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THE SOURCES OF EARLY AMERICAN LAW: COLONIAL PERIOD*

RICHARD B. MORRIS**

If there had been a colonial Fortescue, students of early American legal institutions would hardly find it necessary now to devote so much time to missionary work. Perhaps the nearest we have to the volume *In Praise of the Laws of England* is Jeremiah Dummer's skillful tract in defense of the New England charters. But such colonial efforts were never successful in stemming the tide of criticism, whether in the case of the authors of the Massachusetts Declaration of 1646, which was followed by the slashing attacks of Edward Randolph, or of the apologia of Dummer, which in turn was followed by the devastating revelations of the harsh, arbitrary, and irrational character of much of Connecticut's legal system by Francis Fane, the standing counsel to the Board of Trade; and Jefferson and the revisers of the Virginia statutes were certainly not smugly complacent about the state of colonial law.

Preliminary investigations by students of our early legal institutions have at least established the fact that American law did not spring full grown and fully armed from the brow of Britannia in 1776, the old formula of judicial interpretation. They have also brought to light certain provocative analogies to modern social and economic as well as legal tendencies. The modern trend toward codification, resort to arbitral tribunals, trial of criminal cases at the election of the accused without juries, and experiments with and revolts from legislative interference with certain deeply-rooted habits are reflected in colonial experience. But, perhaps more significant, the chief features of the present economic revolution are paralleled in the seventeenth and eighteenth centuries, where we find attempts to raise commodity prices by crop restrictions, paper-money legislation, arbitrary price-fixing, and moratory laws.

But an investigation of this subject cannot be justified on the ground of utility alone; for there is great danger in analogizing from the experience of the agricultural economy of the thir-

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teen seaboard colonies, which had only partially entered the era of finance capitalism and enjoyed only partial emancipation from outworn mercantilist theories, to the modern era of industrial capitalism and new types of social control.

Yet it is clear that we are not prepared today to write a definitive history of American legal origins, as such an historical work cannot be essayed successfully without a thorough examination and testing of the sources. In recognition of the incentive which the Rolls Series and the publications of the Selden Society have given to the legal historical scholarship of the last fifty years in England, I think we can sacrifice a fragment of our splendid intellectual isolation, and consider the advantages of cooperative endeavor, at least along certain lines. We have only to mention such landmarks of editorial genius as Maitland's introduction to the *Memoranda de Parlamento* and his edition of the *Pleas of the Crown for the County of Gloucester*, and, without further enumeration, the work of Hubert Hall, Miss Bateson, and others, which have revolutionized the writing of English legal history; only to compare Maitland with Reeves and Holdsworth with Coke as legal historians, to appreciate the development. Unfortunately the publication and editing of unprinted English records have largely been confined to the period of the twelfth to the fifteenth centuries; and the English legal historian is still in the Middle Ages, because his documentary series have never quite progressed beyond that period. For the period corresponding with the settlement and development of the American colonies, aside from the law reports dealing with the central courts, there is only a fragmentary amount of printed material. Possibly because it is easier to follow well-beaten paths, editors, archivists, and historians have manifested little initiative in rescuing this material from oblivion. In order to reconstruct the background of English legal history, it is necessary for the student of early American legal institutions to do research among the primary English sources abroad, chiefly in local archives.

From the historical standpoint as well as for the convenience of the bibliographer, we can divide the period of colonial history into the formative period before 1690, and the period from 1690 to the War for Independence, — a period marked by the introduction of the new imperial discipline, the growth of the legal profession, and the large-scale reception of the common law. The major sources of legal growth would be the court records and the

statutes.¹ As for the first period under review, with the exception of the half dozen brief decisions of the Maryland Provincial Court for the period before 1690, reported in 1 Harris & McHenry, haphazardly chosen from the seventy-five folio libers still on file in the Land Office at Annapolis, and a few jejune cases collected by Pennypacker, for Pennsylvania, there are no reported decisions. Such collections, therefore, as the American Digest are of not the slightest aid to the investigator of the seventeenth century, as the abstractors for this work did not examine the minutes, papers, and records, printed chiefly under private auspices, which now have reached impressive proportions.

Turning from the reported decisions, we find that for this first period there has been accomplished to a lesser degree what has been achieved for the period of origins in England. In addition to the documentary series of public records for all the seventeenth-century colonies, the province and court records of Maine, the records of the Court of Assistants of Massachusetts, of the Provincial Court of Maryland, an important series published by the Maryland Historical Society, and now in progress, and interesting fragments from the records of the General Court of Virginia, are of great value. Of the inferior courts, the most extensive publications are for Massachusetts, which can boast the eight-volume collection of the *Records and Files of Quarterly Courts of Essex County* (1638-1683), the edition of the records of the Suffolk County Court, 1671-1680, by Professors Morison and Chafee,² and a forthcoming edition of the Middlesex Court records. Of more fragmentary character are the *Records of the Court of Trials of Providence Plantation*, 1647-1670, and for the middle colonies, the minutes of the Court of Sessions of Westchester County, New York, and the records of Chester and Upland, in Pennsylvania, and of Newcastle and Sussex in Delaware. The transplantation of Dutch law to America is adequately demonstrated in the extensive judicial records for New Amsterdam and the Albany-Schenectady area, edited by Fernow and Van Laer, respectively. But there are equally serious lacunae: to mention but a few, New York under English control, early Pennsylvania, and the Carolinas in the seventeenth century. In some of these areas there is a singular

¹ Full titles of the items covered in this paper are found in E. B. GREENE and R. B. MORRIS, *A GUIDE TO THE PRINCIPAL SOURCES OF EARLY AMERICAN HISTORY (1600-1800) IN THE CITY OF NEW YORK* (1929) 10-55; and R. B. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* (1930) 265-273.

² *Colonial Society of Massachusetts*, Publications, vols. XXIX, XXX.

dearth of manuscript material available before 1690. This deficiency is counterbalanced in part by the rich and systematically-arranged resources of the State Library at Hartford, Connecticut, by the resources of the Virginia State Library at Richmond, where extensive transcripts are available of the county archives, and by the various county repositories in Rhode Island and Maryland.

It is indeed a mystery to me why American social historians have failed to exploit these easily available and conveniently indexed printed sources of local and superior courts for the seventeenth century. To take one instance, for the two successive sittings of the Provincial Court of Maryland of October 9th and 10th, 1661,⁹ we have a record of a brutal assault; a commission of administration to an heir at law; an appeal from the feudal Court Leet and Court Baron of St. Clement's Manor, fragments of whose records have been published; a judgment in a conditional will; a petition for freedom, brought by an indentured servant, who presented depositions in support of his claim to have been forcibly abducted from Ireland at a tender age and compelled to sign articles of indenture to a prominent landed proprietor of Maryland for a term of fifteen years. He had served six and a half, was twenty-one years of age, and felt that any further demands were contrary to the "laws of God and man that a Christian subject should be made a Slave." From the testimony it appears that, of the eight Irish boys brought over, four of them were so little that one deponent was asked "why had not yor Master brought some Cradles to have them Rocked in." A jury, — all of whom were proprietors, of course, brought in a verdict that the plaintiff should serve another two years. On the same day two prosecutions for murder were disposed of; in one, the grand jury found accidental homicide; in the second, very damning testimony was offered to show that a proprietress had cruelly murdered her maidservant. Only three out of the twelve grandjurors, by the way, could sign their names, a rather poor average for the Maryland gentry as compared with New England figures for the same period. No defense was offered, but the jury of proprietors found the defendant not guilty, and she was cleared by proclamation. It is clear that serious practical difficulties stood in the way of securing even-handed justice for the laboring and dependent classes. The first was the intimidation of witnesses, and the second, the difficulty of securing unbiased juries. The English

⁹ ARCHIVES OF MARYLAND, XLI, 470-480.

author of *Lex Londinensis*, in noting that the apprentice could only sue out his indenture against a freeman in the Mayor's Court, lets the cat out of the bag with his naive remark that "the Master need not doubt a fair trial; the Juries being all Masters, and the Court constantly shew them all just and lawful favour."

Such selections are typical, not extraordinary, and can be paralleled in the records of the Essex Quarterly Court for the same period. Social and legal attitudes as manifest in the strivings and conflicts of social groups, in the issues between creditor and debtor, landlord and tenant, in the exploitation of labor and the treatment of poverty and unemployment, by way of example, seem clearly more significant in the history of society than old furniture, witchcraft, and dead doctors, however much we might enjoy collecting the first, psychoanalyzing the second, and embalming the third. By concentrating chiefly on the latter and failing to bring the former into clear relief, historians of early American life, with the possible exception of Philip Alexander Bruce, have failed to produce a work of the importance of Miss Dorothy George's *London Life in the Eighteenth Century*, which stemmed from the illuminating legal sources of Old Bailey and other sessions papers. The type of sources used by Miss George and by Miss Eleanor Trotter, whose *Seventeenth Century Life in the Country Parish* was so largely drawn from the records of the North Riding Court of Quarter Sessions, has been very largely neglected by American historians. Perhaps, to the student of legal history who is interested primarily in the law from the social rather than from the institutional point of view, this failure to recognize the value of legal sources is a symptom that American social history is passing through a primary phase. The process of filtration in this period is necessarily hesitant and labored, and spasms of intellectual indigestion are not infrequent. It is to be hoped that in the secondary phase, marked by a more systematic assimilation of materials and a deeper reflection as to objectives, the historical testimony of the courts of law will be more generally examined and more critically employed. Of the seventeenth century sources, one may now say, as was said by Maitland, writing in 1889 of the prospects for English legal history, that "the lack is rather of workmen than of implements."

The eighteenth century, which witnessed a tightening of mercantilist discipline in the colonies, while it was slowly dis-

⁴LEX LONDINENSIS, OR THE CITY LAW (London, 1680) 47.

integrating at home, and a closer attachment to the law and practices of the central courts in England, has been largely neglected by students of early legal institutions. The contributions of the early frontier life have been exaggerated, origins frequently over-emphasized, and the later, more sophisticated and more Anglicized period of provincial life too often slighted. While so many of the contributions of the seventeenth century were nebulous and impermanent, the period after 1690 left its mark indelibly stamped upon the development of our legal system. This period was marked by a conflict in the law between the forces making for change and progress and the forces making for static security and conservatism. The compromise which was effected was largely a victory of the forces of reaction and brought about the widespread adoption of common-law practices. The basis for this reaction can be found in the new policy of constructive imperialism introduced at the end of the century, with the right of royal disallowance and judicial review, and in the growth of the proprietary and mercantile classes. The influence of both groups was directed toward the maintenance of stability and conservatism and toward the adoption of the more technical legal system of England, which was necessitated by the rapid growth of business.

The trained hand of the professional lawyer was apparent in the large-scale reception of the English legal system. Not that the eighteenth century was devoid of progressive reformers in English law. The age of Holt and Mansfield, the century which begins with *Coggs v. Bernard* and virtually ends with *Pasley v. Freeman*, which is marked by the large-scale reception of the law merchant into the common-law system, cannot be looked upon as blind to change, even when compared with the preceding century, distinguished for legislation of a revolutionary character. However, on the basis of such material as is now available, it must be confessed that the provincial members of the bar in these later years of colonial history were uninfluenced in the main by liberative currents, and inherited or transported their English brethren's concern with formalism and metaphysical subtlety, looking upon the law and the constitution as a system of "petrified perfection" and finality. Of the English system of pleading as introduced into America, one might well agree with Maitland, that it "forced our common law into a prison-house from which escape was difficult." Yet these Whig lawyers who used the common law as a weapon for effecting constitutional emancipation and local

autonomy and erected a code of political liberalism upon the legal foundations of social reaction to which they were devoutly attached offer a fascinating field of study. Men of the intellectual stature of John Read, Edmund Trowbridge, John Adams, Jared Ingersoll, and the elder William Smith, John Dickinson, James Wilson, the two Dulanys, and Sir John Randolph, merit the attention of legal scholars. So do such provincial lawyers as James Hawley, Jefferson, and the erudite Chancellor Wythe, who possessed legal scholarship in combination with liberal social leanings. The mere haphazard listing of some of the chief contributors to the growth of our law should provoke wonder at the astonishing lack of critical biographies, or of any kind of biographies, of many of the first- and second-rate lawyers of the period. Where biographies have been attempted, legal principles and practice have generally been slighted. Yet the papers are in some cases easily accessible. In New York City, for example, there is a wealth of material relating to the practice of Duane, the Smiths, Joseph Murray, and John Tabor Kempe, an excellent collection of whose briefs are available in the New York Historical Society Library. The Bordley papers are in private hands in Philadelphia, and up to the present have eluded the grasp of all investigators, and the rest of the crop has by no means been harvested.

For the eighteenth century, the published judicial sources are fragmentary in character. As for the law reports, while Virginia leads the list with the reports of Sir John Randolph and Edward Barradall and of Thomas Jefferson, it has left us a serious gap between 1741 and 1768. Other colonies have not fared as well. Dallas for Pennsylvania, Quincy for Massachusetts, and Harris & McHenry for Maryland comprise virtually all that has been published from 1700 down to the Revolution. The decisions included in these limited collections represent a mere fragment of the total, and, as it is impossible to determine the rationale of the editors' selections, it does not follow that these cases are by any means typical. Before the Rolls Series, the abridgments in England were of extraordinary usefulness in the study of Black-Letter law. Unfortunately abridgments on an extensive scale were not prepared in America. The appendix to Dane's *Abridgment* and Swift's well-known *System of the Laws* are of limited usefulness even for Massachusetts and Connecticut, respectively, in the pre-Revolutionary period. In fact, the absence of abridg-

ments of judicial decisions renders the principal source material more inaccessible than the Year Books.

The publication program of the Legal History Committee of the American Historical Association, through its series, *American Legal Records*, is an attempt in part to remedy this situation. As the first volume in the series, the extensive proceedings of the Court of Appeals of Maryland, 1695-1729, have been published under the editorship of the present Chief Judge Carroll T. Bond. Covering a strategic period in American legal history when courts of appellate jurisdiction in such colonies as Massachusetts and New York first began to apply on an extensive scale standards and principles of the English common law, this record includes full transcriptions of proceedings in both county and provincial courts from which the cases were removed for review, together with narrations of proceedings in the reviewing court, and it contains a few records of decisions of the Privy Council as the final tribunal at home.

The manuscript field offers numerous other excellent opportunities. For a general publication program some useful guides have already been prepared for Massachusetts, New York City, Connecticut, and Maryland. Other surveys are available, though not printed in full, for the local court records of Maryland, Virginia, and North Carolina. For other areas, a careful survey should be a condition precedent to determining a publication policy, and, for this purpose, some of the Association's Annual Reports on the Public Archives will be found much less helpful than others, especially where investigators failed to perceive the value of legal sources for historical scholarship.

Of prime importance in such a program should be a recognition of the value of critical selection. The mere fact that a document is unprinted and difficult of access should not necessarily add to its value or importance — a fact often lost sight of among antiquarians and collectors. In New York, libers of the Supreme Court of Judicature, available in the Hall of Records, for the period, 1704-1847, with few gaps, are an outstanding example. This record of skeleton minutes, virtually a docket, is typical of eighteenth century judicial material, when the practice, both in England and America, of recording minutes in full seems to have largely died out. The publication by an historical society of the records of this court from 1693-1701 illustrates this conclusively. The same point may be made of the records of the Superior Court

of Judicature of Massachusetts, 1693-1780, available in thirty-three libers, in the Office of the Clerk of the Supreme Judicial Court for the County of Suffolk, although perhaps in the latter case judicious use might be made of the file papers available to the grand total of 900 libers, and the distilled essence extracted. Certainly, if superior court records do not in every case offer publication possibilities, county court material must be most carefully sifted.

If we are to avoid making a fetish of holograph papers and parchments with stereotyped legal forms, we should in our editorial policy take care not to fall under their spell. For the tendency to reproduce in the printed text of to-day the shorthand symbols of ancient and overworked court clerks, I feel no sympathy, especially when editors are led into such pathetic pitfalls as the reproduction of the Anglo-Saxon letter to represent the sound of th, as *y*, or the substitution of a double *ff* for what was meant to be a capital letter. Actual liberties with spelling, capitalization, and punctuation are to be even more sharply condemned, for any attempt to establish consistency in these matters would imply a regimentation which was unknown in colonial times. The careful fidelity to the text of pioneer Shurtleff, and, more recently, the exemplary accuracy of Mr. Paltsits, are counsels of perfection, but it is submitted that symbolic abbreviations and other shorthand expressions should more properly be spelled out as they would have been in a contemporary printing. Furthermore, from the point of view of the legal historian, it is imperative that the indexing of legal records be done by trained legal scholars rather than antiquarians.

In addition to manuscript sources of the common-law courts which might be exploited with profit, the development of the courts of Chancery and the activities of the Governor and Council in dispensing equitable relief in the colonial period might be developed in extracts from unpublished material of representative colonies. In this field the only publication is the seventeenth-century Maryland Chancery proceedings now in press. The judicial activities of the Governor and Council in matters relating to domestic relations and divorce law need further study despite the monumental survey of Howard. For instance, a folio volume of court records, bound as "Divorce, 1760-1768," in the office of the Clerk of the Supreme Judicial Court for the county of Suffolk might justify publication in part or in entirety. The subject of

domestic relations could be developed further in volumes dealing with the disciplinary activities of colonial churches, and illustrative material could be drawn from Massachusetts and Virginia, for example. Jurisdiction over probate and administration of estates could be probed more deeply with profit, notably in Maryland, where the English organization, with a prerogative court and a commissary general, was reproduced with review to a court of delegates specially commissioned, as in England. The institution of the manorial court, transplanted to New York and Maryland, has somehow eluded the grasp of historical investigation. Only one record of a manorial court is definitely known to have survived, that of St. Clement's Manor, Maryland, for the years 1659 to 1672, and it has been reproduced. But at one time, it appears certain, others were in existence. Bozman, the historian of Maryland, appears to have had before him a record of the court baron of St. Gabriel's Manor, but it has not been found in later years. The forthcoming publication as vol. III of *American Legal Records*, of the records of the Vice-Admiralty Court of Rhode Island, under the editorship of Miss Dorothy S. Towle, with an introduction by Professor Charles M. Andrews, will serve to clarify much of the confusion of thought on the subject of colonial admiralty. While Judge Hough's volume of New York records was of considerable usefulness, more attention needs to be paid to the admiralty jurisdiction commonly exercised by common-law and borough courts. The assumption of a recent writer on colonial admiralty jurisdiction in the seventeenth century "that it is possible to undertake a survey of the origin and early growth of admiralty jurisdiction in the colonies without leaving" England is entirely unwarranted. One might just as well attempt a definitive critique of Michelangelo without bothering to visit Rome and Florence.

Even as late as the early eighteenth century, superior courts of common law in England were largely concerned with real estate and agrarian problems. Commercial cases were infrequently dealt with, and the law merchant was primarily administered in the special courts of the fair, the staple, and the borough, — all of medieval origin. In America, borough courts were reproduced, and, in the case of the Mayor's Court of New York City, whose records I have been engaged in editing for the *American Legal Records*, commercial and maritime matters were the prime consideration. Only by a study of such material can we appreciate to

what extent such courts met the business man's demands for cheap and speedy justice. Colonial mayor's courts at Albany, Annapolis, and Philadelphia, among others, still remain to be studied.⁵

In a letter to the Abbé de Mably in 1782, John Adams offered some valuable suggestions for the writing of a colonial history, and urged upon the Abbé the necessity of consulting charters, commissions and instructions to the governors, legislative materials, and, to quote, "all the codes of laws of the different colonies, (and thirteen volumes in folio, of dry, disgusting statutes, cannot be read with pleasure, or in a short time)." Despite the difficulties inherent in such a program of study, historians of the law have in the past leant rather heavily on the statutes. Paul Samuel Reinsch and some of those who followed took the path of least resistance. When a recent writer on the criminal law in a southern colony based his conclusions as to sexual offenses on statutory sources, the criticism might well be made that statute books, colonial or modern, hardly afford us a safe guide in determining the extent to which the laws are enforced.

The problem of dealing with Adams' "dry, disgusting statutes" is difficult enough for the recent period, but the colonial statutes are in a state of anarchy. No general compendium of colonial statute law for the seaboard colonies is available, nor has anything as yet been published to parallel Mr. Philbrick's scholarly edition of the *Laws of Indiana Territory, 1801-1809*. In the year 1704 an *Abridgment* was printed in London of the laws of Virginia, Barbados, Maryland, and Massachusetts, together with a few scattering items from Jamaica, New York, and the Carolinas, but the selections are somewhat capricious and the summaries not always reliable. This pioneer work was not continued, and we are sent to the separate colonial statute books. Of the older ones, Hening for Virginia, Bacon for Maryland, and Trott and Grimké for South Carolina, are of much value; and, among the more modern, Candler for Georgia, Shurtleff for Plymouth, and Batchellor for New Hampshire, are very helpful, and, of course, the magnificent compendium of the Massachusetts Acts and Resolves is a monument to the industry of Abner C. Goodell. But for other colonies the collections are often unreliable and poorly indexed. Of series of legislative journals, the publication pro-

⁵ Studies of colonial county courts have so far largely been confined to the seventeenth century. For the later period historical investigators have ignored much valuable material, including the various county archives in the custody of the North Carolina Historical Commission at Raleigh.

grams are most advanced for Maryland, Virginia, and Massachusetts. I am afraid we shall have to wrestle with the statutes before we can advance much further in our study of the period.

Reverting to the correspondence with the Abbé, we arrive at John Adams' conclusion "that until this vast source of information shall be opened, it will be scarcely possible for any man to undertake the history of the American War." Exactly 150 years have elapsed since these words were written, and vast quantities of the legal sources enumerated in that remarkable letter still remain almost as inaccessible as they were on the eve of the framing of the Constitution; other large quantities have been lost or destroyed; and still others in the hands of unsympathetic custodians or under the stress of unreasoning economy are destined for a like fate. The obligation of the historian and the legal scholar to join forces in the common cause of rescuing, preserving, and utilizing the sources of early American legal institutions seems an impelling one.