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RECEPTION OF ENGLISH COMMON LAW IN THE AMERICAN COLONIES

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So that we may start in cadence, some definitions are due. "Common law" refers to that body of governing principles, mainly substantive, expounded by the common-law courts of England in deciding cases before them. "Reception" means adoption of the common law as the basis for colonial judicial decisions. We are not concerned, as an end in itself, with colonial court systems or with the mechanics of decision making, though inquiries into these subjects, by inference, will advance the quest.[1] Similarly we are not concerned with the workaday study of the colonial lawyer, his education, books, and role in society or with the larger question of the contributions the common law made to the emerging nation. The aim is simply to discover the extent to which the common law as defined above, was received in the American colonies.

STANDARD THEORIES

There are more theories than facts on the influence of English common law in the colonies. Three of these might be referred to as the "standard" ones, and they in turn have spawned comments and variations upon themselves.

The most venerable standard theory is that the common law of England was substantially in force in the colonies from the time of their settlement. Justice Joseph Story stated it most succinctly in 1829 in the famous passage in *Van Ness v. Pacard:*

> The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.[2]

Story's view was the generally accepted one through the nineteenth

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1. For a lengthy study of courts as a branch of colonial government, *see* Surrency, *The Courts in the American Colonies,* 11 AM. J. LEGAL HIST. 253, 347 (1967).

2. Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 143-44 (1829).

century. Chief Justice Lemuel Shaw of Massachusetts took a similar position in 1847 in *Commonwealth v. Chapman.*[3] Kent in his *Commentaries* also agrees, saying: "It [the common law] was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes." [4]

With the new interest in American legal history that arose early in the twentieth century, Justice Story's theory was challenged. Professor Paul S. Reinsch began the attack by asserting what we may refer to as the second standard theory of reception of the common law. He denied that, at least in the colonial beginnings in the seventeenth century and perhaps along into the eighteenth as well, English jurisprudence was even a subsidiary force in the American legal system. Though conceding the colonists expressed adhesion to the common law, Reinsch says the actual administration of justice was "of a rude, popular, summary kind. . . ." [5] Again, he asserted that the colonies underwent "a period of rude, untechnical popular law, followed, as lawyers became numerous and the study of law prominent, by the gradual reception of most of the rules of the English common law." [6] Dean Charles J. Hilkey soon offered support for this view with what may be considered as a variant of the Reinsch theory. Basing his study upon early Massachusetts Bay materials, Hilkey admitted some influence from the common law but emphasized two other sources of law, first the Bible, especially the Mosaic code, and second an indigenous local element. He considered the combination of these elements as forming what was in effect a new legal system.[7] Another writer whose ideas seem to augment the theory advanced by Reinsch and Hilkey is Max Radin. He first made the point that, since the common law was the king's law and since, except for the writ of error, the king's writs did not run across the seas, it was impossible to say the common law was obligatory on the colonies.[8] Radin felt the common law never amounted to more than a supplemental, subsidiary system during the whole colonial period, and he

3. 54 Mass. (13 Met.) 69 (1847).

4. 1 KENT, COMMENTARIES ON AMERICAN LAW * 473.

5. Reinsch, *The English Common Law in the Early American Colonies,* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 369 (1907).

6. *Id.* at 370.

7. Hilkey, *Legal Development in Colonial Massachusetts, 1630-1686,* in 37 COLUMBIA UNIVERSITY STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 160 (1910).

8. Radin, *The Rivalry of Common-Law and Civil Law Ideas in the American Colonies,* in 2 LAW: A CENTURY OF PROGRESS 404, 407-11 (1937).

emphasized the importance of natural law, equating it with Roman law.[9]

For the third standard theory of colonial common-law reception, we are indebted to Professor Julius Goebel. Although agreeing in general with Reinsch that the common law did not play a significant role in the early colonies, Goebel found an English source for their law. In his study, based upon Plymouth Colony from 1620 to 1650, he presented evidence that the law practiced was that of the customary law of the local courts the colonists had known in England. He theorized that the early settlers, having little knowledge of the common law, *i.e.*, the law of the king's courts at Westminster, naturally had recourse to the law and procedure of the borough and manor courts with which they were familiar.[10]

There are some rather obvious inadequacies with the several theories. First, of course, they are so disparate. Then they speak largely of New England and largely of New England in the seventeenth century at that. These comments should not be made critically, for the expectable sources of information scarcely exist. Appellate court decisions are the preferred source, but there are next to none; the only colonial reporter of consequence is volume one of Harris & McHenry's Maryland Reports, covering the period 1658-1774. If we look to the colonists for contemporary accounts, we find they were singularly indifferent to the common law's progress; moreover, when they did make glancing, often unreliable, remarks on the subject, it is not clear what they meant by "common law." Perhaps, in time, intensive local research may produce direct materials, but for now the sources are mostly indirect and fragmentary: clauses in colonial charters, public attitudes toward English law, court systems, conditions of law practice, and the like. From a knowledge of these matters, it is possible to make the inference that common-law reception was feasible, and likely had occurred, within broad limits.

We are aided by having two fixed pillars between which to suspend the historical bridge. The first—and it should not be minimized simply because it is obvious—is that there was no common law in America on 12 May 1607. At the other end of the colonial period, by dint of examining every case reported in New York, Pennsylvania, and South

9. *Id.* at 427-28.

10. Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931).

Carolina from the Revolution to 1810, we are able to make some precise observations on common-law reception as it must have stood on Independence Day. The beginning and end are clear, even if the middle is hazy.

Seventeenth Century

The Colonial Charters

Within each colony the framework of government, and so of the system of law as a part of that government, began with a royal charter. No charter stated expressly that the system of courts was to be patterned after that in England nor that the rules of law of the common-law courts or of any named courts were to be the rules of decision. Most colonial charters simply contained a proviso that the laws should not be " 'contrary to the Laws and Statutes of this our Realm of *England*' " or were to be " 'agreeable to the laws of this our realme of England.' " [11] There is no evidence that it made any difference in the development of law within a colony whether its charter said "not contrary" or "agreeable."

The third charter of the Virginia Company, dated 12 March 1612, chartered what amounted to a trading corporation and granted it land by patent. After creating the governing bodies within the company, including a quarterly court (used in the sense of "council"), it was provided that the quarterly court

> shall likewise have full power and authority to ordain and make such laws and ordinances for the good and welfare of the said plantation, as to them, from time to time, shall be thought requisite and meet: so always, as the same be not contrary to the laws and statutes of this our realm of England. . . .[12]

In Massachusetts Bay the charter of 4 March 1629, after making the grant of land, set up governing bodies, including a council known as the General Court. It was empowered to "make laws and ordinances . . . so as such laws and ordinances be not contrary or repugnant to the laws and statutes of this our realm of England." [13]

Maryland was created 20 June 1632 as a proprietary colony with

11. Brown, British Statutes in American Law, 1776-1836, at 4-6 (1964).
12. 9 English Historical Documents 65 (Jensen ed. 1955).
13. *Id.* at 72.

Cecilius Calvert, Baron of Baltimore, "the true lord and proprietary." Moreso than any other colony, Maryland was in form a feudal barony. Calvert was to rule and make laws but only with the "advice, assent, and approbation" of a majority of the freemen of the colony, or their delegates, who were to be called together as a council to legislate. The charter required the laws to be "consonant to reason, and be not repugnant or contrary, but (so far as conveniently may be) agreeable to the laws, statutes, customs and rights of this our kingdom of England." [14]

Pennsylvania, like Maryland, was a proprietary colony, which was granted to William Penn by a charter of 4 March 1681. Like Calvert, Penn was to enact laws through an assembly of freemen or their delegates. And again the laws they enacted were to be "consonant to reason, and be not repugnant or contrary, but as near as conveniently may be agreeable to the laws and statutes, and rights of this our kingdom of England. . . ." [15] Unlike the other charters, the Pennsylvania charter specifically reserved to the crown appeals "touching any judgment to be there made or given."

Other colonial charters could be referred to, but the ones quoted from are typical enough to serve our purposes. If the question before us is the extent to which the rules and procedures of the English courts of common law were in force in the colonies, we must ask what the charters provided in this respect. One problem that has been commented upon is what the charters referred to when they spoke of the "laws" of England.[16] Coke, writing of the period around 1630, says: "There be divers lawes within the realme of England." He then lists fourteen "laws," such as the law of the crown, law of parliament, law of nature, statute law, customs, ecclesiastical law, etc., of which the "common law of England" was only one.[17] To which of these "laws" were the colonists to conform?

There is another problem so obvious that it is remarkable it seems not to have been raised by legal historians. In requiring colonial law to be not contrary to, or repugnant to, English laws, the charters were imposing requirements upon colonial *legislative bodies*. The requirement related to the kinds of statutes or ordinances that might be adopted,

14. *Id.* at 84. Also found in Smith, *The Foundations of Law in Maryland: 1634-1715*, in LAW AND AUTHORITY IN COLONIAL AMERICA 92, 93-95 (Billias ed. 1965).

15. 9 ENGLISH HISTORICAL DOCUMENTS 93 (Jensen ed. 1955).

16. Howe, *The Sources and Nature of Law in Colonial Massachusetts*, in LAW AND AUTHORITY IN COLONIAL AMERICA 1 (Billias ed. 1965).

17. COKE ON LITTLETON *11b.

but nothing was said about what *courts* might or might not do. The one possible, and perhaps significant, exception was the Pennsylvania charter's reservation to the crown of appeals from court judgments. This suggests that the colonial charters, except possibly Pennsylvania's, made no attempt to govern the rules of decision or procedures in the courts unless, of course, a colonial statute was involved. An inference is possible that this was thought unnecessary because it was assumed that colonial courts would be more or less duplicates of those in England. The fact that the reservation-of-appeal provision was inserted in the Pennsylvania charter, written at the comparatively late date of 1681, suggests the earlier assumptions had proved disappointing to the English government.

Beginnings of the Colonies

One who reads historical materials on the colonial legal systems soon becomes aware of some disturbing phenomena. In the first place, the vast bulk of scholarship has been devoted to early Massachusetts and very little to the other colonies. For instance, the studies done by Reinsch and Hilkey were based upon Massachusetts Bay materials, and Goebel's well known theory was based upon a study of Plymouth Colony from 1620 to 1650.[18] Furthermore, while considerable interest has been shown in the seventeenth century beginnings, little indeed has been written about the law of the more mature eigtheenth century colonies. For these reasons, the approach used in this section of the article will be to outline in some detail the legal system of seventeenth century Massachusetts, then to make brief references to the systems in the other colonies as compared with that in Massachusetts.

It is reasonably apparent that the early Massachusetts leaders did not feel they were obligated to follow the common-law system or any particular existing system except to the extent they freely chose.[19] In the 1630's, attempts to appeal Massachusetts judicial decisions to England were quashed or frustrated.[20] William Pynchon of Springfield, in a letter of 9 March 1646 to John Winthrop, stated that he believed Massachusetts Bay had liberty by her patent to make such laws as the colony considered good.[21] This view was probably held by most of the colony's leading men.

18. *See* notes 5, 6, 7, and 10 *supra* for references to these studies.

19. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 114-15 (1960).

20. *Id.* at 64-65.

21. J. SMITH, COLONIAL JUSTICE IN WESTERN MASSACHUSETTS 19 (1961).

On the other hand, the leaders were interested in a functioning legal system, and the colony developed one that quickly became relatively sophisticated. The first meeting of the Court of Assistants, held in August 1630, conferred upon six of its members the powers of English justices of the peace.[22] In 1636, the system was expanded with inferior courts established at Ipswich, Salem, Newtowne (Cambridge), and Boston. When Massachusetts was divided into counties in 1643, the Inferior Courts became known as County Courts. Above them, having appellate jurisdiction and some original jurisdiction, was the Court of Assistants which held quarterly sessions. The highest court was the General Court, which eventually was to become the Supreme Court of Judicature.[23] Of course the legal system of 1640 was nothing as complex as that comprising all the specialized courts in England. However, later, around 1700, under pressure from the British government, some new, specialized courts were created.[24]

Little is known of Massachusetts's substantive law prior to the adoption of the Body of Liberties of 1641. The magistrates and those in authority resisted written law, having a paternalistic approach toward the governing of the colony.[25] However, there must have been some common-law influence, for technical English terms such as *capias* and *in forma pauperis* were used. Juries were used from the beginning, and forms of action denominated debt, replevin, trespass, and trespass on the case were employed.[26] In 1641, at the insistence of the General Court, the comprehensive code known as the Body of Liberties was adopted. By examining its provisions we get some idea of the various elements—English, Biblical, indigenous, or other—from which early Massachusetts law was formed. The code finally adopted was drafted by Nathaniel Ward, a minister who had English legal training. It is interesting, perhaps significant, to observe that an earlier draft prepared by John Cotton and rejected by the General Court was based on the Scriptures more than was Ward's draft.

Much has been said of the influence of the Bible. Reinsch particularly takes a strong position on this point: "Everywhere, the divine law, interpreted by the best discretion of the magistrates, is looked upon as the binding subsidiary law; while the common law is at most referred

22. HASKINS, *supra* note 19, at 27.
23. *Id.* at 32-34.
24. Howe, *supra* note 5, at 372.
25. Reinsch, *supra* note 5, at 372.
26. HASKINS, *supra* note 19, at 117-18.

to for the sake of illustration." Perhaps it would be safer to say that the early Massachusetts leaders, at least in attitude, felt their laws were opposed neither to Biblical law nor common law, for, as a communication of the General Court said in 1646, the common law was founded on the law of God.[27]

The Biblical influence was strongest in criminal law; here was the greatest divergence from English law.[28] In the Massachusetts code of 1648, the descriptions of certain crimes were lifted nearly verbatim from the Bible, especially from Leviticus and Deuteronomy. Examples are: idolatry, witchcraft, blasphemy, bestiality, sodomy, adultery, man stealing, treason, false witness with intent to take a life, cursing or striking a parent, rebelliousness against parents, and malicious killing. All of these were capital offenses. However, not all the capital offenses named in the Bible were made such by the code of 1648, and some non-capital punishments were made less severe. Yet, even in criminal law there were some common-law influences. The rape statute was copied after the common law. And, though the capital offense of sodomy was Biblical, boys under the common-law age of consent, fourteen years, were not to receive capital punishment.[29]

Massachusetts land law was based upon the common-law system, with important modifications. Feudal tenures or incidents never were recognized, but the method of land division bore a striking resemblance to that of English villages.[30] Conveyances could be made by written deed. By an order of 1651, grants in fee simple had to run " 'to the Party or Grantee his Heires and Assignes forever.' " Life estates and terms for years were recognized by those names.[31] In 1647, the General Court enacted a statute, obviously taken directly from the common law of dower, giving a wife a one-third "dower" interest in all lands her husband held during marriage.[32]

The law of succession, while basically English, had important modifications imposed upon it. From the beginning the courts enforced the right to pass land and personalty by will; furthermore, after 1641, this was expressly provided for by the Body of Liberties. In cases of in-

27. Reinsch, *supra* note 5, at 373-81.

28. Hilkey, *supra* note 7, at 249-67.

29. HASKINS, *supra* note 19, at 142-62.

30. Andrews, *The Influence of Colonial Conditions as Illustrated in the Connecticut Intestacy Law*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 431-32 (1907).

31. Hilkey, *supra* note 7, at 279-83.

32. Haskins, *Reception of the Common Law in Seventeenth-Century Massachusetts: A Case Study*, in LAW AND AUTHORITY IN COLONIAL AMERICA 17 (Billias ed. 1965).

testacy all children, male and female, shared equally, but, perhaps in grudging recognition of primogeniture or perhaps inspired by some English local custom, the eldest son got a double portion. The widow, of course, was protected by the previously mentioned dower system.[33]

Goebel and Haskins give convincing evidence of influence from English local customary law. Both feel the local Massachusetts courts in particular copied many of their practices and rules of law from a recollected synthesis of such customary law, though probably not outright from the printed custumals used in the English local courts.[34] Haskins notes that systems of inheritance similar to that in Massachusetts existed by custom in many English localities. He also points out that the Massachusetts Act of 1840, providing for the recording of deeds and mortgages in town records, established a system similar to that used in many English boroughs since the Middle Ages.[35]

Having sketched some of the salient features of the components of early Massachusetts law, we will now make brief, comparative reference to the other colonies. It should be kept emphatically in mind that the law did not grow by common design in the colonies; each colony developed its own legal system. The assumption that colonial law was essentially the same in all colonies is wholly without foundation.[36] Moreover, it is unfortunate that we must use Massachusetts as a standard of comparison, because, with respect to its legal development, that colony was not at all typical. From its beginning as a haven for Puritan dissenters until the Minutemen faced the British regulars on the Lexington Green, Massachusetts was always the sulky child, rebellious against things English. We would expect the English common law to have less influence there and in the other similarly situated New England colonies than in the colonies to the south.

In New York the common law was given more recognition than in most colonies. While the common-law cases were not held binding until 1761, the English influence was strong from the time the British took New York from the Dutch in 1664. In 1665, Governor Nichols wrote that legal affairs were conducted in a more regular manner than in the other colonies. He reported to the Board of Trade in 1669 that juries were used in all cases and that there were no laws contrary to those of England. A report by Governor Dongan in 1687 described a

33. Hilkey, *supra* note 7, at 293-96.

34. Goebel, *supra* note 10; HASKINS, *supra* note 19, at 163-82.

35. HASKINS, *supra* note 19, at 163-82.

36. *Id.* at 6-7.

system of six kinds of courts, including one of chancery that consisted of the governor and council.[37]

In Pennsylvania, it appears that legal procedures were very irregular before Penn received his charter in 1681. Thereafter, Pennsylvania developed the most complete system of codes of any colony, and the courts exercised both law and equity jurisdiction.[38] The tradition, stated by the Supreme Court of Pennsylvania in 1810, was that the charter had extended the common law.[39] However, it seems the courts felt they had the power to depart from specific common-law rules when they concluded that some overriding situation in the colony required it. For instance, in Pennsylvania married women were empowered to convey land simply by signing a deed before witnesses, though it was well known that the English rule permitted this only by a fine.[40] Reception and development of the common law in Pennsylvania must have been inhibited by the fact that, while the Pennsylvania bar had become distinguished by the time of the Revolution, it was comparatively late in getting a body of trained lawyers.[41]

The court system in Maryland was unique, at least in theory. Because of the form of the grant to Lord Baltimore, he could create manors and boroughs which might have had local courts like their ancient counterparts in England. In fact, such local courts seem not to have been significant factors, since there probably were only two manorial courts and two borough courts that actually operated.[42] Maryland's Assembly probably played the dominant role in developing the colony's legal system, enacting about one thousand general laws between 1638 and 1715. Some acts of Parliament were regarded as binding and some were not, but the basis for choice is not clear. Where statutes did not control, English common law seems to have been regarded as the basis for decision as much of the common-law civil and criminal procedure was used.[43]

The fragments of information we have, point to the conclusion that the common law was more revered in Virginia than in Massachusetts.

37. Reinsch, *supra* note 5, at 390-95.

38. *Id.* at 396.

39. Kirk v. Dean, 2 Binn. (Pa.) 341 (1810).

40. Kirk v. Dean, 2 Binn. (Pa.) 341 (1810); Davey v. Turner, 1 U.S. (1 Dall). 11 (1764).

41. WARREN, HISTORY OF THE AMERICAN BAR 102 (1913).

42. Smith, *The Foundations of Law in Maryland: 1634-1715,* in LAW AND AUTHORITY IN COLONIAL AMERICA 92, 94, 102, 109 n.7 (Billias ed. 1965).

43. *Id.* at 95-98, 100-102.

In Virginia, the purposes of settlement were less to pull away from England and more to preserve the principle of loyalty to the crown in the face of trying conditions.[44] Instructions from the company in London to the colonial government, dated 24 July 1621, were " 'to imitate and follow the policy of the form of government, laws, customs, and manner of trial, and other administration of justice used in the realm of England, as near as may be . . . .' " [45] When the company's charter was vacated in 1624 and Virginia thus became the first royal colony, the change was not very marked in the colony.[46] After Bacon's Rebellion in 1676, however, there was a break in the unity between king and subject in Virginia, and this may have manifested itself in a lessened regard for the king's law.[47]

New Jersey has been regarded as following English precedents to a high degree.[48] During the period when the colony was divided into East Jersey and West Jersey, it seems the common law was more influential in West Jersey. East Jersey's legal system has been likened to that of early Massachusetts, with a heavy Biblical cast to the laws. From 1693, West Jersey had a three-tiered court system and a more regular administration of justice than in East Jersey.[49]

The situation in early Rhode Island, Connecticut, and, perhaps to a lesser extent in New Hampshire, seems to have been roughly comparable to that in Massachusetts. Rhode Island adopted a rudimentary civil and criminal code in 1647, most of whose provisions were lifted verbatim from Dalton's *Country Justice*, a handbook for English justices of the peace.[50] In 1699, Governor Bellomont, transmitting the Rhode Island laws to the Privy Council, wrote that court proceedings were in no wise agreeable to English practice. Yet, in 1708, Governor Cranston wrote the Lords of Trade that the laws of England were generally in force. Developments in the Connecticut and New Haven colonies seem to have closely mirrored those in Massachusetts in the seventeenth century, with the English influence being, if anything, slightly less. In New Hampshire, the story was similar to that in Massachusetts, though

44. Washburn, *Law and Authority in Colonial Virginia*, in LAW AND AUTHORITY IN COLONIAL AMERICA 116 (Billias ed. 1965).

45. 9 ENGLISH HISTORICAL DOCUMENTS 185 (Jensen ed. 1955).

46. KEITH, THE FIRST BRITISH EMPIRE 25 (1930).

47. Washburn, *supra* note 44.

48. WARREN, *supra* note 41, at 113.

49. Reinsch, *supra* note 5, at 395-96.

50. Howe, *supra* note 16, at 13-14.

there may have been more reliance on English law and less on Biblical doctrines.[51]

The Seventeenth Century Lawyer

To a certain degree we should be able to know something of the kind of law practiced by knowing the qualities of the lawyers who practiced it. If, for instance, we were told that all the lawyers in one colony were part-time farmers and largely uneducated, whereas most of the lawyers in another colony were educated in the English inns of court, it would be a fair inference that the common law had the greater influence in the latter colony.

Little is known of the training of colonial lawyers in the seventeenth century. There were no lawyers on the Mayflower, but Massachusetts Bay had a few English-trained lawyers, most of whom did not practice. Governor John Winthrop and Emanuel Downing had studied at the Inner Temple but did not practice. Likewise, Nathaniel Ward, who drafted the 1641 Body of Liberties, had been a barrister of Lincoln's Inn; however, he served as a minister in Massachusetts. Thomas Morton, a member of either Furnewell's Inn or Clifford's Inn (equity inns) came to Massachusetts in 1624 or 1625 and practiced for a while until he was expelled for what the colony's leaders considered personal misconduct. Thomas Lechford, of Clement's Inn (another equity inn) practiced a little in Massachusetts for a year or two until he was disbarred for some sort of professional misconduct. No other English-trained lawyers are known to have lived in Massachusetts during the seventeenth century. Legal matters seem to have been cared for by a class of part-time practitioners who were informally, and most likely often indifferently, trained.[52]

When Connecticut was settled in 1636-1637, three of its leaders had English legal educations. Roger Ludlow and Governor John Winthrop the younger were of the Inner Temple, and Governor John Haynes was "very learned in the laws of England." However, they apparently practiced little, if at all, and Connecticut had no other known lawyers with formal training in the seventeenth century. The handling of legal matters seems to have been by a group less skilled than in Massachusetts.

In Maine one "English barrister," Thomas Gorges, head of the colonial

51. Reinsch, *supra* note 5, at 386-90.

52. WARREN, *supra* note 41, at 59-73; Hilkey, *Legal Development in Colonial Massachusetts, 1630-1686*, in 37 COLUMBIA UNIVERSITY STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 216-21 (1910).

government, practiced in the seventeenth century. Virginia had two English-educated lawyers present in that century. Henry Justice, of the Middle Temple, was transported to Virginia for theft in 1636, and we know of the later presence of William Fitzhugh, born in 1651 and "educated as a lawyer in England." Reportedly there were thirty-three persons practicing law in Virginia in 1680.

While Maryland was noted for having a trained bar earlier than any other colony, its seventeenth century bar seems to have included only two English-trained lawyers, and these late in the century. Charles Carroll, a member of the Inner Temple, came to Maryland in 1688, and Henry Jowles, "a barrister," became Chancellor in 1697.

Research discloses no other English-trained lawyers who may have practiced in the colonies before 1700. Warren says the practice in New Jersey was "evidently engaged in chiefly by pettifoggers and by the court officers. . . ." For seventy years after its settlement, Pennsylvania, though its bar later flourished, had practically no lawyers with any kind of training.[53] The clear inference is that English-trained lawyers were so few and so scattered in the colonies in the seventeenth century as to have, by themselves, a negligible effect upon the practice of law.

Legal Materials in the Seventeenth Century

A common-law lawyer must have his law books. To a considerable extent, then, if we know what books on the common law are present at a given time and place, we can infer the extent to which that law is followed. While much more information on colonial law libraries is needed, what is available will advance our investigation in some degree.

The colonists were almost totally dependent upon importation from England for common-law materials. Before the Revolution only thirty-three law books, including eight editions of one, were published in America. Most of these were manuals for justices of the peace, sheriffs, and other local officers or tracts on the rights of Englishmen, especially the right of trial by jury. No English case reports were reproduced, nor was the treatise of any standard English law writer, except for Blackstone's *Commentaries*, but the first American edition of this did not appear until 1771-1772.[54]

53. The information on Connecticut, Maine, Virginia, Maryland, New Jersey, and Pennsylvania is drawn from WARREN, *supra* note 41, at 44-45, 54-55, 102, 112, 128-34, and 139. Warren does not closely document his sources, so, it is difficult to go behind his statements.

54. WARREN, *supra* note 41, at 157-60.

Of the few English law books known to have been in the colonies before 1700, almost all were treatises. *Coke on Littleton* was the predominant treatise for lawyers during the entire colonial period.[55] A partial set of *Coke's Reports* travelled over on the Mayflower,[56] though its utility must have been marginal, since no lawyer was aboard. In 1647, the Massachusetts General Court voted to import two copies each of *Coke's Reports, Coke on Littleton, Coke on Magna Carta, Book of Entries, New Terms of the Law,* and Dalton's *Justice of the Peace.* Examination of the Suffolk County (Boston) court records from 1671 to 1680 disclosed citation of only *Coke on Littleton* and a volume on the law merchant.[57]

The most complete record available of a colonial justice of the peace court is the so-called Pynchon Court Record, covering the proceedings of the local court at Springfield, Massachusetts, from 1639 to 1702. It does not contain any reference to an English text or to a case of any English or American court. However, the three successive judges who kept the record had some familiarity with a limited number of English treatises. William Pynchon, in a letter dated 9 March 1646, makes passing reference to Fortescue's *Laws of England* and Dalton's *Country Justice.* The inventory filed in the estate of his grandson, John Pynchon, Jr., in 1721 listed the following law books: " 'Fortaques [Fortescue] on the Laws, law Dictionary, A New England Law Book, Cook upon Littleton, Finches laws, Magna Charta, Dalton's Statutes, Dalton on the Laws of England.' " Some of these may have belonged to John, his father, or even to William.[58]

None of the foregoing establishes that the common law of England was not applied in the colonies in the seventeenth century. The fact that a lawyer is not trained in England does not prove he cannot understand and use English precedents. The countless American lawyers who have been trained since the Revolution by law schools, office clerkship, and even self-study demonstrates this. However, when, in seventeenth century America, we find no appreciable number of English-educated lawyers, when we find no evidence of an organized native system of legal education, and especially when the courts were staffed

55. Thorne, SIR EDWARD COKE 1552-1952, 3 (published in pamphlet form by the Selden Society 1957).

56. *Id.*

57. Chafee, *Colonial Courts and the Common Law,* in 68 PROCEEDINGS OF MASSACHUSETTS HISTORICAL SOCIETY 132, 157-58 (1952).

58. J. SMITH, COLONIAL JUSTICE IN WESTERN MASSACHUSETTS 19-20, 157-58 (1961).

by lay judges, it is difficult to imagine any sophisticated or highly technical use of common-law cases and authorities. The probability is that, at least on the appellate level, the basic principles of the common law were known and considered, perhaps from reference to a limited supply of English secondary authorities, such as Coke.

A Generation of Change

A sailor would know how to express it. He has been sailing a reach with sails luffing, making way but not as he might. This would be the course of the common law in the 17th century. When our sailor realizes the situation, he tightens the sheets, snubs off, and proceeds anew, not on a different tack but with a taut boat and quickened pace. There is reason enough to theorize that something like this happened to the colonial ship of state, in historical perspective quite dramatically, during about a generation beginning almost precisely with the year 1700. Probably it was the Council of Trade and Plantations and the Board of Trade that tightened the lines, and the colonies responded.

Directions from England

The British probably had a desire for more control over the colonies about forty or fifty years before the turn of the century. But the political convulsions that rocked England between the Grand Remonstrance of 1641 and the Glorious Revolution of 1688 seem to have delayed a sustained effort in this direction. The first real parliamentary legislation for the colonies was an act of 19 May 1649, which declared England and its colonies a commonwealth, to be governed by the "supreme authority," Parliament; however, upon the Restoration that act was repealed.[59]

The year 1664 saw two events that evinced increased English interest in the American colonies. A British fleet captured New Amsterdam from the Dutch, and Charles II granted it to his brother, the Duke of York, renaming it New York. The following year the Duke promulgated the code of law known as the "Duke's Laws" and installed as the English governor Richard Nichols (or "Nicolls").[60] Also in 1664 a four-man royal commission visited Boston, apparently for the intended purpose of acting as a royal court to override the colony's courts. But

59. Keith, *supra* note 46 at 3-9.

60. Johnson, *The Advent of Common Law in Colonial New York*, in Law and Authority in Colonial America 74 (Billias ed. 1965).

after meeting stubborn resistance from the local freemen, the commissioners abandoned their mission and left Massachusetts.[61]

England again tried to tighten its grasp on recalcitrant New England in 1685 by combining the New England colonies, New York, and the Jerseys into one viceroyalty called the Dominion of New England. Sir Edmund Andros was appointed governor, who, with a council, was to try civil and criminal cases according to the laws and the statutes of England. This move produced remonstrances in the colonies involved, notably the revolt led in New York by Jacob Leisler, and the Dominion collapsed in 1688.[62]

By the 1680's and 1690's, the British government began taking steps that produced a real and lasting tightening of control. In 1684, the Massachusetts Bay charter was annulled. By a new charter of 1692 the colony became a royal colony with an appointed governor, who, with his council, appointed judges and justices of the peace. Thereafter, the practice of law in Massachusetts became more regular and technical.[63] In 1692, Maryland's proprietary charter was annulled, a royal governor was appointed, and the province became a royal colony. While local practice in law may have been little affected, a new court of appeals and new admiralty courts were set up.[64] In New York, the Supreme Court of Judicature was established in 1691, and one author believes there was at this time a rather sudden increase in reliance on the common law in that colony.[65]

The great Navigation Act of 1696 must be noted. By this Act Parliament created a system of six colonial vice-admiralty districts and courts, with the judges and other officers commissioned by the English lords of admiralty. The first vice-admiralty court began to sit in Massachusetts in 1699. Although its procedures were more informal than in the English High Court of Admiralty, the Massachusetts court seems to have taken jurisdiction over more matters than the High Court. In the eighteenth century, at least in Massachusetts, the vice-admiralty court became a symbol of oppressive British control. After 1760, it was in this court that all the hated Acts of Trade were enforced.[66]

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61. Hilkey, *supra* note 52, at 160.

62. 1 MORISON AND COMMAGER, GROWTH OF THE AMERICAN REPUBLIC 84 (5th ed. 1962); JOHNSON, *supra* note 60.

63. Reinsch, *supra* note 5, at 383-85.

64. SMITH, *supra* note 42, at 94-95.

65. Johnson, *supra* note 60.

66. Wroth, *The Massachusetts Vice-Admiralty Court*, in LAW AND AUTHORITY IN

Statutory revision and codification is another area in which evidence of change can be seen. There were a few isolated examples of statute revision in the colonies during the seventeenth century but no real impetus for change until almost precisely 1700, when the Council of Trade and Plantations exerted pressure. In response, for the next fifteen or twenty years there was quite a rash of revisions and codifications. Whereas the colonial laws had previously been gathered together in cumbersome bundles of manuscripts, now they were put in a form more usable, not only by the Privy Council, but by the colonial bench and bar. After approximately 1720, the laws were generally printed by colonial printers such as Benjamin Franklin.[67]

In 1700, the Privy Council wrote to the colonial governors in Barbados and America, requesting reports on their court procedures. Replies are extant from Barbados, Massachusetts, New York, Rhode Island, Maryland, and Virginia.[68] These replies show court systems that varied among themselves rather more than do American state courts today and which clearly were products of the English court system, mainly of the common-law and equity courts. In varying degrees they were abbreviations of the English system, and the procedures are clearly derivatives of English ones. We find direct statements that the common law was applied as the rule of decision[69] or at least that the common-law forms of action were used.[70]

More important than what the colonial governors reported are questions having to do with what they and their subjects thought about the act of reporting. The inferences are fairly strong that during most of the seventeenth century the colonists were too busy with the mundane, often grim, aspects of securing a beachhead on a hostile shore to reflect much upon the law as a science. A modicum of law and order was a utilitarian necessity, and that was about it. Now, nudged by the home government, the colonists were asked to examine them-

COLONIAL AMERICA 32 (Billias ed. 1965); Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 355-56 (1967).

67. Surrency, *Revision of Colonial Laws*, 9 AM. J. LEGAL HIST. 189 (1965).

68. Surrency, *Report on Court Procedures in the Colonies—1700*, 9 AM. J. LEGAL HIST. 69-72 (1965).

69. *Id.* at 177 (New York), 238 (Rhode Island), and 239 (Virginia). The reply from Virginia was quite explicit: "[T]he proceedings are in English and Judgmts: grounded & passed according (or as near) to ye Com[m]on & statute Laws of England & ye Circumstances of ye Country will admitt & to such peculiar Laws as are made suitable to ye present state of ye Country."

70. *Id.* at 169 (Maryland) and 173 (Massachusetts).

selves and say what was their Law in a more speculative sense. This kind of introspection would normally be expected to produce change and refinement and, in the context of 1700, to make the colonies imitate more closely the refinements of the common law.

Colonial Response

On the basis of the evidence, one may infer that English control over colonial legal systems, and by further inference, the influence of the common law, increased perceptibly very near the year 1700. There is also evidence that the colonists themselves became more receptive to the common law shortly after that date.

When we say the colonists had certain attitudes toward the common law, we must be careful to define what we mean by "common law." The object of this article has been to determine the extent to which the procedures and rules of the king's courts of common law governed or influenced the resolution of legal disputes in American courts. However, the colonists did not always think of the "common law" in this way, and it might be possible to build up a case that did not exist by citing certain contemporary colonial references to the "common law."

Often in times of pressure from the English government or from their own colonial governments, the colonists would raise a popular clamor for "the common law of England" as a shield against their oppressors. But in this context they meant almost exclusively the public aspects they felt guaranteed political freedom, *i.e.*, constitutional principles, such as trial by jury.[71] A popular outcry of this kind was raised against the autocratic leaders of Massachusetts in the 1640's.[72] In Maryland for a century after its founding in 1634, the colonists claimed the benefits of the common law in opposition to the proprietor's contention that by the terms of his grant he had the absolute right to govern.[73] Daniel Dulany's pungent pamphlet of 1728 even went so far as to urge his fellow Marylanders to adopt both the common law and all English statutes.[74]

71. Howe, *supra* note 16; KEITH, *supra* note 46, at 184-86; Reinsch, *supra* note 5, at 383-84.

72. Howe, *supra* note 16.

73. WARREN, *supra* note 41, at 49-50.

74. DULANY, THE RIGHT OF THE INHABITANTS OF MARYLAND TO THE BENEFIT OF THE ENGLISH LAWS (1728). This pamphlet is reprinted in an appendix to Sioussat, *The English Statutes in Maryland*, in ser. 21, Nos. 11-12, JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE (1903).

Another kind of evidence can be found and this points toward an increasing use of English common law in the sense this article defines the term. Obviously such a development would not occur at a certain instant, but the indications are that impetus in this direction was considerably felt in the generation beginning about 1700. In 1712, the South Carolina legislature enacted a statute formally adopting the English common law as the rule of judicature and also adopting 126 named English statutes that had been selected by Chief Justice Nicholas Trott.[75] North Carolina, in 1715, enacted a statute adopting the common law "so far as shall be compatible with our way of living and trade." [76] Pennsylvania's Assembly passed an act expressly extending several English penal statutes in 1718. The preamble to this act recited that the common law was the birthright of English subjects and so ought to be the rule in British dominions.[77]

The citation of English cases as authority can be traced to the early 1700's. Reinsch reports the citation and following of an English case in North Carolina in 1729.[78] A scanning of all cases in Volume 1 of Harris & McHenry's Reports for Maryland covering the years 1658 to 1774, showed the earliest citation of English cases to have been in 1718 in *Tanner v. Freeland*.[79] Earlier cases were so sketchily reported that it seems quite possible that common-law cases were relied upon before then but simply not noted by the reporters. After 1718, English cases were cited to and by the Maryland court in gradually increasing numbers. Even in this later period, much depended upon the style of the several reporters, with varying degrees of attention being given to the citation and discussion of English cases.

Consider another important factor reflecting upon the reception of common law, the quality of the judiciary. Not only were there practically no English-trained judges on the colonial bench during the seventeenth century, but it seems to have been made up in large part of men who were not lawyers at all. Again, signs of an abrupt change can be seen beginning at the turn of the century. The first professional lawyer to become judge of an appellate court may have been Henry Jowles, an English barrister who became chancellor of Maryland in

75. Reinsch, *supra* note 5, at 407-10.

76. WARREN, *supra* note 41, at 122-23.

77. Sioussat, *The Theory of the Extension of English Statutes to the Plantations*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 416, 426-27 (1907).

78. Reinsch, *supra* note 5, at 409.

79. 1 Md. 34 (1718).

1697.[80] The first lawyer to become chief justice of New York was William Attwood, an English lawyer who arrived in 1701.[81] In Pennsylvania, the first lawyer to become chief justice was John Guest, an English barrister, in 1706. William Penn, anxious to obtain trained lawyers, had given Roger Mompesson, a good English lawyer, a commission as chief justice, but Mompesson declined the office and went to New York where he was chief justice from 1706 to 1715.[82] New Hampshire, however, had no practicing attorney on the bench until 1754.[83]

The evidence indicates two significant kinds of activity and change traceable almost to the year 1700. First, the British government resolved to regularize colonial legal systems and took effective action to carry out this resolve. This development is consistent with the larger historical background of an England that, after the disturbances of the latter half of the seventeenth century, had put its house in order and now attended to some overdue business in the plantations. Second, in roughly the generation following 1700, the colonies themselves evinced a quickening interest in the refinement of their legal systems, part of which was demonstrably in response to orders from the home government. All this suggests most strongly that the condition of the colonies became, in a short span of time, more receptive to the common law, from which we may infer the common law must have become more understood and followed at this time.

Eighteenth Century

It is curious that legal historians have dealt little with eighteenth century common-law reception, less in fact than they have with seventeenth century developments. The subject did not interest the colonials either, quite possibly because they preferred not to disclose the results of such a study to his majesty's government. However, we do have comparatively good information on some institutions that established perimeters within which the common law probably was applied. By depicting the eighteenth century colonial lawyer, with his training and legal materials, we can judge with some degree of certainty the extent to which the common law could have been received. And by examina-

80. Warren, *supra* note 41, at 54-55.

81. 2 Chester, Courts and Lawyers of New York; A History 1609-1925, 494 (1925).

82. *Id.* at 519-20; Reinsch, *supra* note 5, at 396-400.

83. Warren, *supra* note 41, at 134-38.

tion of thousands of state-court decisions handed down immediately after the Revolution, some detailed, categorical statements can be made about affairs at the end of the colonial period.

The Eighteenth Century Lawyer

Almost from the beginning of the eighteenth century a growth in numbers and improvement in training of the colonial bar can be found. Warren estimates that between twenty-five and fifty American-born lawyers were educated in England before 1760 and that about one hundred and fifteen Americans were admitted to the inns of court between 1760 and the close of the Revolution. Of this latter group, he concludes forty-seven were from South Carolina, twenty-one from Virginia, sixteen from Maryland, eleven from Pennsylvania, five from New York, and one or two from each of the other colonies.[84]

Massachusetts seems to have depended little upon the English inns for the education of its eighteenth century lawyers. Most of the handful present held official positions in the colony's legal system. However, it appears a rather efficient system of educating lawyers by "reading law" in the offices of established lawyers was in operation. The students thus trained often were graduates of Harvard, Brown, or some other college and entered upon their law studies with a good general education. As an outstanding example, the office of the leading lawyer Jeremiah Gridley produced James Otis, Jr., the famous opponent of the writs of assistance, and William Cushing, who became a Justice of the United States Supreme Court. Other offices trained President John Adams, Robert Treat Paine, David Sewall, who became a federal judge, and James Sullivan, a judge and attorney general of Massachusetts. The term "barrister" was used to describe those lawyers admitted, under rules adopted by the Superior Court of Judicature, to practice in court. A total of fifty-six men are believed to have been made barristers, of whom twenty-five were practicing in 1768.[85]

In the other New England colonies the local benches and bars were at a low ebb in the eighteenth century. In Rhode Island, the judges were elected annually until fifty years after the Revolution and were mostly laymen uneducated in the law.[86] Warren lists no Rhode Island lawyer trained in England, and he says there were only a few with

84. *Id.* at 188.

85. DAVIS, HISTORY OF THE JUDICIARY OF MASSACHUSETTS 76-223, 295-97 (1900).

86. DURFEE, GLEANINGS FROM THE JUDICIAL HISTORY OF RHODE ISLAND 14-17 (1883).

American legal training. The state of the bars in Connecticut and New Hampshire seems to have been much like that in Rhode Island. Warren names one English barrister who came to New Hampshire in 1758. In Maine, there were only six "educated lawyers" in 1770, none of whom was English-trained.

The middle and southern colonies depended upon the English inns of court in the eighteenth century far more than did New England. From a slow start, Pennsylvania flowered in producing outstanding lawyers in the period of approximately twenty years before the Revolution. Only South Carolina finally possessed more men than Pennsylvania who were trained at the inns of court. Some of the more outstanding of these in Pennsylvania were Andrew Hamilton, famous for his defense of John Peter Zenger, Pennsylvania chief justices Thomas Mckean and Edward Shippen, and the eminent lawyers John Dickinson and George Read. Maryland seems to have drawn upon the English inns to about the same extent as Pennsylvania. The Maryland bar had the reputation of being better trained from an earlier period than any other and was always highly regarded.

Virginia may well have had the best overall system of legal education of any colony. Although Warren says Pennsylvania had more lawyers from the inns of court than any colony except South Carolina, he lists by name more of them for Virginia than for Pennsylvania. At any rate, the number of English-trained lawyers must have been large in Virginia. In addition, Virginia, like Massachusetts, seems to have developed a successful system of education by office apprenticeship. The great George Wythe, who himself apparently received his legal education in Virginia, provided in his single office the legal educations of Jefferson, Marshall, Madison, and Monroe.

South Carolina became a royal province in 1720. Thereafter most of its chief justices were educated lawyers, though most associate justices were laymen. Because the colony, in adopting a list of specified English statutes in 1712, had adopted the one governing the examination and admission of lawyers, the requirements for practice were strict. As a result, the bar was never large (no more than fifty-eight members were admitted before the Revolution) but it was the highest educated bar in the colonies and contained the largest proportion of English-trained lawyers.

Not much is known of the North Carolina and Georgia bars, and neither colony had large numbers of lawyers. While there were several

English-trained lawyers in North Carolina, most, including James Iredell, who became a Justice of the United States Supreme Court, studied in law offices in North Carolina and other colonies. Georgia had no courts until 1733. After it became a crown colony in 1752, the chief justice was required to be an "English barrister," but the three assistant judges were usually laymen. The eighteenth century bar was small, though it contained a few English-trained lawyers practicing in Savannah.[87]

Perhaps a few words should be said about the lawyer's public image in colonial times. Through most of the period he was an unpopular figure. In the middle part of the 1600's several colonies maintained statutes prohibiting charging fees for legal services.[88] Of course, the class of persons holding themselves out as legal counsel may have justified such stringencies. In 1729, the Rhode Island assembly passed an act forbidding lawyers to sit as members,[89] and there was widespread popular opposition to lawyers being in the assembly in New York.[90] Later in the eighteenth century, as the general level of professional training and competence rose, lawyers must have received increased respect, if not personal esteem. The lawyers who became prominent as leaders in the growing struggle for liberty no doubt enjoyed much popularity. However, this was offset by the popular feeling against the many who were loyalists, a feeling that persisted even after the Revolution.[91] It is doubtful that the legal system itself gained popularity as the Revolution approached. For instance, in Massachusetts, due to the handling of the trials of the British soldiers involved in the Boston Massacre of 1770, the entire court system lost public confidence, which it did not regain until the revolutionary government reorganized the courts during the Revolution.[92]

Legal Materials

Traditionally, legal scholars have taken the position that eighteenth

87. The statements concerning Rhode Island, Connecticut, New Hampshire, Maine, Pennsylvania, Maryland, Virginia, South Carolina, North Carolina, and Georgia are supported by WARREN, *supra* note 41, at 44-49, 54-56, 104-10, 119-43.

88. HILKEY, *supra* note 52, at 216 (Massachusetts); Reinsch, *supra* note 5, at 395, 406 (New Jersey, Virginia).

89. DURFEE, *supra* note 86, at 37-38.

90. Reinsch, *supra* note 5, at 394.

91. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM 80-81 (1940).

92. Cushing, *The Judiciary and Public Opinion in Revolutionary Massachusetts*, in LAW AND AUTHORITY IN COLONIAL AMERICA 168-73 (Billias ed. 1965).

century colonial law libraries were small and that they contained incomplete selections of English authorities. Warren says fifty to a hundred books would have been a large number for a lawyer and that Judge Edmund Trowbridge of Massachusetts was probably the only lawyer whose library contained all the valuable English law books then existing.[93]

An examination of the first volume of Harris & McHenry's Reports for Maryland (1658-1774) raises the question of whether there were far more English law books in eighteenth century America than has been generally supposed. All cases in that volume were scanned and notations made of the English case reporters and secondary authorities cited. For the most part, the citations were shown as having been given as authority by counsel arguing before the Supreme Court of Maryland. The earliest citation was noted in the 1718 case of *Tanner v. Freeland*.[94] There was much irregularity in the form of citations, and in some instances it has not been possible to reconcile them with known English publications.[95]

In all, eighty-four English case reporters were cited in 1 Harris & McHenry, most of them having been referred to repeatedly. Coke's Reports, Time of Elizabeth, was the first to be cited. The citations tended to be mainly to King's Bench reports, such as Coke's Reports, with the fewest citations to equity reporters and with the proportion of Common Pleas citations increasing slightly with time. Fifty-five English treatises were cited, *Coke on Littleton* being the first and favorite. Abridgments, such as Rolle's, Bacon's, and Viner's, were used quite a bit, though perhaps not so much as to indicate a great lack of case materials. As a matter of curiosity, Blackstone's *Commentaries* were first cited in 1768 and seemed to have had a slight effect on the course of colonial law.

The citation of cases in 1 Harris & McHenry was generally without comment, except in some later decisions, where the reporters occasionally gave details of the English cases. However, the English references were cited as authority in support of arguments and propositions advanced by counsel. They obviously were regarded as having some force. Throughout, English cases were cited far more times than were sec-

93. WARREN, *supra* note 41, at 160-66.

94. 1 Md. 34 (1718).

95. For the purpose of identifying publications the writer has referred to the table of abbreviations supplied by Professor Cooley on p. ixv of the first volume of his third edition of BLACKSTONE'S COMMENTARIES (1884).

ondary authorities. In this connection, it is interesting to note that the citation of treatises and abridgments picked up considerably after 1760, which is contrary to what we might have expected. There is no way of knowing how many cases were lifted from secondary authorities without the cases themselves having been read. Therefore, it cannot be concluded that all the English reporters cited existed in Maryland. However, since treatises and abridgments were cited mainly in the later years covered by 1 Harris & McHenry, perhaps it may be inferred that lawyers' libraries tended to contain reporters at an earlier time than they contained secondary authorities and that cases were not lifted in large numbers.

Despite unanswered questions and doubts, the list of English authorities relied upon in 1 Harris & McHenry is impressive. If nothing else, it shows a regular use of English common-law rules as authority from early in the eighteenth century. And the inference is strong that many or most of the reports and treatises cited were present in the colony, though scattered in various law libraries. All this casts some doubt upon the commonly accepted belief that English legal materials were scarce or little relied upon in the colonies until just before the Revolution. From the previous discussion it can be seen that, with respect to reception of the common law, Maryland was fairly typical of the colonies from New York south. The New England colonies, of course, were less disposed to pattern their affairs upon things English, from which it may be conjectured that the existence and citation of English common-law authorities was less in New England than in Maryland and other southern colonies.

Role of the British Government

One would suppose the theory and practice of the British government regarding the American colonies would have a great deal to do with implementation of the common law there. This seems not to have been the case, but the evidence on either theory or practice is sketchy. In the first place, no complete or consistent theory seems to have been worked out as to the effect of the common law, though one was as to the effect of statutes. In the second place, as to practice, there were few appeals from the colonies, and they seemed generally to involve questions of the validity of colonial statutes. The English government was too preoccupied with more important matters—making the colonies profitable elements in a mercantile system—to give much attention to inter-

nal legal affairs. There appears to have been more interest in statute law than in common law; questions on statutes will be discussed only as they shed light on the status of the common law in the colonies.

The English courts themselves never settled the theoretical question of the common law in the American colonies.[96] English lawyers and writers had little interest in colonial legal affairs. For instance, when George Chalmers wrote his *Political Annals of the Present United Colonies* in London in 1780, he could find no published legal opinion of appeals taken to England from the colonies and had to consult archives.[97]

Some propositions of colonial law were settled. Since 1609, it was accepted that if the English king conquered a Christian land, that land's laws remained in effect until the king changed them.[98] If the conquered land were not Christian, its laws being contrary to the laws of God, the prior laws were automatically revoked, and the king was to rule by "natural equity" until he could enact new laws.[99] Finally, "if there be a new and uninhabited country found out by *English* subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England. . . ." [100]

When it came to applying the rules to America, some confusion resulted. In 1707, it was held in *Smith v. Brown & Cooper*[101] that Virginia had been conquered from infidels and that the common law did not automatically extend to the colony. Blackstone similarly states that the American colonies were "principally" so acquired and that "the common law of England, as such, has no allowance or authority there." [102] One serious doubt is at once apparent about the premises upon which the *Smith* case and Blackstone's view are predicated. Were the colonies really lands conquered from foreign princes, or were they more like previously uninhabited lands? Would it not be nearer the truth

96. Radin, *The Rivalry of Common-Law and Civil Law Ideas in the American Colonies*, in 2 LAW: A CENTURY OF PROGRESS 404, 411 (1937).

97. Washburn, *supra* note 44, at 118-19.

98. Calvin's Case, 77 Eng. Rep. 398 (K.B. 1609) (dictum); Blankard v. Galdy, 91 Eng. Rep. 356 (K.B. 1693).

99. Calvin's Case, 77 Eng. Rep. 398 (K.B. 1609) (dictum).

100. Anonymous, 24 Eng. Rep. 646 (1722) (determination by Privy Council upon appeal from the foreign Plantations); Blankard v. Galdy, 91 Eng. Rep. 356 (K.B. 1693) (dictum).

101. 91 Eng. Rep. 566 (K.B. 1707).

102. 1 BLACKSTONE, COMMENTARIES *107-08.

to say that some parts of the new land were conquered and some parts previously uninhabited? Since the Indians did not live in geographically fixed nations in the European sense, could the lines between conquered and uninhabited parts be determined? What about lands acquired peacefully from the Indians by treaty or purchase? In 1756, Britain's attorney general Charles Platt and solicitor general Charles Yorke rendered an opinion that the common law was in force in such places.[103]

To complicate the situation further, in 1720, after the date of *Smith v. Brown & Cooper*, Attorney General Richard West was of the opinion that the common law of England was the common law of "the Plantations." [104] Then, in 1727, in the celebrated case of *Winthrop v. Lechmere*,[105] the Privy Council held that the Connecticut intestacy statute, which divided realty equally among the decedent's children, was void. This was on the ground that it was "contrary to the laws of England," the reference being of course to the common-law rule of primogeniture.

The Privy Council heard appeals from the colonies and also passed upon the validity of colonial statutes. It seems the Council's main concern was that decisions and statutes should not be contrary to those parts of the statutory law of England that were binding upon the colonies. Even within this limited sphere the Council showed an inconsistency and leniency that was probably due to a practical, realistic approach to colonial conditions.

Except for Carolina, Maryland, Connecticut, and Rhode Island during the time they were proprietary colonies, the governors of all colonies had to submit legislative acts to the Privy Council for approval. In many cases the acts expired by their own terms before they could be passed upon. Sometimes it seems the Council was willing to delay action for years to avoid annulling a statute.[106] There must have been many colonial statutes that, though in clear violation of English statutes, never were challenged. For instance, a 1705 act of the Pennsylvania assembly allowed holographic wills, and they were widely used during the remainder of the colonial period, obviously contrarily to the English

103. CHALMERS, OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE 207 (1st Amer. ed. 1858).

104. *Id.* at 206.

105. GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 398-401 (1937); Andrews, *The Influence of Colonial Conditions as Illustrated in the Connecticut Intestacy Law*, in 1 SELECT ESSAYS in ANGLO-AMERICAN LEGAL HISTORY 431, 445 (1907).

106. KEITH, THE FIRST BRITISH EMPIRE 287-88 (1930).

Statute of Frauds and Perjuries.[107] Yet, the Privy Council did disallow many colonial legislative acts, some of them seemingly less obnoxious than others which stood.[108]

The aftermath of *Winthrop v. Lechmere* is another illustration of the unevenness of English control over the colonial administration of justice. In 1738, in *Phillips v. Savage* the Privy Council was asked to annul the Massachusetts intestacy statute, which was in all essentials like the Connecticut statute annulled in the *Winthrop* case, yet the Massachusetts statute was upheld because it had previously been confirmed by the Council. Meantime Connecticut had continued to use its intestacy statute despite the decision in *Winthrop*. Its act was again challenged before the Privy Council in 1745 in *Clark v. Tousey*, but the appeal was dismissed as not having been timely taken. For practical purposes this was the end of the matter, for Connecticut continued to use its "annulled" intestacy act, and no one again had the temerity to make another appeal.[109]

The evidence indicates that the British government, in practice, did not play a strong role in enforcing the common law in the colonies. Added to this, we have seen that English legal authorities never decided for themselves in theory the extent to which the common law should be enforced. It seems justifiable to conclude that direct influence from the home government was not a major factor in colonial reception of the common law.

A Backward Glance

This final section is postulated on the proposition that the common law was applied in substantially the same fashion when the Revolution began as it was in the first days of the Republic. To some extent this proposition is demonstrable. The early judges and lawyers had practiced before the Revolution. They must have had susbtantially the same libraries before as after, for presumably no law books came in during the war. Indeed, one reading the post-Revolutionary cases perceives that the bench and bar were using long-accustomed processes, mental and judicial, for deciding cases. The whole tenor of the opinions is quite convincing that except for some statutes, the judges were applying the same body of law they had long known.

107. *See* discussion in Havard v. Davis, 2 Binn. (Pa.) 406, 417-18 (1810).

108. KEITH, *supra* note 106, at 247-51, lists a number of acts that were annulled.

109. *Id.* at 248-49; Andrews, *supra* note 105 at 445-63.

A few words about methods. All appellate decisions reported for New York, Pennsylvania, and South Carolina from the end of the Revolution through 1810 have been examined. These states were chosen principally because they were the first to publish continuous series of post-Revolutionary reports. Secondarily, their use of common-law precedents is judged reasonably typical, at least of those colonies outside New England. For New York the reports examined were volumes 1-3 of Johnson's Cases, volumes 1-3 of Caines's Reports, and volumes 1-6 of Johnson's Reports, covering in all the period 1798 to 1810. Pennsylvania materials were volume 4 of Dallas's Reports, volumes 1 and 2 of Binney's Reports, and volumes 3 and 4 of Yeates's Reports, extending, with some overlapping among the reporters, from 1790 to 1810. For South Carolina volumes 1 and 2 of Bay's Reports and volumes 1 and 2 of Brevard's Reports, running from 1783 to 1811 with some overlapping, were used.

The evidence sought and recorded consisted of remarks by the judges as to their own understanding of how they were to apply English common-law precedents. What is summarized here is a contemporary judicial commentary on that subject. No attempt was made to determine if the holdings, case by case, matched English rules, for this would entail the virtual compilation of an encyclopedia of English common law *circa* 1800. In the end, it may be doubtful that the product of such monumental labor would produce a general view much different from what shall be seen.

With all three states involved, there was either a statute or a constitutional clause in some wise speaking to common-law reception. In New York, it was the constitution of 20 April 1777, in effect until 1821, that contained this clause:

> [S]uch parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same. . . . That all such parts of the said common law, and all such of the said statutes and acts aforesaid, or parts thereof, as may be construed to establish or maintain any particular denomination of Christians or their ministers, or concern the al-

> legiance heretofore yielded to, and the supremacy, sovereignty, government, or prerogatives claimed or exercised by, the King of Great Britain and his predecessors, over the colony of New York and its inhabitants, or are repugnant to this constitution, be, and they hereby are, abrogated and rejected.[110]

Unlike New York, Pennsylvania did not mention reception of the common law in its constitution. Rather a statute of 28 January 1777 provided:

> [E]ach and every one of the laws or acts of general assembly that were in force and binding on the inhabitants of the said province on the fourteenth day of May last shall be in force and binding on the inhabitants of this state from and after the tenth day of February next . . . and the common law and such of the statute laws of England as have heretofore been in force in the said province, except as is hereafter excepted.[111]

In South Carolina, the matter was handled differently. The Colonial Act of 12 December 1712, after specifically adopting the 126 English statutes enumerated by Chief Justice Trott, also provided:

> All and every part of the common law of England, where the same is not altered by the above enumerated acts, or inconsistent with the particular constitutions, customs and laws of this Province [except for certain matters of feudal land law and ecclesiastical law] . . . is hereby made and declared to be in as full force and virtue within this Province, as the same is or ought to be within the said kingdom of England. . . .[112]

This Colonial Act of Assembly was adopted and carried forward into statehood sucessively by the constitutions of 26 March 1776, 19 March 1778, and 3 June 1790.[113] So, there is special reason to suppose that reception matters in South Carolina would be handled after the Revolution as they were before.

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110. N. Y. Const. art. XXXV (1777), reproduced in 5 Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws, 2623, 2635-36 (1909).

111. 9 Statutes at Large of Pennsylvania 29-30 (Mitchell & Flanders eds. 1903).

112. Reproduced in J. Grimke, Public Laws of South Carolina 99 (1790), and also in 1 J. Brevard, Alphabetical Digest of the Public Statute Law of South Carolina 136-37 (1814).

113. 6 F. Thorpe, Federal and State Constitutions 3247, 3255, 3264 (1909).

Perhaps the most remarkable general observation that can be made is as to what was *not* done and said in the courts. None of the reception clauses or acts were ever explained or interpreted, but their purpose was quite faithfully followed. The courts in the three states cited English cases and secondary authorities regularly, easily, and without any feeling they had to explain their doing so.[114] In any extended or difficult case, requiring doctrinal discussion, English authorities would generally be relied upon. Hardly any hostility to English courts is to be found; in fact, deference was often shown for the learning of English judges. Although in their separate or dissenting opinions the various judges might reach contrary results and might disagree as to the state of the common law, there seems to have been underlying agreement that the English Common law as they saw it was usually binding.

Though the judges, by their actions, evinced a practice of following common-law decisions, they wrote little on the process. Not once do we find anything like a full-dress review of the reception doctrine; the courts were far less aware of the question than we are. About as extended a statement as can be found is this one by Chief Justice Kent: "But whatever may be our opinions on the point, as an abstract question, or whatever may be the decisions of the civil law, or the feudal and municipal law of other countries, we must decide this question by the common law of England." [115] Perhaps the most complete exposition was the remark by the South Carolina Constitutional Court "that the common law was of force in South Carolina, and formed by far the greatest and most important part of her system of jurisprudence." [116] Ten or twelve other cases contain remarks of like vein, but are less sweeping.[117]

114. For instance, the earliest volume of New York reports, 1 Johnson's Cases (1798-1800), contains 184 decisions of the Supreme Court and three for the Court for the Correction of Errors. Of the Supreme Court decisions, 130 were *per curiam* ones containing no citations of authority, 24 were full opinions without English citations, and 30 cited English authorities. Of the three decisions for the Court for the Correction of Errors, two cited English cases. Fifty-three English reports were relied upon 218 times and 13 secondary authorities 29 times. This included nine references to COKE ON LITTLETON but none to Blackstone. In general, later reporters in all three states contain a considerably larger frequency of English citations; volume 1 Johnson's Cases tends to the minimum instead of maximum intensity of citations for the period 1783-1810.

115. Frost v. Raymond, 2 Cai. R. (N.Y.) 188, 191 (1804).

116. Wells v. Martin, 2 Bay (S.C.) 20, 21 (1796).

117. Post v. Neafie, 3 Cai. R. (N.Y.) 22, 36 (1805); Lansing v. Fleet, 2 Johns. Cas. (N.Y.) 3 (1800); Conroe v. Birdsall, 1 Johns. Cas. (N.Y.) 127, 128 (1799); Jackson *ex dem.* Cooder v. Woods, 1 Johns. Cas. (N.Y.) 163, 167 (1799); Bender v. Fromberger,

Tempering what has just been said, the early state courts did not feel bound to slavish attendance upon English precedents. Under certain circumstances they would refuse to follow them, somewhat more freely, it appears, than a present-day state court will overrule its own prior decisions. The English rule was on occasion departed from if judged not compatible with conditions in America[118] or "unreasonable,"[119] or, quite possibly, for no stated reason.[120] A British rule that turned on some statute not in force in a state might be disregarded, the cause for it having disappeared.[121] There was, especially in South Carolina, a fairly evident feeling that procedural, as contrasted with substantive, rules were peculiarly within the local court's domain; hence, the judges were more willing to abandon English rules of practice and procedure.[122]

Certain classes of English decisions were apt to be accorded little

4 U.S. (4 Dall.) 441, 444-45 (1806); Respublica v. Cleaver, 5 Yeates (Pa.) 69, 73 (1804); Cooper v. Cooper, 2 Brev. (S.C.) 355, 358 (1810); Fleming v. M'Clure, 1 Brev. (S.C.) 428, 432-33 (1804) (gratuitous statement about English law merchant); Comm'rs of the Treasury v. Brevard, 1 Brev. (S.C.) 11, 13 (1794); Jenkins v. Putnam, 1 Bay (S.C.) 8, 10 (1784).

118. People v. Croswell, 3 Johns. Cas. (N.Y.) 336, 337 (1804) (celebrated case where court split 2-2 on whether truth was defense to libel); Walker v. Chichester, 2 Brev. (S.C.) 67 (1806); Snee v. Trice, 2 Bay (S.C.) 345 (1802); White v. Chambers, 2 Bay (S.C.) 70 (1796); Hall v. Smith, 1 Bay (S.C.) 330 (1793).

119. Bayard v. Malcolm, 2 Johns. (N.Y.) 550, 554-58 (1807); Leatherwood v. Woodroof, 2 Brev. (S.C.) 380, 385 (1810); Clark v. Minton, 2 Brev. (S.C.) 185, 188 (1807).

120. People v. Howell, 4 Johns. (N.Y.) 296, 302 (1809) (*dictum*); Johnson v. Stagg, 2 Johns. (N.Y.) 510, 522-23 (1807); People v. Barrett, 1 Johns. (N.Y.) 66 (1806) (2-2 decision in which Judges Tompkins and Thompson seem willing to depart from the English rule); Ludlow v. Bowne, 1 Johns. (N.Y.) 1 (1806); Jackson *ex dem.* Van Denberg v. Bradt, 2 Cai. R. (N.Y.) 169 (1804); Kane v. Ingraham, 2 Johns. Cas. (N.Y.) 403 (1801); White v. M'Neily, 1 Bay (S.C.) 11 (1784). *See also* the hotly contested group of New York cases involving validity of English prize-court decisions, in which English rules were dealt with in cavalier fashion if not dispensed with. Rhinelander v. Juhel, 2 Johns. Cas. (N.Y.) 487 (1802); Laing v. United Ins. Co., 2 Johns. Cas. (N.Y.) 487 (1802); Johnston v. Ludlow, 2 Johns. Cas. (N.Y.) 481 (1802); Goix v. Low, 2 Johns. Cas. (N.Y.) 480 (1802); Vandenheuvel v. United Ins. Co., 2 Johns. Cas. (N.Y.) 451 (1802).

121. Jackson *ex dem.* Trowbridge v. Dunsbaugh, 1 Johns. Cas. (N.Y.) 91 (1799); Warnock v. Wightman, 1 Brev. (S.C.) 331, 354, 367-68 (1804); Munro v. Holmes, 1 Brev. (S.C.) 319 (1804); Murrell v. Mathews, 2 Bay (S.C.) 397 (1802). Warnock and Murrell hold that, because the Statute De Donis had never been adopted in South Carolina, a limitation to "A and the heirs of his body" created the ancient conditional fee instead of a fee tail. Particularly in Warnock the court displays considerable knowledge of common-law development in reaching its historically defensible result.

122. Bayard v. Malcolm, 2 Johns. (N.Y.) 550 (1807); Douglass v. Wight, 2 Brev. (S.C.) 218, 219 (1807); Bevin v. Linguard, 1 Brev. (S.C.) 503 (1805); Hane v. Goodwyn, 2 Bay (S.C.) 521 (1804); Perkins v. McIntosh, 1 Brev. (S.C.) 18, 22 (1797).

force, such as nisi prius ones or cases thought to have been unreliably reported.[123] Of course, British cases handed down after 1776 were not considered binding, though they might be persuasive, much as a sister state's decision would be today.[124] On questions on which the English authorities were in conflict or where none was in point, the state courts had to devise their own rules, drawing upon their own sense of reasonableness and perhaps having recourse to civil-law analogies.[125]

Once a state court, by a prior decision, had established a rule on a given issue, that rule was treated with great reverence thereafter. The decisions contain some categorical assertions that prior cases had to be followed, even if they were shown to conflict with settled English rules.[126] In other words, by 1800, New York, Pennsylvania, and South Carolina understood a thoroughgoing doctrine of stare decisis, at least as strong as that applied today, contrary to what had been thought by some contemporary writers.[127]

Legal historians have exhibited interest in the treatment of English precedents in maritime matters. Did the early state courts show a preference for Continental authorities? When there were English maritime cases in point, the judges seemed to feel as bound to follow them as to follow English cases in other areas, though Continental writers might be cited also.[128] If English cases were lacking or were conflicting, then civil-law commentators were quite persuasive.[129]

123. Hartness v. Thompson, 5 Johns. (N.Y.) 160, 161 (1809); Walden v. Le Roy, 2 Cai. R. (N.Y.) 263, 264 (1805); Jackson *ex dem.* Lewis v. Larroway, 2 Johns. Cas. (N.Y.) 114, 115 (1800).

124. Upton v. Vail, 6 Johns. (N.Y.) 181 (1810); Penny v. New York Ins. Co., 3 Cai. R. (N.Y.) 155, 159 (1805) (dictum); Vandenheuvel v. United Ins. Co., 2 Johns. Cas. (N.Y.) 127, 137, 147 (1801); Bogert v. Hildreth, 1 Cai. R. (N.Y.) 1, 3 (1803); Johnson v. Bloodgood, 1 Johns. Cas. (N.Y.) 51, 56 (1799).

125. Coit v. Houston, 3 Johns. Cas. (N.Y.) 243 (1802); Winton v. Saidler, 3 Johns. Cas. (N.Y.) 185, 190 (1802) (minority opinion by Judge Kent); Holmes v. Lansing, 1 Johns. Cas. (N.Y.) 248 (1800).

126. Colden v. Dopkin, 3 Cai. R. (N.Y.) 171, 172 (1805); Van Raugh v. Van Arsdaln, 3 Cai. R. (N.Y.) 154, 155 (1805); Champneys v. Johnson, 2 Brev. (S.C.) 268 (1809); Eveleigh v. Sylvester, 2 Brev. (S.C.) 178 (1807); Bevin v. Linguard, 1 Brev. (S.C.) 503 (1805); State v. Creight, 1 Brev. (S.C.) 169 (1802); Nelson v. Emerson, 1 Brev. (S.C.) 48 (1802).

127. *E.g., see* Kempin, *Precedent and Stare Decisis: The Critical Years, 1800 to 1850,* 3 AM. J. LEGAL HIST. 28 (1959).

128. United Ins. Co. v. Lenox, 1 Johns. Cas. (N.Y.) 377 (1800) (*semble*); Le Roy, Bayard & M'Evers v. Gouverneur, 1 Johns. Cas. (N.Y.) 226, 227 (1800); Seton, Maitland & Co. v. Low, 1 Johns. Cas. (N.Y.) 1 (1799); Forbes v. Rice, 2 Brev. (S.C.) 363, 368 (1810); Sasportas v. Jennings, 1 Bay (S.C.) 470 (1795).

129. Morgan v. Insurance Co. of North America, 4 Pa. (4 Dall.) 455, 458 (1806);

During the eighteenth century there was a maturation of colonial legal systems. With much unevenness from colony to colony, the bench and bar became better trained and better regulated. English-educated lawyers probably exerted appreciable influence in the middle and southern colonies, particularly South Carolina and Virginia, but elsewhere their numbers and impact must have been small. It seems that adequate common-law books were present in at least some of the colonies, though doubtless in scattered libraries. Certainly it can be said that in the fairly typical colonies of New York, Pennsylvania, and South Carolina, the common law was knowable and for the most part followed by the time of the Revolution. The reception process had been very much an indigenous affair, for the English home government had acted only haltingly to impose adoption of the common law.

In the beginning we used the simile of a temporal bridge, suspended between a pillar set in 1607 and another in 1776. At the 1607 end there was no common law in the colonies. In 1776? The post-Revolutionary evidence makes it nigh conclusive that Chief Justice Daniel Horsmanden spoke not only for New York but of colonial America when he said in 1765 that the courts applied the common law "in the main." [130] The ends of the bridge are secure, even if the floor has some missing planks.

M'Bride v. Marine Ins. Co., 5 Johns. (N.Y.) 299, 307 (1810); Mumford v. Commercial Ins. Co., 5 Johns. (N.Y.) 262, 267 (1810); Watson v. Duykinck, 3 Johns. (N.Y.) 335, 339 (1808); Griswold v. New York Ins. Co., 3 Johns. (N.Y.) 321, 325 (1808); Scott v. Libby, 2 Johns. (N.Y.) 336, 340 (1807); Schmidt v. United Ins. Co., 1 Johns. (N.Y.) 249, 265 (1806); Walden v. Le Roy, 2 Cai. R. (N.Y.) 263, 265 (1805); Leavenworth v. Delafield, 1 Cai. R. (N.Y.) 573, 575 (1804); Arnold v. United Ins. Co., 1 Johns. Cas. (N.Y.) 363 (1800).

130. WARREN, HISTORY OF THE AMERICAN BAR 91 (1912).