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“As Near as May Be Agreeable to the Laws of this Kingdom”: Legal Birthright and Legal Baggage at Chebucto, 1749

*Thomas Garden Barnes**

The Old British Empire at its greatest extent and the height of its grandeur, between 1763 and 1776, comprised thirty-three colonies, all but a few of them in North America and the Caribbean, none of them older than 1607. The most recently acquired colonies included the largest, Canada, and some of the smallest, Grenada and St. Vincent.¹ The Empire was not a monolith. Differing geography, history, economics, social structure and dynamics, and ethnicity produced political societies of great variations and disparities, even between contiguous colonies. Historians of the Old Empire have found generalization difficult and dangerous, save when describing “imperial policy” (such as it was). The adjectives applied to the colonies as entities are preponderantly “unique, *sui generis*, extraordinary, remarkable, singular.” Consequently, a claim for the remarkableness of any one colony seems supererogatory if not superfluous. Yet one colony stood out rather more than all the rest, marked by distinctions that were truly singular in comparison with the other major—and older—colonies, and in some instances unique in Britain’s previous colonial experience. Nova Scotia was one of only five major colonies acquired by conquest from European powers. It bore little resemblance to any other colony, though historians often categorize it with Georgia (which was not acquired by conquest) because of the strategic importance of both. Georgia had been founded at crown expense under trustees as an asylum for debtors and as a barrier to Spanish Florida. But Nova Scotia was not set up by proprietary or corporation grant, motive for its settlement was neither commerce nor asylum, and it was colonized rapidly at the sole expense of the King in Parliament. Nova Scotia was literally an act of state. A Crown colony settled in 1749 by an initial draft of some 2,600 colonists,

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1. Canada, or New France, including most of present-day Ontario and Quebec as well as the Old (Transappalachian) Northwest, ceded by France in the Treaty of Paris, 1763, comprised about one million sq.mi.; Grenada (120 sq.mi.) and St. Vincent (133 sq.mi.) were ceded by the same treaty.

of whom just over one-half of the male heads-of-household were ex-naval and -army officers and men,² the settlement was made possible by sizable parliamentary grants that supplied every material need of the colony during the early years of its existence. And the object of the settlement was entirely strategic: to deny French reconquest of Nova Scotia and to provide a counterpoise to and base of operations against the French citadel at Louisburg. Indeed, Nova Scotia was virtually a prototype of colonialization in the first half century of the New British Empire (1800–1850), raised, not quite in a “fit of absentmindedness,” on the ruins of the Old Empire after the defection of thirteen of the American colonies and under the strategic exigencies of trade protection in the age of steam.

The crown, in the Lord Commissioners for Trade and Plantations and its persona at Chebucto, Colonel the Honourable Edward Cornwallis, captain general and governor in chief of Nova Scotia or Acadia, had a clean slate upon which to begin. Since 1710, Acadia (less Cape Breton Island) had been in British hands. The small garrison and diminutive administration at Annapolis Royal was strictly a holding operation, maintaining a British presence and little more for almost four decades, ignored if not forgotten, latterly with an absentee governor, administered by an aging resident lieutenant governor, Lt. Col. John Paul Mascarene, who had been one of the conquerors of Port Royal in 1710. British presence depended heavily upon sporadic and niggardly support from Massachusetts in time of peril and a conciliatory detente between Annapolis Royal and the Acadians around Minas and the Micmacs everywhere in time of peace.³ Mascarene’s services were remarkable, if little appreciated by Cornwallis, who wrote of him to the Board of Trade in 1750 that he was worn out and had sold out.⁴ Unhappily, there was a great deal of truth in the first stricture, and, from the vantage point of the vigorous new administration at Chebucto, Mascarene’s toleration of Acadian neutralism and passive resistance to the oath of allegiance appeared craven.

A recent work of very revisionist, albeit stimulating, scholarship on the Old British Empire urges us to jettison Charles McLean Andrews’ construct of imperial policy to 1763 as being essentially mercantilistic and non-militaristic. Stephen Saunders Webb, in *The Governors-General: The English Army and the Definition of the Empire, 1569–1681*, the first of a multivolume series which will treat the entire Old Empire, proclaims, “It is the intent of this book to establish that,

2. T. Akins, *Selections from the Public Documents of the Province of Nova Scotia* (Halifax, 1869), pp. 506–557 [hereinafter Akins]: list of settlers who came with Governor Cornwallis to Chebucto, June 1749.

3. G. Rawlyk, *Nova Scotia’s Massachusetts: A Study of Massachusetts–Nova Scotia Relations, 1630 to 1784* (Montreal, 1973), chapters 7–10.

4. B. Murdoch, *A History of Nova-Scotia, Or Acadie*, vol. 2 (Halifax, 1867), p. 188.

from the beginning, English colonization was at least as much military as it was commercial.”⁵ The social policy of the imperialists, created by military officers commanding the colonies as governors general, was agrarian, authoritarian, and paramilitary. Obviously Colonel Cornwallis’ Chebucto settlement should fit Webb’s model, and we are not surprised to find that, by the time he reaches the end of the period covered in this volume, Nova Scotia has a niche:

Regular troops in three New York garrisons, and garrisons in Nova Scotia and Newfoundland, from 1696 until the eve of the Revolution, organized soldier-colonies on the Roman model. Such units manifested the army’s social, political, and profoundly imperial influence in colonial America.⁶

Perhaps it is premature to tackle Webb’s contention. Clearly, his reference to Nova Scotia foreshadows fuller treatment in a subsequent volume. But the thrust of his argument is clear enough, and, given the singularity of the Nova Scotia experience, its prototypical nature from Andrews’ viewpoint, its purely typical nature from Webb’s, there might be some merit in determining early on how well Nova Scotia fits the “new model” Old Empire, how closely Cornwallis came up to the mark of Lucius Cornelius Sulla.⁷

Superficially, at least, Nova Scotia was just such a paramilitary colony. Its foundation was to strategic ends, half its original heads-of-household were disciplined veterans, its first three governors (from 1749 to 1760) were British colonels in the establishment list,⁸ and Halifax would long bristle with a relatively formidable garrison of regular soldiers from the arrival in 1749 of Colonel Hopson’s troops evacuated from Louisburg under treaty terms.

Profoundly, however, the record of the settlement’s early years

5. S. Webb, *The Governors-General: The English Army and the Definition of the Empire, 1569-1681* (Chapel Hill, 1979), p. xvi [hereinafter Webb].

6. Webb, *supra*, note 5, p. 453. Webb appears to rely heavily on R.H.R. Smythies, *Historical Records of the 40th (2nd Somersetshire) Regiment* (Devonport, 1894) for the role of the military in Nova Scotia, which is not entirely up to bearing the weight of his interpretation.

7. Sulla (138-78 B.C.) was the Roman *quaestor*, *praetor*, *consul*—dictator—who originated the Roman system of military colonies throughout Italy.

8. Edward Cornwallis (1749-1752); Thomas Peregrine Hopson (1752-1756); Charles Lawrence, president of council *vice* Hopson (1753), lieutenant governor (1754), governor (1756-1760), were colonels. Robert Monckton, lieutenant-governor *vice* Lawrence (1756-1759), was a lieutenant colonel. Henry Ellis, governor, (1761-1763), was not a military man but an hydrographer and Fellow of the Royal Society. The indefatigable Edward How, who for some three decades had played a major role in defusing Acadian and Indian crises along the Fundy, was considered unfit by Cornwallis to be lieutenant governor because he was not a military man: G. Bates, “Your Most Obedient Humble Servant, Edward How” (1961), 33 *Collections of the Nova Scotia Historical Society* 1 at 18.

indicates how slight was the paramilitary aspect of the colony and how un-Sulla-like was Colonel Cornwallis. Cornwallis and his entourage arrived on 21 June; by 1 July all of the transports had arrived. The governor met his council for the first time on 14 July, opened his commission and swore in the six initial councillors. Four days later, four justices of the peace were appointed and sworn in. Two were military men, Lieutenant Robert Ewer, late of Frazer's Regiment, and retired Lieutenant John Collier, but two were civilians, John Brewse, a civil engineer, and John Duport, gent., an attorney-at-law.⁹ On 19 July, the settlers were assembled in separate companies with their respective overseers to choose a constable for each company.¹⁰ Less than a week later, Cornwallis sent to the Board of Trade the plan for the new town of Halifax and its defence perimeter prepared by Brewse, and by the end of the third week of August Brewse and the various overseers had assigned the settlers their lots.¹¹

All this constituted the energetic travail of setting up essential civil polity and preparing in a timely way for shelter against winter. But the real measure of paramilitary organization was its capacity for defence. If Colonel Cornwallis had any illusions on this score, they were soon banished. The council agreed that, before the settlers built upon their lots, the overseers would "propose" that they throw up a defence line, for which each man would be paid 1s. 6d. per diem.¹² How un-martial the old-soldier-and-sailor *colonii* were had to be confessed ruefully by Cornwallis to the Duke of Bedford in early September. While the regular troops—Hopson's men—were busy erecting the palisade, the settlers were raising their own roofs and Cornwallis further marvelling that, while the French were stirring up the Indians, "The Settlers don't seem at all alarmed."¹³ Cornwallis was. Despite considerable satisfaction with the assurances of the deputies from the Acadians, with whom he had met in the first month after his arrival, he did not trust the Indians despite the treaty entered into by them in mid-August. The first blow fell on 30 September, when four unarmed workmen were killed and a fifth carried off by the Micmac at Major Jarman's sawmill on the harbour.¹⁴ The response of the governor and council was modest (so far as mobilizing the colony was concerned): annoy, distress, take, and destroy the Indians, with 10gns. for each Indian or his scalp "(as is the custom of

9. Akins, *supra*, note 2, p. 571. For Ewer, see Akins, p. 509; Collier, p. 255; Brewse, p. 556; Duport, pp. 553, 694.

10. Akins, *id.*, p. 571.

11. *Id.*, pp. 565, 577.

12. *Id.*, p. 572.

13. *Id.*, pp. 585–586. Cornwallis wrote Bedford on 20 August 1749 that there was "no persuading" the settlers to erect defence works before starting to build their own houses: Akins, p. 577.

14. Akins, *id.*, p. 582.

America) if killed.”¹⁵ No move was made to arm the populace, beyond the disposition a fortnight before for arming ordnance artificers, New Englanders, and those settlers who had been in the army—no more than two hundred in all—the council having held then that it “would be very improper to arm all the Settlers.”¹⁶ Indeed, it was not until 6 December that the governor and council ordered all able men between sixteen and sixty to assemble by the town’s quarters to be formed into a militia.¹⁷ Ten days later, the governor and council decided to pay the settlers to clear woods around the lines to open a field of fire.¹⁸ On 7 January 1750, the council rejected “a petition from some of the Inhabitants” asking that martial law be put into effect during the Indian danger; instead, under pain of imprisonment for twenty-four hours and a fine of 5 shillings, militiamen were ordered to stand a night guard in every quarter of the town, and the settlers were ordered to “work a few days to throw up some necessary Works.”¹⁹ The result of these alarms and excursions? On 19 March, Cornwallis wrote the Board of Trade that he was obliged to employ all the hands he could get to raise the barricade to the water’s edge, but could not prevail upon the settlers to cut out the field of fire. “It has been always impossible to get any of them to work without great wages”; and though “The Officers [of the militia] behaved well; I cannot commend the behaviour of the men in general notwithstanding the danger they imagined threatened them.”²⁰ Augustan Britons were not Augustan Romans, evidently. Then, Augustan Britons had undoubted rights and liberties accorded them by the Law and the Constitution.

I do not mean to belabour this point (or Professor Webb). For all the drum-and-trumpet *obligato* to the more humdrum melody of daily life in early Chebucto, the colony was essentially a civil—and civilian—polity. Englishmen’s suspicion of a standing army had not diminished in the three-quarters of a century since James II had bivouacked an army on Hounslow Heath. The annual Mutiny Act was not primarily a means to assure the survival of Parliament; it was a device to maintain parliamentary and civilian control of the army. Britons had come to be able to live with an army, but a little one—much of it quickly paid off when the shooting stopped and the rest of it grossly neglected—which relied on foreign mercenaries for expansion in time of war. It was officered by gentlemen who did not conceive of themselves as a distinct caste or as

15. *Id.*, p. 582.

16. *Id.*, p. 580.

17. *Id.*, p. 596.

18. *Id.*, p. 597.

19. *Id.*, pp. 598–599. The governor and council doubtless welcomed the petition requesting martial law for its value *in terrorem*—it at least gave credence to their sense of urgency in erecting defences.

20. Akins, *id.*, p. 605.

men whose interests were distinguishable from those of their civilian brothers on the county bench and in the country house. The civilian mentality ran deep. A paid-off trooper or a half-pay officer reverted very easily, sometimes too easily as Haligonians for almost a century knew all too well, to civilian status, civilian pursuits, and civilian laxity.

When it came to recruiting settlers for Chebucto, the Board of Trade in its advertisement of 7 March 1749 not only promised transportation, land, tools and utensils, building materials, arms for defence, a year's maintenance in the colony, security, and protection, but also that there would be a

civil government established, whereby they will enjoy all the liberties, privileges and immunities enjoyed by His Majesty's subjects in any other of the Colonies and Plantations in America, under His Majesty's Government. . . .²¹

The new governor's commission gave him power to establish the accepted institutions of civil government: a council, a legislative assembly, courts, and a judiciary. It accorded him the power of the civil executive to defend the colony, exercise the king's prerogative of mercy, administer public funds, make grants and assurances of lands, and establish fairs and markets. Most significantly, Cornwallis' commission, tested 6 May 1749, gave authority to the governor "with the advice and consent of our said Council and Assembly or the Major part of them respectively . . ." in Nova Scotia

to make, constitute and ordain Laws, Statutes & Ordinances for the Publick peace, welfare & good government of our said province and of the people and inhabitants thereof and such others as shall resort thereto & for the benefit of us our heirs & Successors, which said Laws, Statutes and Ordinances are not to be repugnant but as near as may be agreeable to the Laws and Statutes of this our Kingdom of Great Britain.²²

The last clause, as to non-repugnancy and agreeableness to the laws of England, had a long history behind it. And it was a history that included the province of Acadia for three decades before Cornwallis and his colonists arrived at Chebucto. After seven years of essentially military rule following the capture of Port Royal in 1710—under those two rigorous warriors, Samuel Vetch and Francis Nicholson, who took the fort—British Acadia came under the governorship of Col. Richard Philipps in 1717.²³ And there it remained for thirty-two years of increas-

21. *Id.*, p. 496.

22. *Id.*, p. 500.

23. Vetch was governor 1610–1612 and 1615–1617; Nicholson, 1612–1615. See S. Webb, "The Strange Career of Francis Nicholson" (October 1966), 23 *William & Mary*

ing neglect and, after the first four years, the continuous absence of the governor. The Board of Trade was hardly less soporific with respect to the province. In 1719 it finally got around to issuing instructions to Philipps that hinted at the creation of a regular civil government on what was the already accepted pattern for Britain's colonies, with a legislative assembly to make laws, but directed him in the meantime to follow the 1715 instructions to the Earl of Orkney as governor of Virginia.²⁴ Clause 62 of the Virginia instructions read:

You are to take Care that no Man's Life Member freehold or Goods be taken away or harm'd in our said Colony otherwise than by establish'd and known Laws, not repugnant but as near as may be agreeable to the Laws of this Kingdom.²⁵

Virtually the same provision had been contained in the January 1682 instructions to Gov. Thomas Lord Culpepper of Virginia.²⁶

The non-repugnance and agreeableness clause in colonial enabling instruments originated in the 1632 charter to Lord Baltimore for Maryland, which directed that the laws made by colonial legislative authority were to be "inviolably observed" under penalties,

So, nevertheless, that the Laws aforesaid 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.²⁷

In this point, so close are the instructions to Cornwallis to the provisions in the 1632 Maryland charter, it is reasonable to suppose that, if the latter was not the immediate parent of the former, it was the remote ancestor.

Obviously the 1749 instruction (and the Maryland provision of 1632) differ significantly in two ways from the Virginia instructions of 1682 and 1715. First, the Virginia instructions applied the standard of non-repugnancy and agreeableness only to criminal prosecutions touching life and limb (i.e., felonies) and civil actions involving lands and tenements, goods and chattels. It was a procedural standard directing the maintenance of substantive probity in laws that had developed in an old colony with a considerable legislative history. The 1749 instruction to Cornwallis was a substantive standard to be applied to the entire corpus of law yet to be made in a new colony. If nothing else, that quality

Quarterly 513; Nicholson certainly was a latter-day Sulla and fits Webb's thesis perfectly, perhaps too perfectly.

24. L. Labaree, *Royal Instructions to British Colonial Governors, 1670-1776*, vol. 1 (Washington, 1935) §136 [hereinafter Labaree].

25. (1913), 21 *Virginia Magazine of History and Biography* 288 [hereinafter VMHB].

26. (1919), 27 VMHB 329.

27. R. Perry, ed., *Sources of Our Liberties* (New York, 1972), p. 108.

of innovation would have recommended the Maryland model for the Nova Scotian situation. Moreover, Virginia's charters and instructions were silent on non-repugnancy and agreeableness of the whole corpus of colonial law to the laws of the mother country. Secondly, because the Virginia instructions sounded in procedure, not substantive law, they did not make the distinction between common law rules judicially derived and statutory enactments, which was evidenced in the 1749 instruction requiring agreeableness to "the Laws and Statutes" of Britain. The distinction was important in the eighteenth century. It not only bedeviled English law for some two centuries (especially in matters of law reform, codification, etc.), it also contributed mightily to contemporary confusion in the mother country and the colonies as to what English laws were and were not in force in the colonies. The confusion was compounded by the distinction made by lawyers between statutes affirming, amending, or extending common law and statutes making entirely new law. In short, the difference between common law and statute law went a long way towards preventing the emergence of any uniform doctrine of "reception." The want of such a uniform doctrine repeatedly presented difficulties to the colonies, including Nova Scotia, until a century or more of judicial and legislative activity and the emergence of responsible government made the issues moot. For the thirteen colonies which launched out on a bold new experiment in 1776, the lack of a uniform doctrine of reception continued to plague them as states within a federal union, resulting in a great deal more diversity in laws than even state sovereignty demanded. But that is not our concern here.

What law was "received" in Nova Scotia, what were the "liberties, privileges, and immunities" the new colonists were to enjoy according to the promise of the Board of Trade and Plantations? Both technically in law and practically in application the answer to that question is difficult to discover now and was even more difficult to determine then. Contemporaries well understood that what English law was deemed to be in force in a colony depended upon (1) whether the law was statute or common law; and (2) how and under what circumstances the colony in question was acquired. In short, reception of the law of the mother country turned, in the first instance, upon a question of law and, in the second instance, upon a question of fact.

To begin with the question of law, which was simpler and less subject to dispute, we turn to the statutory authority which, from its enactment until its obsolescence under the force of political change and final interment as dead law in 1867, governed the applicability of English statute law to the colonies. This was the 1696 Act for Preventing Frauds and Regulating Abuses in the Plantation Trade, 7&8 Will 3, c. 22, which sought to put teeth into the implementation of the Navigation Acts by penalties on those engaged in colonial trade in breach of the

Acts and on colonial officials from wharfingers to governors for malfeasance and misfeasance in implementing the Acts, and by creating machinery for the better enforcement of the Acts. To prevent the interference of colonial laws with the implementation of the Navigation Acts, the statute declared null and void all "Laws, By laws, Usages or Customs" of the colonies "repugnant" to the Acts; but it went a step further, declaring null and void colonial "Laws [etc.]" repugnant "to any other Law hereafter to be made in this Kingdom, so far as such Law shall relate to and mention the said Plantations. . . ."²⁸ Clearly, the statutory legislation of the mother country was binding upon a colony if the legislation explicitly declared it to be applicable to the colony or to all the colonies. If the legislation was silent as to its applicability to the colonies, then it did not apply to them.

What of the *old* statute law of England, the Acts passed before 1696 that did not explicitly mention the colonies? The 1696 Act was not retroactive save in the case of the Navigation Acts enumerated in it (which mentioned the colonies anyway). On the face of it, an Act of Parliament before 1696 applied to a colony if the colony was in existence before 1696. However, whether or not an earlier Act applied depended upon the answer to a question of fact: Was the colony a territory acquired by conquest, or was it the plantation of an uninhabited territory?

The legal development of this distinction was slight and fraught with constitutional import. It has been well-plowed by scholarship.²⁹ It began—as so much early English constitutional law did—with Sir Edward Coke in the early seventeenth century. It culminated—as so much early English constitutional law did—with Lord Mansfield in the later eighteenth century. In *Calvin's Case*, or the *Case of the Post-Nati*, in Exchequer Chamber in 1608, an essential element in the opinion of Chief Justice Coke as to why a Scot born after the union of the English and Scottish crowns was as well an English as a Scottish subject of the king turned on the historical distinction between the king's realm and the king's dominions not part of his realm but under his obedience. The king within his realm was, like his subjects, bound by the laws of the realm. However, if a dominion not part of the realm was acquired by the king by conquest, then the king could introduce into it such law as he deemed fit. The conquered people were at his mercy; his power over them absolute, the power of life and death. If the conquered dominion was a Christian kingdom, its pre-conquest laws remained in force until

28. 7 & 8 Will. 3, c. 22, s. 9. This Act was repealed, along with a great many other statutes deemed archaic, by The Statute Law Revision Act, 1867, 30 & 31 Vict., c. 59, by the same Parliament which passed The British North America Act, 1867, (c. 3)—coincidental irony!

29. Most notably and persuasively by the late Joseph H. Smith in *Appeals to the Privy Council from the American Plantations* (New York, 1950), pp. 464–522.

the king altered them. If the conquered dominion was infidel, its pre-conquest laws were abrogated at the moment of conquest. In the case of a Christian country, if the king introduced the laws of England, then his successors could not alter those laws without "parliament." Coke's example was Ireland, and it is likely that by "parliament" he intended the Irish, not the English, Parliament.³⁰

Whatever Coke's meaning in 1608, the subsequent and authoritative interpretation placed upon the term "parliament" was that the king's plentitude of prerogative power to give law to dominions not part of the realm was subject to the constitutional restraint; his legislative authority was exercisable only through the imperial Parliament or, once he had extended English law to a colony, its colonial legislature. He could not change the law of the colony otherwise than by Act of the imperial Parliament or of the colonial legislature. This was the emphatic judgment of Chief Justice Mansfield in King's Bench in 1774 in *Campbell v. Hall*. Summing up existing case law from *Calvin's Case* onwards in a series of six propositions, Mansfield's last proposition was

that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old law and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.³¹

Therefore, when the king conquered Grenada from the French in 1762 and was confirmed in his conquest by the peace treaty between France and Britain of February 1763, he was free to give such law as he willed to the colony. But by proclamation of 7 October 1763, the king had promised to extend to a governor, council and assembly in the new colony power to make laws for the colony "as near as may be agreeable to the laws of England" as in other colonies; and on 9 April 1764, by letters patent the king had issued commission to a governor to so summon an assembly as soon as circumstances permitted. Consequently, the king "had immediately and irrecoverably granted to all who were or should become inhabitants [etc.]" of Grenada that "the subordinate legislation over the island" should be exercised by a

30. 7 Co. Rep. 17b; J.H. Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill, 1978), pp. 16-28 at 25, concludes that "parliament" meant the Irish parliament. I am grateful to Professor Kettner, my colleague, for having carefully read and criticized this paper, much to my benefit and its improvement.

31. 1 Cowp. 204 at 209 [98 E.R. 1045 at 1048]; see also Lofft 655 [98 E.R. 848].

governor, council, and assembly as in other colonies, and therefore the king no longer had power to impose a customs duty on Grenada by his prerogative expressed in letters patent of 20 July 1764.³² The window of prerogative in a colony acquired by conquest from a Christian (a Most Christian) king was very small indeed by 1774, a matter of a few months in the case in hand.

Seen from either end of the development, from the alpha or the omega, *Calvin* or *Campbell*, there emerges a clear line of doctrine. By conquest the king could impose what law he wished, but, once having imposed English law, he was bound by the constitutional restraints of English law. Between 1608 and 1774, those constitutional restraints had increased and the king's prerogative decreased and yet had not disappeared.

Intervening between *Calvin* and *Campbell* were a handful of judicial pronouncements and one quasi-judicial one which would have excluded the king's prerogative entirely—or rather, it might be more correct to say, have reduced it to a strict co-extensiveness with his prerogative in England. These decisions also created a line of doctrine of sorts: the “birthright” theory. Since Englishmen were born under the full panoply of English law, common law and statute, they carried this law with them wherever they went; wherever they went, provided it was not to a conquered territory, for there the law was such as the king willed. But if the English settlers founded a plantation in an uninhabited territory acquired merely by first-possession rather than conquest, then that plantation-founded colony “received” the entire law of England as it existed at the moment of settlement.

The “birthright” theory was conceived by Chief Justice John Vaughan of the Common Pleas in *Craw v. Ramsey* (1670), it was born by Chief Justice John Holt of King's Bench in *Blankard v. Galdy* (1693), studiously ignored by the House of Lords in *Dutton v. Howell* (1693), well thrashed but not murdered by Holt in *Smith v. Brown and Cooper* (1705), and finally thoroughly weaned from childish rebelliousness by the Privy Council in 1722. For reasons that bore no relationship to reality but probably grew from Vaughan's unwillingness to contradict the luminous Coke (a reluctance characteristic of all Stuart judges), Vaughan in *Craw* posited English settlement in lands utterly devoid of inhabitants, such settlements being therefore plantations in territory not acquired by conquest. In a confused opinion, full of future mischief, he argued that the courts of such plantations were subject to the same remedial writs, particularly error, to the King's Bench and the House of Lords as was any other court in the realm of England.³³ A quarter century later, in *Blankard*, Chief Justice Holt (per curiam) is reported to

32. 1 Cowp. 204 at 213 [98 E.R. 1045 at 1050].

33. Vaugh. 274 [124 E.R. 1072].

have held that "In case of an uninhabited country newly found out by English subjects, all the laws in force in England are in force there; . . ." but went on to find that the colony in the case in hand, Jamaica, had been conquered, and therefore the laws of England did not "take place there, until declared so by the conqueror or his successors."³⁴ A few months later, in *Dutton*, the House of Lords was moved in error from Exchequer Chamber in the matter of a *scire facias* for damages for false imprisonment awarded a former deputy governor of Barbados against Dutton, the governor who, with his council, had committed the deputy to jail awaiting trial. The counsel for the deputy's executors argued that all the laws of England were in force in the Barbados because it was a plantation, not a conquest, being "not inhabited by any, but overgrown with Woods," and that such imprisonment by the colonial council was illegal by English law. The unlearned Lords refused to deal with the fundamental issue of reception and found against the deputy's executors on the narrow grounds that in England the Council had power to commit and that the colonial council, being also a council of state, must have the power to commit awaiting trial before a competent court.³⁵ In *Smith* (1705) in an assumpsit for a Virginia slave sold in England, Chief Justice Holt gave the plaintiff leave to amend his declaration so that it would aver that the sale was in Virginia, because "as soon as a negro comes into England, he becomes free, . . ." whereas by the laws of Virginia Negroes are saleable, "for the laws of England do not extend to Virginia, being a conquered country their law is what the King pleases. . . ."³⁶ We might suppose that Holt, C.J. had come to regret his indiscretion of a decade before in *Blankard*; the "birthright" theory made reception an unwieldy sword for the protection of the rights and liberties of Englishmen overseas and a two-edged sword which might be turned to slash those very liberties in England by introducing such an odious institution as chattel slavery.

In 1722 the Privy Council in the exercise of its ordinary jurisdiction under the prerogative of hearing appeals from the colonies apparently made a clear statement in a case from the Barbados of the distinction between plantation and conquest. In the latter two of three propositions, the Council summed up the Cokeian doctrine of conquest, without adding to it and *without* Coke's stricture, that once the king introduced the laws of England into a conquered Christian country he could not alter those laws save by "parliament." The first proposition is the most arresting:

That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so,

34. 2 Salk. 411 at 411 [91 E.R. 356 at 357].

35. Shower 24 at 31, 34-35 [1 E.R. 17 at 19, 23-24].

36. 2 Salk. 666 at 666 [91 E.R. 566 at 566].

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 in land, does not bind *Barbadoes*.³⁷

Barbados was planted in 1626; therefore no English statutes not explicitly naming the colonies were in effect there after that date. But what of common law? Conceivably the law made by English courts of record of superior jurisdiction after 1626, being part of the Englishman's "birthright," would still be the law of Barbados. This was at least arguable, but the reports of English cases are silent on the point. Moreover, applying the 1722 resolution of the Privy Council to all the plantation-founded colonies introduced a considerable disparity into their settlers' "birthright": what statute law was in effect varied from colony to colony depending upon the date of the colony's plantation.

Two circumstances reduced the effect of the "birthright" theory both as a source of liberties and as a vehicle for introducing unnecessary complexity in reception. First of all, there were very few plantations of uninhabited territories. Blackstone pointed out in 1765 that "Our American plantations are principally of this latter sort [conquest], 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."³⁸ Barbados, if we accept the 1722 resolution, clearly was plantation-founded. In that same year the law officers were not sure whether Jamaica was or was not plantation-founded or by conquest, but in 1774 Chief Justice Mansfield was convinced that it was plantation-founded, "all the Spaniards having left the island or been driven out" as the English arrived!³⁹ The barren rock of St. Helena and, surprisingly, the Isle St. Jean—which we know as Prince Edward Island—were plantations, in the opinion of the attorney general in 1774. This mixed bag, largely culled from obiter in *Campbell v. Hall*, points to the second, and more important, circumstance which reduced the "birthright" theory to negligible practical importance.

Mansfield's judgment in *Campbell* affirmed as principle what had long since become the practice of British imperialism: Early in the life of a new colony, whether acquired by conquest or plantation of an uninhabited territory, the king granted to the colony the authority to

37. *Anon.*, 2 P.Wms. 75 at 75 [24 E.R. 646 at 646]. The Statute of Frauds was 29 Car. 2, c. 3 (1677).

38. William Blackstone, *Commentaries on the Laws of England*, vol. 1 (1765), p. 105.

39. *Campbell v. Hall*, 1 Cowp. 204 at 212 [98 E.R. 1045 at 1049].

make its own laws, provided they were not repugnant to the laws of England and as agreeable to them as local conditions permitted. *Campbell* settled that such a grant, perhaps merely the solemn promise of such a grant, of legislative authority was irrevocable by the king alone; throughout the eighteenth century, however, political reality suggested how slight was the peril of a wholesale revocation of colonial laws by prerogative act. What could be done by prerogative was to assure on a case-by-case and statute-by-statute basis that colonial law was non-repugnant and agreeable to the law of the mother country. By the same grant of legislative authority the king gave power to his governor to erect courts of record to do justice and to implement the laws of the colony. But the laws made by the colonial legislature were reviewable by the King in Council to ensure non-repugnancy and agreeableness to the laws of England and subject to nullification if they were repugnant; and the King in Council reserved power to hear appeals in error to the judgments of colonial courts. These were considerable powers but in practice bore less heavily on the colonies' initiative in legislation and judicial action than we might suppose from the few, well-documented, worst-case incidents of nullification and appellate reversals, especially in New England in the early eighteenth century. The creation of colonial courts and colonial legislatures, subject to the uneven surveillance of the King in Council but immune to routine review by the courts of the mother country, gave practical effect to the theory that English law was the subject's "birthright," without regard to how the colony was acquired. Each colony essayed a new experience in the law, able because of its considerable legislative and judicial autonomy to receive so much or so little of the law of England as was appropriate to its domestic (although, not its imperial) circumstances. In practice, reception as a source of uncertainty and complexity in the law of the colony was rapidly vitiated by the individual colony's growing corpus of statutory enactments and records of the judicial determinations of its courts. What legal "birthright" the first colonists brought with them rapidly became mere legal baggage, like old clothes to be worn if they still fitted, retailored if woven of sound stuff, or discarded if useless.

And so it would be for the first colonists and their successors at Chebucto in 1749 and after. There was no doubt that Nova Scotia was a colony acquired by conquest confirmed by treaty. The conquest was already four decades past, the treaty struck in 1713, by the time Governor Cornwallis opened his commission. Between 1710 and 1749 the conquered province of Acadia languished in that kind of limbo that came right out of *Calvin's Case*. The conquered subjects of the vanquished and expelled Christian King, absent the imposition of what law the victorious British king willed to be imposed upon them, remained subject to the precedent law in effect in Acadia before 1710. The only

exception was the law of allegiance. Their new sovereign, by his agent in Annapolis Royal, sought to impose upon the Acadians the English law of allegiance in the form of an unconditional oath of allegiance. The Acadians' refusal to take such an unconditional oath led in 1755 to one of the most unhappy episodes in the history of the Old British Empire. However, by then the king had imposed the law of his will in the commission to Governor Cornwallis. Henceforth Nova Scotia would be subject to the law characteristic of that of the British king's other colonies in North America. In the process, the anomalous situation of the handful of natural British subjects at Annapolis Royal, who for four decades had struggled to evolve and apply law that was recognizably English for their own limited polity, was regularized by their absorption into the new colony. The British king had finally done what he had indicated was his intention in 1719 when the Board of Trade instructed Governor Philipps to follow the Virginia instructions of 1715, while enjoining him "not to take upon you to enact any laws till his Majesty shall have appointed an assembly and given you directions for your proceedings therein."⁴⁰

Early Nova Scotia gained a certain notoriety among the British colonies in the eighteenth century for its dilatoriness in giving effect to the direction in Cornwallis' commission to summon a legislative assembly. Governors Hopson and Lawrence were no less resistant. These first three governors were soldiers, and Professor Webb's thesis has applicability here. It is a matter of conventional wisdom that the first legislative assembly for Nova Scotia, which convened 2 October 1758—over nine years after the settlers arrived in Chebucto—and passed thirty-six Acts, was largely the result of persistent pressure from a Board of Trade imbued with Whiggish purism, agitation by the growing New England merchant community in Halifax, and finally Chief Justice Jonathan Belcher's belated conversion to legislative probity.⁴¹ The thirty-six statutes promulgated in the first session constituted a record number of Acts passed in a single session in the province until the 1820–1821 session. They were a flood loosed to quench a thirst.

They are an impressive collection. Only a common lawyer's prudence prevents one from calling them a "code."⁴² This is not the place, nor do we have the time, to analyze in detail the work of that first session of Nova Scotia's legislature. But the statutes tell us much about the province's perception of legal needs and, therefore, much about

40. Labaree, *supra*, note 21, §136.

41. W. MacNutt, *The Atlantic Provinces: The Emergence of Colonial Society, 1712–1857* (Toronto, 1965), pp. 57–60 [hereinafter MacNutt].

42. My reservations about using the term "code" for enactments in the common law tradition are set down in *The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusetts* [1648], ed. T. Barnes (San Marino, 1975), Intro. p. 7 [hereinafter *Laws & Libertyes Mass.*].

reception. Six statutes dealt with property, real and personal, among other things putting into full force the Statute of Frauds (1677).⁴³ What we would call family law was bounded out by three statutes, on matrimony, divorce, incest, adultery, and polygamy, on guardianship of minors, and on bastardy.⁴⁴ One Act established the Church of England, allowed Protestant dissent, and provided in a rather benign way for the "suppression of Popery."⁴⁵ Two statutes, one for treason and felonies and the other for misdemeanours, together constituted a relatively comprehensive measure for the repression of serious crime.⁴⁶ A number of the Acts were directed against vice, disorder, and commercial malfeasance; these essentially regulatory laws were akin to English penal statutes and similarly enforceable by common information.⁴⁷ Interestingly enough, some of these Acts regularized as law previous ordinances by proclamation issued by Cornwallis and his successors from the first settlement repressing such disorders.⁴⁸ One Act provided for limitations in time for civil actions to the end of avoiding suits at law; it provides a fairly concise, though probably not all-inclusive, indication of what actions were common in the colony's litigation at the time.⁴⁹ Another Act sought to encourage husbandry and the fishery by bounties and premiums.⁵⁰ Three statutes dealt with finances and taxation.⁵¹ One Act was clearly in furtherance of imperial concerns: to prevent harbouring or assisting navy deserters.⁵² Five statutes were institutional in nature, providing inter alia for a militia, a harbour lighthouse, a house of correction, and allowances for collectors of impost and excise.⁵³ Finally, four important Acts regularized prior governmental activity. Three of them, the second amending the first Act, and the third "amending and explaining" the other two, were passed confirming previous proceedings of the courts of judicature and regulating future proceedings of the same.⁵⁴ The fourth Act revived and put in full force

43. The Statutes at Large . . . Nova Scotia, R.J. Uniacke ed. (Halifax, 1805) 32 Geo. 2, cc. 2, 3, 11, 14, 15, 18 [hereinafter Statutes at Large, N.S.].

44. Statutes at Large, N.S., 32 Geo. 2, cc. 17, 19, 26.

45. *Id.*, c. 5.

46. *Id.*, cc. 13, 20.

47. *Id.*, cc. 4, 10, 16, 21, 23, 25, 28, 32, 35.

48. *Id.*, c. 4, prohibiting distilleries within a quarter-mile of Halifax, compare to resolution of 11 July 1751, Akins, *supra*, note 2, p. 643; c. 20, s. 15, criminal libel and slander and spreading false news, compare to resolution of 16 February 1751, Akins, *id.*, p. 639; c. 23, prohibiting persons leaving the province without a pass, compare to resolution of 16 December 1749, Akins, *id.*, p. 597; c. 32, for observance of the Lord's Day, compare to resolution of 12 September 1750, Akins, *id.*, p. 623.

49. Statutes at Large, N.S., 32 Geo. 2, c. 24.

50. *Id.*, c. 31.

51. *Id.*, cc. 1, 7, 33.

52. *Id.*, c. 11.

53. *Id.*, cc. 6, 8, 9, 22, 34.

54. *Id.*, cc. 27, 29, 36.

“several of the Resolutions or Acts of His Majesty’s Governors and Council of this Province heretofore made.”⁵⁵

One is hard put to find in these first statutes any foreign source for them other than the law of England. Only one of them, that for limitations of actions, bears enough resemblance to the statutes of another colony—in this case, Massachusetts⁵⁶—to raise much possibility that there was any large borrowing from the principal colonies to the south, Massachusetts, New York, or Virginia. Virtually all of them dealing with criminal law, including most of the regulatory penal statutes, and civil law seem based firmly on English statute and common law. One of the penal statutes, 32 Geo. 2, c. 4, prohibiting erection of distilleries within a quarter-mile of the Halifax town pickets, was based upon a resolution of the governor and council in July 1751 prohibiting distilleries within the picket lines; in promulgating it then the governor and council had referred explicitly to having consulted the “Laws of the other Colonies.”⁵⁷ Yet none of the laws are slavish copyings of the English books. There is an admirable economy in the number of capital felonies compared to the mother country, where by the end of the century there would be about two hundred capital crimes. Here, perhaps, is the strongest case for a Massachusetts influence on the early statutes, because since at least 1648 the number of capital crimes in the Bay Colony was rigidly curtailed.⁵⁸

Most of the first statutes of Nova Scotia evidently met the standard of non-repugnancy and agreeableness, and were sufficient for the moment for the colony’s needs. The two Acts that did not meet the standard and were, in whole or in part, nullified by the king in council were in areas of law outside the run of criminal and civil enactments. The clause in 32 Geo. 2, c. 17, establishing desertion and non-maintenance

55. *Id.*, c. 30.

56. Compare Statutes at Large, N.S., 32 Geo. 2, c. 24, An Act for Limitations of Actions, and for Avoiding Suits of Law, with Acts and Laws of the Province of Massachusetts Bay (Boston, 1742), 13 Geo. 2, c. 3, An Act for Limitation of Actions and for Avoiding Suits in Law where the Matter is of Long Standing (1739). Nova Scotia and Massachusetts differed considerably on the terms for limitations, and the 1758 Nova Scotia statute limited to twenty years a right of entry, with a saving proviso, s. 3, for minors, femes covert, mental incompetents, prisoners, and those overseas to enter ten years after becoming able to enter, etc. The proviso in s. 3 was based on a number of English cases and the English statute 4 & 5 Anne, c. 16, according to Uniacke’s marginal note.

57. Akins, *supra*, note 2, p. 643.

58. *Laws & Liberties Mass.*, Text p. 5, “Capital Laws.” A recent, both revisionist and radical, interpretation of the death penalty in eighteenth century England provides interesting new insights into the subject: D. Hay, P. Linebaugh, J. Rule, E. Thompson, C. Winslow, eds., *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (Longon, 1975). A necessary corrective to the new view is J. Langbein’s review of it, “*Albion’s Fatal Flaws*,” (February 1983), 98 *Past & Present* 96.

for three years as a ground for divorce was nullified probably because it was in direct conflict with and contradictory of the grounds for divorce *mensa et thoro* which alone was allowed under English canon law governing matrimonial matters.⁵⁹ An Act for establishing the rate of Spanish Dollars, and the interest on money in the Province, 32 Geo. 2, c. 7, was nullified in toto, one suspects because its fixing of the Spanish Dollar at 5 shillings was in direct breach of the 6 shilling rate set by 6 Anne, c. 57, the 1707 imperial statute establishing the official value of the empire's coinage.⁶⁰ Clearly, the colonists' legal baggage was English and overwhelmingly unexceptionable and conventional, if plain and homespun. Only when the colonists tried fancy dress—(grass)widow's weeds and a coat sequined with Spanish silver pieces-of-eight—were they turned away at the door back home!

We can reasonably ask how Cornwallis, Hopson, and Lawrence managed to do justice during the long initial drought before the convening of a legislative assembly to give Nova Scotia its own law. The answer depends in part on what they did in judication—and in part on what they did not do in legislation. To take up the latter point first, these governors worked with genuine devotion and assiduity to institute an acceptable and workable civil polity, to preserve public peace, and to advance the colony's commonweal. Their reluctance to convene an assembly, apparently more pronounced and more strenuously held by Charles Lawrence than by his two predecessors, grew from the exigencies of a new settlement. It was stalked by the real threat of Indians, growing suspicion of the reliability of the "neutral French" (Acadians), and the continuing bellicosity of the French at Louisburg and in Canada. The population was in a state of flux, with many of the original Chebucto settlers leaving, their places taken by indigent Irish bondsmen fleeing Newfoundland and Virginia, by a growing cohort of New Englanders, by merchants, sailors, artisans, and by drafts of sullen and even mutinous Palatine Germans and Swiss. Save for the latter's beachhead on the south shore, there was no substantial settlement outside Halifax. In 1750 Halifax's population was almost 5,000; five years later it was some 1,500, too many of them newcomers and non-Britishers, most of them still dependent upon public maintenance from Britain. They were a turbulent and heterogeneous lot. Out of such sorry stuff the "General Assembly of the Freeholders and Planters" enjoined in Cornwallis' commission could hardly be fashioned.⁶¹ The reluctance of the early governors to trust the legislative to what appeared to be—and some-

59. *Acts of the Privy Council, Colonial Series*, vol. 4 (London, 1911), p. 557, disallowing part of s. 7 of Statutes at Large, N.S., 32 Geo. 2, c. 17, 16 March 1763.

60. *Acts of the Privy Council, Colonial Series* (London, 1911), p. 808, 30 April 1761. See J. McCusker, *Money and Exchange in Europe and America, 1600-1775: A Handbook* (Chapel Hill, 1978), pp. 125-131, 231.

61. Akins, *supra*, note 2, p. 499.

times truly was—a mob is understandable. The early governors did not govern with much of a consensus, and certainly with a declining one once the New Englanders became shrill proponents of an assembly. Still, they governed as well as the situation in which they found themselves would allow, as well as the circumstances of those they governed would permit. And they governed by English law.

First of all, they established courts. The governor and council, as the high court of general jurisdiction for the trial of serious offences and important civil actions, and as the court of special jurisdiction in equity and admiralty and matrimonial matters, was the first court to essay existence. The second court came with the appointment of the first four justices of the peace in Halifax in July 1749.⁶² In December following, a committee of three councillors recommended that the practice in the Virginia general court and county courts be followed in Nova Scotia's governor and council and courts of inferior jurisdiction, respectively.⁶³ By implementing this report the governor and council also assumed an appellate jurisdiction in criminal and civil cases. For the early years of the colony the Virginia model in all its detail was somewhat too sophisticated and, consequently, not always followed. However, one by-product of the imitation of Virginia's courts was the inclination of the Halifax authorities to look to Virginia law for models for substantive rules dealing with the problems presented by colonial circumstances. Early on, the question arose whether settlers at Chebucto could be pursued in Nova Scotia courts for debts contracted in Britain or other colonies. The governor and council noted that it was the general custom in the colonies not to allow a debt to be pleaded in the colonial court against settlers unless contracted for goods imported into the colony, and that a check of the Acts of the Virginia Assembly found this to be the "standing Law of that Colony."⁶⁴ While the Virginia practice was duly considered, Cornwallis and the council provided a more limited protection to Nova Scotia settlers from being impleaded in foreign debt. Virginia practice insofar as the courts were concerned was also changed in some substantial points under the influence of the growing contingent of New Englanders, who had emphatic notions of what constituted justice and conceived of the jury as a popular institution serving as a counterpoise to executive power. Still, the Virginia model survived and the doing of justice in Nova Scotia grew up to it.

62. Akins, *id.*, p. 571.

63. The report is given in extenso in C. Townshend, *History of the Court of Chancery in Nova Scotia* (Toronto, 1900), pp. 19–24 [hereinafter Townshend].

64. Akins, *supra*, note 2, p. 599. Virginia statute 18 (Car. 1), c. 24 (1643) established no impleading of foreign debts, was confirmed and asserted to have been in continuous force by Virginia statute 15 Car. 2, c. 10 (1663), and the latter was included in the printed laws of that colony of 1733, *Statutes at Large . . . Virginia*, vol. 2, ed. W. Hening (New York, 1823), p. 189.

Secondly, the early governors made the courts work. The first murder trial, of Peter Carsal, mariner and settler, for the stabbing of Abraham Goodside, boatswain of the transport *Beaufort*, which took place before the governor and council on 31 August 1749, was almost a showpiece performance. Clearly, it was intended to be that as much as a means to punishment. The indictment was meticulous (right out of a formulary book). The grand jurymen were as substantial as the colony could provide. The verdict was just, judgment pronounced as required in law, and sentence of death by hanging executed after a suitable passage of time to allow the governor to consider whether or not he would exercise the prerogative of mercy.⁶⁵ The Board of Trade was suitably impressed, writing to Cornwallis on 16 October 1749,

Your method of proceeding in the trial of Peter Cartell for murder was very regular and proper, and will have a good effect, as it will convince the settlers of the intention of conforming to the Laws and Constitution of the Mother Country in every point.⁶⁶

If in the next few years such majestic due process in criminal trials appears to have eroded, the cause of the decline is in part explicable by the diminution in the quality of veniremen in an increasingly heterogeneous population.⁶⁷

Thirdly, the governor and council made laws. Or perhaps, we should say, they made ordinances, termed "resolutions." Such resolutions were usually expressed in the form of proclamation. Prohibition of the cutting down of trees within the town was promulgated by proclamation.⁶⁸ Even more significantly, proclamations against forestalling markets, selling fresh fish at exorbitant prices, and retailing liquor without a licence imposed penalties of fine and/or forfeiture, and in the latter two instances provided for enforcement by informers who

65. Townshend, *supra*, note 63, pp. 11–12, prints the indictment in *R. v. Carsal (or Cartell)*. That indictment, and other parts of the record of the trial, were on a leaf of the judgment book, Public Archives of Nova Scotia, RG. 39, J, v.117, since excized. The petty jury (listed in the MS. judgment book) was comprised of a navy mate, a midshipman, a surgeon, a schoolmaster, two mariners, two civilian artisans, three husbandmen, and one unknown. All eleven known jurors were settlers, most of them were married, none had come on the same ship as the defendant though one of the husbandmen had come on the vessel of which the victim was a crewman. *Prima facie*, a balanced and impartial jury. See also Akins, *supra*, note 2, pp. 554, 579–580, 585.

66. Akins, *id.*, p. 590.

67. MacNutt, *supra*, note 41, p. 55. MacNutt relied heavily for his evidence of jury partiality and the New Englanders' "introduction of the Massachusetts system of inferior courts in which they entrenched themselves" on *An Account of the Present State of Nova Scotia, in Two Letters to a Noble Lord* (London, 1756). These two anonymous tracts deserve a thorough investigation and testing against the extant records of the courts in the Public Archives of Nova Scotia.

68. Akins, *supra*, note 2, p. 595, 6 November 1749.

would have the benefit of the penalty.⁶⁹ The inhabitants were enjoined by proclamation under pain of fine or imprisonment to assist the magistrates in the execution of their duties.⁷⁰

So far were the governor and council prepared to use proclamation that the infamous Black Act (1723) of Old England came to Nova Scotia by that means: anyone convicted of stealing or destroying "Oxen, Cows, Sheep, Goats, Hogs or Fowls shall be punished according to the utmost rigor of the Laws of England."⁷¹ Indeed, in this proclamation is the key to the governor's and councils' use of that device virtually to make law. The English courts had held that if a proclamation *declared* existing law, it was effectual in compelling observance of that law. By proclaiming that the rigour of English law against cattle wounding, a felony by statute of 1723, would be exacted, Cornwallis and his council were merely implementing the law of England. The governor and council deemed that law appropriate to the maintenance of order in Nova Scotia and gave effect to it by proclaiming the fact. The resolutions and proclamations of the governor and council before the establishment of the legislative assembly constituted a "reception" of English law.

The subsequent legislative history of Nova Scotia's Black Act proclamation points to how far resolution-proclamation made lasting law. The first comprehensive felony statute of 1758 did not make destroying cattle a crime, though stealing cattle would come under section 22 of the Act and therefore be non-capital petty larceny.⁷² In 1768 a statute made killing, maiming, wounding, or otherwise hurting horses, sheep, or other cattle a tort for which treble damages could be recovered by suit in any court of record in the province by action of trespass upon the case.⁷³ Though such statutory provisions were much less rigorous than the law obtaining in England, or conceivably the law that had obtained in Nova Scotia under the proclamation, the legislature had accepted the importance of repressing such wrongs. Much more proclamation "law" found statutory affirmation in the early legislative history of the colony, a contribution of the practice of the

69. Akins, *id.*, p. 629, 19 November 1750; p. 640, 27 May 1715; p. 624, 11 October 1750.

70. *Id.*, p. 595.

71. *Id.* The most complete treatment from a socio-criminological historical approach, though not a legal historical one, of the Black Act's origins and implementation is E. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York, 1975). The major distinction between the Nova Scotia resolution-proclamation and the Black Act was that the defendants' being disguised was an essential ingredient of the crime in most cases under the latter.

72. Statutes at Large, N.S., 32 Geo. 2, c. 13. Section 21 of the Act, making felony without benefit of clergy maliciously shooting at a person or sending an unsigned or fictitiously signed letter to extort money or other thing of value, was taken directly from a provision of the imperial Black Act, 9 Geo. 1, c. 22 (1723).

73. 8 Geo. 3, c. 11 (1768, N.S.).

courts given vigour by executive proclamation during the first decade of Nova Scotia's existence.

By governing according to the forms of law in adjudication, the early governors did substantial justice. Due process was observed by courts composed almost entirely of laymen. Those courts implemented as much of the law of England, statute and common law, as the governor and council by resolution and proclamation felt necessary to the colony's well-being. In civil matters, what law and how much law was to be received from the mother country was largely determined by the demands of the litigants and the intellectual capacities of a lay judiciary grappling with much very abstruse doctrine and even more contorted procedure. There is always a danger of underestimating the abilities of eighteenth century laymen doing law; there is also a danger of overestimating the demand for sophisticated law in a new society. The vocational spread of the first settlers at Chebucto in 1749 is revealing.⁷⁴ There were thirty-four "health professionals," including twenty surgeons and two midwives; that is, one for every 112 settlers. There were eight wig makers—and about eighty men in the colony of such social eminence as to sport a peruke—thus giving one for each ten prospective clients! Lawyers? There was no barrister-at-law from the Inns of Court (that distinction appears to have come with Chief Justice Belcher, called by the Middle Temple in 1734).⁷⁵ There were two attorneys: Daniel Wood and John Dupont. The latter was quite literally taken into court with his appointment as one of the first four justices of the peace. Among the rest of the early settlers there were as many as a half-dozen clerical men who might have had some training in law, not to the level of a professional qualification as attorney or solicitor, perhaps, but who at least would have been able to advise on procedural matters in the courts and, in the well-established custom of the day, would have been available to parties to do so.⁷⁶ Until there was a sufficient demand for the services of professional lawyers, especially in civil litigation, the new colony was well enough served by its lay benches and clerical advisers (learned or not).

All this seems familiar. It is. For what we observe in early Halifax is a situation and a development almost indistinguishable from early

74. Compiled from Akins, *supra*, note 2, pp. 506–557: list of settlers who came with Governor Cornwallis to Chebucto, June 1749.

75. *Register of Admissions . . . to the Middle Temple*, ed. H. Sturgess (London, 1949), p. 309. Belcher was admitted 14 March 1730 and called 24 May 1734.

76. William Nisbett, governor's clerk to Cornwallis, and Thomas Walker, who was not listed among the original arrivals but might have been in the governor's "suite" aboard H.M.S. *Sphinx*, were appointed the first notaries public in September 1750, Akins, *supra*, note 2, p. 624. Thomas Gray, Archibald Hinchelwood, and John Kerr were also governor's clerks, and Rumbold Whitehead was listed as a "clerk" in the first draft of settlers.

Boston in the 1630s. For Halifax's "governor and council" read Boston's "general court." For the former's "resolutions and proclamations" read the latter's "general orders." As the few legally trained Halifax settlers quickly moved into positions of administrative and judicial authority, so did the early lawyers in the Massachusetts Bay Colony.⁷⁷ The parallels are clear but should not be limned too finely. Some years ago that eminent Nova Scotia historian, Peter Waite, reminded the neophyte historian that "Governments do not make society so much as society makes them."⁷⁸ For well over a century before Cornwallis came to Chebucto, Massachusetts society had been hard at work making Massachusetts government. The society and the government of Massachusetts Bay in the 1630s was vastly different from that of Chebucto Bay in the 1750s. Moreover, there was little necessary cause-and-effect relationship between the Old Commonwealth and the New Province worked by virtue of the growing Massachusetts contingent in Nova Scotia or even because of the long intertwining of Massachusetts' interests and fortunes with those of Nova Scotia. Rather, there was at work in both places a century and a quarter apart the same process of sorting out legal baggage, by which much was jettisoned, and that which was not eased the ultimate process of "reception." But in the meantime, until the old-Englishman (Irishman, German, New Englander, Acadian, etc.)-become-new-Nova-Scotian was able to legislate for himself, sorting out the legal baggage was neither so frenzied nor so thorough as to deny him the Englishman's legal birthright, "as near as may be agreeable to the laws of England."

77. T. Barnes, "Law and Liberty (and Order) in Early Massachusetts," in *The English Legal System: Carryover to the Colonies* (Los Angeles, 1975), p. 63 at 78-79. The first professionally-trained (as a solicitor) practitioner in Massachusetts was Thomas Lechford, 1638-1641—and he was alone.

78. P. Waite, ed., *Canadian Historical Document Series: Pre-Confederation*, vol. 2 (Scarborough, 1965), p. xi.

