PART I

BACKGROUND AND SUMMARY
Chapter 1

BRITISH STATUTES IN HISTORICAL PERSPECTIVE

The North American plantations were not the earliest overseas possessions of the English Crown; neither were they the first to be treated as separate political entities, distinct from the realm of England. From the time of the Conquest onward, the King of England held — though not necessarily simultaneously or continuously — a variety of non-English possessions including Normandy, Anjou, the Channel Islands, Wales, Jamaica, Scotland, the Carolinas, New-York, the Barbadoes. These holdings were not a part of the Kingdom of England but were governed by the King of England. During the early medieval period the King would issue such orders for each part of his realm as he saw fit. Even as he tended to confer more and more with the officers of the royal household and with the great lords of England — the group which eventually evolved into the Council out of which came Parliament — with reference to matters relating to England, he did likewise with matters relating to his non-English possessions.¹

Each part of the King’s realm had its own peculiar laws and customs, as did the several counties of England. The middle ages thrived on diversity and while the King’s writ was acknowledged eventually to run throughout England, there was little effort to eliminate such local practices as did not impinge upon the power of the Crown. The same was true for the non-English lands. An order for one jurisdictional entity typically was limited to that entity alone; uniformity among the several parts of the King’s realm was not considered sufficiently important to overturn existing laws and customs. Illustratively, in 1323 the King in Council at Nottingham enacted Ordinatio de Statu Terrae Hiberniae consisting of articles for the reform of government in Ireland.² Although the King in Council eventually became the King in Parliament, in the opinion of the Crown its right to legislate for its non-English holdings did not automatically devolve upon Parliament. However, the practice of separate legislation for separate jurisdictional entities continued.

². 1 Statutes of the Realm 193–94.
Where the King in Parliament, acting as the King in Council, did legislate for one or more of the non-English Crown possessions, the operation of such act of Parliament would be restricted to the particular possession or possessions named therein. Wales provides an example of the control by the King in Parliament of a possession acquired by the Crown in 1284 but not made a part of the realm of England until 1536. Scotland, of course, 3. "Concerning the laws to be used in Wales," 27 Hen. 8, c. 26 (1535), 4 Statutes at Large 388. The act stated in part:

"Albeit the dominion, principality and country of Wales justly and righteously is, and ever hath been incorporated, annexed, united and subject to and under the imperial crown of this realm, as a very member and joint of the same, whereof the King's most royal majesty of meer droit, and very right, is very head, King, lord and ruler; (2) yet notwithstanding, because that in the same country, principality and dominion, divers rights, usages, laws and customs be far discrepant from the laws and customs of this realm . . . (5) his Highness . . . minding and intending to reduce them to the perfect order, notice and knowledge of his laws of this his realm, and utterly to extirp all and singular the sinister usages and customs differing from the same . . . hath . . . ordained, enacted and established, That his said country or dominion of Wales, shall be, stand and continue for ever from henceforth incorporated, united and annexed to and with this his realm of England; (6) and that all and singular person and persons, born and to be born in the said principality, country or dominion of Wales, shall have, enjoy and inherit all and singular freedoms, liberties, rights, privileges and laws within this his realm, and other the King's dominions, as other the King's subjects naturally born within the same have, enjoy and inherit.

"II. And that all the singular person and persons inheritable to any manors, lands, tenements, rents, reversions, services or other hereditaments, which shall descend after the feast of All-Saints next coming, within the said principality, country or dominion of Wales, or within any particular lordship, part or parcel of the said country or dominion of Wales, shall for ever, from and after the said feast of All-Saints, inherit and be inheritable to the same manors, lands, rents, tenements, reversions and hereditaments, after the English tenure, without division or partition, and after the form of the laws of this realm of England, and not after any Welch tenure, ne after the form of any Welch laws or customs; (2) and that the laws, ordinances and statutes of this realm of England, for every, and none other laws, ordinances, ne statutes, from and after the said feast of All-Saints next coming, shall be had, used, practised and executed in the said country or dominion of Wales, and every part thereof, in like manner, form and order, as they be and shall be had, used, practised, and executed in this realm, and in such like manner and form as hereafter by this act shall be further established and ordained; any act, statutes, usage, custom, precedent; liberty, privileges, or other thing had, made, used, granted or suffered to the contrary in any wise notwithstanding.

* * * *

"XXVII. Furthermore it is enacted by the authority aforesaid, That immediately after the prorogation or dissolution of this present parliament,
is an even more familiar example: James I ruled over the two kingdoms simultaneously, but it was not until the reign of his granddaughter Anne that Parliament passed the Act of Union in 1706.  

However, while the King in Parliament as the successor to the King in Council claimed and for some centuries exercised the right to legislate separately for this several dominions, the reverse was also true. That is, an act of the King in Parliament did not operate in a non-English dominion unless it was specifically extended to such dominion. Illustratively, to place an act of Parliament in force in Wales prior to its union with England in 1536, it was necessary to specify in the act that it was to be in force in that particular possession of the Crown. Moreover, the laws that were held to be common to all England or acts of Parliament designed to apply to all England were not considered as equally applicable to, say, the Channel Islands.

The lord chancellor of England shall direct the King's commission under his Grace's great seal to such persons as to him shall be thought convenient, to enquire and search out, by all ways and means that they can, all and singular laws, usages and customs used within the said dominion and country of Wales; (2) and the same shall return and certify to the King's highness, and his most honourable council, before the said feast of All-Saints next coming; (3) and that upon deliberate advice thereof had and taken, all such laws, usages and customs as the King's highness and his said most honourable council shall think expedient, requisite and necessary to be had, used and exercised in the before rehearsed shires, or any of them, or in any other shire of the Wales, shall stand and be of full strength, virtue and effect, and shall be for ever inviolably observed, had, used and executed in the same shires, as if this act had never been had ne made; any thing in the same act contained to the contrary in any wise notwithstanding."


5. Goebel, note 1 supra, at 276 states that where "parliamentary power was exercised [over a Crown dominion] it was by virtue of an extraordinary power or prerogative in the Crown, because of the exceptional position of the dominion."

6. At the time of the Conquest, the Channel Islands were a part of the Duchy of Normandy. As such, they became a part of the Crown's holdings and have remained possessions of the Crown though not part of the realm of England. Contrary to popular belief, island registration of an act of Parliament is not necessary to make such an act operative therein. However, an act of Parliament does not extend automatically to the islands, either collectively or separately. The island or islands must be specifically named therein. See Schuyler, note 1 supra, at 13-20.
The Crown lawyers, drawing up the original charters for the North American Atlantic seaboard settlements, were quite aware of the differentiation between the realm of England and non-English holdings of the English Crown. They knew that the statutes of Parliament did not automatically extend to the non-English dominions. They also recognized that the Crown had no intention of yielding its prerogative with respect to the right to legislate for its dominions. Yet inserted in the charters are phrases respecting the laws which are to be enacted. These laws are not to be "contrary to the Laws and Statutes of this our Realm of England..."; they are to be "agreeable to the laws of this our realm of England...".

7. See, for example, the Third Charter of Virginia, 1611-1612 which empowered the setting up of a "great, general, and solemn Assembly..." with the power to "ordain and make such Laws and Ordinances, for the Good and Welfare of the said Plantation... So always, as the same be not contrary to the Laws and Statutes of this our Realm of England..." 7 Thorpe ed., Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3802 at 3808 (1909) [hereinafter cited as Thorpe]. See also the Charter for Rhode Island and Providence Plantations, granted in 1663, which gave a General Assembly the power to enact laws provided such laws shall "bee not contrary and repugnant unto, but, as neare as may bee, agreeable to the lawes of this our realm of England, considering the nature and constitutione of the place and people there..." 6 Thorpe 3211 at 3215.

8. Utilization of these phrases imposing a comparable standard on the laws to be enacted was not limited to the colonies later comprising the United States. For the use of British statutes in the area later comprising the Dominion of Canada see Brown, "British Statutes in the Emergent Nations of North America: 1670-1949," 7 Am. J. Legal Hist. 95 (1963). These phrases were included in the following charters, grants, or commissions:

- Virginia (1609)
- Virginia (1611-1612)
- Maryland (1632)
- Maine (1639)
- Connecticut (1662)
- Carolina (1663)
- Rhode Island (1663)
- Maine (1664)
- New Jersey (1664)
- Carolina (1665)
- Hudson's Bay Company (1670)
- Maine (1674)
- Pennsylvania (1681)
- Massachusetts Bay (1691)
- Georgia (1732)

7 Thorpe 3790 at 3801
7 id. 3802 at 3806
3 id. 1677 at 1680
3 id. 1625
1 id. 529 at 533
5 id. 2743 at 2746
6 id. 3211 at 3216
3 id. 1637 at 1638
5 id. 2535 at 2538
5 id. 2761 at 2764
1 Oliver ed., The Canadian Northwest 135, 145 (1914)
3 Thorpe 1641 at 1642
5 id. 3035 at 3038
3 id. 1870 at 1882
2 id. 1870 at 1882
Why these clauses were inserted is not clear. In effect, however, the fact of insertion placed some restraint on the legislative power granted the governing authority in the new dominion.\(^9\) It imposed a standard, an assurance against unlikeness.\(^{10}\) At the same time it protected the Crown against "contrary" local enactments. But there was no intention to grant the laws

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<tr>
<td>Prince Edward Island (1769)</td>
<td>2 Cartwright, Cases on the British North America Act 511 at 514-15 (1887)</td>
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<td>New Brunswick (1784)</td>
<td>Id. 572 at 575-76</td>
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<tr>
<td>Newfoundland (1832)</td>
<td>1 Consolidated Statutes of Newfoundland iii (1916)</td>
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9. Goebel, Law Enforcement in Colonial New York 3-5 (1944) comments in a footnote that additional research into the early history of this restriction would be profitable, and then states in the text with reference to the 1664 New York charter to the Duke of York:

"... there were limits to the grant: the Duke was subject ... to the necessity of conforming as nearly as possible to English law.

"The exact significance of this last restriction is difficult to assess. Since the time of Henry VII, it had been usual to insert this or an equivalent clause in grants and charters to individuals or companies engaged in overseas enterprise, partly because the exercise of by-law power was traditionally supposed to conform to common law standards, and partly because the government was already committed by statute to a policy of supervising the rules of domestic bodies. Consequently some warning of surveillance of activities conducted by Englishmen in regions beyond the reach of the statutory machinery was desirable. There is no evidence that the employment of the conformity formula was at all connected with the safeguarding of the royal prerogative over legislation ... the words of the charter just quoted could hardly be taken as an explicit direction to introduce English law, and thereby to divest the Crown of its prerogative ... .

"The effect of the charter provision as respects the Crown was thus to reserve implicitly a control over legislation enacted by the proprietor ... As far as the colonists were concerned, the charter provision was of no avail to them as a ground for demands regarding the laws of the province ... ." 10

10. At the same time this standard was a broader one than if it had been restricted to the common law of England. It made possible the use of any kind of law used in England, whether employed in the common law courts, the chancery courts, or the inferior local courts. It was this latter type of court, including the manorial, borough, county, and sessions courts, that the Plymouth settlers were most familiar with and on which they based their earliest court organization. See Goebel, "King's Law and Local Custom in Seventeenth Century New England," 31 Colum. L. Rev. 416 (1931).
of England themselves, whether common or statute.\textsuperscript{11} The phrase meant exactly what it said and to twist the words into another meaning — as was done in later years — evidences a flagrant disregard for historical facts.\textsuperscript{12}

Another clause, typically inserted in the charters, provided that the English settlers and their descendants were not to be deprived of their "liberties and immunities." The First Charter of Virginia, 1606, stated:

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Jurisdiction & Date as of which introduced & Method of introduction \\
\hline
Gambia & 11-1-1888 & Ordinance \\nGhana & 7-24-1874 & Ordinance \\
Kenya* & 8-12-1897 & Order in Council \\
Nigeria & 1-1-1900 & Ordinance \\
Northern Rhodesia & 8-17-1911 & Ordinance \\
Nyasaland & 8-11-1902 & Order in Council \\
Sierra Leone & 1-1-1880 & Ordinance \\
Somaliland** & & Order in Council \\
Tanganyika & 7-22-1920 & Order in Council \\
Uganda*** & 8-11-1902 & Order in Council \\
Zanzibar & 7-7-1897 & Order in Council \\
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\textsuperscript{11} Added confirmation that the Crown had no intention to grant the unrestricted use of the laws of England appears in the Pennsylvania Charter of 1681 where specific provision is made for the use of certain classes of English laws until altered in the province. 5 Thorpe 3035 at 3038. See also "Concessions" made by William Penn in 1681 where provision was made for temporary continuance of certain other classes of English laws. Id. 3044 at 3046.

\textsuperscript{12} This is in marked contrast to the later practice as illustrated in the case of twelve African colonies and emergent nations within the British Commonwealth. For details of the utilization of British statutes in these jurisdictions, see Brown, "British Statutes in the Emergent Nations of Africa: 1844-1962," 24 Pittsburgh Law Review 503 (1963). Note the following table which indicates the date of the introduction of English law within these jurisdictions.

\*In Kenya the introduction of the common law, doctrines of equity, and statutes of general application was restricted to such portions of the law as to which the Civil Procedure, Criminal Procedure, and Penal Codes of India did not extend.

\**The Somaliland Orders in Council for 1899 and 1929 refer to "the Common and Statute Law of England."

\***In Uganda the introduction of the common law, doctrines of equity, and statutes of general application was restricted to such portions of the law as to which the Civil Procedure, Criminal Procedure, and Penal Codes of India did not extend. Subsequently these codes were superseded by enactments of the local legislature.
...all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.13

Later generations were to argue that this grant of "liberties and immunities" should be construed as a grant of the laws of England.14 There is no evidence that this was the intention of the Crown.

Within the framework of the charters, which provided that the colonists were to have "liberties and immunities" as if they were "abiding" within the "Realm of England" and that the laws which were to be made for them were to be "agreeable" to the laws of England, and which did not provide that the colonists were entitled to the laws of England or that the laws of England were to extend to the colonies, the details of application were spelled out by the courts and Crown officials in response to specific fact situations or to questions posed, due regard being had for precedent.

The earliest of the sources showing such application is Calvin's Case which was concerned specifically with whether a man born in Scotland after James VI of Scotland has ascended to the English throne could bring in England an action of novel disseisin. The question was argued before the leading judges of England. The opinion, holding the plaintiff was entitled to bring such an action, discussed the power of the sovereign to extend the laws of England. It drew a distinction between the right of a subject of the King, say in Ireland, to bring an action

13. 7 Thorpe 3873 at 3878. Phrases imposing a comparable standard on the laws to be enacted were included in charters, grants, or commissions for the following colonies:

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<th>Colony</th>
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<tr>
<td>Virginia (1609)</td>
<td>See 7 Thorpe 3790 at 3800</td>
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<td>Maine (1639)</td>
<td>3 id. 1635</td>
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<td>Maine (1664)</td>
<td>3 id. 1637 at 1638</td>
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<td>Carolina (1665)</td>
<td>5 id. 2761 at 2765</td>
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<tr>
<td>Massachusetts Bay (1691)</td>
<td>3 id. 1870 at 1881</td>
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<tr>
<td>Georgia (1732)</td>
<td>2 id. 765 at 773</td>
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14. See 1 Blackstone, Commentaries 382 (Tucker ed. 1803).
in an English court and possess in Ireland, "privileges and benefits" and the actual extension of English laws into an acquired territory. Coke reported the case, stating in part:

... there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath vitae et necis potestatem [power of life and death], he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue; and in that case, until certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as Kings in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been said. But if a King hath a kingdom by title of descent, there seeing by the laws of that kingdom he doth inherit the kingdom, he cannot change those laws of himself, without consent of Parliament. Also if a King hath a Christian kingdom by conquest, as King Henry the Second had Ireland, after King John had given unto them, being under his obedience and subjection, the laws of England for the government of that country, no succeeding King could alter the same without Parliament. And in that case, while the realm of England, and that of Ireland were governed by several laws, any that was born in Ireland was no alien to the realm of England. In which precedent of Ireland three things are to be observed. 1. That then there had been two descents, one from Henry the Second to King Richard the First, and from Richard to King John, before the alteration of the laws. 2. That albeit Ireland was a distinct dominion, yet the title thereof being by conquest, the same by judgment of law might by express words be bound by Act of the Parliament of England. 3. That albeit no reservation were in King John's charter, yet by judgment of law a writ of error did lie in the King's Bench in England of an erroneous judgment in the King's Bench of Ireland. Furthermore, in the case of a conquest of a Christian kingdom, as well as those that served in wars at the conquest as those that remained at home for the safety and peace of their country, and other the King's subjects, as well antenati as postnati, are capable of lands in the kingdom or country conquered, and may maintain any real action, and have the like privileges and benefits there, as they may have in England.\textsuperscript{15}

\textsuperscript{15} Calvin's Case referred briefly to the power in Parliament to provide binding legislation for a "dependency" if such dependency were named therein. The status of an English statute in a colony if such colony were not specifically named therein was considered in an opinion delivered in 1681 by Sir William Jones,
Attorney General to Charles II, on a case sent him from Virginia.
Sir William stated:

I, having perused the will of Burnham, and the depositions relating to the same, am of Opinion,

That this is undoubtedly a good will, if not avoided by the Act of Parliament, made in England, Anno 1677, against frauds, &c. For it clearly appears, the devisor was compos mentis and understood himself, and did willingly, with a full desire, both cause the same to be written, and did after sign and publish the same: And

Whereas there were only two witnesses, who did, in the presence of the testator, subscribe their names as witnesses; ... though it was not discreetly done to do so, yet being, done, it in nothing vitiates or makes void the will:

That this will, made in Virginia, of lands there, is not within the compass of the act abovesaid, so as that it should be necessary to have three witnesses subscribing their names in the presence of the testator (as that act requires for devises of lands in England:) For though I do agree that an act of Parliament made in England doth bind Virginia or any other of the English plantations, where they are expressly named; yet I do conceive a new law or statute made in England, not naming Virginia or any other plantation, shall not take effect in Virginia or the other plantation, till received by the General Assembly, or others who have the legislative power in Virginia or such other plantations; and this upon a double reason—

1st. Because the Parliament of England, when they make a law without naming more places than England as to the extent to which it shall relate, are not to be presumed to have consideration of the particular circumstances and conditions of the plantations, especially considering no Members come from thence to the Parliament of England.

2dly. Because the plantations have their own representatives, and though the Parliament of England hath a superior power, when they think fit by express words to execute it, yet it shall not be presumed that they execute that extraordinary power, when they do not in express words declare it.

And as this hath been anciently resolved in many cases, with relation to Ireland, so I think that same reasons hold with relation to the plantations. And if it should be otherwise, this great inconvenience amongst others, would follow: That a law made in England (which relates, if no time be expressed, to the first day of the Parliament — and when a time is set at which it shall take effect, it is commonly so short a time that no notice can arrive at the plantations before it begins to take effect) should bind the plantation, who have not any ready means to know it for a long time after it is passed; and so men should be bound by laws of which they are, or may be reasonably supposed, necessarily or invincibly ignorant.16

Two major points were thus made by Sir William in his 1681 opinion. First, that an Act of Parliament which did not

specifically name a particular colony or colonies did not come into force in such colony or such colonies. Second, that an Act of Parliament not naming a particular colony or group of colonies could be "received by the General Assembly, or others who have the legislative power in Virginia or such other plantation. . . ."

In two late seventeenth century cases Chief Justice Holt expressed the opinion that in a conquered country, the law depended upon the King's pleasure and the laws of England did not automatically extend there. Smith v. Brown involved the sale of a negro in Virginia. Holt stated there that "... the laws of England do not extend to Virginia, being a conquered country their law is what the King pleases. . . ." In Blankard v. Galdy, the same Chief Justice went into more detail, stating:

"... Et per Holt C. J. & Cur.

1st, In Case of an uninhabited Country newly found out by English Subjects, all Laws in Force in England are in Force there; so it seemed to be agreed.

2dly, Jamaica being conquered, and not pleaded to be Parcel of the Kingdom of England, but Part of the Possessions and Revenue of the Crown of England the Laws of England did not take Place there, until declared so by the Conqueror or his Successors. The Isle of Man and Ireland are Part of the Possessions of the Crown of England; yet retain their ancient Laws: That in Davis 36, it is not pretended, That the Custom of Tanistry was determined by the Conquest of Ireland, but by the new Settlement made there after the Conquest: That it was impossible the Laws of this Nation, by mere Conquest, without more, should take Place in a conquered Country; because, for a Time, there must want Officers, without which our Laws can have no Force: That if our Law did take Place, yet they in Jamaica having Power to make new Laws, our general Laws may be altered by theirs in Particulars; also they held, That in the Case of an Infidel Country, their Laws by Conquest do not entirely cease, but only such as are against the Law of God; and that in such Cases where the Laws are rejected or silent, the conquered Country shall be governed according to the Rule of natural Equity, . . ."

While both of these opinions take the position that the laws of England did not automatically extend to a conquered country, in Blankard v. Galdy appears the express statement that where an uninhabited country was "newly found out by England subjects, all laws in force in England, are in force there." Thus, in the case of a totally uninhabited country, the English colonists would carry with them their laws. This distinction was usually, but not always, maintained in the statements of officials.

In 1720, Richard West, Counsel to the Board of Trade, took the position that Englishmen carried the law with them, although no statutes made subsequent to the settlement of a particular colony were in force therein unless such colony were specifically mentioned. He stated:

The Common Law of England, is the Common Law of the Plantations, and all statutes in affirmance of the Common Law passed in England, antecedent to the settlement of a colony, are in force in that colony, unless there is some private Act to the contrary; though no statutes made since those settlements, are there in force, unless the colonies are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him, as the nature of things will bear.19

Two years later, in 1722, the Privy Council differentiated between an uninhabited country settled by Englishmen and an inhabited country conquered by the King and settled by Englishmen. The memorandum stated:

1st, That 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: though, after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them for which reason, it has been determined that the statute of frauds and perjuries, which requires three witnesses, and that these should subscribe in the testator's presence, in the case of a devise of land, does not bind Barbadoes; but that,

2dly, Where the King of England conquers a country, it is a different consideration: for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases. But,

3dly, Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact any thing that is malum in se, or are silent; for in all such cases the laws of the conquering country shall prevail.20

19. 1 Chalmers, Opinions of Eminent Lawyers on Various Points of English Jurisprudence, chiefly concerning the Colonies, Fisheries, and Commerce of Great Britain, 194 (1814). A more recent expression of the position taken by West in 1720 appears in Allott, Essays in African Law 3 (1960) where he states, in connection with the reception and modification of English law in Africa, "English settlers are presumed to take their English law with them... and the English law they take with them means the common law of England, equity, and statutes of general application in force at the time when the newly-acquired colony was constituted...."

20. Privy Council Memorandum, 2 Peere Wms. 75.
The Counsel of the Board of Trade, Richard West, and the drafter of the Privy Council memorandum, while disagreeing on the circumstances under which the laws of England were carried to new settlements by English colonists — West stating it was under all circumstances and the drafter of the Memorandum confining it to an uninhabited country — were both in agreement that subsequent to settlement the only acts of Parliament in force in the plantations were such statutes as specifically named such plantations.

In 1729 Attorney General Yorke gave as his opinion that specific English statutes could be in force in plantations either by "long uninterrupted usage or practice" in the plantations or by declaration of the local assembly as well as by a specific extension in the act of Parliament itself. He stated:

**Quere.**— Whether such general statutes of England, as have been made since the date of the charter of Maryland, and wherein no mention is made of the plantations, and not restrained by words of local limitation, are, or are not, in force without being introduced there by a particular act of their own?

I am of opinion, that such general statutes as have been made, since the settlement of Maryland, and are not, by express words, located, either to the plantations in general, or to the province in particular, are not in force there, unless they have been introduced, and declared to be laws, by some acts of assembly of the province, or have been received there by long uninterrupted usage, or practice, which may import a tacit consent by the lord proprietor, and the people of the colony, that they should have the force of a law there.21

The official British position at the outbreak of the Revolution may be summarized as follows. Whether English colonists took with them the laws of England as of the date of settlement depended on whether the country they settled was uninhabited or was inhabited and made English by conquest or cession. If uninhabited, they took with them "all laws in force in England."

21. 1 Chalmers, note 19 supra, at 196. In 1757, id. at 197, "The opinion of the attorney and solicitor, Henley, and Yorke," dealing with whether a particular act of parliament dealing with the counterfeiting of foreign coin was in force in Nova Scotia, after stating that the act in question was restricted to "this realm of which Nova Scotia is no part," went on to observe:

"Secondly, we are of opinion, that the proposition adopted by the judges there [i.e., Nova Scotia], that the inhabitants of the colonies carry with them the statute laws of this realm, is not true, as a general proposition, but depends upon circumstances, the effect of their charter, usage, and acts of their legislature; and it would be both inconvenient, and dangerous, to take it in so large an extent."

See also the opinions delivered in 1762 and 1767, id. at 199 and 200 relative to the extension of acts of parliament to the colonies.
If inhabited, they did not take the laws of England with them, although the King had power to declare what, if any, laws of England were to be in force. Whether or not statutes enacted after the date of settlement were in force in the plantations depended on the existence of either of two conditions. If an act of Parliament itself was specifically extended to one or more colonies, it was in force where so extended. Alternatively, if an act of Parliament were "received" into a particular colony, either by an act of the colonial legislature or by long-accepted usage or practice on the part of the colonial courts, then such act was considered in force in that colony.

England considered that the plantations in North America were acquired through conquest; hence it followed that the law officers of the Crown held that the colonists did not take with them the laws of England. As a consequence, the common law and acts of Parliament in force in England at the time of the settlement of each colony were not considered as automatically brought by the settlers to that colony. Subsequently enacted statutes, however, could be extended to one or more colonies either by the act of Parliament itself or by act of the particular colony.

Blackstone's seventh edition, published in 1775 stated:

Besides these adjacent islands, our more distant plantations in America, and elsewhere, are also in some respect subject to the English laws. Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are enforced by penalties) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king.
in council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in this mother country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions. They are subject however to the control of the parliament; though (like Ireland, Man, and the rest) not bound by any acts of parliament, unless particularly named.22

Postponing momentarily the colonial reaction to this British viewpoint, it is clear that in itself the position of the Crown's law officers automatically insured a wide variety in the degree to which both common and statute law was "received" into the colonies. Given the different times and conditions of settlement, the varying types of settlers in each colony, the diversity of governments, the variations in climatic conditions, unlikeness of local law and custom became the rule rather than the exception.

Historically and legally, the British were on unassailable ground. English legal theory held that English settlers going to inhabited countries did not carry the laws of England with them. Once it was assumed that the North American plantations had been made in inhabited countries, the sequitur was obvious. The

22. 1 Blackstone, Commentaries 106 (7th ed. 1775). This was an elaboration on the views expressed in the first edition. The same theory was apparently applied in Pennsylvania, for Charles II's charter of 1681 to William Penn provided that the laws which were to be enacted should "bee consonant to reason, and bee not repugnant or contrarie, but as neare as conveniently may bee agreeable to the Lawes and Statutes, and rights of this Our Kingdome of England...." 5 Thorpe 3035 at 3038. The charter also provided for the temporary use of certain English laws, i.e., "that the Lawes for regulateing and governing of Propertie within the said Province, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and Chattles, and likewise as to Felonies, shall bee and continue the same, as they shall bee for the time being by the generall courts of the Law in our Kingdome of England, untill the said Lawes shall be altered...." Id. at 3038. Note also Penn's Concessions of 1681, id. 3044 at 3046, XVI, which stated: "That the laws, as to slanders, drunkenness, swearing, cursing, pride in apparel, trespasses, distriesses, replevins, weights, and measures, shall be the same as in England, till altered by law in this province."
several charters did not grant the laws of England to the colonists.\textsuperscript{23} An Act of Parliament might be extended specifically to the colonies or to a particular colony, but this did not assure the inhabitants of the far-off Atlantic settlements a right to the laws of England equal to that possessed by a man of Norfolk or Suffolk.\textsuperscript{24} The colonists, however, felt otherwise.

St. George Tucker, in his 1803 edition of Blackstone's Commentarues, added an Appendix, which, inter alia, commented on the extract from the Commentaries previously quoted. Undoubtedly his views were shared by many colonists. He observed:

As I apprehend the opinion here cited is not as correct as many others of the learned commentator, I shall venture to state some objections to it: observing by the way, that his conclusion is applicable only to the colony of New-York, which was originally settled by the Dutch, and afterwards conquered by the English, and ceded to the crown by the treaty of Breda in 1667; and perhaps, to the adjacent colony of Jersey, which was likewise ceded by the same treaty, and was also peopled at that same time by the Dutch, the boundaries between the two colonies being not then established. But with respect to the other colonies; whether they were obtained by purchase from the Indian natives, as was certainly the case with Pennsylvania, and as it has been said, was the case with several others; or whether the territory was acquired by conquest; or by cession; in either case, as those persons by whom the colony was settled, were neither the people who were conquered, nor those who were ceded by treaty, to a different sovereignty; but the conquerors themselves, or colonists, settling a vacant territory ceded by treaty, the conclusion here made by judge Blackstone will appear to be erroneous. For baron Puffendorf informs us, that sovereignty, by way of conquest, is acquired when a nation, having just reason to make war upon another people, reduces them by the superiority of their arms to the necessity of thenceforward submitting to the government of the conquerors. And with respect to countries ceded by treaty, Grotius tells us, it is not the people that are alienated, but the perpetual right of governing them as a people. Now the British emigrants by whom the colonies were settled were neither a conquered nor a ceded people, but free citizens of that state, by which, the conquest was made, or, to which, the territory was ceded; the Indians, the former people, having uniformly withdrawn themselves from the conquered, or ceded territory. What is here said by Mr. Blackstone, cannot,

\textsuperscript{23} A discussion of the opposing points of view as related to the Province of New York circa 1700 appears in 1 Hamlin & Baker, Supreme Court of Judicature of the Province of New York 1781-1704, at 385 (1959).

\textsuperscript{24} For a 1956 case denying the extension of a British statute, which related solely to certain offences committed in England, to an act which would have constituted an offence under this statute if committed in England but which was in fact committed on a British-registered aircraft on a flight from Bahrein to Singapore, see Regina v. Martin, 1956 U.S. & Can. Av. R. 141, [1956] 2 W.L.R. 975.
therefore, be applicable to any colony, which was settled by English emigrants, after the Indian natives had ceded, or withdrawn themselves from, the territory, however applicable it may be to New-York, where the Dutch settlers remained, after they were conquered, and after the perpetual right of governing them as a people, was ceded by a treaty of Breda before mentioned.

This distinction between the English emigrants, and the Indian natives, being once understood, we shall be able to apply to the former, what Grotius says upon this subject, viz. "When a people, by one consent, go to form colonies, it is the original of a new and independent people; for they are not sent out to be slaves, but to enjoy equal privileges and freedom." This...corresponds precisely with the declaration contained in Queen Elizabeth's charter to Sir Walter Raleigh, bearing date March 25, 1584, whereby she "...grants to the said Sir Walter Raleigh, his heirs and assigns...that they and every one of them that should thereafter be inhabiting in the said lands, countries, and territories, should and might have and enjoy the privileges of free denizens, or persons native of England." The like engagements and stipulations were contained in all the successive charters granted by King James, to the colony of Virginia; from whence it seems probable that the charters of all the other colonies contained the same. If this were the case, we may, without recurring to the authority of the writers on the law of nations, decide upon the ground of compact alone, that the English emigrants who came out to settle in America, did bring with them all the rights and privileges of free natives of England; and, consequently, did bring with them that portion of the laws of the mother country, which was necessary to the conservation and protection of those rights. A people about to establish themselves in a new country remote from the parent state, would equally stand in need of some municipal laws, and want leisure, and experience to form a code adapted to their own peculiar situation. The laws of the parent state would from this circumstance acquire a tacit authority, and reception in all cases to which they were applicable. Of this applicability, the colonists themselves could be the only competent judges; the grant of a legislature of its own, to each colony, was a full recognition of this principle, on the part of the crown; and sanctioned the exercise of the right, thereby recognized, on all future occasions.25

Two points made by Tucker stand out with peculiar clarity. First, the Virginian argues that the English brought their law with them under the English rule because the land was in fact uninhabited. He then shifts his ground to argue that the grant of "privileges" equal to those of the "free denizens" of England was tantamount to a grant of the laws of England. Tucker rather carefully avoids the specific language in the charters which does refer to the laws of England. After referring to the "compact" theory, which he uses to produce a right to the laws of England out the grant of "privileges," he then wanders into something

25. 1 Blackstone, Commentaries 382 (Tucker ed. 1803).
vaguely akin to natural law in explaining why the early legislative groups "received" the laws of the parent state.

What might be termed the colonial attack upon the English position took three main routes. It was intermittently argued that the charter language of "agreeable to the laws of England" was tantamount to a grant of the laws of England. It was also contended that the grant of "privileges" conferred a grant of the laws of England. By way of frontal assault, the colonists from time to time attempted to enact or introduce by reference large numbers of the English statutes. To all these efforts, the official Crown position was usually, but not always, in opposition.

In 1712, South Carolina declared a long list of specific English statutes, together with the common law, to be in force in that province. There is no record of a disallowance by the Privy Council of this action by the colonial General Assembly.

In 1715 North Carolina enacted a catchall statute which did not specify any particular acts of Parliament but declared that the common law and certain particular groups of English statutes were to be in force. This act likewise went unchallenged. In 1749, however, when North Carolina passed an act similar to but not identical with the South Carolina act of 1712, the Crown did act. The North Carolina statute of 1749 was disallowed in 1754 by an order in council. However, the Privy Council did not act upon a much shorter list of English statutes introduced into the law of Rhode Island by an act of 1749.
York declared a substantial list of British statutes to be in force, but the act was disallowed by an order in council of December 9, 1770.

The records of the Maryland General Assembly show what arguments were actually advanced by Crown and colonial when an effort was made in 1723 to introduce the English statutes "in a Lump." The Proprietor addressed a communication to the legislators which stated in part:

... [a specific act of the Assembly] seems by implication to introduce English Statutes to operate there, which Statutes have been always held not to extend to the Plantations unless by Express Words Located thither and you are upon all Occasion so as to Conduct yourself as not only to admit any such practice to take Place in Maryland but even to discountenance any Doubts concerning the same and when any of the English Statute Laws are found Convenient and well Adapted to your Circumstances you ought specially to Enact them De Novo, or such part of them as you find proper for you; and not by an Act of the Province Introduce in a Lump (as it were) any of the English Statutes....

Apparently the Lower House found it expedient to appoint a committee to reply to the Proprietor. The committee shortly thereafter turned in a report which observed:

...we hope that what we have Collected, Will be Sufficient to evince, that as well the Governours as the People Governed Within this Province since it's first Settlement, or at least ever since we Can find any foot Steps of Assemblys or Judicial Proceedings, deemed the General Statutes of England to have the force of Laws in Maryland...and it would be a great Absurdity to advance that we are intituled to all the Rights and Liberties of British Subjects and that we Can't have the


34. The report of Richard Jackson, counsel to the Commissioners of Trade and Plantations, in Public Record Office, C.O.5/1075, 461, cited by Goebel, note 9 supra, at 15 n.76, stated:
"It is with a good deal of Concern that I find myself obliged to represent to your Lordships that though the first of these acts introduces no Law or part of any law of this kingdom the substance of which upon a careful perusal does not appear of public utility to that province yet it does not seem fitting they should be thus adopted in Cumulo and that without stating more of the several Acts than the Title and the number Sections adopted. That nothing can be more obvious than that such a Cumulative Act deprives both the Crown and the Governor of that distinct approbation or dis-approbation that is essential to the Constitution of the Province, and to all similar constitutions and that the perusal of
These, however, were attempts to introduce "by way of reference" large numbers of English statutes at one time. English officials looked with much less disfavor upon an act of a provincial assembly which introduced a specific act of Parliament, probably at least in part because it presented a clear-cut question: Should this particular statute be permitted to stand or should it be disallowed? Virginia, for example, successfully introduced a number of English statutes by specific acts of assembly which declared such and such an act of Parliament to be in force.

Although the "introduction by way of reference" may have been a source of friction between the colonists and the Crown officials, it has great merit for the historian. These acts of the colonial assemblies not only state precisely what statutes or groups of statutes were considered of sufficient importance by the colonists to be introduced in this manner, but, on the whole, statutes—even those of the early colonial period—have been better preserved than the court records which constitute the only source for determining what portions of English law, whether common or statute, were introduced into the law of a particular colony by way of long accepted usage or practice.

As early as 1729 Attorney General Yorke had conceded that English statutes which were not specifically extended thereto by Parliament could be "received there by long uninterrupted usage, or practice, which may import a tacit consent by the lord proprietor, and the people of the colony, that they should have the force of a law there." This method of reception was thus accepted and approved. However, the determination of what statutes or what parts of the common law were in fact so "received" in a particular colony is extraordinarily difficult.

Not only are there relatively few colonial court records still in existence, but there are very few scholars able to find their way through the common law and chancery pleadings who have the patience and skill to collect, arrange, classify, and draw conclusions from the mass of often dusty and ill-kept files and volumes, which present the added problem of crabbed

the Acts of Parliament themselves, make it palpable that such an introduction by way of reference will frequently occasion great difficulties in the Construction, and those sometimes such as ought not to be left to a Court of Justice to decide."

and difficult handwriting. Yet this paper by paper and page by page examination of the original court records is the only means to determine precisely what parts of English law were used in the courts of a colony, i.e., were received into practice in that same colony. As a gloss on his efforts, the scholar knows, when all this is done and a valid conclusion drawn, that that conclusion will apply only to a particular colony whose records were so examined, for it is a fact too frequently — though often conveniently — overlooked that these colonies were political and jurisdictional entities, and in consequence a legal practice accepted or a statute placed in force in one does not necessarily imply comparable acceptance or reception in another. The colonies were not without reason in regarding each other as "foreign" states. Each colony, therefore, must be investigated separately. Such procedure is the only approach to determine the meaning of those phrases used in early state constitutions and statutes which provided for a continuation of the existing laws. What specific parts of the common law, what particular English statutes, what acts of the colonial assemblies did heretofore "form the law of the . . . colony," as was continued in effect by the New York constitution of 1777? What laws were included within the phrase in the New Hampshire constitution of 1784 which referred to "all the laws which have heretofore been adopted . . . and usually practiced on in the courts of law . . . ."? The colonial statutes provide an incomplete answer. The printed reports in most jurisdictions do not antedate the Revolution. Reliance on treatises which describe the law in England is utter folly. To attempt to determine what was the common law in South Carolina from a treatise which discussed its contemporary application in England is to presume an identity between the courts of South Carolina and the courts of England which did not exist. Merely because English treatises and English reports were widely used in the colonies does not mean that the common law as practiced in London was identical with that received and practiced under in Charles Town or that Charles Town and New York received and practiced under the same parts of the common law of England. However much the colonists may have wished that they

37. When Jefferson catalogued his library, probably in 1783, he classified under the heading of "Foreign Law" the statutes of Massachusetts, Connecticut, and other states as well as those of Barbados and Bermuda. See Goebel, note 9 supra, at xxxv. For a contemporary discussion pointing out the differences see 1 Tucker, ed. op. cit. note 25 supra, at 393.

possessed the full body of the common law of England, they did not.

Thus it is only when the records of the courts of each colony have been collected and analyzed, conclusions drawn, and the separate results for each colony correlated into one master report, that valid statements can be made concerning the reception of the common law and English statutes prior to the Revolution. Until that time, generalizations of more than local or limited application are unwarranted.

The strained relations between England and the colonies which culminated in the Revolution increased the colonial interest in the common law and English statutes. When the First Continental Congress in 1776 adopted a Declaration of Rights, it included the following resolutions:

"...the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law. ... they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances."


40. In this connection see Goebel, note 9 supra, at xxxiv–xxxviii.

41. 1 Journals of the Continental Congress 1774, 63 at 69 (1904). The Declaration of Rights also provided (id. at 68) "That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England." For an account of the adoption of the Declaration of Rights see Burnett, The Continental Congress 52–54 (1941). A draft resolution, found among the papers of James Duane of New York, designed to be offered to the 1774 Continental Congress (quoted in Goebel, Cases on the Development of Legal Institutions 405 (1937)) stated:

"The colonists in the several colonies are bound by, and entitled to the Benefit of, those parts of the Common Law of England, of the civil and maritime Law used there and of the statutes of that Kingdom of Force there, at the time of the settlement of the Colonies which are applicable to them and [which] from their local circumstances are not impracticable there, and the like parts of the statutes of Great Britain made from that time for securing the Rights and Liberty of the Subject. We do not however admit into this collection but absolutely reject the statutes of Henry 8 and Edward 6 respecting Treasons and Misprison of treasons.

Footnote continued
These resolutions were not made a part of the Articles of Confederation. They did not appear in the Declaration of Independence. Comparable provisions, however, were inserted during the first years of independence in state constitutions and statutes in an obvious attempt to secure to the colonists what had been so long denied them. These provisions, continuing the common law and such English statutes as had been heretofore practiced under or were suitable to the several newly independent states, should be appraised in the light of contemporary conditions. They did not, as might be superficially concluded, represent a strong pro-British sentiment. Quite the reverse. The colonists for a variety of reasons wanted the laws of England, and they saw to it that the guarantee of those laws was provided. From the point of view of the voteless man, accustomed to but resentful of the summary justice of the Crown officials, it assured his right to the habeas corpus act. The lawyer at the other extreme may well have viewed it as a welcome continuation of the accepted order of things, much as a twentieth century attorney might be relieved to know that a proposed revision of his state's statutes involved merely renumbering and not a change in substance or even reorganization. The landed proprietor recognized that he still could protect his acres by the accustomed legal remedies. The merchant could still bring an action of debt. Though no break with the legal patterns of the past took place, the assurance of what the colonists had sought for decades to achieve represented a triumph over the previous rebuffs by the Crown. With this achievement they were temporarily content. Only in Virginia were there any rumblings which looked forward to a revision of the existing laws. The laws which had heretofore been in force were continued or the common law and such English statutes as were considered suitable were said to be in force. The application of these standards in determining what was the law in force awaited the decisions of the future.

"They are also entitled to the ... privileges which have been from time to time granted to them respectively by royal Charters, and to a free and exclusive power of Legislation in all cases of Taxation and internal policy. Such parts of the Common, Civil, and maritime Law and Statutes of Great Britain, the acts of our several assemblies and the Charters granted to the Colonies ... only constitute the law of the Land and the rights and privileges of the Peoples in the Colonies. These cannot be altered or abridged by any authority but our respective legislatures."