The Courts in the American Colonies

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THE ADMINISTRATION OF JUSTICE was an important aspect of the government of the colonies. The judicial organization of the individual colonies has been described in previously published studies, but never from the point of view of the British official seeking an understanding of the courts in all the colonies. When these organizations are analyzed from this point of view, a historical pattern emerges. Certain problems were common. The British Government claimed the sole power to create courts, and the early courts, except those in the charter and proprietary colonies, were created by executive action. However, after the initial settlement, the judiciary received little attention from the king, and colonial courts were left to evolve without much thought or consideration. England never tried to make the judicial system in the colonies uniform.

In seventeenth century England, different problems came within the jurisdiction of various courts. It was impossible to establish all of these courts in America, and hence, their jurisdiction had to be reassigned. Probate matters, for example, which came within the jurisdiction of the ecclesiastical courts in England, were generally handled in America by the governor. This practice was fairly uniform throughout the colonies. Other adjustments of this nature made the American courts distinctive organizations.

No separation between the functions of the executive, legislative, and judicial branches existed in the colonies, and all three branches had a role at one point in the judicial process. Individuals would hold several positions simultaneously, and distinctions between different bodies or courts were blurred. This is not surprising, for the judiciary in seventeenth century England was struggling to establish its independence and get a clearer demarcation between the different courts. This lack of clear-cut authority and the fact that a judge held several commissions made possible the combining of several courts into one. The establishment of the judicial system in the individual colonies has been the subject of several studies. The initial courts generally were established by executive action, but later the judicial system was formalized by legislation. However, some courts were created by virtue of rights arising from a grant; the grant of a large estate carried with it the

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authority to hold a court baron. These courts have generally escaped the attention of students of the judicial system. Nevertheless, these courts constituted a part of the scheme of administering justice.

Because so little attention was given to creating an adequate judicial organization, the colonists sought to pattern their courts in America after those existing in England. The instruments establishing the colonial courts often expressed their jurisdiction in terms of the courts in Westminster. In trying to follow this pattern, some colonial judges would hold sessions of their courts under a different title, such as chancery or exchequer, although the same judge would be presiding. This poses the problem of determining whether these were separate courts. In addition, the title of the same court was confusing for it was not given precisely, and the petitioners would address it differently. These factors led to the development of courts which exercised similar jurisdiction in different colonies under different titles. Regardless of these differences, many problems were common, which makes the study of the origin of the American courts possible. The following study is an attempt to solve some of these problems, and to sort out the various conflicting details.

1. British Policy

The administration of justice in the British North American colonies was a source of constant complaint to the Home Government! These petitions complained of the irregular procedure in the courts, of delays in holding sessions of the courts, and of the character and ability of the judges and other court officials. Since the courts held regular terms for so short a period when in session, the administration of justice was dilatory, and often the courts failed to sit at the appointed times.[1]

The Earl of Bellomont, writing to the Board of Trade in 1699, described the courts held by the governor and assistants in Rhode Island in these terms: "They know little law and give no direction to the jury nor sum up the evidences to them. Their proceedings are many times very arbitrary and contrary to the laws of the place, as is affirmed by the Attorneys that have sometimes practiced in their courts." One petition expressed the sentiment that "speedy injustice is less grievous than dilatory justice." [2]

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[1] 8 *Va. Mag. of Hist. & Bio.* 193; 1701 *Calendar of State Papers, American West Indies* hereinafter cited as CSPAWI, 525-526, 619, 1031; 74 *Va. Mag. of Hist. & Bio.* 162 (1966).

[2] 1699 CSPAWI 543. Washburne, *Imperial Control of the Administration of Justice in the Colonies* 22-25; Labaree, *Royal Government in America*, 382; 1700 CSPAWI, 509.

In 1704, a petitioner to the Board of Trade complained that Governor Nicholson of Virginia, in holding the General Court, used "gross and visible partiality in most cases of his friends," abused the counsel and often hectored fellow judges if they disagreed with him. Further, Governor Nicholson was accused of keeping the courts at "unseasonable hours" at night to the great dissatisfaction of all concerned. The Governor was accused of directing the sheriffs to put certain individuals who were his friends on the juries and tampering with the grand juries to get "flattering encomiums" of himself. Most serious of all, Governor Nicholson was accused of making entries in the records contrary to the opinion of the court.[3]

As late as 1722, the citizens of Charleston, South Carolina, complained of the multiplicity of courts. Their petition stated that for a population of 291 males who answered the muster for duty in the militia, fourteen courts were held annually: six sessions of the mayor's court, four sessions of the courts of common pleas and four sessions of the court of sessions.[4] Certainly, for that population, the number of courts was great, but no changes were made.

However, the colonial courts are not without defenders. One author, quoting Holdsworth, points out that the English courts of the seventeenth century were of poor quality, for this was the century of Lord Chief Justices Jeffrey and Scroggs. Holdsworth stated that "Under the last two Stuart Kings, the type of man that the crown found to be the most amenable to its wishes was the political lawyer, without principles, with a fluent tongue, and with a little knowledge of law." [5] It was urged that the colonial courts resembled the county courts and courts of quarter sessions in England more than the courts at Westminister. This may be true in fact, but the colonial courts were compared by the statutes establishing them and by writers to the courts at Westminister. The colonists expected their courts to render justice and to handle the problems arising in a competent manner, the same objectives modern society sets for its courts. There can be little argument

[3] 1704-1705 CSPAWI 92-93; Another observer stated that "practitioners . . . do not understand anything of the laws, do impose very much upon the Justices . . . who are very little skilled . . . make a great many choose to sit down loosers rather than go to Law." 19 CSPAWI item 1103.

[4] C05, 358, p. 241.

[5] 6 Holdsworth, *History of English Law* 504, quoted in 4 *Province and Court Records of Maine, the Court Records of York County Maine, Province of Massachusetts Bay*, November 1692-January 1710-ii, edited by Neal W. Allen, Jr., 1. See Edward Foss, *Biographica Juridica* 351 (1870), quoted in 1 *Amer. L. Rev.* xi.

that the procedure in the colonial courts differed in many material respects from the English Courts and that colonial legislation encouraged this development, making any comparison difficult.[6] When trained judges came to the colonies, they attempted to stem this tide and restore the practice of the courts at Westminister, but even then, they had to accommodate their aims to the reality of the colonial courts. Throughout the colonial period the courts, with few exceptions, were poorly staffed; the effects of this were felt in the organization of American courts well into the Nineteenth Century.

The government in London became concerned with the problems of the courts at the close of the seventeenth century as a result of constant complaints against the administration of justice, especially in the Barbados Islands. A paper entitled, "The Present State of Justice in the American Plantations and particularly in the Barbados with some thoughts how the same be amended," was presented to the Board of Trade in 1700, describing the procedures in the courts, their organization in that island, and some of the many defects arising mainly from the lack of qualified judges. The paper was later published in 1702 as a pamphlet.[7] Other complaints had been received by the Board of the courts in the other colonies previous to its consideration of this pamphlet which led to the steps to remedy the situation. Under date of 18 July 1700, the Council of Trade and Plantations instructed each governor to report on "the method of proceedings in the several courts upon trials of all sorts of causes in the said Courts in those parts." The reports of the governors are preserved but their contents and completeness vary.[8]

The Council of Trade and Plantations endeavored to learn more of the judicial organization in the colonies, and for this purpose, issued a circular letter under date of 16 April 1703 to the governors of Virginia, Maryland, New York, New Jersey, Massachusetts Bay, and New Hampshire requesting reports on the judicial business. The letter stated that there had been constant complaint of great delays in the proceedings of the courts in the colonies, and instructed the governors to see that justice was impartially administered and that all judges performed their duties without delay or partiality, provisions which were included in all subsequent instructions. Finally, the governors were required to send an ab-

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[6] 4 *Maine Providence and Court Records* xlix.

[7] 10 *Amer. J. Leg. Hist.* 237 (1966).

[8] 1700 CSPAWI 423, doc. 651. These reports are reprinted in 9 *Amer. J. Leg. Hist.* 69, 167, 234 (1965).

stract of all proceedings in the several courts of justice.[9] The response to this request was lists of the cases pending in the courts, the type of action and the judgment.[10] These lists for Massachusetts are especially complete, but within a few years, the practice of submitting such reports ceased, although this requirement for the governor of Massachusetts was not removed until 1730, when Belcher was commissioned.[11]

Provisions were included in the instructions to the Royal Governors of this period to send information on the organization of the courts, but later this report was included under the requirement to return a general account of the colony.[12] Among the documents of the colonial period are descriptions of the colonial courts.[13] An examination of the colonial records indicates a lessening of interest in the judiciary on the part of the Board of Trade after the second decade of the eighteenth century.

2. Beginnings of the Courts in America

The precise origins of many courts in America are difficult to determine because of their nebulous beginnings. Today, one expects to find the authorization for a court embodied in some statute, but the courts in the colonies often had their origins through some other source, later regularized by a statute. Under English law, certain grants of power from the king to his subjects carried with them the privilege to create courts, and these principles were applied in America. The charter granted to the City of Philadelphia by William Penn carried with it the power to exercise certain judicial functions within the geographical limits of the city and thus began the mayor's court of that city.

Immediately following the establishment of the colonies, the need for a regularly established judicial system was not as pressing as other problems. An exception is Georgia where the founders early provided for a court and sent the necessary robes for the judges.[14] During these early periods, controversies were settled on

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[9] 1702-1705 CSPAWI 356, sec. 578.

[10] List of several cases tried in the Courts of Massachusetts, CO5, 863, nos. 19 to 19 xvi; 1704-1705. CSPAWI 270; List of Causes Tried in Superior Court of New Hampshire, 1708, CO5, 865, doc. 30ii, 1708,/09/# CSPAWI 244.

[11] 1730 CSPAWI 60.

[12] Leonard S. Labaree, *Royal Instructions to British Colonial Governors* 1670-1776 297 (1935).

[13] An account of the several courts, and officers, in Maryland, CO5, 717, no. 51.

[14] Warren Grice, *The Georgia Bench and Bar* 19 (1931).

an ad hoc basis by the governor or leader of the settlement. Thomas Olive, Governor of West Jersey, was in the habit of dispensing justice sitting on a stump in his meadow.[15] Although there is some evidence that juries were used in criminal cases, most generally the governor acted on his own authority, or, occasionally, he associated members of his council with him; and they would act as judge and jury. The judicial activity of the governor of New Sweden is a well known story.[16]

The power to act in a judicial capacity was given to the governor under his commission or by instructions. The instructions of the Virginia Company to Sir Thomas Gates in 1610 authorized him to proceed in capital and criminal justice according to martial law. He was advised that in civil matters it was wiser to proceed as a chancellor, rather than as a judge, "upon natural right and equity than upon the niceness and letters of the law which perplex in this tender body," and to decide "all causes so that a Summary and arbitrary way of Justice descretely [sic] mingled [with] the gravities and forms of magistracy as shall in your discretion seem apt for you and the place." [17]

The next step in this evolution was the organization by the executive of some type of judicial body on a more regular basis. Very often, the governor with his council acted as a court of general jurisdiction. Justices of the peace were appointed early after settlement, the exception being the New England colonies, who exercised a judicial function similar to that exercised in England, which meant that they held courts of limited jurisdiction, and acted as committing magistrates. Thus, two different levels of courts were established, one with limited jurisdiction and the other with broader powers.[18] Throughout the history of the judiciary in the colonies, these courts held by the justices of the peace came into existence without any other legislative authority than the fact that the office was established in each county. Later legislation regularized the justice court.

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[15] Richard S. Field, *Provincial Courts in New Jersey with Sketches of the Bench and Bar* 20 (1849).

[16] Dudley Cammett Lunt, *Tales of the Delaware Bench and Bar* 3-14 (1963).

[17] 3 *Records of the Virginia Company* 15. Similar instructions given to Sir Thomas West, p. 27.

[18] See 49 *Maryland Archives* ix-x. In 1637, the Commander on Kent Island was authorized to appoint a justice of the peace to exercise with him jurisdiction of 10 shillings or less and criminal jurisdiction to the same extent as justices of the peace in England.

At the beginning of the seventeenth century, another step was taken in the evolution of the courts. The governor and his council gave up their general trial jurisdiction to a court created for this purpose consisting of a chief justice and two or more associates. After the establishment of these courts, the judicial system was formed that was to serve each colony down to the Revolution and, in some cases, for a period beyond that event.[19]

The earliest assemblies claimed to exercise judicial functions. The House of Burgesses in Virginia, at its first meeting in 1619, sentenced a servant to be whipped for making false statements against his master and degraded a captain for inferring to an Indian chief that a greater governor was coming to Virginia.[20] The first assembly in Maryland similarly conducted judicial business.[21] This trial jurisdiction was soon given up in Maryland and the general assemblies acted as appellate courts. However, before the end of the seventeenth century, the legislative bodies had, in general, given up any claim to judicial power, except in the New England colonies.

The evolution of the courts in the American Plantations is described in an interesting pamphlet presented to the Council of Trade and Plantations in 1700.[22] The author states that, during the first settlement, controversies were decided in a summary way, by some of the principal inhabitants, but as cases multiplied and were "found too intricate", courts were organized. The original procedure used in these cases was "plain and short, niceties in pleading were not understood. The Judges commonly guessed at the right side of a cause by their natural reasons, and the matters controverted were seldom so considerable, as to give a sufficient temptation to injustice." However, as suits grew more numerous and important, "small dealers in the law" came to handle these matters. They knew little, but were able to confuse the courts with their limited knowledge. At times, these attorneys solicited opinions from counsel in England which were presented to the courts. When these matters were in Latin or French, the court sought the assistance of a translator, but what authority the court considered them was not indicated. The governor and council, acting as the

[19] Herbert L. Osgood, *American Colonies in the Seventeenth Century* 277 (1930).

[20] 15 *Original Narratives of Early American History* 268, 274.

[21] Bacon, *Laws of Maryland.*

[22] 1700 OSPAWI 509. This paper is entitled, "The Present State of Justice in the American Plantation, and Particularly in Barbadoes." This paper was later published under the title "Plantation Justice 1702," and reprinted in 10 *Amer. J. Leg. Hist.* 237 (1966).

court of errors, were completely unacquainted with the law and generally proceeded on the advice of the attorney general. The author complains that proceedings were dragged out for a period of years to run up the costs, and that the courts failed to sit as often as necessary to handle the business before them. The author ends this paper with the suggestion that a chief justice be sent over from England. This suggestion was made several times during the colonial period by others.[23] The conclusion of one editor, in commenting on this author's complaints and other petitions to the council, was that he had succeeded in showing that there were causes for his complaints.[24]

The Council of Trade and Plantations received other complaints, and petitions claiming injustices at the hands of the colonial courts were plentiful. The recommendation that a trained chief justice be sent over was acted upon in several colonies. One further suggestion made to the Board was to send judges from England on assizes to the colonies, but this plan apparently was never seriously considered.[25] About all that the Council did was to admonish the royal governors to see that justice was done and to correct any abuses which came directly to their attention. This injunction was repeated throughout the eighteenth century in the instructions to the royal governors.[26] A thorough reform was never considered.

3. Characteristics of the Colonial Judicial Systems

The judicial systems of American colonies present a pattern unfamilar to the modern lawyer. The first striking feature was the lack of separation of powers between the different functions of government, a principle which is accepted today as fundamental. The general assemblies, in the initial stages of settlement, participated in the administration of justice as courts. A few such examples have previously been discussed, but probably nowhere did the legislative bodies retain such extensive control over judicial matters in the seventeenth century as in the New England colo-

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[23] Lt. Governor Bull of South Carolina again made this suggestion in 1700, CO5, 379, p. 222.

[24] 1701 CSPAWI lil.

[25] Omitted.

[26] These instructions read: "We do particularly require you to take especial care that in all courts where you are authorized to preside justice be impartially administered and that in all other courts established within our said province all judges and other persons therein concerned do likewise perform their several duties without delay or partiality." 1 Labaree, *Instructions, op. cit. supra.* Note 12, p. 289, sec. 411.

nies.[27] Here, the general court exercised an appellate jurisdiction over the trial courts until the beginning of the royal period. The General Assembly of Virginia lost its appellate jurisdiction in 1682 by an order of the king.[28] However, assemblies continued to pass special acts granting new trials or revising judgments in some colonies until the beginning of the nineteenth century.

The governor, with the council, played an important role in the administration of justice. During the entire colonial period in Virginia, they formed together the chief trial court, known as the General Court for the entire colony both in civil and criminal jurisdiction. This appears to be the only colony where this practice continued throughout the colonial period.

The judicial systems of the colonies were generally centralized; that is, the major trial court of the system held its sessions exclusively in the capital. The General Court of Virginia, which exercised a general jurisdiction, held its sessions in Williamsburg. In Maryland, the Provincial Court, whose jurisdiction was exclusive in amounts greater than 3,000 pounds of tobacco or 100 pounds sterling, held its sessions in Annapolis. In both of these colonies there were courts in the counties exercising limited jurisdiction.

In Pennsylvania, Maryland, New York, and North Carolina, the justices of the supreme courts went on circuit to hear appeals and to try a limited number of cases under their general jurisdiction. Capital offenses in all the colonies were tried in the capital, necessitating the travel of witnesses and the transportation of the accused. The circuit was not a common feature of the judicial system in the colonies.

One of the features often commented upon by observers was the fact that the court of general jurisdiction in each colony combined the jurisdiction generally exercised by different courts in England. In 1711, the Governor of New Jersey, in his description of the courts, stated that the Supreme Court of Judicature had the powers of the courts of Kings Bench, Common Pleas and Exchequer.[29] On the whole, the colonists never created the numerous courts with limited jurisdiction similar to those found in England at that period. Attempts were made to introduce courts baron, an exchequer court, and a few others, but all these attempts met with failure.

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[27] Mark DeWolfe Howe, *Readings in American Legal History* 110 (1949).

[28] Oliver Perry Chitwood, *Justice in Colonial Virginia* 19, 24 (1905); Bruce, *Institutional History of Virginia* 690. (1910).

[29] CO5, 970 doc. no. 160i.

4. Authority to Establish Courts

The power to establish courts in the beginning of the seventeenth century in England was the exclusive prerogative of the king. Lord Coke expressed the opinion in Jentleman's Case[30] that the "King may create a new court and appoint new judges in it: but after the Court is created and established, the Judges of the Court ought to determine matters in it." At another point in the case, Coke held that the king's writ could not alter the jurisdiction of the common law courts. This prerogative to create courts was definitely abolished by the Bill of Rights of 1688, but it is doubtful whether the abolition of this right extended to the colonies. Any prerogatives of the king in America were exercised through his representative, the royal governor.

The power to create courts in America may be found in several sources: first, through powers granted by the king in charters; secondly, through the exercise of the royal prerogative; thirdly, through the creation of certain subordinate governmental organizations; and fourthly, through creation by legislation. Today, it may be stated as a general principle that all courts must be created by legislation, but in the seventeenth century this doctrine was not as clear.

When the plantations in America were established, the king provided for the government of these colonies and granted the authority to establish courts in the charters to those who held these patents. Typical of the extent of this power is the grant in the Georgia Charter of 1732:

> "to erect and constitute judicatories and courts of record, other courts, to be held in the name of us, our heirs and successors for the hearing and determining of all manner of crimes, offences, pleas, processes, plaints, actions, matters, causes, and things whatsoever, arising or happening, within the said province of Georgia, or between persons of Georgia whether same be criminal or civil, and whether the said crimes be capital or not capital, and whether the said pleas be real, personal or mixed: and for awarding and making out execution thereupon; to which courts and judicatories, we do hereby, . . . grant full power of authority, from time to time, to administer oaths for the discovery of truth in any manner in controversy, or depending before them, or the solemn affirmation, to any of the persons commonly called quakers, in such manner,

[30] 6 *Rept.* 11.

as by the laws of our realm of Great Britain, the same may be administered."[31]

Similar provisions are found in all the other charters.

The details of the organization of these courts was of no concern to the king. From the above quoted section of the charter, it may be observed that no definite judicial organization was prescribed, and thus it was left to the ingenuity of the proprietor to establish the necessary courts. The English courts were taken as a model and their names adopted for courts which had little resemblance to their namesakes.

The king sought to exercise his authority during the seventeenth century through the commissions and the instructions to the royal governors, which provided them with authority to create courts with the consent of the council.[32] The Commission of 1639 to Governor Wyatt of Virginia gave him the authority, with the consent of his council, to erect inferior courts for the trial of suits up to £10. In 1679, a general authority to constitute courts was given the governor of Virginia.[33] Although the commissions continued to give the authority to establish courts, instructions were introduced in the early eighteenth century prohibiting the governors from exercising this function. To the authorities in England, there could be little doubt of the powers of the governors to establish courts, for under date of 29 June 1711, the Council of Trade and Plantations wrote Governor Hunter, then the Royal Governor of both New York and New Jersey, that if he found any difficulty in the organization of the Supreme Court, he had the power under his commission and instructions to establish courts of judicature to remedy any defects in the organization of the courts.[34] The Royal Governor of New Jersey established the courts in that colony by ordinances over the objections of the General Assembly, and the system so established survived into the nineteenth century.[35]

There are other examples of judicial systems that were established by executive action of royal governors; these courts survived throughout the colonial period and later, with minor changes

[31] 2 Francis Newton Thorpe, *American Charters, Constitutions and Organic Laws* 774 (1909).

[32] Leonard S. Labaree, *Royal Government in America* 373 (1930); 2 *New Jersey Archives* 495; Anthony Stokes, *A View of the Constitution of the British Colonies in North America* 158 (1783).

[33] Labaree, *Instructions, op. cit. supra,* note 12, p. 294.

[34] 1710-1711 CSPAWI 570.

[35] Labaree, *Government, op. cit. supra,* note 32, p. 374.

by the legislature. The first Royal Governor of Georgia was apparently the last to have broad authority to establish courts. His instructions read:

> "And you are as soon as possible after your arrival to constitute and erect such and so many courts of justice and judicature within our said colony as you shall find necessary, taking care that no greater powers be vested in our courts of justice in this kingdom and that the methods of proceeding in such courts be as near as may be agreeable to the methods and rules of proceeding of our courts here." [36]

The courts established under this power were based upon a plan developed by the attorney general and proclaimed by the governor. The system established survived until the American Revolution, with the general assembly making minor changes.

At times, the governor was forced to create a judicial system to prevent a failure of justice. In 1701, the General Assembly of Pennsylvania passed an act creating a new judicial system for the colony, but this was disallowed and the old system was re-established. The act of 1705 met a similar fate, but Governor Evans, by proclamation of 11 February 1707, established a judicial system very similar to the one provided for in this last act.[37]

The governors of the colonies felt that they had the authority to establish courts of chancery by virtue of the fact that they were entrusted with the seal of the colony. In England, the official so entrusted was the lord chancellor, through whom the courts of chancery developed. Governor Cornbury established a court of chancery in New York, which was soon to be abolished, and in 1720, Governor Keith in Pennsylvania created such a court over the opposition of the general assembly; after his death, the court lapsed and was never revived.[38]

Although the royal governors considered their instructions binding on themselves in the conduct of the government, the general assemblies refused to give any such effect to these documents, and very clearly claimed the power to legislate on matters concerning the creation of courts and their jurisdiction. In 1675, the assembly in East New Jersey established four county courts, and provided for the election of the judges. In 1682, this same assembly declared that certain recent attempts to establish courts by ordinance were infringements of the liberties of the province. In 1698, the assembly declared that it had the authority to create all courts but the

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[36] 1 Labaree, *op. cit. supra*, note 12, p. 298.

[37] *Duke of York's Laws* 305.

[38] William H. Loyd, *The Early Court of Pennsylvania* 179 (1910).

court of chancery.[39] However, their claims were not established, for they were based upon early charters. When the royal government was established in New Jersey, one of the first items of business was the establishment of the courts by an ordinance issued by the royal governor. This was not the only instance of a legislature claiming the right to establish courts during the colonial period.

A controversy took place in New Hampshire over the authority of the royal governor to establish courts. When Edward Cranfield arrived as the royal governor in 1682, the assembly claimed to have a voice in the establishment of the courts, but this power was denied that body, which confined itself to passing laws in conjunction with the council and governor enumerating crimes and other matters.[40] In 1769, Governor John Wentworth of New Hampshire used his influence to have a bill passed which divided the colony into counties and established courts in each county. This statute was approved by the privy council, and one authority argues that this conceded the privilege of establishing courts to the general assembly.[41] However, this action was merely one establishing existing types of courts in new areas, a power which does not seem to have been challenged.

The power to create courts was specifically granted to the general Court of Massachusetts in the charter of 1691, but this colony experienced similar difficulties in perfecting its judicial system, as had Pennsylvania, for several judicial acts were disallowed.[42] The point of contention was not over the broad power but over the assumed power of the general court to establish a court of chancery.

Only the colonies of Rhode Island and Connecticut enjoyed the authority to establish courts by legislative action from their founding, a power that was granted to them by their charters.

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[39] Aaron Leaming and Jacob Spicer, *Grants, Concessions and Original Constitutions of the Province of New Jersey*, 96, 97, 99, 222, 229-232, 369, 408, 448; quoted in 2 Osgood, *op. cit. supra*, note 19, pp. 291-292.

[40] Fry, *New Hampshire as a Royal Province* 435-436.

[41] Fry, *op. cit. supra*, note 40, p. 436; one authority states that after middle of eighteenth century, colonial acts creating courts were seldom disallowed but this statement overlooks the fact that many of the judicial acts disallowed previously were disapproved because of other factors, as in the case of Pennsylvania and New York. Labaree, *Government, op. cit. supra*, note 32, p. 376.

[42] Grinnell, "Bench and Bar in Colony and Provinces," in 2 A.B. Hart, *Commonweatlh History of Massachusetts*, 165-166. Labaree gives different reasons; see Labaree, *Government, op. cit. supra*, note 32, p. 376; Joseph H. Smith, *Colonial Justice in Western Massachusetts* 84 (1961).

The power to create courts was given to the general assemblies of New Jersey in the first charter, but this power was taken away when the royal government was established.[43]

The British Government sought to exercise the function of creating courts directly through an act of Parliament only once, when it established the admiralty courts in the colonies. Since there could be little doubt that these were created under an act of Parliament and were not controlled by the colonies, may in part explain the colonial hostility towards them.

The jurisdiction exercised by certain courts in England was given to the governor by his instructions. Probate matters were determined in the English ecclesiastical courts, but this power was given to the governors which in the eastern American states explains the original separate existence of these courts. In Pennsylvania, matters arising from wills were given to a special court.

From this review it is evident that, in the majority of the colonies, the initial creation of the courts was the action of the executive, but gradually the general assemblies legislated on procedures of the courts and other matters. Since the early part of the seventeenth century, the royal governors were prohibited from creating new courts and the initial system grew. No thought was given to creating a model judiciary; its growth was left to the circumstances of the times, which has had a lasting effect on our courts into the present century. Although the passage of time cured many defects, the lack of qualified judicial personnel continued to plague the administration of justice.

5. Judicial Systems in the Colonies

The courts in the American colonies were patterned after those in England, but often the American variety bore little resemblance to the English prototype. The names may have been the same, but the jurisdiction and the operation of the courts varied greatly, and hence the American variety bore little resemblance to the English courts.

When comparing judicial systems of the American colonies, one is struck with the similarities in the systems. The trial courts in the counties were presided over by justices of the peace, and the titles of the courts were similar. Generally, each colony had a trial court presided over by a Chief Justice whose jurisdiction extended

[43] New Jersey, originally two colonies—East Jersey and West Jersey—combined into one in 1702 when it became a royal colony. Concessions to West New Jersey provided that courts be established by the general assembly. Leaming and Spicer, *op. cit. supra*, note 39, p. 391.

to the entire colony and included an original jurisdiction. This court heard appeals from the lower courts.

However, the colonists were not consistent in the titles given their courts, for the records revealed significant changes in titles. For this reason, one should not conclude that a separate type of court existed because another title is found in use or is referred to by varying names in contemporary sources. Laymen and lawyers have been careless in their use of the titles of courts throughout history. When using different titles for the same body, the colonial official was trying to differentiate in the functions of that body. In South Carolina, the commission to one of the early governors authorized him, with the advice and consent of three deputies, to establish courts to determine civil and criminal causes, according to law and equity. This omnibus legal body as it is described, "is on record as resolving itself by turn into a Court of Chancery, a Court of Admiralty, an Orphans' Court, and a Court of Oyer and Terminer, according as the business in hand might require."[44] A most simple explanation for variations in titles of the same courts, was the carelessness of the clerks and legislatures.

Probably the most important courts in America were those held by the justices of the peace, whose jurisdiction was limited. Traditionally, in England, the justices of the peace had exercised criminal jurisdiction in courts of quarter sessions and some civil jurisdiction; but their most important function lay in the administration of local affairs. This office was transplanted to America, but the justices of the peace took on a wider civil jurisdiction than their counterparts in England.

In the American colonies, the justices of the peace were given jurisdiction in certain criminal and civil matters. They exercised exclusive civil jurisdiction in cases involving amounts of less than forty shillings in Massachusetts and New Jersey. This amount was rather uniform in all the colonies.

In the different counties within each colony, the number of the justices of the peace varied widely. In commissioning these offices, a distinction was made between two types, one of which was known as justices of the quorum. These justices, as well as the ones who were not so commissioned, would hold courts for civil matters, known as the courts of common pleas, and for criminal matters, known as the courts of quarter sessions. In Virginia and Maryland this last was called the county court, which exercised civil as well as criminal jurisdiction. Another popular name

[44] Anne King Gregorie, *Records of the Court of Chancery of South Carolina 1671-1779* 6 (1950).

for this court was the court of general sessions, a title used in New Jersey and Rhode Island.

In the southern and middle Atlantic colonies, the justices of the peace presided over a slave court for the trial of slaves in criminal matters.

The courts of quarter sessions had certain local administrative functions which varied greatly depending upon the colony. These courts supervised the laying out of roads, issuing of licenses to taverns and ferries, the fixing and collection of taxes, and other administrative duties.

In the early history of each colony, the governor and council exercised a jurisdiction as an initial trial court; but gradually, this function was given to a court presided over by a chief justice with several associate justices. The governor and council became the appellate court, often called the court of appeals. Only in Virginia did this evolution not take place, for there the governor and council constituted the General Court, which exercised a very broad general jurisdiction, both civil and criminal. These courts, presided over by the chief justice and associates, had different appellations in different colonies: Provincial Court in Maryland, Supreme Court in New Jersey, and Superior Court in Connecticut and North Carolina. These courts generally exercised criminal jurisdiction in all felonies, civil jurisdiction in matters exceeding a certain sum of money, and often, cases involving land disputes. These courts could hear appeals from the courts presided over by the justices of the peace. Circuit duty was not unknown to the judges in colonial America, for the judges of these central trial courts were required to hold courts in different parts of the colony. Generally, the judges associated with them were the local justices of the peace. Pennsylvania, in an act as early as 1684, required at least two of the central judges to go on circuit through the counties of the province.[45] North Carolina was divided into five districts in 1762, but this act expired in 1772.[46] However, the chief justice was not required to go to one particular district, because of its great distance from the capital. Another judge was appointed for that district.

An attempt to establish circuits in Maryland met with failure, for the general assembly there refused to enact such a law. The judges of the provincial court may have gone out on assizes, for the governor reported in 1708 that the judges had gone out on the East-

[45] John Blair Linn, ed., *Charter to William Penn and the Laws of the Province of Pennsylvania* 168, 184, 225 (1879).

[46] See 7 *N. C. Colonial Rec.* 477. This statute was enacted in 1762 and reenacted in 1767, but expired in 1772. 1 Brooks and Lefler, ed. *The Papers of Walter Clark* 508 (1948).

ern Shore twice a year and other parts of Maryland for four times a year.[47] This practice was soon suspended, but the circuit duty was established in 1723, and continued until the Revolution. The circuit duty was not a common feature of the judicial systems during the colonial period.[48]

In the royal colonies, and in several of the other colonies, appeals were taken from this court to the governor and council, known generally as the Court of Appeals. Little is known about the appellate procedure in these courts, but it can be said that it was not uniform. Generally, the case was transferred to this court by a writ of error, which confined consideration to matters of law.[49] In some instances, the court proceeded on an informal basis, weighing petitions presented to it by the parties, while in other cases attorneys appeared.

Only in Pennsylvania does it appear that the governor and council did not act as an appellate court, and did not in some measure function in a judicial capacity. William Penn, in his Frame of Government of 1701, provided that no person would be answerable in a law suit, except in a court of law. In the statutes creating the courts of that colony, appeals were authorized from the supreme court to the Privy Council in England. Since the governor and his council were the final trial court in the colony of Virginia, the next appeal was to the Privy Council in England.

These were the courts in the colony which handled the common law judicial business. Other special courts were created which had limited jurisdiction. These courts will be described in later sections.

6. Criminal Courts

In the seventeenth century a distinction existed between felonies and misdemeanors. All felonies were punished by death or a loss of a member of the body. Misdemeanors could be punished by loss of a member of the body, sitting in the pillory for a period of time or lashing on the bare back. The latter type of crime usually came under the jurisdiction of the justices of the peace in courts of quarter sessions, while felonies were tried before judges appointed by the king and holding a commission of oyer and terminer.

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[47] Bill was rejected May 14, 1701. 1701 CSPAWI 232. As late as 1707, the Governor was considering the problem of itinerant judges. 1706-1708 CSPAWI 388.

[48] Carroll Taney Bond, *Proceedings of the Maryland Court of Appeals* 1695-1729 xiv (1933); act 1723, c.23, 26 *Maryland Archives* 565.

[49] Stokes, *op. cit. supra*, note 32, p. 225. (1783).

The governor had the authority to issue writs of oyer and terminer and was directed to do so by his instructions.[50] However, permanent writs were given to judges and the governor would issue them only for special trials. A special commission, for example, was issued by the Council of New York for the trial of Col. Bayard.[51] In the eighteenth century it became customary for the judges of the chief trial court to hold their commissions permanently, and it was before these courts in the colonial capitals that felons were tried. Because of this fact, the criminal jurisdiction came to be merged with the regular jurisdiction of the trial court, and the distinction between criminal courts and civil courts was obliterated.

In Virginia, the county court was given jurisdiction over minor crimes and, for a period after their establishment, over felonies. In 1655, this latter jurisdiction was removed, for the general assembly reasoned that the grand juries in the sparsely settled counties were not as familiar with criminal law as those in English shires. Until the Revolution, all crimes involving life or member were tried in the General Court, consisting of the governor and members of his council.[52]

Pennsylvania and Delaware, like several of the other colonies, preserved the English criminal courts of quarter sessions and oyer and terminer. The latter court was held by the justices of the supreme court. The courts of quarter sessions were held by the justices of the peace[53] for the trial of minor cases. New York had a similar division of criminal jurisdiction.

Only on one occasion during the colonial period did a governor attempt to issue these commissions, to anyone other than the judges permanently commissioned. The Governor of Virginia sought to issue commissions to other than members of the council; but after they protested, the practice was dropped and never attempted again.[54]

As a general statement, it is true that no appeal was possible in a criminal case in the colonial period; and this was especially true in felonies, where the condemned was sentenced to execution. However, the governor's instructions authorized him with his council to hear appeals from the superior court in the colony. This instruction was construed to include appeals in cases where a fine

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[50] 1 Labaree, *Instructions*, *op. cit. supra*, note 12, p. 336.

[51] 1702 CSPAWI 63.

[52] 1 Hening's *Va. Stat.* 397, 476.

[53] 1 *Sm. L.* 131, and notes under the act.

[54] Chitwood, *op. cit. supra*, note 28, p. 59.

in excess of the jurisdictional amount was involved.[55] This appeal was in the nature of a writ of error, and did not reach the facts of the case.

7. Chancery Courts

The development of the chancery courts as a remedy for the strict procedures of the common law courts and the conflicts of these courts with the common law courts under Sir Edward Coke is a well known story. Since chancery courts were a well-established part of the English judicial system at the time of settlement of the American colonies, it is not surprising that such courts were established in America. What is surprising is that so few of these courts were established permanently in the colonies; and that they were established amidst political conflicts.

Equity, by the seventeenth century, was conceived as the conscience of the king and administered by the chancellor, who was the king's chief adviser and administrator. The royal governor, as the representative of the king and the keeper of the great seal of the colony, succeeded to the powers of this office. Because of this concept, the royal governors argued that they had the authority to establish chancery courts by executive action, and all but one court was begun by this method. In 1703, the attorney general in England, in considering the question of whether the General Court in Massachusetts could establish a chancery court, did not consider the matter worth much analysis in answering this question in the negative.[56] The only colonies in which courts of chancery were established and continued for any length of time were New York, New Jersey, Maryland, and South Carolina. In Maryland the first assembly attempted to establish a chancery court, but the proprietor denied its authority to initiate such legislation. In 1660, Philip Calvert was appointed governor and chancellor of the colony, but during the following year the offices were separated and Philip continued as chancellor. For the period from 1661-1669, the law courts and the chancery courts met together. Beginning in 1669, separate records for the court of chancery were kept, but the governor and chancellor continued to sit on both courts. In 1694, the judicial system of Maryland was reorganized, and a court of chancery was established without opposition; this court continued until it was abolished in the nineteenth century.[57]

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[55] 1 Labaree, *op. cit. supra*, note 12, p. 329, sec. 458.

[56] Chambers, *Opinions of Eminent Lawyers* 194; 1704/05 CSPAWI 102; CO5, 863, no. 90.

[57] "The First Century of the Court of Chancery of Maryland," in 51 *Maryland Archives* xxxiii.

Equitable powers had been exercised by the Court of Common Right in New Jersey before the government of that colony was assumed by the king. A separate chancery court was established in 1705, consisting of the governor and members of his council. Later, the royal governor claimed the right to act without the members of the council; and the court was so constituted until the Revolution. The Governor of New Jersey exercised the authority of chancellor until 1844, when a separate court with independent judges was organized. The Governor of New Jersey was the last governor in the United States to relinquish his authority as chancellor.[58]

In South Carolina, the proprietors provided that the governor, upon his arrival in the colony in 1669, would cause the election of five representatives who, together with five deputies already appointed, should serve as the provisional council. With the advice and consent of this group, the governor established such courts as became necessary. This council exercised all judicial functions including that of the court of chancery down to 1719. After the Revolution of 1719, at which time South Carolina became a royal colony, a special chancellor was appointed who could be removed only by the king. The formal structure of a chancery court was established by the Chancery Act of 1721. By virtue of this act, the governor and a majority of twelve members of the royal council held the court of chancery. After a time, this was changed to include only the majority of the members of the council residing in the colony at that time. This organization of the court of chancery in South Carolina continued until 1784, when three judges were appointed to the court.[59] The separate court of chancery was abolished in the middle of the nineteenth century.

The establishment of these courts by executive action of the governors aroused protests from the legislatures; and probably in no colony did this protestation cause as much furor as in New York. The court of chancery was first created in New York by a proclamation of the Governor issued in 1701. The legislature characterized this action as "unwarrantable, a great oppression to the subject . . . that all proceedings, . . . ought to be declared null and void."[60] The next governor believed that a need for a chancery court existed and thought he had the authority to establish such a court. In 1711, he appointed a committee of the council to make recommendations concerning the establishment of a chancery court,

[58] Field, *op. cit. supra*, note 15, pp. 46, 113. Tanner, *The Province of New Jersey* 465.

[59] Gregorie, *op. cit. supra*, note 44, pp. 5-8.

[60] 1702 CSPAWI 708.

and this committee reported that the governor had the power to create such a court. Acting on this advice, the governor issued a proclamation on October 4, 1711, appointing a court of chancery and the officials of the court.[61] The legislature argued that this was "contrary to law, without precedent, and of dangerous consequence to the liberty and property of the subject."[62] This was not the only time that the legality of the court was challenged, for in a law suit at a later date, when fraud was charged in the procuring of a land grant, an exeption was filed questioning the establishment of the court.[63] The British Government replied strongly, defending the authority of the crown to create the court.[64]

In these chancery courts, two patterns of organization evolved: one where the court was held by the governor alone, and the other where the members of the council sat with him. At least one commentator preferred the first organization, arguing that the governor could make immediate decisions acting alone.[65]

In Pennsylvania, Governor William Keith established a court of chancery in 1721, at the request of the legislature. He was assisted by six members of the provincial council. The creation of this court caused some controversy, as it was done by a proclamation of the governor, rather than by establishment by the General Assembly. Petitions against the court were presented to the General Assembly of Pennsylvania; and in January 1736, that body resolved that the court as constituted was contrary to the charter of privileges. The legislature would never pass an act giving equity power to the court; and after Sir William Keith died, the succeeding governors never attempted to re-establish a Court of Chancery in Pennsylvania.[66]

The Board of Trade and Plantations apparently never conceded the right of the legislatures to establish courts of chancery. In a letter to Henry Ellis, the Royal Governor of Georgia, the board stated that in other colonies courts of chancery had been established irregularly by local laws, but the Governor by virtue of his commission was chancellor. This power was to be exercised by him alone, unless conferred on other members of the council.[67]

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[61] CO5, 1054, p. 247.

[62] Labaree, *Government, op. cit. supra,* note 32, p. 380, 1710-1711. CSPAWI 482; 1711-1712 CSPAWI 190, 199; 1712-1714 CSPAWI 160, 167.

[63] 41 CSPAWI 453.

[64] 42 CSPAWI 52.

[65] Stokes, *op. cit. supra,* note 32, p. 194.

[66] Loyd, *op. cit. supra,* note 38, pp. 178-186.

[67] 34 *Ga. Col. Rec.* 359-360.

One observer in the colonial period, Anthony Stokes, stated that the practice of the court of chancery varied little from that of the High Court of Chancery in England. The English books of practice were used as guides in the colonies except "in a few trifling instances"[68] where variations were due to local circumstances of the colonies. The Chancery Court in the Leeward Islands, for example, established some fifty rules extracted from the books of practice of the High Court of Chancery.[69]

Whenever the governor was not a lawyer, the affairs of the court of chancery were not conducted in an orderly and predictable manner. Stokes makes mention of the fact that several of the governors were lawyers, and during their administrations the courts were conducted properly. This commentary points out that the court of chancery was difficult to conduct when done with the council. The main advantage of the governor being the sole member of the court of chancery was that he could make immediate decisions.[70]

Although courts of chancery were not popular, some sentiment existed for their creation as gaps in the jurisdiction of the common law courts became apparent. Courts of chancery in England generally exercised jurisdiction over frauds, trusts, and the correction of errors in written instruments. At least one attorney reported that the law courts considered themselves bound by the rules of law, and would give no relief in these areas. Several cases were cited where fraud had been committed, but no relief was allowed. In Pennsylvania, equity powers were given to the courts by the statutes creating them. In other colonies where no chancery court existed, this jurisdiction was gradually absorbed by the common law courts after a long period of time.[71]

8. Probate Courts

In England, matters pertaining to the administration of wills and estates were within the jurisdiction of the ecclesiastical courts. Rarely in the eighteenth century was property or land devised in a will. For this reason, the jurisdiction of the ecclesiastical courts was concerned with chattels and matters arising

[68] Stokes, *op. cit. supra*, note 32, p. 191.

[69] Stokes, *op. cit. supra*, note 32, p. 191.

[70] Stokes, *op. cit. supra*, note 32, p. 194-195.

[71] 7 *N. C. Col. Rec.* 472; Petition of Mr. Thomas Newton of Boston, 1706-1708 CSPAWI 93, CO5, 864, no. 54. Gov. Hunter in New York stated he had been "pelted" with petitions to create such courts. 1710-1711 CSPAWI 482.

from intestacy. However, by the middle of the seventeenth century the courts of chancery had taken jurisdiction of the supervision of the administration of an estate, although the ecclesiastical courts granted letters of administration. The latter courts were the sole judges of questions involving the interpretation of wills.[72]

As no ecclesiastical courts were established in the colonies, the governors of the royal colonies were authorized to assume the jurisdiction over matters arising from the administration and the probate of wills. All records were generally kept in the office of the secretary of the colony. However, by the eighteenth century, complaints were made against the centralization of this function. In 1707, a complaint was made in New Jersey that there was only one office for probating wills existing in the colony, and that was in Burlington. The address asked that the governor establish additional offices throughout the state,[73] which he did shortly thereafter. In New York, the governor established deputies in the various counties, and these courts came to be known as prerogative courts. The jurisdiction of these courts was swept away by the American Revolution, at which time new and separate courts were established.[74]

In Virginia, wills were originally proven before the General Court. In 1645,[75] this jurisdiction was transferred to the county court. The county court had the power to grant letters of administration and to pass upon appraisements, inventories and accounts. However, the commission as administrator was issued by the governor.[76]

Among colonial records, mention is often made of orphans' courts. These courts were commonly held by the justices of the peace. The prototype of this court was the orphans' court held in London, which was created for the purpose of protecting the interests of the orphans of the city. This court protected these interests by requiring the giving of security by administrators and executors. Any funds due to the orphans were paid into the court. This court supervised the apprenticing of an orphan, and could appoint a guardian for the minor.

The only colonies in which the orphans' court was formally established were Pennsylvania and Delaware, although the court

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[72] 1 Holdsworth, *A History of English Law* 625-632.

[73] Field, *op. cit. supra*, note 15, p. 66; 1706-1708 CSPAWI 782.

[74] Matter of Brick's Estate, 12 Abb. Prac. Rep. 12, 17 (N. Y., 1862).

[75] 1 Hening's *Va. Stat.* 302.

[76] 1 Philip Alexander Bruce, *Institutional History of Virginia in the Seventeenth Century* 547 (1910).

is mentioned in other colonies.[77] In 1683, the General Assembly of Pennsylvania authorized the justices of the peace to hold an orphans' court in each county of the colony. Several acts attempting to formalize the jurisdiction were passed, but these acts were disallowed. In 1713, the formal statutory basis of the court in Pennsylvania was established. Jurisdiction was given to the court in all matters of accounts of such persons who, as guardians and trustees, were entrusted with the property of orphans or persons under age. Wills were probated in the office of the register general, who was appointed by the governor and who in turn appointed deputies in each county. This office came to exercise a judicial function which was not formalized by statute until 1777. During the colonial period, the deputy register general could be associated with justices of the peace when the latter held an orphans' court.[78]

Maryland appears to be the only colony in which a separate probate court was established, known as the prerogative or commissionary general's court. This court was established in 1673, apparently by the proprietors of Maryland, although no record can be found to substantiate this supposition. This court continued in existence until the time of the Revolution, when it was regulated by statute. The records of this court still exist.[79]

During the Revolution, the control over probate courts was assumed by the assemblies, which put them on a more regular basis. Rarely were these courts made courts of record; and, when they were, the higher courts tended to disregard this fact.[80]

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[77] Webb, *The Office and Authority of a Justice of the Peace* 108 (1736).

[78] Loyd, *op. cit. supra*, note 38, pp. 217-236.

[79] 49 *Maryland Archives* xv.

[80] This was true in Pennsylvania. See *Marriott v. Davey*, 1 Dallas 164 (Pa. 1786).