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LAW-MAKING AND LEGISLATIVE PRECEDENT IN AMERICAN LEGAL HISTORY

IN COMMEMORATION OF THE 300TH ANNIVERSARY OF THE BOOK OF THE GENERAL LAWS AND LIBERTIES OF MASSACHUSETTS (1648)

BY STEFAN A. RIESENFELD*

I.

THE IMPORTANCE OF LEGISLATIVE PRECEDENT IN THE DEVELOPMENT OF AMERICAN LAW

It is a regrettable though explainable fact that no comprehensive History of American Law has as yet been written. Until recently the time had probably not been ripe for such a task, particularly because our knowledge of the law in colonial times was so scanty. But meanwhile the stream of publications of colonial records and documents by the several states and the multitude of local historical societies has furnished the necessary evidence, and

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1. This was the opinion of the great historian Herbert Osgood regarding the situation in his time. He wrote in 1904. "The time has not yet come when a thorough comparative study can be made of the judicial institutions of the American colonies. The sources, at best, for the seventeenth century are fragmentary. They are also not easily accessible. A knowledge of contemporary judicial institutions and legal procedure in England, such as is scarcely yet possessed by anyone, is a prerequisite for the undertaking. But when the conditions shall be ripe a rich harvest awaits the legal historian who shall attempt thoroughly to investigate the history of the introduction of English law into the American colonies." 1 Osgood, The American Colonies in the 17th Century 182 footnote (1904).

2. The colonial records of New Plymouth, Massachusetts Bay, Connecticut, New Haven, Rhode Island, Maryland, and other colonies as well as of the most important towns located therein have been published during the second half of the last and at the beginning of the present century. A number of early court records for Virginia, Massachusetts, Maine, Maryland, Connecticut, Delaware, New Jersey, New York, and Pennsylvania have been made accessible in print either in extenso or in excerpt during the present century by various learned societies.
valuable monographs and books concerning various phases of colonial legal practice and thought have appeared. Thus, a comprehensive treatise now seems both possible and desirable.

The present paper has a much more modest aim and is devoted merely to one particular factor which has been of fundamental importance in, and influence upon, the growth of the American legal system, viz., the effect of legislative precedent. It should be of equal interest to the student of the law-making process as an essential function in present day society, the scholar who is interested in law as a continuously developing social phenomenon, and the practitioner who is confronted with the application of specific statutory provisions.

Professor Horack appears to have been the first author who has called attention to the fact that the weight of precedent is just as common and important in the field of legislation as it is in the realm of judicial law-making. The reader—if he is not repelled by the faulty Latin term of “Stare de Statute” (1) and is willing to overlook such little slips as citing a Massachusetts Act of 1798 as evidence of colonial law—will find valuable material in support of a highly significant and original thesis.

The weight of legislative precedent is, of course, superficially but not incorrectly explained by the fact that draftsmen of legal instruments, be they judgments, pleadings, documents embodying party transactions, or statutes, have an innate tendency to lean on proven models. The result is a unifying trend among the statutes of the various American jurisdictions and generally, though not always, the spread of forward-looking policies after successful experimentation in pioneer states.

While the mere age or wide acceptance of a particular statutory rule is not decisive for either its validity or its meaning, these properties do constitute socially and legally significant features in


5. For a more detailed development of these ideas, see Horack, supra note 4.
determining the applicability of a provision. At least the broad language of the Supreme Court in *Edwards v. California,* if not the result of that case, might have been affected had Justice Byrnes, instead of relying on a questionable assertion of the Harvard Law Review, taken cognizance of the fact that provisions against the “passing on” and “dumping” of indigents are as old as the Constitution and had spread from Massachusetts into the surrounding states and thence all over the continent.

The primary purpose of the present study is to establish that the phenomenon of legislative precedent throughout the history of American Law has had a much greater importance than one would be inclined to think on first impression. Statutes form the great bulk of today’s American law. But this is not a comparatively recent development. The *lex scripta* has always been of much greater importance on this side of the Atlantic than has ordinarily been conceded. This holds true even for the early colonial days. In fact, it applies as well to the mother country, if we take

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6. An admirable collection of materials bearing on the various elements involved in the judicial handling of statutes is Read and MacDonald, *Cases and Other Materials on Legislation* (1948).
7. 314 U. S. 160 (1941).
8. 53 Harv. L. Rev. 1031 (1940).
10. Of course, accurate scholars such as Professor Bordwell never misconceived the situation, as his remarks in *Experimentation and Continuity in Legal Education*, 23 Iowa L. Rev. 297, 301 (1938), clearly show.
account of the charters and by-laws of boroughs and guilds which controlled the life of the average artisan and worker since the sixteenth century Mercantilism, religious intolerance, and moral prudery spun a web of rules which enmeshed the "free" Englishman of that epoch.

The force of tradition and the weight of precedent were of decisive effect on the character of the early colonial "codes" as well as on draftsmanship and content of later statutes. Law-makers believed in its salutary nature to the extent that, for instance, the Ordinance for the Territory Northwest of the River Ohio expressly prescribed the adoption of statutes in force in the original states.12

Although the specific aspects of the phenomenon have changed somewhat in different periods, the basic pattern was set in the early colonial times. We will follow it through the various periods with special emphasis upon the formative days.

The special occasion for writing this study is the three hundredth anniversary of The Book of the General Laws and Libertyes Concerning The Inhabitants of the Massachusets of 1648. This great code, the authentic text of which was rediscovered and reprinted only in 1929,13 was the first painstaking law revision on this side of the Atlantic. While most of its content today appears to be quaint and only of historical interest, it by no means deserves to be forgotten. Its influence on the law of surrounding colonies was tremendous, as we can fully appreciate only today. In fact many of its provisions were carried into the various colonial codes of later days, and its content determined noticeably the path of early American law 14 Thus the Massachusetts code became truly a legislative precedent par excellence. But most of all it is memorable because it recognized and enshrined, in an early stage, a number of the civil liberties which have come to be considered the necessary and priceless pillars of a free society


12. Ordinance for the Government of the Territory of the U. S. Northwest of the River Ohio, 1787, 1 U. S. Stats. 1789-1799, 50. The term "original" was later conveniently interpreted as "existing," Williams v. Bank of Michigan, 7 Wend. (N.Y.) 539, 552 (1831).


14. For details see infra p. ....
II.
THE EARLY COLONIAL PERIOD

1.
The General Characteristics of Early Colonial Law and Contemporaneous English Problems

The character of colonial law has been the subject of much misinterpretation and confusion.\(^5\) The causes, of course, are on the one hand the failure to distinguish between various stages of the evolution and on the other hand the inclination of certain authors to make sweeping, one-sided and unsubstantiated generalizations coupled with a lack of knowledge of English legal practice and problems of the identical period.

In so far as generalizations are permissible, it may be said that the early colonial law, particularly in New England, was characterized by four basic, and sometimes conflicting, factors:

1) the English background and institutional traditions of the colonists (viz., the so-called national heritage).
2) the specific limitations on the law-making powers in the charters.
3) the tenets as to government held by the Separatist and Puritan creeds.
4) the exigencies produced by a colonial, and comparatively primitive, society and the aversion to remnants of feudalism.

1) The national background and traditions of the colonists gave the legal systems in the colonies a distinct English character. This does not mean that the common law was applicable “in toto” and “proprio vigore.” English law of this period did not consist solely of the law administered in the great law courts at Westminster and of the statutes of the realm, but a substantial portion of it was local law,\(^6\) i.e., rules contained in the borough charters and the by-laws (customals) made thereunder, practices of the borough and leet courts and orders issued by the justices of the peace, particularly in the Quarter Sessions.\(^7\)

\(^{15}\) For a survey of the different theses propounded see Reuschlein, \textit{op. cit. supra} note 3.

\(^{16}\) See Goebel, \textit{op. cit. supra} note 3. This brilliant and painstaking essay is invaluable to an understanding of early colonial law and practically disposes of the subject.

\(^{17}\) Fortunately a great number of the existing contemporary Quarter Sessions Reports are now in print. See the list by Kimball, A Bibliography of the Printed Records of the Justices of the Peace for Counties, 6 U. of Toronto L. J. 401 (1946).
The famous charter of the Massachusetts Bay Colony itself was nothing but a slight adaptation of the contemporary corporate charters of the English boroughs. Thus the celebrated clause in the grant to make laws which required that they be “not contrary to the laws of England” was not only in conformity with traditional Tudor practice initiated in 1555 for charters to merchant adventurers operating abroad, as Goebel and Naughton have pointed out, but had its counterpart in identical limitations placed on the powers of incorporated municipalities to make by-laws.

“Assistants” on either side of the ocean were not infrequently charged with the functions of justices of the peace, and the transactions before the colonial magistrates and in the town records read like pages from the contemporary English Quarter Sessions and Court Leet records. For instance, the requirement of formal admission of freemen or even inhabitants, the prohibitions against inmates, the practice of “warming out” undesirable newcomers, particularly if they caused an apprehension of needing public relief, and the settling of unsettled poor existed in similar fashion on both sides of the Atlantic, long before the English statute of 1662 con-

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18. It is revealing to compare the charter issued to the Governor and Company of the Massachusetts Bay in 1629, 1 Records of the Governor and Company of the Mass. Bay 3 (ed. by Shurtleff, 1853), with contemporary corporate charters of English boroughs, for instance, the corporate charter for the borough of Dorchester of 1629, Municipal Records of the Borough of Dorchester 56 (ed. by Mayo, 1908) On the incorporation of boroughs, see Weinbaum, The Incorporation of Boroughs (1937), and Review by Plucknett, 53 L. Q. Rev. 426 (1937)

19. The clause of the Massachusetts charter reads “That it shall and may be lawful to and for the Governor or Deputy Governor and such of the Assistants and Freemen of the said Company for the time being as shall be assembled in any of their general courts aforesaid from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions not contrary to the laws of this our realm of England.” 1 Mass. Bay Recs., cit. supra note 18, 16.

20. See Goebel and Naughton, op. cit. supra note 3, 3 footnote 10.

21. The pertinent portion of the Dorchester charter reads “Habeant and habebunt plenam potestatem et authoritatem condendi et constitucendi, ordinandi, faciendi et stabiliendi de tempore in tempus huusmodi leges statuta et ordinaciones racionabies quaecumque quae eis bona, salubria, utilia, honesta et necessaria suta eorum sanas discreciones fore videbuntur pro bono regnum. Ita tamen quod leges statuta, ordinaciones non sint repugnancia nec contraria legibus, statutis, consuetudinibus sive nuribus Regni nostri Angliae.

22. The magistrates of the Massachusetts Bay Colony who were first installed as justices of the peace with the customary powers of those in England were the Governor, the Deputy Governor, and the Assistants Saltonstall, Endicott, Ludlow, and Johnson, 1 Mass. Bay Recs., cit. supra note 18, 74. For New Plymouth, see references by Goebel, op. cit. supra note 3, 434 footnote 32.

23. The same conclusion was first reached by Goebel, op. cit. supra note 3, 420, 435, 436 and footnote.
cerning settlement and removal codified and regulated some portions of the matter.24

The emphasis on "liberties," which we will discuss later, is, of course, particularly characteristic of the English tradition dating back to the Magna Carta.25

2) The second factor determining the character of early colonial law was the charter provisions prohibiting the establishment of laws contrary to the laws of England.26 This clause resulted in real apprehensions and controversies in the Massachusetts Bay. When the freemen of that Colony in 1635 desired the preparation of a "body of laws," the magistrates and the elders were hesitant about it, alleging, among other excuses, that such a code might violate the charter, while the establishment of customs would not. Governor Winthrop stated this view as follows:

"It would professedly transgress the limits of our charter, which provide, we shall make no laws repugnant to the laws of England, and that we were assured we must do. But to raise up laws by practice and custom had been no transgression, as in our church discipline, and in matters of marriage, to make a law, that marriage should not be solemnized by ministers, is repugnant to the laws of England; but to bring it to custom by practice for the magistrates to perform it, is no law made repugnant, etc."27

The question became particularly pressing in 1646 during the famous controversy raised by Vassall and Dr. Child.28 They ob-

24. For a detailed substantiation of this statement based on contemporary borough and Quarter Sessions records in England and on the various orders of the general courts, special courts and town records of the colonies, see my forthcoming study, "Public Assistance in the American Colonies." For early examples of regulations in the colonies concerning these subjects, see the rules against inmates (1636), against the harboring of strangers (1637, 1638), and the authorization of the court of assistants to make settlement orders (1639) in the Massachusetts Bay Colony, 1 Mass. Bay Recs., cit. supra note 18, 186, 196, 241, 264, the rule against separate households by unmarried young men in Connecticut (1636), 1 Public Records of the Colony of Connecticut 8 (ed. by Trumbull, 1850), the rules for the admission of inhabitants (1636) and the settlement and relief of the poor (1642) of New Plymouth, 11 Records of the Colony of New Plymouth 26, 40 (ed. by Pulsifer 1860).

25. See Radin, The Myth of Magna Carta, 60 Harv. L. Rev. 1060 (1947), Thompson, Magna Carta, Its Role in the Making of the English Constitution, 1300-1624 (1948). Of course, the coveted "liberties" of the English boroughs were also kindred documents.

26. For a list of these clauses in the American colonial charters, see Goebel, op. cit. supra note 3, 416 footnote 1.


jected that the form of government of Massachusetts and New Plymouth abridged their liberties as freeborn subjects of England. They were promptly proceeded against in the general court, which resolved to publish a declaration showing the consistency of the Massachusetts laws with the laws of England. The text of this declaration is preserved.

3) Of singular effect upon the early stages of colonial law was the religious background of the settlers. In this respect Goebel, Morris, Osgood, and Wright have furnished invaluable data and material pertaining to many phases of the early colonial institutions. Without minimizing the great contributions of these authors, it can be said, however, that a comprehensive evaluation and analysis of the interplay between religio-political thought and actual practice at that stage is still lacking.

Of course, there existed many divergencies among the different jurisdictions and generalizations are extremely hazardous. Still, it seems to be permissible to state that Calvinist notions were preponderant in all of New England, including even Rhode Island, which was most advanced in matters of freedom of conscience. In New Plymouth, to be sure, a substantial portion of the original immigrants had belonged to the church in Leyden, which held the views shaped by the separatist or quasi-separatist teachings of R. Browne, H. Barrow and, above all, J. Robinson, their pastor. But none of these ministers had come to America, and those who finally were secured by the churches belonged to the Puritan wing. In Massachusetts Bay the clergy, particularly the influential Cotton, built upon the foundation laid by Cartwright and Fenner.

29. 2 Winthrop, op. cit. supra note 27, 351. Of course, this view reveals not only the concern about the charter powers, but also the traditional prejudice against written laws prevailing in men trained in the common law, as Winthrop was, cf. infra note 134.


32. The impact of Separatist doctrine of early New Plymouth law is treated splendidly by Goebel, op. cit. supra note 3, where an abundance of references is given.

33. Revealing is the chapter on "Minister Troubles" in Willison, Saints and Strangers 343 ff. (1940).

34. An excellent account of the work of Fenner and Cartwright is given by Pearson, Thomas Cartwright and Elizabethan Puritanism 1535-1603 (1925). About Cartwright's influence on Cotton, see id. at 417
The same held true in the daughter colonies of New Haven and Connecticut, although Hooker in Hartford practiced much more liberal and democratic views on the relation between church and state than were applied in New Haven by Davenport, the friend and disciple of Cotton. 35

Since the Bay Colony assumed the role of a pioneer in legislation among the New England settlements, the impact of Puritan thought on its legal system is of particular interest. One of the essential tenets of English and American Puritanism was the binding force of the Law of God as revealed in the Scriptures. It was not so much this principle itself but rather the extent to which it was carried which constituted the characteristic and troublesome features. Calvin in his Institution of the Christian Religion had expounded the doctrine that the laws of Moses consisted of three groups of concepts: moral laws, judicial laws, and ceremonial laws. 36 Fenner and Cartwright followed this tripartition, but they went beyond the somewhat vague and more moderate statements of Calvin by asserting that the judicial laws of Moses had never been effectively abrogated by Christ. 37 It was this view which had brought them under suspicion of revolutionary tendencies and which was used in their persecution under Whitgift. In the summary of the latter's charges against Puritanism in 1590, it was explicitly stated with references to Cartwright's and Fenner's tracts:

"Lastly, They abrogate or change the greatest part of the laws of the land; and namely, for example's sake, . . . by urging, of necessity, the judicial law of Moses, for penalty of death upon blasphemers, disobedient to parents or that curse them, and such like. For they hold that no prince or law may spare the life of any such persons. By teaching that Ministers should be judges juris, what is law in all matters; and civil magistrates judges only of the fact." 38

John Cotton was the staunch supporter of these doctrines in the colonies. We still possess a manuscript by him on the question, "How Far Moses Judiciales Bind Massachusetts." 39

35. On Hooker, see Walker, Thomas Hooker (1891), and Archibald Thomas Hooker, 4 Connecticut Tercentenary Pamphlet Series (1933), on Davenport, see Dexter, Life and Writings of John Davenport, 2 New Haven Hist. Soc. Papers, 205 ff. (1875). On the influence of Cotton on Davenport, see Calder, John Cotton and the New Haven Colony, 3 New England Qu. 82 (1930).

36. 2 Calvin, Opera Omnia, Institutions Christianae Religionis Libr. 4, bk. 4, cap. 20, 14 ff (ed. by Baum, Cunitz, Reuss 1864).

37. See Pearson, op. cit. supra note 34, 90, with references.


ton divided the judicials into temporary and perpetual laws. The latter, and only the latter were binding on Massachusetts, but he was careful to explain,

"By this I mean not only those which are literally expressed, but also all such necessary consequences and deductions that may be justly drawn from them."\(^{40}\)

Cotton's interpretations of the scriptures and views on their binding force led him—as they had his Master Calvin—to a strong support of an aristocratic and theocratic form of government. He expressed his adverseness to democratic ideas in his famous letter to Lord Say and Sele\(^{41}\) and acted accordingly by insistence on church membership as a prerequisite of political rights,\(^{12}\) the advocacy of the short-lived council for life,\(^{43}\) his exaltation of the position of the magistrates,\(^{44}\) and his attitude at the beginning of the "negative vote" controversy.\(^{45}\)

\(^{40}\) *Id.* at 281. Of course this view permitted a reconciliation of the statement that the Lord is the Law-giver (Isa. 33.22) with the practical needs for legislation, considered to lay down special means leading to special ends for the purpose of perfect guidance (*id.* at 283, 284). This view was repeated in the introductory epistle to the Laws and Liberties of 1648 (ed. by Farrand 1929) A2 and (in essence) by Aspinwall in his introductory note to his edition of 1655 of the famous Cotton Code, see infra note 107. See also Morris, Studies, *cit.* supra note 3, 34.

\(^{41}\) Printed in Hutchinson, *op. cit.* supra note 28, 496, 498.

\(^{42}\) The statute to this effect was enacted in 1631 before Cotton's arrival. Cotton defended it in the letter to Lord Say and Sele, *cit.* supra note 41, and inserted a similar rule in his famous draft Code, *infra* note 107, Chap. II, sec. 1. The principle was also defended in the famous Discourse About Civil Government in a New Plantation Whose Design Is Religion (1663), the authorship of which was ascribed to Davenport by Cotton Mather and by practically all subsequent writers upon his authority, but which recently has been claimed for Cotton in accord with the title page by Calder, *op. cit.* supra note 35, 88 footnote 17.


\(^{45}\) The "negative vote" was the power of the Massachusetts magistrates to prevent legislation, if the majority failed to concur. In 1634 the freemen were granted the right to be represented by deputies in all general courts except courts of election, 1 Mass. Bay Recs., *cit.* supra note 18, 118. In 1635 it was provided that no law or order should be made without the assent of the greater part of the magistrates and of the greater part of the deputies, *id.* at 170. In 1644, after long agitation, it was provided that magistrates and deputies should sit separately, 2 *id.* at 58. The attacks against the negative vote were first raised on the occasion of the vote on Hooker's removal to Connecticut, 1 Winthrop, *op. cit.* supra note 27, 168. These objections led to the censure of Isaac Stoughton, 1 Mass. Bay Recs., 135, 136, and 1 Winthrop, *op. cit.*, 185. The question flared up again on the
His ideas were shared by Nathaniel Ward, another influential clergyman, and, above all, by Governor Winthrop. Saltonstall and, even more, Richard Bellingham were the only magistrates championing people's rights. As Winthrop related reproachingly, they "took part with the deputes against the other ten magistrates about their power, and in other cases where any difference was."  

Governor Winthrop's views are particularly important for an understanding of the intellectual background and the color of Massachusetts law. He labored assiduously to bring within a common denominator the prescripts of the Scriptures, the mandates of the charter, and the traditional liberties of Englishmen and to cast them into one mold. The best evidences for both his ideas and techniques are his two famous pamphlets, Defense of the Negative Vote and Discourse on Arbitrary Government.

The first work was a reply to an answer which one magistrate (Bellingham?) had written to a discourse by another magistrate in justification of the negative vote. Winthrop propounded the theses that the negative vote was directly established by the charter and an act of 1634 (1635?) and was unalterable because of its fundamental nature. The reasoning in that latter respect is characteristic:

"That which makes a specifical difference between one form occasion of Mrs. Sherman's celebrated "sow business" and led to much agita-

46. Ward disclaimed expressly, in his reputed letter to the Westminster Assembly (1645), to be "of a democratical spirit," Dean, A Memoir of the Rev. Nathaniel Ward 201 (1868), and expressed concern in 1640 about the right of the freemen to vote on his draft of the Body of Liberties, 4 Winthrop Papers, cit. supra note 45, 162.

47. 2 Winthrop, op. cit. supra note 27, 228. Richard Saltonstall attacked the "standing council" in a pamphlet, but after lengthy proceedings finally gave in, see 2 Mass. Bay Recs., cit. supra note 18, 5, 20, 21., 2 Winthrop, op. cit. supra note 27, 77, 107, 139, 4 Winthrop Papers, cit. supra note 45, 347, 4 New England Qu. 68 (1931). Bellingham opposed the negative vote, 2 id. at 139, refused to give in, id. at 228, sided with Saltonstall, id. at 257, stood for freedom of expression and petition in the contempt proceedings against Hubbert, 2 id. at 313, and (together with Saltonstall) in the proceedings against Dr. Child, 2 id. at 356. No wonder that Winthrop, who had many quarrels with him, see 1 id. at 385, was prompted to make the nasty comment on Bellingham's threat to resign in 1641, viz., that "no man desired to keep him," 2 id. at 66.

48. 4 Winthrop Papers, cit. supra note 45, 380.
49. Id. at 468 ff.
50. 2 Winthrop, op. cit. supra note 27, 142, 143, see also supra note 45.
of government and another, is essential and fundamental. If the negative vote were taken away our government would be a mere democracy whereas now it is mixed. If we should change from a mixed aristocracy to a mere democracy first we should have no warrant in scripture for it there was no such government in Israel. Secondly we should hereby voluntarily abase ourselves and deprive ourselves of that dignity which the providence of God has put upon us. It is well proved and concluded by a late judicious writer in a book newly come over, entitled An Answer to Dr. Fern that although all laws that are superstructive, may be altered by the representative body of the commonwealth yet they have not power to alter anything which is fundamental.

The Discourse on Arbitrary Government was composed in reply to the demands by the deputies that the penalties for all crimes should be specified by statute and that the magistrates should be deprived of their power to inflict punishments according to their judgment. Charges against this practice had been made in 1641 and were repeated with increased insistence in 1644. Hooker, incidentally, had disapproved of this method as early as 1638. Winthrop wrote the "small treatise" to uphold the power of the magistrates. Again his argumentation is based on the mixed nature of the government and its accordance with the scriptural authorities.

"It appears [from a statute of 1636] that the officers of this body politic have a rule to walk by, in all their administrations, which rule is the Word of God, and such conclusions and deductions, as are or shall be regularly drawn from thence. The Fundamentals which God gave to the Commonwealth of Israel were sufficient to them to guide all their affairs. We having the same with all the additions, explanations and deductions which have followed, it is not possible, we should want a rule in any case, if God give wisdom to discern it. I would know by what rule we may take upon us to prescribe penalties where God prescribes none. The determination of law belongs properly to God. He is the only law-giver. But he has given power and gifts to men to interpret his laws, and this belongs principally to the highest authority in a commonwealth and subordinately to other magistrates and judges according to their several places. The law is

51. From the Catalogue of Printed Books of the British Museum it may be surmised that Dr. Ferne's book was his The Resolving of Conscience Upon This Question Whether Subjects May Take Arms and Resist (1642) and that the Answer which the governor read was either Burrough's A Brief Answer to Dr. Ferne's Book (1643) or Herle's, An Answer to Misled Dr. Ferne (1642) or his A Fuller Answer to a Treatise Written by Dr. Ferne (1642) None of the pamphlets was accessible to the author.
52. 4 Winthrop Papers, cit. supra note 45, 382, 383, 391.
54. See the letter from Hooker to Winthrop, 4 Winthrop Papers, cit. supra note 45, 75 ff.
always the same and not changeable by any circumstances of aggravation, or extenuation as the penalty is."

Similar words occur in the introductory "epistle" to the Laws and Liberties of 1648, which in a certain sense denotes the close of an era, marked by the deaths, in rapid succession, of Hooker, Winthrop and Cotton.

Not only did the teaching of the Puritans constitute the intellectual background of New England law, but the scriptures themselves were followed, particularly in matters of capital offenses. After some individual legislation which, as in the case of the punishment for adultery, gave rise to doubts about its validity, a catalogue of capital laws was enacted in 1641 and with some additions printed in 1643. Connecticut copied these laws verbatim in 1642 but omitted three of them (manslaughter in anger or passion, carnal copulation with female children, and rape of single women).

2. Trend Toward an Expansion and Legal Guaranty of Civil Liberties

While the idea that the scriptural precepts were binding impressed the colonial administration of justice with a character of

55. Id. at 468, 472, 473, 480. The argument contained also a touch of Aquinas in the reason: "It is an error as to conceive laws, as if they were not perfect without penalties annexed. . . . Law was created with and in man, and so is natural to him, but penalty is positive and accidental." Id. at 478, quoting an extract from Aquinas. The deputies considered the treatise "defective, pernicious and dangerous," id. at 483.

56. The first capital law against adultery was made in 1631, 1 Mass. Bay Recs., cit. supra note 18, 92, but in 1638 in the cases of Hathaway, Allen and Scale the court refused to apply it, doubting its publication, 1 id. at 225, 1 Winthrop, op. cit. supra note 27, 309. It was published again, but acts committed before the publication were not punished according to it 2 id. at 17. In 1640 it was re-enacted, 1 Mass. Bay Recs. 301.

57. Capital punishment was imposed upon idolatry, witchcraft, blasphemy, murder, manslaughter, killing through guile, bestiality, sodomy, adultery, man-stealing, perjury and treason.

58. The additions prompted by the rape of seven year old girl by a boy and the abuse of two small girls by three men, Matter of Fairfield, Davis and Hudson, 2 Winthrop, op. cit. supra note 27, 45, 54; 2 Mass. Bay Recs., cit. supra note 18, 12. The new laws imposed death penalty on the abuse of girls under 10 years of age, rape of married or engaged women and as maximum penalty on the rape of single women, 2 id. at 21.


60. 1 Conn. Recs., cit. supra note 24, 77
great severity, the influence of Puritan thought and political experience also made for the legal recognition of certain civil liberties which at that time in England still formed the object of controversies and uncertainties.

The freemen of the Massachusetts Bay Colony, in particular, not only wrested ever increasing political rights from their reluctant magistrates but also succeeded in the legal recognition of certain personal guaranties which then, as today, were conceived and designated as "civil liberties." These guaranties were first incorporated in the celebrated Ward Code of 1641, which was a forerunner of the code of 1648, and subsequently in the Book of Laws and Liberties itself. These civil rights went, in some respects, noticeably beyond the traditional liberties of the Englishman. Particularly worth mentioning among them appear to be the following:

The right of every person in the colony to the enjoyment of the same justice and law, the freedom of removal from the colony, unless curtailed by special legal impediments, the privilege against double jeopardy, the prohibition of torture for the purpose of compelling a man to confess any crime against himself, the requirement of testimony by two or three witnesses, or its equivalent, for capital punishment.

These privileges, of course, were by no means innovations. They had formed part of the political thought of the West for centuries. In fact, some of them had long enjoyed comparatively general and

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61. The term "civil liberties," for instance, was used and defined by Governor Winthrop in his contemporary History of New England, op. cit. supra note 27, 104 and 280.
62. See infra p. 123.
63. Ward Code, Liberty 2, Book of Laws and Liberties, op. cit. supra note 13, 35, sub voce Justice: "Every person within this jurisdiction, whether inhabitant or foreigner, shall enjoy the same Justice and law, that is general for the plantation, which we constitute and execute one towards another without partiality or delay."
64. Ward Code, Liberty 17, Book of Laws and Liberties, op. cit. supra note 13, 35, sub voce Liberties Common: "Every man of or within this jurisdiction shall have free liberty, notwithstanding any civil power, to remove both himself, and his family at their pleasure out of the same, provided there be no legal impediment to the contrary."
65. Ward Code, Liberty 42, Book of Laws and Liberties, op. cit. supra note 13, 46 sub voce Punishment: "No man shall be twice sentenced by civil justice for one and the same crime, offense, or trespass."
66. Ward Code, Liberty 45, Book of Laws and Liberties, op. cit. supra note 13, 50, sub voce Torture. "No man shall be forced by torture to confess any crime against himself nor any other unless it be in some capital case, where he is first fully convicted by clear and sufficient evidence to be guilty."
67. Ward Code, Liberty 47, Book of Laws and Liberties, op. cit. supra note 13, 54, sub voce Witnesses. "No man shall be put to death without the testimony of two or three witnesses or that which is equivalent thereunto."
undisturbed legal recognition. Thus the privilege against double jeopardy reaches back to the days of classical Roman and early Canon Law.68 But others of them had been the object of encroachment, struggle and uncertainty in England and had even been the object of early colonial controversies or discussions.

For instance, the freedom of removal had been involved in the difficulties of Hooker to secure the approval of the General Court for his removal from the Bay Colony to Connecticut.69 The privilege against self-incrimination and the required number of witnesses had formed the object of an intercolonial consultation requested by Governor Bellingham in 1641. The occasion was rather disturbing. The mounting instances of sexual offenses, especially bestiality,70 but also sodomy,71 rape of children72 and other reprehensible practices,73 created a problem of obtaining appropriate evidence. The abuse of two small children prompted the governor of the Bay Colony to write to the governors of New Plymouth, Connecticut, and New Haven asking them to solicit the advice of the elders of their churches on three questions. The first dealt with the definition of sodomy. The other two, dealing with the problem of proof, were phrased as follows:

“How far a magistrate may extract a confession from a delinquent to accuse himself, seeing Nemo tenetur prodere seipsum.”

“In what cases of capital crimes, one witness with other circumstances shall be sufficient to convict; or is there no conviction without two witnesses?”74

68. See Levy, Pauli Sententiae, A Palingenesia of the Opening Titles as a Specimen of Research in West Roman Vulgar Law, 125 ff. (1945), with references to Roman law sources, and Corpus Juris Canonici, Decretals of Gregor 9, (ed. by Friedberg, 1881) Book 5, Title 1, ch. 6: “An accusation cannot be repeated with regard to the crimes for which the accused has been acquitted.”

69. For an account of this episode, see 1 Winthrop, op. cit. supra note 27, 166 ff.

70. For instances, see: In New Plymouth the case of Granger, 2 Records of the Colony of New Plymouth 44 (ed. by Shurtleff, 1855), Bradford, Of Plymouth Plantation 474 (Commonwealth ed. 1901), in the Mass. Bay Colony the case of Hatchett, 1 Mass. Bay Recs., cit. supra note 18, 344, 2 Winthrop, op. cit. supra note 27, 58, or the anonymous case related in id. at 26; in New Haven the case of Spencer and the one eyed pig, id. at 73, 1 Records of the Colony and Plantation of New Haven 62 ff., 72 (ed. by Hoadly 1857). He was executed because, by the fundamental agreements of 1639, the judicial law of Moses governed all New Haven proceedings. Id. at 69. In 1644 “the judicial laws of God, as they were delivered to Moses,” were expressly made applicable to all offenders, “till they be branched out into particulars hereafter.” Id. at 130.


72. Matter of Fairfield, Davis and Hudson, cit. supra note 58.

73. Matter of Plain, 2 Winthrop, op. cit. supra note 27, 324.

74. The questions are quoted in letters of reply by the Revs. Reynor and Chancy, printed in Bradford, op. cit. supra note 70, 463, 467
Governor Winthrop has furnished us with a summary of the replies given, and Governor Bradford of New Plymouth preserved in full the answers of three clergymen in his colony.

The fact that Governor Bellingham asked the two last questions is probably much more of interest than the verbose and muddled replies which he received. The necessity of two witnesses was, of course, suggested by the famous biblical precept to that effect which was considered as binding by the Puritans. In England this requirement had had a long and vacillating statutory history in respect to the law of treason and had been the subject of quite inconsistent assertions by Lord Coke. Bellingham's reference to the maxim *Nemo tenetur prodere seipsum* (nobody is held to incriminate himself), is probably the most noteworthy part of his inquiry, particularly in view of the fact that the privilege against self-incrimination has again today become the focus of public interest.

Curiously enough no complete history of this fundamental civil liberty has ever been written. Its roots can probably be traced to a statement of St. Chrysostomous (ca. 400) in his commentary to St. Paul's Epistle to the Hebrews. Said he “Non tibi dico ut ea tamquam pompam in publicum proferas, neque ut apud alios te accuses” (I don't tell you to display [your sin] before the public like a decoration, nor to accuse yourself in front of others) This rule was incorporated into Gratian's celebrated Decretum, which was a restatement of early canon law, in the following form “Non tibi dico, ut te prodas in publicum, neque apud alios accuses” (I don't tell you to incriminate yourself publicly or to accuse yourself before others) When the later Canon Law developed the

75. 2 Winthrop, *op. cit. supra* note 27, 56.
77 Deuteronomy 19:15.
78. For details see Reznik, *The Trial of Treason in Tudor England, Essays in History and Political Theory in Honor of C. H. McIlwain* 258, 277 (1936), Wigmore, Required Number of Witnesses, 15 Harv. L. Rev. 83, 100 (1901).
79. The most important studies in the English language are Wigmore, The Privilege Against Self-Crimination, Its History, 15 Harv. L. Rev. 610 (1902), reprinted with revisions in 8 Wigmore, Evidence, 276 (1940), Maguire, Attack of the Common Lawyers On the Oath Ex Officio As Administered In The Ecclesiastical Courts In England, Essays In History & Political Theory In Honor Of C. H. McIlwain, 199 (1936), and recently Thompson, *op. cit. supra* note 25, 207 ff.
81. Gratian, Decretum, 2d Part, Causa 33, Qu. 3 (de poenitentia) c. 87, 1 Corpus Juris Canonici 1184 (ed. by Friedberg, 1879).
so-called process by inquisition, but was therein followed by medieval secular law, the text-writers of that age were extremely careful to discuss the conditions under which a suspect, consistent with this Canon Law principle, could be interrogated upon his oath despite the absence of a formal accusation by another.

The English Church adopted the new canonical procedure in 1236. From here it spread apparently to the secular, judicial bodies, particularly the King's Council. But it promptly met with popular complaints and petitions in parliament which resulted in statutory prohibitions. The jurisdiction of the Church itself, as early as during the reign of Edward I, was drastically curtailed. Whether this restriction originally was directed only against the jurisdiction, or also against the canonical procedure, is not quite clear. Beginning with the sixteenth century, the question became the object of an acrimonious controversy which is still unsettled.

The oldest report of an invocation of the maxim in the quoted form of Nemo tenetur prodere seipsum in an English proceeding can be found in John Foxe's narration of the trial of John Lambert for heresy in 1532. Foxe's book, which appeared first in 1563, ran through many editions and was widely read in England as well as in the colonies. Thus it was only natural that the maxim

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82. This development began in 1199.
84. As evidence of this pre-occupation, we refer to the works of the two most famous continental, medieval jurists on criminal procedure, viz. Durantis, Speculum Judiciale (printed ed. of 1576), particularly his treatment of the interrogation of witnesses (Book 2, part 2, § 7, cl. 40, de positionibus) and of the process by inquisition (Book 3, part 1, de inquisitione), and Gandinus, Tractatus de Maleficiis (printed ed. of 1555), chap. De Inquisitionibus. Durantis, in the first of the mentioned passages, quoted specifically the rule of the Decretum against self-incrimination, stating: "Non enim cogitur aliquis respondere se criminose invicem ille 'Non tibi dico, ut te prodas'" (For nobody can be compelled to answer that he is a criminal, according to the rule, "I do not tell you, to incriminate yourself.").
86. See Baldwin, Select Cases Before the King's Council 1243-1282, 35 Selden Society, Introduction XLIII (1918).
87. See 25 Edw. III, st. 5, c. 4 (1351), 42 Edw. III, c. 3 (1368) ; and the references to the parliamentary petitions in Baldwin, op. cit. supra note 86, XLIII, n. 3.
88. See the disagreement on this point between Maguire, op. cit. supra note 79, and Wigmore, op. cit. supra note 79, and particularly his unwarranted comments in 8 Evidence 277, at end of n. 1.
89. 5 Foxe, Acts and Monuments, 221 (ed. by Cattley, 1838).
90. Indicative of the great esteem of the Martyrology in the colonies is the request made by (Hugh?) Peter in 1636 to the Boston Church "that a new book of martyrs might be made, to begin where the other had left," 1 Winthrop, op. cit. supra note 27, 222.
was again invoked in 1584 when Archbishops Wlghtgifl commenced
the prosecution of the non-conformist, particularly Puritan, clergy
by interrogation upon oath of the suspect ministers in respect to
twenty-four articles framed for that purpose. The propriety of
that procedure was criticized even by Lord Treasurer Burghley
When Whitgift resorted to the same procedure against Thomas
Cartwright himself (1590), the privilege against self-incrimina-
tion and the legality of the oath ex officio became the center of
a public controversy and the subject of a veritable battle of
pamphlets.

It is important that at that juncture the common law lawyers
picked up the maxim. Lambard incorporated it in the second edition
of his widely used Eirenarcha (1588), and Lord Coke asserted
it in the following year when of counsel in a petition for a writ
of prohibition against an ecclesiastical prosecution for inconti-

How far the common law actually accepted the privilege
at that time is extremely uncertain. At any rate it was frequently
invoked. It is therefore quite natural that Bellingham accepted
the famous maxim as law and that the colonists incorporated the
corresponding liberty in their codes. Thus the privilege against
self-incrimination became a recognized civil right long before the
adoption of the Constitution.

91. For a detailed account of the various phases of the proceedings
by the High Commission for Causes Ecclesiastical, see 1 Strype, op. cit.
supra note 38, 268 ff. The text of the articles is reprinted 3 id. at 81 ff.
92. For the letter of the Lord Treasurer expressing this criticism, see
3 Strype, op. cit. supra note 38, 104. See also Thompson, op. cit. supra
note 25, 212.
93. For a description of the different stages of these proceedings
against Cartwright and others, see Pearson, op. cit. supra note 34, 316 ff.,
2 Strype op. cit. supra note 38, 23 ff.
94. At least two of these tracts have survived and exist, for instance, in
the University of Minnesota Law Library. They are Morice, A brief treatise
of Oaths exacted by Ordinaries and Ecclesiastical Judges, to answer generally
to all such articles or interrogatories as pleases them to propound (1590
or 1591), Cosin, An Apology for sundry proceedings by Jurisdiction Eccle-
siastical, of late times by some challenged, and also diversely by them
impugned (2 parts, 1593). For manuscript sources, see Maguire, cit. cit. supra
note 79, footnotes 47 and 59; Thompson, op. cit. supra note 25, 216.
95. Lambard, Eirenarcha, 213 (2d ed. 1588) The first edition (1581)
did not contain this passage with the maxim. A copy of Lambard's second
edition existed in John Harvard's Library, Potter, Catalogue of John Har-
96. Collier v. Collier, Cr. Eliz. 201, 78 E. R. 457, 4 Leon. 194, 74
E. R. 816, Moore 906, 72 E. R. 987 (1589)
97. Cf. Wigmore, op. cit. supra note 79, Maguire, op. cit. supra note
79.
98. For the history of the privilege subsequent to the Body of Liber-
ties, see Pittman, The Colonial and Constitutional History of the Privilege
Against Self-Incrimination in America, 21 Va. L. Rev. 763 (1935)
3.

Bibliography of the Seventeenth Century Colonial Codes and Revisions

The individual acts passed by the various colonies during the seventeenth century can in many instances be found in the printed public records which have been published by the respective states since the middle of the last century. In addition thereto, a number of states and, in some instances, private compilers have provided for the publication of special collections which contain the acts which were passed during the entire or later colonial period. But the early colonial codes and revisions are in some instances reprinted only in other places and can easily be missed by lawyers not familiar with historical materials. It is believed that a short bibliography of the early colonial codes and revisions will be helpful.

1. Virginia.
   a. Strachey’s For the Colony in Virginian Britannia, Laws Divine, Moral and Martial, 1612
   b. Charter of Grants and Liberties, 1618 (no known copy extant)

2. New Plymouth.
   a. Code of 1636
   b. Revision of 1658

99. The colonial records for New Plymouth, the Massachusetts Bay Company, New Haven, and Connecticut (the latter embracing the whole period from 1636 to 1776) have already been mentioned. The early Rhode Island laws were printed in Records of the Colony of Rhode Island (ed. by Bartlett, 10 vols. 1856-1865), The Maryland Acts between 1637 and 1770 are contained in the 30 vols. of Proceedings and Acts of Assembly, printed in Archives of Maryland (1883-1945). Some early acts for the Carolinas are printed in The Colonial Records of North Carolina, 1662-1776 (10 vols. ed. by Saunders, 1886-1890).


101. Reprinted in 3 Force, Tracts and other Papers, Relating to the Origin etc. of the Colonies in North America, No. 2 (1844).


103. 11 New Plymouth Recs., cit. supra note 24, 6; Compact with the Charter and Laws of the Colony of New Plymouth 35 (ed. by Brigham, 1836).

104. 11 New Plymouth Recs. 79.
3. The Massachusetts Bay.
   a. Cotton’s proposed code, called "Moses His Judicis"107
   b. Ward’s Body of Liberties108
   c. Laws and Liberties Concerning the Inhabitants of the Massachusetts, 1648109
   d. Revision of 1660110
   e. Revision of 1672111

   a. Fundamental Orders of 1639112

106. A few of the original prints are still in existence, the one seen belongs to the Harvard Law Library.
107 The Cotton Code which was prepared between 1636 and 1639 was first printed in London in 1641 under the title Abstract of the Laws of New England as They Are Now Established. A copy is owned by the University of Minnesota Law Library. It was reprinted in 3 Force’s Tracts, cit. supra note 101, No. 9, and in 5 Coll. Mass. Hist. Soc. (1st ser.) 171 (1798). A second, slightly different edition was published by Aspinwall in 1655. It was reprinted with minor variations in 1 Hutchinson Papers, cit. supra note 28, 161, which in turn were again reprinted by the Prince Society (1865). 181 ff. Hutchinson’s copy was called “not the best” by a contemporary writer. Letters from Andrew Eliot to Thomas Hollis, Letter of Sept. 7, 1769, 4 Coll. Mass. Hist. Soc. (4th ser.), 398 at 442, 444 (1858). The Abstract is accepted as Cotton’s work by Gray, Remarks on the Early Laws of the Massachusetts’s Bay, 8 Coll. Mass. Hist. Soc. (3d ser.) 191 (1843). Whitmore, Bibliographical Introduction, in The Colonial Laws of Massachusetts Reprinted from the Edition of 1672 (1800), Ford, Cotton’s Moses His Judicis, cit. supra note 39. The Code as printed is apparently not the original draft, but the version which incorporates Governor Winthrop’s humanitarian corrections which Hutchinson and Eliot report to have seen, see Hutchinson, op. cit. supra note 28, 442 (“the first draught of the laws of Mr. Cotton which I have seen corrected with Mr. Winthrop’s hand”) and Letters of Andrew Eliot to Thomas Hollis loc. cit., at 434, 437, letter of Jan. 29, 1769 (“I have formerly seen a MS. in Mr. Cotton’s hand-writing, which I believe was a first draught of this. It was corrected by our Governour Winthrop.”). The title “Abstract of the Laws of New England” is strikingly identical with the entry of Lechford in his Notebook, 7 Trans. Am. Antiqu. Soc. 237 (ed. by Hale 1885), to the effect that he copied “An Abstract of the Laws of New England” for Winthrop in 1639. Prof. Howe of the Harvard Law School was kind enough to compare the photographic copies of an existing manuscript of the Abstract discovered in England, 16 Proc. Mass. Hist. Soc. (2d ser.) 274 (1903), with other papers written by Lechford and found that it was in a different handwriting.
109. Reprinted in 1929 (ed. by Farrand)
111. Reprinted, loc. cit. supra note 108.
b. Ludlow’s Code of 1650\textsuperscript{113}
c. Revision of 1673\textsuperscript{114}

5. New Haven.
   a. Fundamental Agreement of 1639 and Fundamental Orders of 1643\textsuperscript{115}
   b. Eaton’s Code of 1656\textsuperscript{116}

6. Rhode Island.
   a. Code of 1647\textsuperscript{117}
   b. Revision of 1665\textsuperscript{118}

   a. Duke’s Laws of 1664\textsuperscript{119}
   b. Elizabethtown Code of 1668\textsuperscript{120}
   c. Penn’s Body of Laws, 1682\textsuperscript{121}

   a. Cutt’s Code (1679)\textsuperscript{122}
   b. Cranfield’s Code (1682)\textsuperscript{123}

The Genesis of the Massachusetts Code of 1648 and Its Effect as Legislative Precedent

The colonists from the beginning, of course, had to make certain rules governing their lives. The settlements were organized communities of people who had come from a comparatively advanced economic and cultural development. The allotment and distribution of land, the necessary governmental offices, the right to vote,

\textsuperscript{113} Id. at 509. Various older editions known as Blue Laws are in print.
\textsuperscript{114} Reprinted in 1865 (ed. by Brunley).
\textsuperscript{115} 1 New Haven Recs., cit. supra note 70, 11 ff., 112 ff.
\textsuperscript{116} Recs. of the Colony or Jurisdiction of New Haven, 1653-1665, 561 ff. (ed. by Hoadly 1858).
\textsuperscript{117} 1 Rhode Island Recs., cit. supra note 99, 156 ff.; Staples, The Proceedings of the First General Assembly of “The Incorporation of Providence Plantations” and the Code of Laws Adopted in 1647 (1847).
\textsuperscript{118} After the receipt of the charter of 1663 the old laws were redated. See Rider, in Acts and Laws of His Majesty’s Colony of Rhode Island, 1719, 1 ff. (reprinted 1895). A real revision was made in 1705, Laws and Acts of Rhode Island and Providence Plantations, 1705 (ed. by Rider, 1896).
\textsuperscript{119} Reprinted in 1 Colonial Laws of New York, cit. supra note 100, 6 ff., Charter to Wm. Penn and Laws of the Province of Pennsylvania 1 ff. (ed. by George, Nead & McCamant 1879).
\textsuperscript{120} Grants, Concessions and Original Constitutions of New Jersey 77 ff. (ed. by Learning and Spicer, 1752).
\textsuperscript{122} 1 Laws of New Hampshire, cit. supra note 100, 11.
\textsuperscript{123} Id. at 60.
qualifications for office, rights of new-comers, punishment of offenses and the settlement of disputes had to be regulated.

The New Plymouth plantation was small, and only a few acts were passed. Certain practices were introduced without formal action. The most important one is probably the civil marriage, which was one of the Separatist and Puritan tenets. Governor Bradford made the following statement in his History of Plymouth Plantation.

"May 12 (1621) was the first marriage in this place, which, according to the laudable custom of the Low-Countries in which they had lived, was thought most requisite to be performed by the magistrate, as being a civil thing, upon which many questions about inheritances do depend, with other things most proper to their cognizance, and most consonant to the scriptures. 'This decree or law about marriage was published by the States of the Low-Countries Anno 1590. ' Petets Hist. fol. 1029"124

But in the larger and populous Massachusetts Bay, more extensive legislation was needed, and more complicated issues arose.125

In New Plymouth the desire for a codification and revision of the laws was felt in 1636. The matter was regarded as simple and was quickly disposed of. A committee of fifteen, consisting of the governor, the seven assistants, and eight representatives for the three towns, was appointed for the task on Oct. 4 and 5, 1636,126 and on Nov 15 of that year a short and crude code was drafted and adopted.127

In Massachusetts the genesis of the first code was much more controversial and consumed an aggregate of fourteen years. The story has been often and well told, and a great deal of scholarship has been spent on the ascertainment of the various steps and phases.128 But the fact that the code recently had its 300th birthday

124. Bradford, op. cit. supra note 70, 122. See also the statements on this point by the agent of the plantation, Winslow, which led to his imprisonment in the Fleet in 1635, id. at 393.
125. See the various references supra Sec. II, 1. cf. also Dickinson, The Massachusetts Charter and the Bay Colony in 1 Commonwealth History of Massachusetts 93 ff. (ed. by Hart, 1928).
126. 1 New Plymouth Recs., cit. supra note 24, 43, 44. The committee members were Winslow as governor, Alden, Bradford, Browne, Collier, Hatherly, Hopkins, and Prince as assistants, and Annable, J. Brewster, W Brewster, Cudsworth, Doane, J. Jenny, R. Smith, and Wadsworth as town deputies. About their backgrounds, see Willison, op. cit. supra note 33, Appendix A.
127. 11 New Plymouth Recs., cit. supra note 24, 6.
might permit a brief recall of the matter. Broadly speaking, the whole process developed in two succeeding stages. The first began with the appointment of the first law revision committee in 1635 and ended with the adoption of the Body of Liberties and the Capital Crimes in 1641.\textsuperscript{129} The second stage ended in 1648 with the final code called The Book of the General Laws and Liberties Concerning the Inhabitants of the Massachusetts.\textsuperscript{130}

The idea of a law revision appeared at the same time the deputies of the freemen were asserting their right to participate in the law-making process. Winthrop was willing to concede them only the right to revise the laws and demand the necessary changes from the court of assistants.\textsuperscript{131} But soon after the deputies obtained their right to vote in the passage of acts,\textsuperscript{132} the general court appointed Winthrop and Bellingham as a committee to prepare a proposal of a complete law revision.\textsuperscript{133} It is significant that both men were trained lawyers, Winthrop having practiced law before his emigration\textsuperscript{134} and Bellingham having occupied the offices of recorder and member of Parliament for the borough of Boston in Lincolnshire.\textsuperscript{135} In 1635 the deputies broadened the task of the committee. They desired "a body of grounds of laws, in resemblance to a Magna Charta, which should be received for fundamental laws"\textsuperscript{136} and, accordingly, the committee was enlarged by adding Governor Haynes and Dudley, another lawyer.\textsuperscript{137} In the following year a new committee was appointed, composed of the old members with the addition of Vane, the incumbent governor, and three members of the clergy. The latter were Cotton, the celebrated minister of

\begin{itemize}
\item \textsuperscript{129} Loc. cit. supra note 108.
\item \textsuperscript{130} Loc. cit. supra note 109.
\item \textsuperscript{131} 1 Winthrop, \textit{op. cit. supra} 27, 152.
\item \textsuperscript{132} 1 Mass. Bay Recs., \textit{cit. supra} note 18, 118 (1634).
\item \textsuperscript{133} Id. at 137 (March 1635).
\item \textsuperscript{134} On Winthrop as lawyer, see Robinson, \textit{John Winthrop as Attorney} (1930), and 2 Winthrop Papers 1 ff. (Mass. Hist. Society 1931).
\item \textsuperscript{135} About Bellingham's position in Boston, Lincolnshire, see Thompson, \textit{History and Antiquities of Boston} 458 (1856), and 2 Winthrop Papers, 55 footnote 1. A recorder was usually trained in law and some borough charters required such training. The Boston charters are unfortunately not in print, see Weinbaum, \textit{British Borough Charters} 1307-1666, 70 (1943), but Dorchester, for instance, required the recorder to be a "vir legibus Angliae eruditus." See \textit{supra} note 18. Other Boston recorders were high-ranking law officers of the crown. See the list in Thompson, \textit{op. cit. supra}. Bellingham took part in the codification from the beginning to the end, and Hutchinson, \textit{op. cit. supra} note 28, 437, remarked appropriately that Bellingham and Cotton had the greatest share in the work. About the democratic tendencies of Bellingham see \textit{supra} note 47 and text.
\item \textsuperscript{136} 1 Winthrop, \textit{op. cit. supra} note 27, 191. About the notion of "fundamental" law, see \textit{supra} text to note 52.
\item \textsuperscript{137} 1 Mass. Bay Recs., \textit{cit. supra} note 18, 147. About Dudley, see 2 Winthrop Papers, \textit{cit. supra} note 134, 55 footnote 2 with further references.
\end{itemize}
Boston, England, who had arrived three years before. The assigned task was "to make a draft of laws agreeable to the word of God, which may be the fundamentals of this commonwealth." Cotton accordingly prepared a model called Moses, His Judicia. However, no official action was taken until 1638 when another committee, which included Nathaniel Ward, a former common law practitioner and now a minister, but omitted Cotton, was appointed. The committee was to consider, sift, and consolidate the recommendations of deputies for a body of fundamental laws and to survey all existing laws in conjunction with this task. The many delays were due to the fact that most of the magistrates and some of the elders felt inexperienced in law-making and were apprehensive of transgressing the limits set by the Charter. In June, 1639, the General Court seems to have lost patience, and the committee was formally notified to present the drafts to the next court. Since experience had showed that the committee was too large for profitable work, the matter was referred to Cotton and Ward, each of whom prepared a model for presentation to the court. In November, 1639, a new committee was appointed "to peruse all those models which have been or shall be presented to the court, to draw them up into one body (altering, adding and omitting what they shall think fit) and to submit copies of the draft to the several towns for consideration." The committee proceeded accordingly. Apparently at this stage

138. On Cotton see Calder, op. cit. supra note 35, with further bibliographical references.
139. On Hugh Peter, the alleged regicide, see Felt, A Memoir or Defence of Hugh Peter (1851). He left for England in 1641. Shepard is identified as an elder in 1 Mass. Bay Recs., cit. supra note 18, 222.
140. Id. at 174.
141. 1 Winthrop, op. cit. supra note 134, 240. This code purported to be merely a scientific model of the judicial laws of Moses, which were thought by Cotton to be binding on Massachusetts. See supra, Sec. II, 1, where the consonance of this view with general puritan doctrine is discussed. That the term "judicia" of Moses was familiar in New England is evidenced also by Rev. Chancy's reply to Bellingham's questionnaire. Bradford, op. cit. supra note 74 and text.
144. Id. at 389.
146. 1 Winthrop, op. cit. supra note 27, 388.
148. 1 Winthrop, op. cit. supra note 27, 389. (" the two models were digested with diverse alterations and additions, and abbreviated and sent to every town.")
the Ward model became the basis for the final draft. There are various reasons for this assumption.

In the first place the General Court had prescribed in the quoted order that the various models should be consolidated into one model. Secondly, the preface to the Code of 1648 tells specifically: "... about nine years since we used the help of some of the Elders of our Churches to compose a model of the judicial laws of Moses, with such other cases as might be referred to them, with intent to make use of them in composing our laws but not to have them published as the laws of this jurisdiction." In other words the models were merely designed to constitute a framework for the final draft. Even more significant is the fact that all available evidence proves that after November, 1639, the Cotton model was no longer acted upon and that the Ward model served as foundation of the final body of liberties. Of course, the committee introduced apparently considerable changes. In a letter of December 22, 1639, Ward asked Winthrop to be permitted to peruse one of the copies which Lechford had been employed to transcribe. If no changes were made, such request would have had little meaning. Lechford himself submitted a memorandum to...
the magistrates on March 4, 1640, in which he objected to the proposed "liberty" concerning the establishment of new churches. On the one hand this shows that the final technique of drafting liberties was already being employed at that time; on the other hand the difference in the final version of the attacked liberty proves that substantial alterations occurred until the ultimate enactment.

On Dec. 18, 1640, the preamble to the final Body of Liberties was already known to Captain Johnson, then recorder of Woburn, who entered it at that date as introduction to the town orders.

On May 13, 1640, the general court demanded that the reply of the elders and towns be delivered to the next general court.

On October 7, 1641, Ward was requested to furnish the final draft of the liberties and the capital laws for submission to the towns, and on December 10, 1641, the body was enacted. The form of the enacting clause was noteworthy.

"Howsoever these above specified rites, freedoms, immunities, authorities, and privileges, both civil and ecclesiastical are expressed only under the name and title of liberties and not in the exact form of laws and statutes, yet we do with one consent fully authorise and earnestly entreat all that are and shall be in authority to consider them as laws."

"Lastly because our duty and desire to do nothing suddenly which fundamentally concerns us we decree that these rites and liberties shall be audibly read and deliberately weighed at every General Court that shall be held within three years next ensuing."

The purpose of this form of enactment was to forestall any premature invocation of the liberties as fundamental and therefore immutable laws, a notion which was causing so much controversy in connection with the negative vote.

153. Loc. cit. supra note 152.
154. See liberty 95 (1) in the final form of the Body, cit. supra note 108.
155. Poole, op. cit. supra note 128, lxxx and el.
157. Id. at 340.
158. Id. at 346. 2 Winthrop, op. cit. supra note 27, 66.
159. Body of Liberties, cit. supra note 108, sections 96 and 98.
160. This purpose was indicated by Winthrop who reported that the liberties were "established for three years, by that experience to have them fully amended and established as perpetual." 2 op. cit. supra note 27, 66. Even more specific is the prefatory epistle of the Code of 1648, cit. supra note 109, which states that liberties were established by authority of the court seven years before but emphatically repudiates the claim that they had the nature of fundamentals and reserves their repeal at any time even after their insertion into the new code. Apparently Farrand, Introduction to the Laws and Liberties vi (1929), Dean, op. cit. supra note 46, 56, and Trumbull, Introduction to Lechford's Plain Dealing, 62 (1867), have misunderstood the true situation and therefore doubted whether the Liberties were ever formally enacted. The Liberties were specifically referred to as "positive laws" and as "enacted here to prevent arbitrary government" by Winthrop in his "Discourse on Arbitrary Government" of July 1644, cit. supra note 49.
A comparison between Cotton’s model and the final Body of Liberties is revealing in many respects. The former represents the scheme for a government of a theocratic-aristocratic nature such as the Old Testament seemed to prescribe. The form which is preserved in the print of 1641 is apparently the version which was corrected and approved by Winthrop and sent by him to Davenport in New Haven, who incorporated parts of it in the Fundamental Orders of 1643. The model consisted of ten chapters dealing with the election and powers of magistrates, the admission and rights of free burgesses and free inhabitants, the protection and administration of the country, the right of inheritance, commerce, tort liability, crimes subject to capital punishment or banishment, less heinous crimes, civil and criminal procedure, and foreign relations. Most of the provisions, except those in the chapter on free burgesses and free inhabitants and a few other rules concerning commerce, etc., were based on biblical sources. The chapter, “of free burgesses and free inhabitants,” incorporated the law of 1635, discussed above in connection with the negative vote controversy.

The term, free burgess, did not correspond to the Massachusetts charter which used the term, freeman, but it was in accord with the terminology of the English borough charters, and the chapter heading had its parallel in the caption “of citizens and burgesses” in Smith’s De Republica Anglorum. The long list of crimes subject to capital punishment or banishment, the adoption of a council for life, and the entire draftsmanship made it undesirable to the freeman struggling for the protections of their civil liberties.

The Ward code, conversely, put the whole emphasis on the

161. About Winthrop’s corrections of Cotton’s first draft, see supra note 107.
162. The influence of the Cotton Code upon the New Haven fundamentals has been demonstrated by the careful study of Miss Calder, cit. supra note 35.
163. These unsupported rules were designated as “prudential rules” rather than “properly laws” by Aspinwall in his preface.
164. See supra note 45.
165. Thus in the Dorchester charter of 1629, we find several references to “liberi burgenses et (vel) liberi inhabitantes, Municipal Records of the Borough of Dorchester, cit. supra note 18, 75, 78. About the rise of the burgesses as a politically privileged class, see Tait, The Medieval English Borough (1936). In Virginia the deputies to the legislative assembly were called burgesses.
166. Smith, De Republica Anglorum, 1583 (ed. by Alston, 1906) Bk. 1, Ch. 22.
167. It might be noted that one of the members of the committee of 1638 was Wm. Hawthorne, the speaker of the deputies and protagonist in the battle against arbitrary government and Mr. Winthrop in particular. See 2 Winthrop, op. cit. supra 27, 66, 67, 206, 210 (“the principal men in all these agitations”).
liberties, privileges, and immunities guaranteed by it, in accord with the desire of the people. It was divided into a chapter concerning the common liberties and privileges of all men, a chapter dealing with the rites, rules and liberties concerning judicial proceedings, a chapter concerning the liberties peculiar to freemen, chapters specifying the liberties of women, children, servants, foreigners, and even animals, a chapter containing the catalogue of capital crimes, and finally a chapter on the liberties of churches. A comparison in the exterior form of the code shows a much more skillful draftsmanship, the unmistakable imprint of the Magna Carta tradition, and much greater popular appeal owing to the deletion of many of the obnoxious features of the Cotton model. It has been pointed out that the Body of Liberties endeavored to combine the liberties of Englishmen with the mandates of the scriptures and the practical needs of an efficient administration of justice. The privileges against double jeopardy, compulsory self-incrimination, and cruel and barbarous torture or corporal punishment are examples of this spirit. Characteristic is Liberty 47 “No man shall be put to death without the testimony of two or three witnesses or that which is the equivalent thereto.” The first alternative is, of course, a direct quotation from the Bible, while the second alternative is a gloss which was derived from the answers of the elders to the third question in Bellingham's questionnaire of 1641.

The Body of Liberties, because of its conditional enactment, was never printed, with the exception of the catalogue of the capital crimes which issued from the Cambridge Press in 1643 with the additional capital crimes that had meanwhile been defined.

The work now entered the second phase which consisted of a revision of the laws which had been passed since the establishment of the colony and its consolidation with the Body of Liberties into one code. Bellingham, the outstanding legal talent of the colony, bore the brunt of this task also. In 1641 he was appointed for the preparation of a revision of the existing ordinances. In 1644 he was reappointed for that task and two other committees were

168. See supra text to note 136.
169. Liberty 42, cit. supra note 65.
170. Liberty 45, about its history see supra Sec. II. 2.
171. Liberty 45, and 46.
172. See supra text to note 77.
173. See supra text to note 74.
174. See supra text to note 58.
176. 2 id. at 61.
established for the purpose of reporting on necessary changes in the Body of Liberties.\footnote{177} Later in 1644 Bellingham delivered the desired collection to the House of Deputies,\footnote{178} which in the meantime had become a separate body.\footnote{179} Three sub-committees were established for the preparation of the actual draft of the Book of Laws in 1645,\footnote{180} and after the completion of their work\footnote{181} the final form of the code was entrusted to another committee\footnote{182} which, after a reappointment,\footnote{183} completed the task. The Laws and Liberties were considered ready for printing in 1647, and the court made the necessary orders for this final step,\footnote{184} which was executed in 1648.

To understand the reason for the long interval which lies between the enactment of the Body of Liberties and the final adoption of the Book of Laws and Liberties one need only recall that the intervening period was a stormy one. It covers the famous controversy about the negative vote, the attacks of the freemen upon the arbitrary government of the magistrates, and the charge of Dr. Child and his associates that the Massachusetts laws abridged their rights as Englishmen and were in violation of the charter.\footnote{185} The general court and the magistrates were anxious to meet these complaints. Thus, a number of new criminal statutes were passed to secure conformity with the scriptures\footnote{186} and to define certain acts as criminal.\footnote{187} The final drafting committee was specifically instructed to use all care to obviate any appearance of arbitrariness.\footnote{188} To assure conformity with the common law the court even

\begin{itemize}
  \item \footnote{177}{Ibid. One committee was composed of Winthrop, Dudley and Hibbens, the other of the magistrates residing at Ipswich.}
  \item \footnote{178}{3 id. at 6; 2 id. at 157}
  \item \footnote{179}{Cf. supra note 45 and text.}
  \item \footnote{180}{2 Mass. Bay Recs., cit. supra note 18, 109; Johnson, op. cit. supra note 128, 205.}
  \item \footnote{181}{2 Mass. Bay Recs., cit. supra note 18, 128, 157, 3 id. at 74.}
  \item \footnote{182}{Id. at 168; Johnson, cit. supra note 128, 205.}
  \item \footnote{183}{2 Mass. Bay Recs., cit. supra note 18, 196.}
  \item \footnote{184}{Id. at 209, 217, 218.}
  \item \footnote{185}{See supra text to notes 45, 53 and 28.}
  \item \footnote{186}{The imposition of capital punishment for cursing and smiting of parents and on rebellious sons in 1646 is probably the most remarkable instance of this compliance with the scripture. 2 Mass. Bay Recs., cit. supra note 18, 179.}
  \item \footnote{187}{Burglary, for instance, was made punishable “according to the nature of the offense” in 1642. Id. at 22. The code changed the penalty to branding. The indefinite punishment permitted the court to deal gently with James Ward, son of the drafter of the Body of Liberties, in 1644. 2 Winthrop, op. cit. supra note 27, 203.}
  \item \footnote{188}{The instruction ordered the committee “to consider and contrive some good method and order, titles, and tables for compiling the whole, so as we may have ready recourse to any of them upon all occasions, whereby we may manifest our utter disaffection to arbitrary government, and so all relations be safely and sweetly directed and perfected.” 2 Mass. Bay Recs., cit. supra note 18, 169.}
\end{itemize}
ordered acquisition of the leading law books of the period.\textsuperscript{189}

The great care which had gone into the preparation of the code of 1648 made the latter the outstanding compilation of the period. Connecticut, which had put its most prominent lawyer, Ludlow, in charge of its revision,\textsuperscript{190} copied it almost completely into the code of 1650.\textsuperscript{191} In fact the rediscovery of the Laws and Liberties in 1929 shattered the reputation of Ludlow as the great lawmaker which some authors had claimed for him.\textsuperscript{192} New Haven adopted a very similar Code in 1656.\textsuperscript{193} Its author, Gov Eaton, frankly admitted his reliance on the Massachusetts model.\textsuperscript{194} New Plymouth remained relatively independent in the revision of 1658,\textsuperscript{195} but in the revision of 1671 the Massachusetts revision of 1660 was followed to a certain extent.\textsuperscript{196} In her code of 1647\textsuperscript{197} Rhode Island, which was not a member of the New England confederation, relied primarily on the English statutes, rather than on the Massachusetts model, but there, also, no independent body of laws was evolved.\textsuperscript{198}

\textsuperscript{189} Id. at 212. The books were Coke on Littleton, Coke, Book of Entries, Coke on the Magna Carta, Rastell’s Termes de la Ley, and Dalton’s Justice of the Peace and Coke’s Rep. The books were apparently used for the last stage of the revision of 1648. The appendage of “presidents” and “forms” and the quotations in the introductory epistle are strongly indicative. “Crescit in orbe dolus,” for instance, had been also quoted by Coke in Twyne’s Case.

\textsuperscript{190} 1 Conn. Recs., cit. supra note 24, 138 (1646), 154 (1647), 216 (1650).

\textsuperscript{191} Supra, note 113.

\textsuperscript{192} See Taylor, Roger Ludlow, The Colonial Lawmaker (1900), and Warren, A History of the American Bar 128 (1911).

\textsuperscript{193} Loc. cit. supra note 116. Some changes like the greater elaboration on capital sex crimes were occasioned by further unwelcome incidents in the colony, such as the matter of Plaines, reported in 2 Winthrop, op. cit. supra note 27, 265.

\textsuperscript{194} He was, in fact, expressly instructed to consider the new Massachusetts Code and Cotton’s Code which had been reprinted in 1655, cf. supra note 107, Recs. of the Colony or Jurisdiction of New Haven, cit. supra note 116, 146. This draft was adopted and 500 copies were ordered to be printed and received, Id. at 154, 186.

\textsuperscript{195} This revision, loc. cit. supra note 114, retained the crude exterior form of the original code of 1636, but endeavored to arrange the different provisions according to certain topics. The revision committee consisted of Collyer, Hatherly, Alden, Andworth and Winslow, 3 New Plymouth Recs., cit. supra note 24, 117 The laws were not printed but transcribed by the clerk into books procured by each town. Id. at 143.

\textsuperscript{196} The revision of 1671, loc. cit. supra note 105, about the genesis of which there seems to be no record, was technically far advanced over the previous codes. It consists of 15 chapters dealing with various topics. The capital crimes were borrowed from the Mass. revision of 1660 with certain changes, omissions, and additions. It may be noted that New Plymouth acquired a set of English Statutes in 1662. 11 New Plymouth Recs., cit. supra note 24, 208.

\textsuperscript{197} Loc. cit. supra note 117

\textsuperscript{198} The code contained a series of provisions without particular arrangement regulating criminal and civil liability and other matters for the
When the so-called Middle Colonies came into the fold of the British colonial empire in 1664, the Code designed for their government, the so-called Duke’s Laws, avowedly relied on the other existing colonial codes. While it serves no particular purpose to identify the provenance of each of its sections, it is interesting to note not only that the greatest portion of its provisions was borrowed from the Massachusetts Revision of 1660 and the largely identical Connecticut Code of 1650 but that also the Virginia Statutes (for instance, the section on the Church) and the New Haven Code of 1656 (for instance, the subdivision on unmarked swine in the woods) were used as sources. The Elizabethtown Code of 1668 and its revision of 1675 likewise reveal the influence of the New England codes in their provisions concerning capital crimes and various other matters.

The last code to be mentioned is the famous Pennsylvania “Great Law” or “Body of Laws” passed at Chester on December 7, 1682. It was the outgrowth of a set of laws which had been drawn up by William Penn for the government of his new colony and agreed upon in England. The laws were a link in a chain of documents for the establishment of the colonial government which was preceded by the Royal Charter of March, 1681, the Certain Conditions and Concessions of July, 1681, the Charter of Liberties of April 20, 1682, the Frame of Government of April preservation of peace and order, referring to the appropriate English statutes on the matter. The draftsmen relied, according to their own references, on Dalton’s Countrey Justice, and tried to classify the common law crimes into the five groups mentioned in the New Testament. It may be mentioned that around 1673 a “Book of English Statutes” had to be at hand at each sitting of the Assembly. The introductory clause of the Duke’s Laws, stated that they were “collected out of the several laws now in force in his Majesty’s American Colonies and Plantations.” For the political reasons underlying this acknowledgment, see Goebel and Naughton, op. cit. supra note 3, 17.

199. The introductory clause of the Duke’s Laws, cit. supra note 119, stated that they were “collected out of the several laws now in force in his Majesty’s American Colonies and Plantations.” For the political reasons underlying this acknowledgment, see Goebel and Naughton, op. cit. supra note 3, 17.

200. Compare the sections of the Duke’s Laws entitled Church and Churchwardens with the Virginia statutes I, II, IV, VIII, XII, and XIII of 1661/2, 2 Hening’s Stats. of Virginia, cit. supra note 100, 44 ff.

201. Compare the Duke’s Laws, section on Cattle, Cornfields, Fences, subd. 8, with the equivalent section of the New Haven Code, subd. 3.

202. Loc. cit. supra note 120.

203. Grants, Concessions etc. of New Jersey, cit. supra note 120, 94 ff.

204. Supra note 121.


206. About the background of these charters see Hull, William Penn, A Topical Biography 224 ff. (1937), Beatty, William Penn as Social Philosopher 16 ff. (1939).

207. Thorpe, op. cit. supra note 205, 3035.

208. Id. at 3044.

209. Id. at 3047.
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25, 1682,210 and followed by another Frame of Government of April 2, 1683.211 The Body of Laws were obviously a work of independent draftsmanship. However, their content makes it clear that the framers were familiar with the contemporary colonial codes.

III.

THE LATER COLONIAL PERIOD ADVENT OF THE ENGLISH STYLE OF DRAFTSMANSHIP

The adoption of the Great Law of Pennsylvania marks the end of an era in colonial law-making. The days of the simple and all embracing code—offspring of the borough costumals—were over. The following period brought the enactment of carefully drawn acts on specific topics which resembled in style and content the contemporary British statutes,212 from which they were copied verbatim in many instances. The reasons for this development fall into two general classes:

1. the growth and transformation of the methods of imperial control.

2. the economic and social progress which necessitated technically more perfect laws and occasioned the rise of a legal profession in the colonies.

1. It is impossible, of course, within the limits of this study to discuss the evolution of the imperial control over the colonies. Professor Osgood's incomparable presentation of the subject must be consulted by anyone interested in this important subject.213 Three important particulars in the growth of the "imperial discipline,"214 however, must be emphasized: a) the gradual transformation and, in some instances, consolidation of the majority of the corporate and proprietary colonies into royal provinces, characterized by the "negative voice" of the governor and their "government by instruc-

210. Id. at 3052.
211. Id. at 3064.
212. As has previously been pointed out, the question of the validity of the Statutes of the Realm in the colonies proprio vigore is a different and quite complicated and confused problem. See Morris, Studies, op. cit. supra note 3, 15, and Sioussat, The English Statutes in Maryland, 31 Johns Hopkins Univ. Studies in Hist. and Pol. Science (1913).
213. See particularly 3 Osgood, The American Colonies in the Seventeenth Century, bearing the subtitle, Imperial Control—Beginnings of the System of Royal Provinces (1907), and 1 Osgood, The American Colonies in the Eighteenth Century, c. I, bearing as one of its subtitles, The Administrative Framework of the Empire (1924).
tion,\textsuperscript{215} b) the assertion, and in more recent charters the express reservation, of the prerogative of the crown to hear appeals in council,\textsuperscript{216} and, finally, and most important, c) the imposition upon the colonies of the duty to transmit their laws for royal approbation or disallowance.\textsuperscript{217}

The early charters establishing corporate or proprietary colonies did not provide for submission of all legislation to the crown for approbation or disallowance. Consequently, the right of the crown to disallow colonial acts did not rest on indisputable ground. Of course, the passage of acts which were passed in violation of the charter provisions and limitations could and did entail (in the cases of the Virginia Company in 1624\textsuperscript{218} and the Massachusetts Bay Company in 1684\textsuperscript{219}) the forfeiture of charters by quo warranto proceedings. But whether the crown could annul individual acts by order in council without resorting to such a drastic remedy as quo warranto was a more difficult question. In the Carolinas, where the proprietors had reserved themselves the right to reject legislation,\textsuperscript{220} the Privy Council at times chose the expedient of instructing the proprietors to exercise their right,\textsuperscript{221} but on other occasions it acted directly.\textsuperscript{222} In rare instances the Privy Council declared acts invalid as transgressing the charter limitations when it was confronted with them on appeal.\textsuperscript{223} But in all

\textsuperscript{215} See Labaree, Royal Government in America (1930), particularly 222, 420 ff.

\textsuperscript{216} For the origin and administration of these appeals see Hazeltine, Appeals from Colonial Courts to the King in Council with Especial Reference to Rhode Island, Ann. Rep. Am. Hist. Soc. 299 ff. (1894); Schlesinger, Appeals to the Privy Council, 28 Pol. Sci. Qu. 279 ff., 433 ff. (1913); Washburne, Imperial Control of the Administration of Justice in the Thirteen Colonies, 1684-1776, 238 Columbia Univ. Studies in History, Econ. and Public Law (1923); Morris, Studies, \textit{op. cit. supra} note 3, 63, 64.


\textsuperscript{218} 3 Osgood, The American Colonies in the Seventeenth Century, 51 (1907).

\textsuperscript{219} Id. at 333.

\textsuperscript{220} The reservation was contained in the Concessions and Agreements, 1665, sec. 10, cl. 2, 5 Thorpe, \textit{op. cit. supra} note 205, 2756, 2758. For an exercise of the veto in regard to an Act to suspend the prosecution of foreign debts (1684), see 1 Recs. in the British Public Record Office Relating to South Carolina, 1663-1684, 294, 298 (ed. by Salley, 1928).

\textsuperscript{221} Russell, \textit{op. cit. supra} note 217, 97.

\textsuperscript{222} Id. at 97 (South Carolina), 103 (Connecticut, Rhode Island). Stanhope in a report to the Board of Trade (1715) took the position that the crown could disallow acts of any plantation by virtue of its prerogative. 2 North Carolina Recs., \textit{cit. supra} note 99, 157, 166.

\textsuperscript{223} Russell, \textit{op. cit. supra} note 217, 104, 105 with further references.
these cases there existed no obligation of the colony to transmit all acts regularly and promptly for approval or disallowance. In 1714 the Privy Council was advised that the Carolinas, Connecticut, and Rhode Island had no such duty, and in 1752 this body again took cognizance of this situation. Nevertheless, even these privileged colonies were requested from time to time to furnish copies of their laws for information, and they complied, although in dilatory fashion.

In the royal provinces no difficulties existed in regard to the imposition of a duty to transmit their laws for royal approbation or disallowance in regular course. Virginia was the first colony on the continent to follow such practice after having become a royal province. It transmitted the first laws in 1631, and from then on this practice was regularly observed. It was specifically required in 1679 by an order of the Lord Commissioners for Foreign Plantations. In the same year the new royal governor for New Hampshire (which had become a royal province as a result of the judicial opinion of 1677 that its government was vested in neither the Mason family nor the Massachusetts Bay Company) was instructed to transmit all acts for royal approval or disallowance. Thereafter we find such provisions appearing regularly in the commissions or instructions for the new governors of other colonies which were transformed into royal provinces, viz., New York (1686), Maryland (from 1691 until 1715), New Jersey (1702), South Carolina (1719), and North Carolina (1729). In Massa-

226. See Russell, op cit. supra note 217, 102, 103. The request by the Board of Trade to the government of Rhode Island for transmittal of authentic copies of Feb., 1698, is printed in 3 Rhode Island Recs., cit. supra note 99, 330, its reiteration in Oct., 1698, id. at 341, 347. The assembly ordered compliance in Oct., 1698, id. at 350, but the result displeased the lords, id. at 376.
227. 3 Osgood, op. cit. supra note 213, 73 footnote 1.
228. See Reply to the “Enquiries” by the Lord Commissioners of Foreign Plantations of 1670, 2 Hening, Stats. of Virginia, 511, 512. See also Russell, op. cit. supra note 217, 20, 29 ff.
229. 2 Hening, cit. supra note 100, 512 footnote.
230. 3 Osgood, op. cit. supra note 213, 320, 336.
231. 1 Laws of New Hampshire, cit. supra note 100, 1, 6.
232. About the transformation of the various colonies into royal provinces see 3 Osgood, The American Colonies in the Seventeenth Century 358 (New York), 505 (Maryland), 1 Osgood, The American Colonies in the Eighteenth Century 396 (New Jersey), 2 id. at 360 (South Carolina), 398 (North Carolina), for the restoration of Lord Baltimore's proprietorship in Maryland, see 2 id. at 213. For the commissions and instructions of the first governors in the respective provinces ordering the prompt transmission of the laws for approbation, see 1 Colonial Laws of New York, cit.
chusetts the new charter of 1691 (which was obtained after the stormy Dominion of New England interval) specified in detail the period within which the laws were to be transmitted to and, if so desired, disallowed by the crown. Pennsylvania was the only proprietary colony which had a similar clause in its charter. Transmission had to be made within five years, and the crown had only a six-month period for disallowance, a situation which created many difficulties.

Without discussing the standards of review which the Board of Trade developed in advising the crown whether a specific act should be confirmed or disallowed, it may suffice to state that the technical perfection of the acts, their consistency, unambiguity, and coverage of the content by the title were issues which were considered by the board. The latter also recommended, from time to time, revisions and the preparation of orderly copies. Russell, the author of the best study on the work of the Board of Trade in this respect, has come to the following conclusion:

"When the Board of Trade began its work at the close of the seventeenth century the acts of every colony were ill-kept, loosely worded, and burdened by contradictory amendments. . . . Left to their own initiative, no doubt the colonists, with the gradual development of a trained bench and bar, would have remedied these defects. But the marked improvement in the technique of law-making displayed during the early part of the eighteenth century, by all the colonies whose acts were subject to review at home, was due primarily to persistent tutelage from the Board of Trade and the law officers. Their guidance constituted the most potent factor in the gradual molding of a colonial jurisprudence similar in broad lines and essential features to that of England."

2. The other factor which contributed to the modelling of

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supra note 100, 177, 178 (commission and instructions for Governor Dongan, 1686); Proceedings of the Council of Maryland 1687/8-1693, 8 Md. Archives, cit. supra note 99, 263, 265, 271, 272 (commission and instructions for Gov. Copley, 1691); Grants, Concessions, etc., of New Jersey, cit. supra note 120, 647, 650 (commission for Lord Cornbury, 1660); 2 Coll. of the South Carolina Hist. Soc. 145 (1858) (instructions for Gov. Nicholson, 1720); 3 North Carolina Recs., cit. supra note 99, 66, 69 (commission for Gov. Burrington, 1730).

233. For the text of the charter provisions, see 3 Thorpe, op. cit. supra note 205, 1870, 1883.

234. For the text of these clauses, see 5 id. at 3036, 3039. About the history of and difficulties caused by them see Russell, op. cit. supra note 217, 37 ff., 40, 90 ff.

235. For them see Andrews op. cit. supra note 217, and Russell, op. cit. supra note 217, 109 ff.

236. Id. at 141 ff.

237. Id. at 93 ff.

238. See the objections against the Rhode Island copies, 3 Rhode Island Recs., cit. supra note 99, 376.

239. Russell, op. cit. supra note 217, 205.
colonial acts after the English patterns was the progress in economic and social conditions which facilitated and necessitated the growth of a legal profession. The early settlers had carried with them the ancient grudge against lawyers which had become very vociferous in the first part of the seventeenth century. The early colonies, Virginia and Massachusetts in particular, made a legal profession impossible. Thomas Lechford’s sad experiences in Massachusetts and Ward’s rebuke by Winthrop are too well known to require comment. But in the eighteenth century the situation changed. English lawyers were attracted by the colonies, and Americans trained in the English inns of court or in home offices began to follow the law as a profession. The scarcity of trained men who were able to draft statutes, which was complained of in the seventeenth century, no longer existed after the middle of the eighteenth century when lawyers began to dominate the legislatures.

It would serve no useful purpose to cite a great many statutes to substantiate the perfection of the acts in scope and draftsmanship and the adoption of the English style. The process was, of course, gradual. A good example is the Massachusetts legislation for the relief of the poor. The simple grant in 1639 of authority to the county court judges to attend to the matter grew into a series of detailed sections in the 1692 Act for Regulating of Townships. In 1699 an act for the suppressing and punishing of rogues, vagabonds, etc., and also for setting the poor to work was added, the first part of which was clearly worded with the English vagrancy.

240. About the history of the legal profession in America see Warren, op. cit. supra note 192, Morris, Studies, op. cit. supra note 3, 65, with further references at 260.
241. For the deep-rooted nature of this popular feeling against lawyers, see Radin, The Ancient Grudge, 32 Va. L. Rev. 734 (1946).
243. See Virginia Act of 1645 barring mercenary attorneys, 1 Hening, Stats. of Virginia 302, Massachusetts, Body of Liberties, Liberty 26.
244. See 1 Mass. Bay Recs., cit. supra note 18, 274, 310, 2 Winthrop op cit. supra note 27, 42, 43.
245. For details see Warren, op. cit. supra note 240, Morris, Studies, op. cit. supra note 3, 65.
246. For such complaint made in 1697 in regard to Virginia, see Russell, op. cit. supra note 217, 94 footnote.
247. Harlow, The History of Legislative Methods in the Period Before 1825, 24, 52 (1917)
249. 1 Acts and Resolves of the Province of Mass. Bay, 64. The greater portion of this Act, incidentally, was taken from the Revision of 1685 of New Plymouth, which had become part of the province in 1691. The law of settlement and removal and of the primary family responsibility which is incorporated into this act clearly reveals the influence of the corresponding British statutes.
acts of this period as models.\textsuperscript{251} The middle colonies borrowed their relief legislation to an even greater extent from the mother country. The Pennsylvania Poor Law of 1705 and the Settlement Laws of 1718 and 1735,\textsuperscript{252} which were passed to supply some defects, copied practically all provisions, including the titles, from the pertinent English statutes.\textsuperscript{253} New Jersey's Poor Law of 1758\textsuperscript{254} extensively relied on both the Pennsylvania acts and the English statutes as models, and New York passed an elaborate act for the settlement and relief of the poor in 1773,\textsuperscript{255} which in turn was a complete compilation of the English and New Jersey provisions on the subject.

The genealogy of these statutes also illustrates another phenomenon which became pronounced during this period: the rise of statute families among the various jurisdictions. In the South many of Virginia’s acts were imitated in the Carolinas, in New England Connecticut and New Hampshire borrowed heavily from Massachusetts,\textsuperscript{256} and in the middle colonies Pennsylvania and later New York influenced the statutes of their neighbors. Legislative precedent thus entrenched itself firmly in American law-making.

IV

LEGISLATIVE PRECEDENT IN THE NINETEENTH CENTURY: RECEPTION OF THE NEW YORK CODES

The nineteenth century brought ample opportunity for the statutes of some jurisdictions to be adopted by others. The establishment of the great territories and their gradual subdivision and organization into states not infrequently confronted the respective

\textsuperscript{251} 39 Eliz. c. 4 (1597), 1 Jac. 1, c. 7 (1603); 7 Jac. 1, c. 4 (1609).
\textsuperscript{252} 1 Pennsylvania Stats. at Large, 1682-1801, 251 (act for the relief of the poor); 2 id. at 221, (act for supplying some defects in the law for the relief of the poor); 3 id. at 266 (a supplement to the several acts for the relief of the poor).
\textsuperscript{253} 43 Eliz. c. 2 (1601); 14 Car. 2, c. 12 (1662), 3 W & M., c. 11 (1691), 8 & 9 Wm. 3, c. 30 (1697); 9 Geo. 1, c. 7 (1722).
\textsuperscript{254} 2 Acts of the General Assembly of the Province of New Jersey 217 (ed. by S. Neill). This act was the most elaborate act for the settlement and relief of the poor in any colony until the new Pennsylvania act of 1771.
\textsuperscript{255} 5 Colonial Laws of New York, cit. supra note 100, 513.
\textsuperscript{256} In the field of welfare legislation, for instance, Connecticut copied the Massachusetts acts for the relief of idiots and distracted persons of 1693-4 and the act "providing in case of sickness" (1701-1702). Compare 1 Acts and Resolves of the Province of Mass. Bay, 151 and 469, with 3 Conn. Recs., cit. supra note 24, 285 (1699) and Acts and Laws of His Majesty's Colony of Connecticut 160 (1715). New Hampshire borrowed the Massachusetts acts "providing in case of sickness," "for suppressing and punishing rogues, vagabonds etc.," "directing the admission of town inhabitants" and "for regulating townships etc." without any change whatsoever. 2 Laws of New Hampshire, 129, 266, 312, 340 (1913).
legislatures with the task of establishing almost overnight a suitable set of laws.

We have already mentioned that the Ordinance for the Territory Northwest of the River Ohio required the adoption of "such laws of the original states, criminal or civil, as may be necessary and best suited to the circumstances of the district."257 After some abortive attempts the territorial law-makers enacted in 1795 and 1798 a series of statutes which were adapted from the corresponding laws of Pennsylvania, New York, Massachusetts, Connecticut, New Jersey, Virginia and Kentucky.258 In 1800 the Territory was divided into the Territory of Indiana and the Northwest Territory. The state of Ohio was carved out of the latter in 1803, and the remainder was attached to the Indiana Territory. Within this area, with an addition coming from the old Louisiana Territory in 1834, the territories and later states of Michigan, Indiana, Illinois, Wisconsin, Minnesota and the two Dakotas were organized.259 The various organic acts regularly contained clauses which carried existing laws over into the new territory or state, until altered or amended by its legislature. Thus in many instances individual statutes in the Midwestern states can be traced back to their own territorial days and beyond, when the particular area formed part of a larger territory with a different name. In all these territories and states, revisions of the existing laws were enacted from time to time. In some instances the first revision of a new territory varied but little from the last revision of the old from which it was derived,260 in other instances radical departures were taken.

257. See supra note 12.
258. See The Laws of The Northwest Territory 1788-1800, xxv, 123 ff. (ed. by Pease 1925). The majority of the laws were of Pennsylvania origin as was the governor himself.
259. In 1805 the Michigan Territory was separated from the Indiana Territory, and in 1809 the Illinois Territory was detached. In 1816 the greater portion of the Indiana Territory was organized as state and in 1818 a part of the Illinois Territory gained statehood. The remainder was attached to the Michigan Territory, which also received an area from the old Louisiana Territory in 1834, which later became part of Minnesota, Iowa, and the Dakotas. In 1836 a part of Michigan Territory gained statehood, the remainder being organized as the Wisconsin Territory. In 1838 the Territory of Iowa was detached therefrom. In 1846 part of the Iowa Territory became a state, as did part of the Wisconsin Territory in 1848. The remaining area of both territories formed the Minnesota Territory, part of which was organized as a state in 1858, the residual area becoming the Dakota Territory. It was divided into two states in 1889. For details and references, see Mussman and Riesenfeld, Garnishment and Bankruptcy, (1942) 27 Minn. L. Rev. 1, 27 ff.
260. For instance, most of the (revised) Statutes of the Territory of Wisconsin of 1839 are substantially identical with the (revised) Laws of the Territory of Michigan of 1833 and the acts passed until the separation in 1838.
occurred. In these latter cases the revisors frequently relied heavily upon the statutes of some other states, and it may sometimes require much ingenuity and real patience to ascertain the source from which the compiler borrowed.

A good illustration of the weight of legislative precedent and the extent to which the codifications of older states influenced the legislation of the younger territories and states is presented by the development of the law in Michigan, Wisconsin and Minnesota. The early law revisions in these states were taken almost entirely from the two great codifications made in the first part of the nineteenth century: the New York Revised Statutes of 1829\textsuperscript{261} and the Massachusetts Revised Statutes of 1836.\textsuperscript{262} The latter were themselves markedly influenced in arrangement by the New York precedent, but in language and substance their draftsmanship was original and based intrinsically upon the Massachusetts acts passed prior to the date of compilation.

The state of Michigan had its first revision in 1838, two years after its admission.\textsuperscript{263} The revisor, Fletcher, relied very heavily upon the Massachusetts Revision of 1836 for his draft. The arrangement, as well as the title and chapter headings, was almost completely taken from the model, and by far the majority of all sections were copied verbatim. In some instances the Massachusetts law was apparently not appropriate. In many of these latter cases the compiler resorted to the New York revision as his source.\textsuperscript{264} Naturally the Michigan constitution also required some adaptation in respect to matters of local government. Significantly enough, the final report of the revision contains no reference to his technique.\textsuperscript{265} In 1846 Michigan again revised her law.\textsuperscript{266} While the revision of 1838 was used as a basis, the new revisors added a number of chapters and inserted other changes which in a great number of cases again incorporated verbatim provisions taken

\textsuperscript{261} Revised Statutes of the State of New York (3 vols. 1835-36).  
\textsuperscript{262} Massachusetts, Rev. Stats., 1836. The report of the Commissioners appointed to revise the General Statutes was published in four parts and amendments (1834-1835).  
\textsuperscript{263} Michigan, Rev. Stats. (1838).  
\textsuperscript{264} Instances of portions coming from New York instead of Massachusetts deal with such diversified subjects as relief of the poor, bills of exchange and promissory notes, highways, bridges and ferries, and the action of ejectment.  
\textsuperscript{265} Communication from the Hon. W A. Fletcher, commissioner appointed to revise the law, Journal of the Senate of the State of Michigan, 277, Sen. Doc. 1 (1837).  
\textsuperscript{266} Michigan, Rev. Stats. (1846).
When Wisconsin acquired statehood she proceeded instantly to a revision of her laws. The Wisconsin draftsmen in turn relied on the Michigan Revised Statutes of 1846 as a model, but again added some further chapters borrowed from New York, for instance, the chapters on "corporations for manufacturing, mining, lumbering, agricultural, mechanical and chemical purposes" and "incorporation of villages." The Wisconsin Revised Laws of 1849 finally served as foundation for the Revised Laws of the Territory of Minnesota of 1851. The committee in charge of the draft had to complete their work in sixty days. Consequently they made very few actual changes. In some instances they preferred to retain the law as it had been inherited from the Territory of Wisconsin rather than adopt the form which the State of Wisconsin had enacted. This was the case, for example, with respect to the Poor Law and arbitration. In the case of garnishment they adopted a Michigan statute of 1849 which had been borrowed by the first territorial legislature. The most significant digression from the Wisconsin statute was the incorporation of large portions of the draft of the New York Commissioners on Practice and Pleadings which had been published in 1850. In adopting certain chapters of the draft the Minnesota revisors went even further than the New York legislatures itself had gone in enacting the proposed code in 1848 and 1849. They copied practically all general provisions relating to civil practice from this proposed code, usually preferring, but not always, the wording of the proposal over the form in which

267. Instances of such new New York grafts upon the Massachusetts basis are, particularly, c. 62 (Of the nature and qualities of estates in real property and the alienation thereof), c. 63 (Of uses and trusts), c. 64 (Of powers), certain changes in c. 65 (Of alienation by deed, and the proof and recording of conveyances, etc.), or the addition of the ancestor clause to the right of inheritance of the halfblood in c. 67, sec. 5.

269. Id., c. 51, c. 52.
270. Terr. of Minnesota, Rev. Stats. (1851).
271. Compare Territory of Minnesota, Rev. Stats. 1851, c. 16, with Territory of Wisconsin, Stats. 1839, 132. This act was itself copied from the Illinois Act for the Relief of the Poor of 1833 as amended in 1835, Laws of Illinois 1834-1837, 522, 524.
272. Compare Territory of Minnesota, Rev. Stats. 1851, c. 96, with Territory of Wisconsin, Stats. 1839, 279.
273. See Mussman and Riesenfeld, cit. supra note 259, 49.
274. Code of Civil Procedure of the State of New York, Reported Complete by the Commissioners and Practice and Pleading (1850) The reporters were Loomis, Graham and Field.
it actually had been passed in its home state. However, it should be mentioned that some of the chapters on proceedings in particular cases and special proceedings came from the Wisconsin revision or the existing territorial law.

This reliance of the Minnesota revisors on the New York proposed Code of Civil Procedure is characteristic of the reception which the much debated New York code drafts gained in a number of the younger states and territories. The New York Code Commission prepared five codes, viz., the codes on civil and criminal procedure, a political code, a criminal code and a civil code. In 1866 Mr. Field, the mainspring of the enterprise, could report to the British Social Science Association: "The Code of Criminal Procedure . . . has been adopted by ten of the States and Territories of the Union, while the Code of Civil Procedure is now the law of sixteen of them." Since it would serve no particular purpose to enumerate the states which gradually have enacted all or some of these codes, it may suffice to note that the Dakota Territory was the first to enact the proposed civil code and that the western states and territories were particularly receptive to these drafts.

This course of events introduced the newest and, perhaps, final phase in the evolution of legislative precedent, the era of the "model acts" and proposed "uniform acts." In order to assure scientific draftsmanship and avoid unnecessary or harmful state particularism where uniformity or the observance of certain standards is required, the work of the actual formulation of the final or, at least, working drafts has passed to official or semi-official organizations or the federal government. The model bills originally prepared by the Social Security Board for the state unemployment compensation statutes, the various acts proposed by the Commissioners for Uniform State Laws, and the recent

276. Practically all of the following chapters of the Minnesota Rev. Stats. of 1851 were borrowed verbatim from the proposed New York Code: chapters 70 to 72, 74 to 76, 78 to 84, 92 and 93.

277. The Wisconsin Rev. Stats. or the territorial law are the source of the chapters on fees (c. 73), on visitatorial powers over corporations (c. 77), the sections on the writ of prohibition and habeas corpus (c. 83, sec. 18 ff.), the chapters on foreclosure by advertisement (c. 85), forcible entry and detainer (c. 86), on insolvency law (c. 95) and some other proceedings. The sections on homesteads and other exemptions (c. 70, secs. 93 ff., 100 ff.) are a combination of a New York statute on homesteads (1850 ch. 260) and Wisconsin law.

278. For details see "Codes of Common Law" in 1 Field, Speeches, Arguments and Miscellaneous Papers (ed. by Sprague, 1884), 307 ff.

279. Id. at 344.

280. Id. at 349.
model acts of the American Law Institute are the best-known examples. Essentially they constitute no new departure. They are the logical consequence of an important factor in the development of our law – the force of legislative precedent.

CONCLUSION

The purpose of this article was not to develop a thesis but rather to demonstrate certain important features in the growth of American Law. It was designed to show that the weight of precedent is just as great in the field of legislation as it is in that of adjudication. In both processes we are apt to encounter bad and good precedents, but we probably may conclude that, generally speaking, the effects of legislative precedent have been salutary. A more detailed investigation in the latter respect would be useful. At any rate, the history of American legislation from its beginnings seems to demonstrate that the preparation of scientifically prepared model drafts which the states can adapt to their individual needs constitutes a promising and fruitful task for cooperation in scholarship.