch 1; “An Act to authorize the Erection of Fences and Gates across certain Roads in the several Counties of this Province where the same shall be found necessary. Passed the 18th February, 1797,” *Acts of the General Assembly of His Majesty’s Province of New-Brunswick passed in the year 1797* (Fredericton, NB: Christopher Sower, 1797), 37 Geo III, Ch 3.

65. For water fences into and across waterways, see York County Sessional Court Minutes, 17 Jan 1795 and 2 Jan 1812. An 1876 survey of American fence law revealed similar legislation. In Georgia, for example, all navigable waterways were “deemed fences, whenever, by reason of freshets, or otherwise, fences cannot be kept on such streams.” See Ranson H Tyler, *A Treatise on the Law of Boundaries and Fences including the rights of property on the sea-shore and in the lands of public rivers and other streams, and the law of window lights* (Albany: William Gould & Son, 1876) at 491. See also 424-425; 487-488.

prevent cattle from trespassing onto adjacent riverbank properties, these structures would not have deterred livestock from fording or swimming across to islands. The provision in the 1787 legislation that defined waters surrounding islands as legal fences had benefitted island landowners, but disadvantaged their riverbank neighbours.<sup>66</sup> The 1789 law, in contrast, assisted shoreline proprietors, but left island landowners vulnerable to damage from trespass by livestock of riverbank farmers who elected to build water fences instead of fencing the entire shore frontage of their lands.<sup>67</sup>

In 1791, legislators provided additional protection for island properties in York County, the largest of which, Sugar Island, was divided into small lots.<sup>68</sup> During that year the Assembly both renewed the 1789 fence and gates act and passed an act that enabled York County justices of the peace to declare the waters surrounding the chain of river islands above Fredericton to be lawful fences.<sup>69</sup> The latter act effectively restored the full provisions of the 1787 island property legislation within that county. Although legislators let this law expire in 1793, the York County Sessional Court appears to have continued to exercise authority over these islands, and later in the decade it declared the waters surrounding them to be a lawful fence.<sup>70</sup>

In 1794 and 1795, in response to the freshet's erosion of riparian properties, the Assembly passed new laws to preserve the riverbank.<sup>71</sup> These laws restricted farmers from pasturing animals along ecologically vulnerable stretches of the riverbank during the growing season in the parishes of Magerville, Sheffield, Waterborough, and Lincoln, as livestock loosened earth with their sharp hooves, and ate plants whose roots helped bind the soil in place. The new legislation exempted supervised droving,

---

66. See "An Act to Authorize the respective Proprietors of certain Islands," *supra* note 47.

67. See "An Act to authorize the erection of Fences and Gates," *supra* note 64.

68. For Sugar Island lots, see Lawrence, *supra* note 41 at 59-64; Valerie H McKito, *From Loyalists to Loyal Citizens: The DePeyster Family of New York* (Albany, NY: State University of New York Press, 2015) at 53-54.

69. See "An Act for the Security and Protection of Certain Islands in the River Saint John," *Acts of the General Assembly of his Majesty's Province of New-Brunswick passed in the year 1791*, *supra* note 64, 31 Geo III, Ch 11.

70. "An Act to continue sundry acts of the General Assembly, which have expired or are near expiring," *Acts of the General Assembly of his Majesty's Province of New-Brunswick passed in the year 1793* (Fredericton: J Ryan, 1793), 33 Geo III, Ch 1.

71. See "An Act for preserving the bank of the river Saint John in front of the parishes of Magerville, Sheffield and Waterborough" *Acts of the General Assembly of His Majesty's province of New Brunswick passed in the year 1794* (Brookville, NB: Christopher Sower, 1794), 34 Geo III, Ch 9; "An Act for preserving the Bank of the river Saint John, in front of the Parish of Lincoln in the County of Sunbury," *Acts of the General Assembly of His Majesty's Province of New-Brunswick passed in the year 1795*, *supra* note 65 35 Geo III, Ch 4, 340-341.

but mandated that no livestock “be suffered to go at large in the highway, or graze on the bank of the river Saint John” from mid-March to mid-November, the season when livestock threatened hay and other crops.<sup>72</sup> Legislators and farmers sought to keep animals’ destructive appetites and environmental hoofprints in check with fences, water fences, and highway gates to prevent them from straying, wading, or swimming onto neighbouring properties.<sup>73</sup> The riverbank preservation laws threatened to fine people who owned animals that violated the legislation through the colony’s trespass laws. Although the legislation likely decreased incidents of cattle crossing from the riverbank to Oromocto Island and Middle Island, it would not have aided island proprietors located outside these four parishes, such as those situated upstream of Fredericton. Nor would the new acts have offered protection from cattle that strayed unsupervised from the Fredericton Commons or local farms and wandered along the river’s shoreline during periods of low water in summer and autumn. The Assembly renewed the riverbank preservation acts in 1796 and 1801,<sup>74</sup> the same year that legislators amended colonial trespass laws to make them more suited to addressing riparian property issues.<sup>75</sup>

In June 1799, proprietors of the St. John River islands located near the mouth of the Keswick River above Fredericton petitioned the York County Sessional Court to “make regulations for the preservation of the said Islands.” Despite the lack of any statutory authority to do so, the Court responded favourably to the petition, declaring that the waters surrounding the islands were a lawful fence.<sup>76</sup> Although this regulation helped island landowners seek compensation from damage caused by trespassing livestock without having to fence their lands, it appears to have created problems for others. In January 1800, the Court considered a petition from John Althouse, a co-owner of a mill on the Keswick River

---

72. See “An Act for preserving the bank of the river Saint John in front of the parishes of Magerville, Sheffield and Waterborough,” *ibid.*

73. For continued problems from cattle swimming across rivers and injuring crops, see Sunbury County Sessional Court Papers, 2 June 1801; 22 Jan 1817.

74. See “An Act to revive and continue an Act intituled ‘An Act for preserving the Bank of the River Saint John in Front of the Parishes of Magerville, Sheffield and Waterborough,’” *Acts of the General Assembly of His Majesty’s province of New-Brunswick passed in the year 1796* (Fredericton, NB: Christopher Sower, 1796), 36 Geo III, Ch 2; and “An Act for preserving the Bank of the River Saint John in front of the Parish of Lincoln in the County of Sunbury. Passed the 21st of February, 1801,” *supra* note 71.

75. See “An Act to repeal all the Acts now in force relating to Trespasses, and for making new Regulations to prevent the same Passed the 4th of February, 1801,” *Acts of the General Assembly of his Majesty’s Province of New-Brunswick in the year 1801* (Saint John, NB: John Ryan, 1801), 41 Geo III, Ch 9, 10, and 3.

76. York County Sessional Court Minutes, vol 1, 11 June 1799; 14 June 1799.

near the islands, and other York County residents who called the recent changes in island property regulations “a grievance” for which they sought redress.<sup>77</sup> Although the records do not discuss the petitioners’ concerns in further detail, these citizens likely had problems preventing their livestock from wading or swimming across the narrow and shallow channels of water that separated the islands from the northern shore of the St. John, or experienced property damage from island livestock that crossed onto the riverbank. As there were no longer wooden fences to prevent animals from trespassing onto the islands, the riverbank farmers were vulnerable to fines if their animals degraded island property. However, they could not receive compensation for damages committed to their lands by island livestock because the islands were now lawfully enclosed by water. Despite the petition, the Court renewed the island regulations on 12 June 1800, but on the same day it appointed a four person committee “to take into consideration the state of the Islands and low lands in the county of York and to report such regulations as may be expedient for the better securing of the said islands and lowlands” from damage from livestock. The committee included Edward Winslow, a York County judge, justice of the peace, and member of the Executive Council, whose lands and fences had been devastated by a freshet the previous year, and Stair Agnew, also a York County judge and justice of the peace, as well as a member of the Assembly who had just petitioned the Court to declare a stretch of the Nashwaak River bordering his low-lying property a lawful fence. Although committee members had a vested interest in protecting low-lying riverbank properties, they appear to have supported maintaining the regulations that made the waters surrounding islands legal fences provided that rivers could also be considered lawful boundaries of shoreline properties.<sup>78</sup>

In 1801, the Assembly revised New Brunswick trespass law to empower justices of the peace to regulate “Islands and Low lands in their respective Counties as they may think necessary, and to determine and order what waters or water fences shall be necessary and sufficient for

---

77. York County Sessional Court Minutes, vol 1m 17 Jan 1800. See also Letter from John Althouse to Mr. Easson (22 July 1786), Halifax, Nova Scotia Archives (MG 1 vol. 3478 A/157); Sheila Andrew, “Louis Mercure” in *Dictionary of Canadian Biography*, vol 5, online: <[www.biographi.ca/en/bio/mercure\\_louis\\_5E.html](http://www.biographi.ca/en/bio/mercure_louis_5E.html)>.

78. York County Sessional Court Minutes, vol 1, 12 June 1800. The committee’s findings are not recorded, but subsequent rulings of the York County Sessional Court maintained the island regulations.

the protection of the same.”<sup>79</sup> At the request of riverbank landowners such as William Turner, a York County magistrate living in Wakefield Parish who could not maintain fences on his flood plains, sessional courts made stretches of the St. John and its tributaries, including Agnew’s property, legal fences in the years that followed the passing of this legislation.<sup>80</sup> They also maintained regulations that made the waters surrounding islands legal barriers. Whereas New Brunswick trespass laws originally only recognized built fences on land, newer laws had provisions for extending fences into water and recognizing water itself as a legal barrier. These new laws suggest that New Brunswick legislators now recognized that the physical environment of their colony was diverse, and that the property rights of owners of island and low-lying lands along the St. John could not be effectively protected without adapting property law to local circumstances. Moreover, the laws also suggests that lawmakers thought that river islands and low-lying properties were best regulated locally through the sessional court system rather than by colony-wide legislation.

A trend toward increasing sensitivity and adaptation to the dynamic nature of rivers is evident within the development of early New Brunswick property laws. The challenge that the St. John River posed to early lawmakers, however, did not end with the legislative response. Rather, the river continued to be the source of disputes about the rights and obligations of property owners into the modern era. Writing in the mid 20th century, historian Esther Clark Wright noted that proprietors of Sugar Island above Fredericton used the island for pasture based on a stipend system of two cattle per acre owned. She claimed, however, that island farmers could not keep registered cattle on the islands as there were no physical fences to restrict unregistered cattle of unknown pedigree from accessing the island and breeding with registered animals.<sup>81</sup> More recently, during the age of fast-moving motor vehicles, the lack of island fences and the wandering habits of cows raised new legal challenges. For example, in December 1998, Brent Porter and his wife Lesley Porter struck a cow

---

79. See “An Act relating to Trespasses,” *Acts of the General Assembly of his Majesty’s Province of New-Brunswick in the year 1801*, *supra* note 77, 41 Geo III, Ch 3. The Assembly maintained the island regulations when they overhauled the trespass act again in 1831, see “An Act to repeal all the Acts in force relating to Trespasses, and to make more effectual provision for the same. Passed 25th March 1831,” *Acts of General Assembly of His Majesty’s Province of New-Brunswick passed in the year 1831* (Fredericton, NB: John Simpson, 1831), 1 William IV, Ch 9.

80. For Turner, Agnew, and 1823 island regulations, see York County Sessional Court Minutes, vol 1, 2 Jan 1812, 10 June 1803, and 15 Jan 1823. For a description of Turner’s 1,000 acre estate, see WO Raymond Scrapbook, The Old Garrisons at Presquisle and Grand Falls (13 May 1896), Fredericton, Provincial Archives of New Brunswick, online: <archives.gnb.ca/exhibits/forthavoc/html/Raymond74.aspx?culture=en-CA>.

81. Esther Clark Wright, *supra* note 27 at 155-156.



on the Trans-Canada Highway as they were driving home from a party at Kings Landing north of Fredericton.<sup>82</sup> The cow had wandered onto the highway after swimming to the south shore of the St. John River from its pasturage on Sugar Island. Porter sued the cow's owner, John Pond, "for the injuries received in the accident," but his claim was rejected by the New Brunswick Court of the Queen's Bench and the Court of Appeal.<sup>83</sup> Local farmers testified that people had pastured cattle on St. John River islands for hundreds of years, and that for fifty years "highways and motor vehicles have co-existed with this practice."<sup>84</sup> While cows infrequently swam to shore from the islands, there was no evidence that they had previously wandered as far as the highway. Both levels of court concluded that it was reasonable for a farmer to regard the St. John River as an "effective barrier" for cattle pastured on an island located in the middle of the river with a swift current to insulate the island from the highway.<sup>85</sup> The Court of Appeal stated that fencing the island "would be impractical" due to its size and the likelihood that spring floods would destroy fences each year.<sup>86</sup> The ruling did not note the colonial legislation, but agreed with its underlying assumptions, and cattle remain unfenced on their pastures on York and Sunbury County islands to this day.

Although New Brunswick officials founded their colony on private land ownership, the plight of river island landowners forced them to recognize that the St. John River's ever-changing nature thwarted efforts to settle its banks with a private land management system dependent on static boundaries and fixed fences. With petitioners' local ecological knowledge and needs in mind, legislators tailored colonial laws to be more compatible with the St. John's fluctuating flow. Whereas New Brunswick trespass laws initially recognized only land fences, the revised laws included provisions to give water fences and even flowing waters the same legal status as fences built on land. Studies of western property law and colonization have emphasized the maladaptation of British property law to new environments, but New Brunswick legislators worked with landowners to develop legislation and regulatory processes that were sensitive to the seasonal behaviour of the St. John River, and its impact on riparian lands and local livelihoods.<sup>87</sup> New Brunswick riparian farmers and lawmakers

---

82. *Porter v Pond*, 2004 NBCA 47, 271 NBR (2d) 392.

83. *Ibid* at para 1.

84. *Ibid* at para 6.

85. *Ibid* at para 6.

86. *Ibid* at para 23.

87. For focus on property law's maladaptation to and incompatibility with environmental conditions and natural processes, see Steinberg, *Slide Mountain*, *supra* note 6; Graham, *Landscape*, *supra* note 6.

were highly attentive to the influence of local climatic conditions and other aspects of the physical environment on their lives and laws, and they began adapting legislation to their geographical circumstances in the Assembly's second legislative session.

Legislators' adaptations of property law to contend with flooding were strategies within a larger process of understanding the St. John River and living with it. Farmers and lawmakers addressed immediate needs, but they also planned for the future and sought to conserve the landscapes and social harmony that they depended upon. The collective island management system appears to have reduced social tensions among island proprietors, as it provided them with a regulatory process to democratically mitigate potential conflicts from incompatible land uses, and to conserve pastures from overgrazing. Owners of parcels of land on a collectively-managed island did not enjoy the rights to pasture livestock on their lands in whatever numbers and whenever they wished. The new regulations bound them to the collective will of their immediate neighbours, and, in effect transformed the right of owners of private property to exclude others from using that property into a right to participate in setting the rules for access to property that would be treated as a closed-entry commons. However, laws that declared the waters surrounding river islands to be a legal fence sometimes pitted island property owners against riverbank neighbours who might be held liable for damages for trespass if their livestock could ford or swim to the islands and harm property there that was not protected by wooden fences. Despite legislators' efforts to minimize conflict, the reality of the St. John River made disputes inevitable. What constitutes a legal barrier around island properties remained contentious throughout the early history of the colony, and into the present day.

