"HOW FAR ENGLISH LAWS ARE IN FORCE HERE": NOVA SCOTIA'S FIRST CENTURY OF RECEPTION LAW JURISPRUDENCE

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The development of the "British tradition in Canadian law" has usually been examined from the perspective of "reception," or the process by which the common law provinces acquired their legal systems.[1] No study of the reception of English law may commence without acknowledging its indebtedness to the magisterial essay by J. E. Côté, who in a headnote to his 63 page article, denies that the subject forms part of legal history at all.[2] What he means, of course, is that reception is not dead; it remains adjudicable, as it has always been, and reception law continues to be made by both judges and legislators.

The theoretical issue, however, is deeper than whether the study of reception belongs to legal history; it is fundamentally whether legal history belongs to history or to law. Côté would probably respond that it belongs to the former, and should be distinguished carefully from the latter. Apart from a few conspicuous exceptions, the principal difficulty of existing studies of reception is that they are unhistorical, or at best anachronistic surveys, where legal reasoning and argument coexist uneasily with pseudo-historical "research." Constitutional lawyers, especially, seem to have difficulty conceptualizing the historical origins and evolution of basic law. Some of them appear to believe that the rules of present-day law, which are being continually applied and expounded, do not have an evolutionary past which is a proper subject for historical inquiry. It appears that the concept of *stare decisis*, for example, which played quite a significant role in the legal culture of colonial societies, cannot be applied satisfactorily to the interpretation of constitutional law except at the expense of historical accuracy. It is a tool of legal argument and judicial decision-making, not historical analysis, and as such belongs to the lawyer and the judge rather than to the legal historian. Legal reasoning and forensic analysis may address the same subjects as legal

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[1] See, for example, P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto 1985), p. 21.

[2] J. E. Côté, "The Reception of English Law" (1977) 15 Alta. L. Rev. 29.

history, but they proceed from quite different assumptions, follow quite different lines and serve quite different purposes.

Most of the quasi-historical discourse on the reception of English law, therefore, has been superficial at best. Three recent Canadian examples illustrate how poorly the subject has fared, especially with regards to Nova Scotia, the oldest of the common law provinces and the first to have received English law. "The Maritime provinces are different," writes a British Columbian jurist looking askance at the far east:[3] "Instead [of legislative enactment], the date for their acquisition of English law was established by the courts of the provinces as the issue arose in various cases brought before them." One is then referred to various terminal dates of reception – really *termini ante quem* – which were, for the most part, not determined by judges or legislators but prescribed arbitrarily by late 19th and early 20th century treatise writers. These authors misread the rather attenuated case law in light of their own ignorance and false assumptions.

The second edition of the standard text on Canadian constitutional law included a new chapter, entitled "Reception," which introduced some pre-confederation historical speculation in the shape of a bald assertion that the leading case "establishes that English law was received in Nova Scotia as of 1758, when the first legislative assembly was held."[4] The most recent edition of an influential law students' treatise, moreover, states (by way of inference from the common law criteria) that the "Maritime provinces were ... acquired by settlement and, *therefore*, the date for reception of English law is the date at which each of the colonial legislatures was instituted [emphasis added]."[5] In other words, Nova Scotia stopped receiving English statute law automatically when it became capable of enacting its own. The conclusion which necessarily follows, however, is that the date of reception was the date of settlement, not the first meeting of the legislature.

The first, and until recently the only, useful treatment of this subject for 18th century Nova Scotia was Professor Barnes' contribution to the centenary number

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[3]J.C. Bouck, "Introducing English Statute Law into the Provinces: Time for a Change?" (1979) 57 Can. Bar Rev. 74.

[4]Hogg, *supra*, note 1, p. 22 n. 4. The error has been perpetuated in the recently published new edition of the same treatise: *Constitutional Law of Canada*, 3rd ed. (Toronto, 1992), p. 28 et seqq. The most distinguished proponent of the reception date misconception was the late Chief Justice Laskin, who stated in his celebrated Hamlyn lectures that "Nova Scotia ... may be said to have received the corpus of English law (including the statute law), so far as applicable, as it stood immediately before October 3, 1758" – that being the date of the first legislative assembly of the colony: B. Laskin, *The British Tradition in Canadian Law*, (London, 1969), pp. 5-6.

[5]G. L. Gall, *The Canadian Legal System*, 3rd ed. (Toronto, 1990), p. 52.

of the *Dalhousie Law Journal*.[6] Although the Commission and Instructions to Governor Edward Cornwallis in 1749 can scarcely be said to have addressed the question of the extension of English statute law, Barnes argues persuasively that the "resolutions and proclamations of the governor and council before the establishment of the legislative assembly constituted a reception of English law."[7] As the governor and his privy council between 1749 and 1754 together constituted the superior court, their ordinances were implicitly judge-made law. Barnes' further point about the scarcity of professionally trained lawyers in Nova Scotia is well taken, because the only barrister in the province at this time was Chief Justice Jonathan Belcher. It is no coincidence that among Belcher's own legal baggage, when he arrived in 1754 to reconstitute the Supreme Court as a separate and independent tribunal exclusively for the chief justice to preside in, was an abridged edition of English Statutes. This was subsequently annotated and used by him as a source-book for drafting many of the early Acts of the Legislature, "in which were incorporated the chief provisions of very important English statutes, such as the Statutes of Treasons, Felonies, Frauds, Wills, etc."[8]

No less than three levels of courts existed in Nova Scotia for most of the five years preceding the second, effective establishment of the Supreme Court of Judicature in 1754. Not even the lay bench of the Inferior Court of Common Pleas shrank from addressing the reception question, when it arose during the course of adjudication. Indeed, the reception controversy may be considered to have begun as early as December 1752, when an attempt was made to impeach the justices of the Inferior Court of Common Pleas, a majority of whom were from Massachusetts. The first of ten "Articles of Accusation" against them alleged:

> That Great Countenance and Encouragement hath been frequently given by the said Judges to Introduce the Laws and Practices of the Massachusetts into the Court of Common Pleas in this Province which Laws and Practices however good and beneficial they may be to the Inhabitants of the Massachusetts yet we conceive are Injurious and detrimental to Numbers of People in this Colony ... who we conceive are to be governed *by the Laws and Practices of England* and of this

[6]T. G. Barnes, " 'As Near as May be Agreeable to the Laws of this Kingdom': Legal Birthright and Legal Baggage at Chebucto, 1749" (1984) 23 Dalhousie L. J. 1. It has now been superseded by J. Phillips, " 'Securing Obedience to Necessary Laws': The Criminal Law in Eighteenth-Century Nova Scotia" *Nova Scotia Historical Review*, XII, 2 (December 1992), pp. 87-124.

[7]Barnes, *op. cit.* p. 21.

[8]B. Murdoch, "An Essay on the Origin and Sources of the Law of Nova Scotia ... " [1863], (1984) 23 Dalhousie L. J. 187 at 190. On 3 October 1758, the second day of the first session, the Assembly voted to ask the Governor for "the Collection of the English Statutes," which no doubt had been used for drafting "all the Resolutions of His Majesty's Governors and Council heretofore made and passed...": *Votes of the House of Assembly. Province of Nova Scotia* [manuscript book], 1758-1760: Public Archives of Nova Scotia (hereinafter PANS).

Province only [emphasis added].[9]

In light of such disaffection, it is hardly surprising that the first statute law reception case in Nova Scotia originated in the Inferior Court of Common Pleas. *Steele* v. *Steele* was an action for trespass and ejectment tried at Halifax in December 1754.[10] A Halifax surgeon who was attempting to turn his widowed sister-in-law off property inherited under the terms of her husband's will, adduced the *Caroline Statute of Frauds and Perjuries* in order to invalidate the will. As the pertinent section of the English Act of 1676 had been extended statutorily to the colonies in 1752,[11] and the decedent's will had been executed after the date of the latter's coming into force, counsel for the plaintiff was able to establish a good *prima facie* case.

The Act of 1752, however, had been passed with a suspending clause making its operation dependent on whether the *Statute of Frauds* had been enacted by the colonial legislature or "received as Law" by force of customary usage. This effectively begged the question. The jury in the case made their verdict conditional on whether the Statute of Frauds extended to Nova Scotia, whereupon the justices, none of whom were lawyers, "having Considered the Several Arguments of the Attorneys Concerning the Statute of Frauds and Perjurys Extending to this Province are of oppinion [*sic*] that the Same Cannot Extend here without Manifest Disadvantage to the Province."[12] Judgment was rendered for the defendant with

[9]Minutes of Council, 3 January 1753: RG 1, vol. 186, pp. 291-92, PANS. The so-called "Justices Affair" led in the short term to packing the bench of the Inferior Court with non-New Englanders, and in the long term to the appointment of a professional man to act as Chief Justice of the province. The memorial preferring the Articles would perhaps carry less weight in the eyes of the legal historian if two of the forty-seven signatories had not been members of the nascent provincial bar: Daniel Wood, the only Cornwallis emigrant described in the shipping list as an "attorney" and notary William Nesbitt, the future King's Attorney. For a circumstantial account and chronicle of the affair see B. Murdoch, *A History of Nova-Scotia, or Acadie*, II (Halifax, 1866), pp. 17-18.

[10]Trial: RG 37 (HX), box 2, file 73, PANS; appeal: RG 39 "C" (HX), box 2, files 1, 2, 15, PANS. (The progress of the appeal may be traced in "Nova Scotia. Supreme Court. Easter Term 1755. Memorandum Book" [file 2], *passim*.) The case files, both action and appellate, lack provenancial integrity; associated materials are to be found in the Belcher family fonds at the University of British Columbia Library. I am grateful to Professor D. G. Bell for drawing these hitherto unidentified archival court records to my attention, and to my colleague, George Brandak, Manuscripts Curator, UBC Library [Special Collections and University Archives Division] for providing photocopies of all the relevant documents on very short notice. (Previous to 1764, when the superior courts of law and equity were substantially reformed, the Supreme Court of Nova Scotia possessed only appellate jurisdiction in civil actions.)

[11]*An Act for avoiding and putting an End to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning real Estates ... in his Majesty's Colonies and Plantations in America.* Imp. (1752) 25 Geo. 3, c. 6.

[12]*Ratio decidendi* [3 February 1755], *supra*, note 10, p. 12.

costs. The plaintiff appealed to the Supreme Court, where the verdict of the lower court was upheld. The appellate jury disregarded the instructions of Chief Justice Belcher, who ruled that the defendant's husband's will was invalid under the *Statute of Frauds*, which was in force and extended to the province when the will was executed. Chief Justice Belcher had ordered the bench of the Inferior Court of Common Pleas to explain and justify their original judgment in the case, and the justices, in their formal written reply, enunciated a general theory of the reception of English statute law which was very restrictive in scope. Ignoring French territorial counterclaims and actual colonization ("Interruption of the French") as early as 1598 or 1604, the justices argued that laws enacted afterwards did not extend to Nova Scotia unless expressly named therein.[13] They took 1621, in which year Sir William Alexander received his grant from King James I, as the date of settlement. The justices went further than Belcher was prepared to go, however, by contending that laws enacted previously did not necessarily extend unless they were demonstrably applicable. Evidently, the justices, as laymen, were unfamiliar with the imperial Act of 1752, which extended the *Statute of Frauds* to the American colonies.

The justices were nevertheless confirmed in their dissenting opinion by the judgment in *Blankard* v. *Galdy*, an action in the English Court of King's Bench in 1694. This case determined that Acts of Parliament passed before the settlement of a colony did not extend if they were not applicable to local circumstances.[14] A different and perhaps better informed view of this case, which had become an established precedent on imperial laws extension, was taken by Chief Justice Belcher, who had privately sought the advice of the leading lawyer and the leading judge of his native Massachusetts – Jeremiah Gridley and Stephen Sewall.[15]

Belcher's consultants, however, disagreed: Chief Justice Sewall confirmed Belcher's view that the *Statute of Frauds* did indeed extend to Nova Scotia, while Counsellor Gridley took the contrary position. "The principle ... is unquestionably establish'd," wrote Belcher in his reply to Gridley, "that English Subjects Settling, either in uninhabited Countries, or conquer'd Countries relinquished upon the Conquest, carry the laws of England as their Birthright; and Nova Scotia as well as Virginia and Jamaica, is a Settlement in some measure within the last Branch of this Principle." Nova Scotians, nevertheless, as English subjects, should not be deprived of the protection which the statute afforded them against "fraudulent Testaments" – the rule of universal applicability. Nova Scotia was also a

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[13]Reasons for trial judgment [pp. 3-4]; probably drafted by the chief justice of the Common Pleas, Charles Morris: Belcher family fonds (*supra*, note 10).

[14](1694), 4 Mod. Rep. 215, 87 E.R. 356.

[15]J. Belcher to S. Sewall, 21 Aug. 1755: Misc. Mss. Coll., MG 100, vol. 110, doc. 8, PANS; J. Belcher to J. Gridley, 21 Aug. 1755: Belcher family fonds, UBC.

plantation effectively settled in 1749, nearly seventy-five years after the Act was passed. Accordingly, by the rule of anterior receptibility, the *Statute of Frauds* was at least eligible to be considered as received in Nova Scotia.

The second leading, early 18th century case which Chief Justice Belcher and his advisers would have taken into account was *Smith* v. *Brown*, an action in the Court of King's Bench in 1705 concerning the sale of a slave exported from Virginia. In this case, Chief Justice Holt ruled that "the laws of England do not extend to Virginia[;] being a conquered country their law is what the King pleases."[16] Although Virginia had long been propounded as a constitutional model for Nova Scotia, Chief Justice Belcher's application of the doctrine which he believed to be supported by these cases seems to fly in the face of his subsequent reasoning in *Steele* v. *Steele* on appeal from the Inferior Court. On the former occasion, the Chief Justice argued that the King might delegate his right and power to govern the inhabitants of "Countries accruing to the Crown by conquest or by Cession" to the Governor and Council. "If the Subjects of England become Settlers and Inhabitants of those Countries they carry with them the Laws of England and are to be Governed by them 'till they are changed by other Laws or ordinances from the Crown."[17]

Chief Justice Belcher seems to have inferred from the contradictory evidence of Nova Scotia that a country might be both conquered *and* settled, depending on the nature and *ad hoc* purpose of the argument. Two of the criteria for reception at common law were thus satisfied. Not only did the founders of Halifax bring the laws of England with them (the "birthright" theory); the king, having delegated his power of making laws to the governor and council, left them free to pick and choose, accept or reject, amend or innovate, howsoever they pleased, with respect to enforceable English statute law. Such was Chief Justice Belcher's rationale for the constitutional validity of the "acts" or "ordinances" of the governor and council between 1749 and 1758, a period during which (until 1754), the executive branch of the government held plenary legislative as well as judicial power.

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[16](1705) 2 Salk. 666, 91 E.R. 566-67 (K. B.), Holt LCJ. The *locus classicus* is the judgment by Mansfield LCJ in *Campbell* v. *Hall*, (1774) 1 Cowp. 204, 98 E.R. 1045, delivered just two years before Belcher's death. Although Grenada and Nova Scotia were both colonies acquired by conquest and ceded by treaty, it is unlikely that Belcher would have agreed with Lord Mansfield that the mere grant of a legislative assembly, whether by Proclamation [Grenada] or Commission and Instructions [Nova Scotia], limited, much less destroyed, the prerogative of indirect legislation through delegation of powers. The grant of representative government had in any case put Nova Scotia – nearly forty years after conquest and cession – into the constitutional position of a settled colony; cf. W. Holdsworth, *A History of English Law*, XI (London 1938), p. 237.

[17]"Observations on the power of the Governor and Council to make Laws for Nova Scotia": J. Belcher to Lords of Trade, 16 January 1755: CO 217/15/ foll. 191r - 193r, PRO (mfm. at PANS). I am grateful to Jim Phillips for drawing this important text to my attention.

The third case which supported the "settled" principle of law that Chief Justice Belcher sought to apply in *Steele* v. *Steele* was *Mendez* v. *Battyn*, a probate appeal from the Court of Chancery in Barbados, which was determined by the Privy Council in July 1722.[18] The case was germane to *Steele* v. *Steele*, because it apparently bore on the testamentary disposition of real estate, and had originally been tried at common law by a jury. As an example of "how the chancery procedure was extended to embrace interstitial common law practice,"[19] *Mendez* v. *Battyn* had attracted the attention of the then Master of the Rolls, Sir Joseph Jekyll. He observed in *obiter dictum* two weeks later that the Lords Committee had determined that the date of reception was the date of settlement. The particular conciliar ruling was that the *Statute of Frauds* did not extend to Barbados, *which was* a colony planted by English settlers some fifty years before the Act was passed. On the same principle, the Statute did extend to Nova Scotia, which, according to Chief Justice Belcher's argument, was settled in 1749.

The misleadingly-titled "Privy Council Memorandum" was a significant exposition of appellate policy on the part of the court of last resort as far as the colonies were concerned.

> What made the statement of particular importance, was the fact that it was published in Peere Williams' *Reports* (1740), which properly enjoyed great reputation both in England and overseas. This accident of publication probably had more effect upon the colonial courts and lawyers at large (since it was available, as were precedents in general) than any particular conciliar decision made during the first half of the 18th century.[20]

229 This "anonymous" case – ironically reported as High Court of Chancery, although it had not been adjudicated there – was well known both to Chief Justice Belcher and to practitioners at the bar of Nova Scotia who found themselves on opposite sides of the reception question. Despite Smith's conclusion that the Privy Council Memorandum "settled nothing as to the extension of statutes enacted antecedent to settlement,"[21] Chief Justice Belcher felt justified in inferring from the case "that Statutes antecedent to each Settlement bind, but those Subsequent, on account of the legislative powers vested by Commissions or Charters, do not

[18](1722), 2 P. Wms. 75, 24 E.R. 646. The actual case was not reported, so the text is purely obiter. The example of Barbados is further instructive, for in 1825 the Legislative Council, having attempted unsuccessfully to enact a post-settlement British penal statute, stated a case for the opinion of the law officers, which commenced as follows: "It has always been holden that no acts of the imperial Parliament, passed since the settlement of the colony, extend to this island, *and only such of the laws of England enacted antecedently to that period as are applicable to our situation and circumstances*" [emphasis added]: quoted in R. H. Schomburgk, *The History of Barbados*, (1848; repr. London, 1971), p. 425.

[19]J. H. Smith, *Appeals to the Privy Council from the American Plantations*, (New York, 1950), p. 378.

[20]*Ibid.*, p. 483; see also pp. 482-83 and 548, note 119.

[21]*Ibid.*, p. 483.

extend to the plantations unless they are nam'd."[22]

The Privy Council Memorandum was to bulk large in *Rex* v. *Young*, which was tried in the Supreme Court in Michaelmas Term 1756.[23] This case, as is clear from Murdoch's indirect and second-hand use of it in the *Epitome*, became the leading authority on Nova Scotia reception law for the later 18th and early 19th centuries. Unlike *Steele* v. *Steele*, it was not a civil action appealed from the Inferior Court of Common Pleas, but a criminal prosecution conducted in the Supreme Court. Whether counterfeiting, the offence with which the accused was charged, was dominated treason, a felony or a misdemeanour varied according to whether one shared the point of view of the Chief Justice (who presided), the Attorney-General (who prosecuted), the grand jury (who altered the indictment) or the English law officers (who ultimately were asked to report on the case).

As on the previous occasion, Chief Justice Belcher was confronted with a popular and independent-minded grand jury which refused to draw the indictment precisely as the Chief Justice would have wished it. He again sought the advice and assistance of ranking justices of the Inferior Court of Common Pleas, the first and second of whom sat with him on the trial. The Attorney-General, opening for the Crown, observed that as forging or counterfeiting were not punishable at common law, and there was no provincial law for punishing such a crime, he had grounded his case on the relevant English statutes of Mary, Elizabeth and Anne. The Crown's case, therefore, depended on whether these statutes extended to and were in force in Nova Scotia, a proposition rejected by counsel for the accused, who, like Murdoch seventy-five years later, took the view that penal statutes must be construed strictly.

Since no question of fact was in dispute, and the grand jury had only to deliberate on the classification of the crime, the three questions of law arising during the trial were the following:(i) whether the statute of 1553,[24] declaring forging or counterfeiting foreign coin current within the kingdom treasonous,

[22]Belcher to Gridley: *supra*, note 15.

[23]Jonathan Belcher fonds: MG 1, box 1738, doc. 112, UBC; RG 39 "C" (HX), box 2, files 28, 29, 38, 39; RG 39 "J" vol. 117, PANS; CO 217/16/foll. 132r -144r, Public Records Office (hereinafter PRO) [three enclosures in letter of J. Belcher to J. Pownall, 20 January 1757], mfm. at PANS; A. Shortt *et al.*, comp., *Documents relating to Currency, Exchange and Finance in Nova Scotia ... 1675-1758*, (Ottawa, 1933), pp. 456-57 [§483], 460-61 [§488]. For a brilliant dissection of *Rex* v. *Young*, and analysis of its importance for the selective reception of enforceable English criminal statutes, see article by J. Phillips (*supra*, note 6, p. 98 *et seqq.*), to which my account is indebted. Phillips' treatment makes clear that Belcher's ruling in favour of the motion in arrest of judgment was ultimately motivated by uncertainty as to whether the English statutes adduced by the crown prosecutor were in force. Murdoch (*supra*, note 8, p. 190) "would deem it correct to say that English penal statutes in general may be regarded as not being in force among us."

[24]Statutes of England, (1553) 1 Mary [Sess. 2nd], c. 6.

extended to the plantations; (ii) whether the statutes of 1562 and 1576,[25] making treasonous the adulteration of foreign coin current either inside the kingdom or within the "dominions," were applicable in the construction of the statute of 1 Mary; and (iii) whether Spanish dollars – the only silver coin in local circulation – were legal tender in Nova Scotia. The last item referred to the Royal Proclamation of 1704, confirmed by Act of Parliament three years later, which legalized Spanish silver dollars as currency in the American colonies.[26]

The legal arguments for and against extending the statutes adduced by the King's Attorney run to thirteen foolscap pages, consisting of arguments by counsel for the prisoner and rebuttal by the court – too lengthy and detailed to be narrated here. Both *Blankard* v. *Galdy* and the Privy Council Memorandum were cited. The former was construed by the bench as having established the rule that the laws of England, whether statute or common, are the right and privilege of every English subject, and as such were introduced into uninhabited countries newly discovered and colonized by English settlers, "& continue in force there, at least, till they are varied by the respective Legislatures, according to the Circumstances of each Colony."[27] The real linchpin of the Crown's argument, however, was "that an appointment of proper Courts & Officers who may execute the Laws of England, is a virtual declaration that they shall be in force."[28] Chief Justice Belcher was less certain as to the classification of the crime of which the accused was eventually convicted. In view of the fact that the case had been "the Subject of much Controversy," not to mention that treason was a capital offence, he referred the entire proceeding to the Lords of Trade. They in turn sought the opinion in law of the Attorney- and Solicitor-General.[29]

The law officers took the view that the statute of 1 Mary, on which the Crown's case depended, did not apply to foreign coins current in the plantations. Thus, the question of whether the two statutes of Elizabeth were of any force in the construction of the earlier Marian statute was rendered hypothetical. The law officers also expressed themselves more generally to the effect

> that the Proposition adopted by the Judges there [in Nova Scotia], that the Inhabitants of the Colonies carry with them the Statute Laws of this Realm is not true as a general Proposition, but depends upon Circumstances, the Effect of their

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[25]Statutes of England, (1562) 5 Eliz., c. 11; (1576) 18 Eliz., c. 1.

[26]*An Act for ascertaining the Rates of foreign Coins in her Majesty's Plantations in America* [preamble], Imp. (1707) 6 Anne, c. 30. The corresponding Nova Scotian statute, (1758) 32 Geo. 2, c. 7, *An Act for establishing the rate of Spanish Dollars* ..., was disallowed by the crown and repealed as being *ultra vires*.

[27]"Upon the trial, Three Questions arose in point of Law, ...," p. 2: CO 217/16/fol. 139v, PRO.

[28]*Ibid.*, p. 3, fol. 139r.

[29]Belcher to Pownall, 20 January 1757: CO 217/16/fol. 130r, PRO.

Charter, Usage, and Acts of their Legislature; and it would be both inconvenient and dangerous to take it in so large an extent.[30]

It might be argued that the law officers were simply begging the question: Nova Scotia was neither a charter nor a proprietary government. As well, the colony had not been settled long enough to have developed customary usage, and no legislature yet existed to enact laws. Attorney-General Henley and Solicitor-General Yorke appear to have drawn from the *Plantation Trade Regulation Act* of 1696 the same inference as does Barnes: if the statutory legislation of the imperial power "was silent as to its applicability to the colonies, then it did not apply to them."[31]

Elizabeth Brown, on the other hand, found the law officers' report suggestive of the expediency of leaving royal provinces such as Nova Scotia "in large measure free to interpret the legislative standard as a grant of such English statutes as seemed suitable to their condition."[32] This view, however, is difficult to sustain

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[30]The law officers' report was submitted on 18 May 1757: CO 217/16/ fol. 146r, PRO, having been requested several weeks previously: J. Pownall to R. Henley and C. Yorke, 1 April 1757: CO 218/5/fol. 161v-r, PRO; *Journal of the Commissioners for Trade and Plantations from January 1754 to December 1758* (London, 1933), pp. 312 [31 Mar. 1757] and 323 [24 May 1757]. It may be that Sir Matthew Lamb was indisposed, or declined to act in the absence of appellate due process. There may have been other reasons, however, more of a political than a professional nature, why Sir Matthew did not participate in the reference: "His appointment to be counsel to the Board of Trade in 1746, and a report that he was to be made a K.C., though he 'never was an hour in Westminster Hall as a counsel in his life,' excited great indignation in the legal profession": R. Sedgwick, comp., *The History of Parliament. The House of Commons 1715-1754*, vol. 2 (New York, 1970), p. 196. Although in England itself criminal appeals were tolerated only as special grace, there was something of a precedent for reserving – if not appealing – crown cases from the American plantations for review by the law officers: Smith, *supra*, note 19, p. 240, and Index, pp. 728-29 *s.v.* 'Criminal appeals.' This concept of reference and review is comparable to the mid-19th century phenomenon of the Court for [Consideration of] Crown Cases Reserved, whereby any judge presiding in a criminal court in which the prisoner had been found guilty by verdict might reserve any question of law arising on the trial for decision by the Twelve Judges of Westminster Hall. It is obvious that the verdict in *Rex* v. *Young* turned on a question of reception law which arose during the course of both trials. Belcher CJ as trial judge "stated a case" for the opinion of the law officers. Although the Attorney-General and Solicitor-General jointly reported that the point had been wrongly decided, however, the verdict was not quashed – unlike the first trial, where it had been lost on a technicality. In any event, the pseudo [or quasi?]-appeal proceeded no further than the Lords of Trade sending Belcher a copy of the law officers' report, for his "guidance and direction" in the matter: J. Pownall to J. Belcher, 3 June 1757: CO 218/5/fol. 162v-r, PRO. That was, after all, what Belcher had been asking for in the first place. On this subject generally, see also, J. H. Smith, "Administrative Control of the Courts of the American Plantations," (1961) 61 Colum. L. Rev. 1210 at 1249 *et seqq.*

[31]*Supra*, note 6, p. 9. The statute concerned was: *An Act for preventing Frauds, and regulating Abuses in the Plantation Trade*, (1696) 7 & 8 Wm. 3, c. 22.

[32]E. G. Brown, "British Statutes in the Emergent Nations of North America: 1606-1949" (1963) 7 Am. J. Legal Hist. 95 at 134. This article, although better known and more frequently cited, is inferior not only to J. E. Read's classic essay, "The Early Provincial Constitutions," (1948) 26 Can. Bar. Rev. 621, but also to Brown's own slightly later work: the introductory Chapter 1 ("British Statutes in Historical

in the absence of a legislature capable of applying or implementing any standard for statutory enactment. The question of what constituted basic law was, therefore, left to the discretionary judgment of the Supreme Court.

A formal opinion by the law officers, however categorical, carried no judicial weight. Such a report was entirely extra-judicial and non-binding. As there was no provision in the Royal Instructions for higher criminal appeals from the colonies, there was no question of obtaining a determination from the Privy Council. The law officers' report did not become part of the record, and the verdict was not overturned. The accused, having already had a second trial, was not to have yet a third one. These are the reasons why *Rex* v. *Young* did not attain the status of binding precedent or case law, despite the prominence given it by Murdoch. He renders the report verbatim in support of the proposition that penal statutes made in England, which mention "this realm," do not include Nova Scotia or any other colony.[33]

This is not to say that the report did not decisively influence the development of Nova Scotia's own penal code, when the Legislature first met in 1758. When the subject of counterfeiting foreign coin current in the province was raised in the course of *An Act for punishing Criminal Offenders*, it was classified not as treason or even a felony but as a misdemeanour.[34] The English statutes which the Crown adduced in the prosecution of Young were not retrospectively re-enacted in Nova Scotia. Chief Justice Belcher nevertheless saw to it that these statutes of Mary, Elizabeth and Anne were cited as marginalia in the statute-book. Writing ten years after his decision in the case, he seemed to rule out the likelihood, even the possibility, of another crown prosecution such as *Rex* v. *Young*: "No Foreign coin is now current that is legitimated, and most probably none will, so that on the English Statutes there can be no prosecutions, till some species of foreign coin is legitimated."[35]

Perspective") to *British Statutes in American Law, 1776-1836*, (Ann Arbor, 1964), p. 1 – by far the best general treatment of the subject.

[33]B. Murdoch, (1832) 1 *Epitome of the Laws of Nova-Scotia*, p. 37 [asterisked note following]. Murdoch's use of *Rex* v. *Young*, which he nowhere specifically identifies, is treated in greater detail, *infra*.

[34]S.N.S., (1758) 32 Geo. 2, c. 20, s. 6.

[35]*Ibid.*, footnote (f). The authority for Belcher's argument was the first Discourse, on "High Treason," by the libertarian jurist Sir Michael Foster [1689-1763] JKB: *Crown Cases and Discourses upon a few branches of the Crown Law*, (London, 1762). "As illustrated commentaries upon legal principle and expositions *de lege ferenda* they became immensely influential in shaping modern criminal law": "Foster, Michael," in A.W.B. Simpson, ed., *Biographical Dictionary of the Common Law*, (London, 1984), p. 188. As Belcher undoubtedly shared the view of Judge Foster "that capital statutes [should] be construed strictly" (p. 189), it is ironic that elsewhere in the same volume (p. 41) a distinguished Canadian legal historian should credit Belcher with "promotion of maximum reception of English law."

The provincial statute of frauds, unlike the law on counterfeiting, which differed widely from its English counterpart, followed the latter quite closely. The British precedents had been noticed judicially in the earliest case on the law of reception, but subsequent legislative treatment of the subject-matter differed according to notions of the applicability of English law. *Rex* v. *Young*, especially, may have been viewed as a cautionary tale, having occurred not long before the first meeting of the legislature, and appearing to risk the importation of the more barbarous criminal punishments prescribed by the English penal statutes. Indeed, cases such as *Rex* v. *Young* underlined the necessity for a representative assembly, legally competent to enact whichever English and British statutes were deemed necessary or applicable.

Evidence of differing perceptions among lawyers, legislators and judges as to the residual force of English statute law is shown by the provincial *Statute of Frauds*, enacted during the first session of the legislature in 1758. The Act was, as Murdoch observes, "(nearly a transcript of the English act, [1676] 29 Car. 2 c. 3, sec. 17)."[36] On the assumption that the corresponding English statute was in force, this Act can of course be regarded as merely declaratory of existing law. It is significant that Nova Scotia's first House of Assembly included both Attorney-General William Nesbitt, who soon became Speaker, and George Suckling, the only regularly admitted English attorney practising at the bar.[37] Nesbitt had acted both as solicitor for the appellant in *Steele* v. *Steele*, and as crown prosecutor in *Rex* v. *Young*, while Suckling had represented the successful appellee, widow Steele.

When the House of Assembly met for the first time, in 1758, it endeavoured to legalize those English statutes which were deemed to extend to, and be in force in Nova Scotia, by enacting them in whole or in part. That a majority of the legislators, prominent among whom was Chief Justice Belcher, who acted as president of the Council when it was functioning as the upper house of the bicameral legislature, took the same view of reception at common law as did the Inferior Court judges, is clear from the preamble to an Act passed in 1759. It states that "this Province of Nova Scotia or Acadie ... did always of right belong

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[36](1833) 3 *Epitome*, p. 14.

[37]Although only serving one term as an MHA, Suckling – "a rascally Attorney" – was the most prominent, active and controversial lawyer-politician in the two sessions of the First Assembly: J. L'Heureux, "Suckling, George" *Dictionary of Canadian Biography*, IV, (1979), p. 724. Suckling in fact moved and drafted the very first bill to be introduced in the Assembly: "a Bill to establish the authority of the House" [*supra*, note 8]; it did not become law, however, having apparently been rejected by the Council after it had passed the House of Assembly. Having been admitted an attorney of the English Court of Common Pleas before emigrating to Nova Scotia, Suckling went on to become first Attorney-General of Quebec and ultimately first Chief Justice of the Virgin Islands.

Another prominent lawyer, David Lloyd, who acted as counsel for the prisoner in the second trial of *Rex* v. *Young*, became Chief Clerk of the House of Assembly.

to the Crown of England, both by priority of discovery and ancient possession."[38] Having thus to their own satisfaction met two of the criteria for reception at common law, the Assembly placed the English statutes on an equal footing with the various "resolutions," "acts" or "ordinances" of the Governor and Council. The status of both had theretofore been quasi-legal at best. Unlike the latter, however, there was no wholesale enactment of those Acts of Parliament which were requisite – a fact which suggests that the lawyers in the legislature thought that the statutes demanded selective rather than collective consideration. It had been the province of the Supreme Court to declare what the law was, that is, to determine which English statutes the settlers had carried with them. It was, therefore, the province of the Legislature to decide what it would be, that is, to determine which English and British statutes would be retrospectively enacted into and confirmed as basic law.

Chief Justice Belcher neatly summed up the *status quo ante* 1758 in his reply to Counsellor Gridley: " ... our Courts here would [otherwise] be left to the difficulty of Construing Statutes into Laws, & So in some measure become a legislature."[39] Not only did the Supreme Court act as a court of civil appeal – it exercised no original jurisdiction in civil actions before 1764 – but it also exercised informal judicial review and oversight of the pseudo-legislation ("resolutions") of the Governor and Council. The Supreme Court under its first chief justice was, of necessity, what would now be called an activist or interventionist court. Belcher himself, as *ex officio* president of the Council and subsequently administrator of the government and lieutenant-governor, provided continuity through the period of transition from judicial determination to legislative declaration.

Despite six years of intense legislative activity in Nova Scotia, the "Table of Statutes up to 1764 [*sic*] expressly or virtually extended to the Colonies, ... "[40] included various English and British statutes which had not been enacted into law in Nova Scotia. The procedure would have been redundant where Acts of Parliament in force *proprio vigore* were concerned. This table was doubtless produced in anticipation of the Royal Proclamation of October 1763, which established civil governments in territories recently acquired by conquest confirmed

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[38] *An ACT for the quieting of Possessions to the Protestant Grantees of the Lands formerly occupied by the French Inhabtants, and for preventing vexatious Actions relating to the same*, S.N.S., (1759) 33 Geo. 2, c. 3.

[39] *Supra*, note 15.

[40] MG 23 A 4, vol. 27, foll. 9-26, National Archives of Canada (hereinafter NAC). The occurrence of this uniquely important document among the Lansdowne Transcripts is explicable by the fact that the Earl of Shelburne (as he then was) served as chief commissioner of the Lords of Trade from April to September 1763. The mistaken conjectural date "1764," which appears in the finding aid, resulted from a confusion of calendar years with regnal years.

by treaty. An authority on commonwealth and colonial law, Sir Kenneth Roberts-Wray, however, has argued that the Royal Proclamation "superseded the Commission of 1749 and applied English law as it then stood" to greater Nova Scotia[41] – a jurisdiction which, from 1763 to 1769, comprised the entire Maritime provinces.

Whatever the implications for the extension of English law to older royal provinces, this tabulation of statutes, alphabetically arranged by subject-heading, consisted of a schedule which appears to have been specially drawn up for Nova Scotia. The table was most likely provided as an *aide-mémoire* to Lieutenant-Colonel Montagu Wilmot, who had been appointed governor in September 1763. On assuming office in May 1764, he undertook a major institutional reform of the superior courts of law and equity. The table records, under the heading "Wills," that the Statute of Frauds generally extended to and was in force in the British colonies in America. Among the statutes listed were those of 5 and 18 Elizabeth and 6 Anne, all of which were adduced by the Crown in *Rex* v. *Young*. Conspicuous by its absence, however, was the statute of 1 Mary. The omission of this Act gives credence to the opinion of the law officers at the time that it was expressly confined to England and could not extend to the plantations, whether applicable to local circumstances or not.

Further evidence of pre-American Revolution British attitudes is to be found in the statute (1766) 6 Geo. 3, c. 12, which empowered Parliament "to make laws and statutes of sufficient validity to bind the Colonies in all cases whatever."[42] Writing in the 1820s, the politically progressive lawyer, Thomas Chandler Haliburton, expressed strong doubts as to whether this statute could have been a true declaratory Act.[43] The passage of the infamous *Stamp Act* indeed belied the credibility of the subsequent enabling Act. The 1766 statute did not, in any case, address the question of whether the colonies had to be expressly named in order to be bound. Parliament was asserting a general power to override colonial legislatures. This was at a time when only those Acts of Parliament which had been passed before the date of settlement were considered to be in force in planted colonies unless expressly named.

Important contemporary evidence is also provided by the first edition (1767) of the "Perpetual Acts" of Nova Scotia, which, coincidentally, was prepared by the first justice of the Inferior Court of Common Pleas under the direction of Chief

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[41] K. Roberts-Wray, *Commonwealth and Colonial Law*, (London, 1966), p. 836.

[42] *An Act for the better securing the Dependency of his Majesty's Dominions in America upon the Crown and Parliament of Great Britain.*

[43] T. C. Haliburton, *An Historical and Statistical Account of Nova-Scotia*, II (Halifax, 1829) [repr. 1973], p. 346.

Justice Belcher, who revised and annotated it.[44] Introductory to this work was a concordance, or "Table of such English and British Statutes as have been enacted in Nova Scotia," which ranges from the Statute of Westminster the Second of 1285 to the thirtieth year of George 2. No Acts of Parliament passed later than 1756 were explicitly enacted into law in Nova Scotia. This suggests that statute laws enacted before the effective settlement of the colony potentially were in force, while those passed after the legislature was established were generally inoperative. The implication is that no such statutes could legally remain in or come into force in Nova Scotia unless they were enacted by the legislature, then in its ninth year of operation.

Few, if any, Acts of Parliament were enacted into law in Nova Scotia after 1758. That is perhaps the reason why the first convocation of the legislature has, by popular misconception, been regarded as the date of reception, by which is meant a *terminus ante quem* for the extension of English law. That the date had no particular significance for reception law, however, is clear from the fact that as late as 1864 an imperial statute of (1773) 13 George 3 allegedly provided the grounds for a decision in the Supreme Court of Nova Scotia.[45] The court held that the statute was valid and in force regardless of its not having been adopted. Nearly forty years after the original publication of Chief Justice Belcher's *Laws*, the compiler of the third revised edition of Nova Scotia statutes republished Belcher's notes of cases and marginal references to Acts of Parliament. He described them as "convincing proof" that the earliest legislators had copied

[44]*The Perpetual Acts of the General Assemblies of His Majesty's Province of Nova Scotia*, (Halifax, 1767); see B. Russell, "An old Provincial Statute Book" (1893) *Canadian Magazine* I, 1 (1893), p. 609. The compiler was "gentleman" John Duport, a lay magistrate who has been mistakenly presumed by every student of the subject up to and including Barnes (*supra*, note 6, p. 22) to have been a lawyer; the source of the error was T. B. Akins ("History of Halifax City" *Collections* of the Nova Scotia Historical Society, VIII (1895), p. 235), who evidently confused Duport with George Suckling [*supra*, note 37], "the English Attorney" who married Duport's daughter. Although Duport went on to become an assistant justice of the Supreme Court of Nova Scotia and first Chief Justice of Saint John's [Prince Edward] Island, lawyer-judges of the Inferior Courts of Common Pleas were altogether unknown in pre-Loyalist Nova Scotia. Between 1749 and 1764, moreover, when the superior courts of law and equity were reformed, civil justice was dispensed exclusively by laymen not lawyers.

[45]*Salter* v. *Hughes* (1864), 5 N.S.R. 409 at 416. The statute concerned was (1773) 13 Geo. 3, c. 21, which arguably was in force *proprio vigore*, and was in any case an extension of a pre-settlement statute explaining the *Foreign Protestant Naturalization Act* of 7 Anne: (1731) 4 Geo. 2, c. 21. Of counsel for the defendant, the judgement against whom was upheld by the Supreme Court *in banco* was Beamish Murdoch. The judgment of the Court was delivered by Bliss, senior puisne, who forty years earlier had acted as solicitor for the complainants in the Chancery action, *Cochran* v. *Cochran* [*vide infra*], and who had no compunction about adducing the Victorian statute, *The Aliens Law Amendment Act*, (1844) 7 & 8 Vic., c. 66, in *prima facie* support of the plaintiff's case. One can only infer that *all* these statutes were held to extend and be in force, *proprio vigore*, regardless equally of the date of settlement and of their date of passage.

English statute law as far as possible.[46] That would explain the meaning of retrospective re-enactment of English or British statutes by the colonial legislature.

The most significant late 18th century event, in what Professor Bell has described as "the gordian complexity of Nova Scotia's colonial history and ... uncertainties in reception law jurisprudence," was the constitutional crisis of 1795-96 in New Brunswick.[47] This dilemma was provoked by the Assembly's failed attempt to enact a bill declaratory of which Acts of Parliament extended to and were in force in the province. There seems to be no reason why New Brunswick ought not to have adopted the same reception date at common law as Nova Scotia. Failing that, it could have accepted the date of the erection of the Planter townships in 1765, its own creation as a separate government in 1784 or the first convocation of the legislature in 1786. The Governor and Council nevertheless decided at that time, on the flimsiest possible legal grounds – without any historical basis on which to justify their misapplication of a recognized common law principle, or corresponding legislative enactment – that the province should receive English law as it stood in 1660. That was the year in which constitutional government was re-established in England, and was hypothetically prescribed as the date of settlement. This was done so that the chief and puisne justices of the Supreme Court, all of whom were American *émigré* lawyers and who also occupied seats at the Council board, would have to take judicial cognizance of as few Acts of Parliament as possible which had not been received into the former Thirteen Colonies. The document justifying this course of action to the home government was drafted by the new province's solicitor-general, Ward Chipman, a Massachusetts tory lawyer.[48]

The legal character of these Declaratory Bills reveals that it was not the date of the first convocation of the legislature in 1758, but that of the constitution and settlement of 1749 (mistakenly recorded as 1750) which was implicitly taken to be the date of reception of English law into greater Nova Scotia. The rationale was that the existing case law made the reception of English statutes dependent on the date of settlement, which in the case of Nova Scotia was construed as the founding of Halifax. Those statutes enacted anteriorly extended if applicable; those enacted posteriorly did not extend unless necessary. The theory forming the legal character of these bills was "that the actual date of a colony's settlement is a

[46]R.J. Uniacke, comp., *The Statutes at Large* ..., (Halifax, 1805), p. ix.

[47]D. G. Bell, "The Reception Question and the Constitutional Crisis of the 1790s in New Brunswick" (1980) 29 U.N.B.L.J. 157 at 162.

[48]CO 188/3/fol. 254r-255r, PRO (mfm. at PANS); D. G. Bell, "A Note on the Reception of English Statutes in New Brunswick," (1979) 28 U.N.B.L.J. 195 at 197 and n. 13. It was Professor Bell who established that Ward Chipman *père* was the author of the document.

factor of critical importance in arriving at a proper reception date."[49] This was scarcely an innovation, of course, but rather a well-established precedent in both Privy Council appeal cases and among the Lord Chief Justices in the Court of King's Bench, at least from Holt's time (1689-1710) onwards.

The bills' sponsors in the New Brunswick House of Assembly would certainly not have assumed 1749 to be the *terminus ante quem* for the automatic extension of applicable English statute law, if "1758 was the reception date observed in Nova Scotia itself."[50] This was not the case at the time, nor had it ever been, and the text of New Brunswick's Declaratory Bills provides conclusive evidence of the fact. On the assumption that the founding of Halifax signifies not only the beginning of continuous, effective, permanent settlement but also the regrant of constitutional government, the import of the remodelled 1796 declaratory bill is perfectly obvious: " ... all Acts of Parliament applicable to our [New Brunswick's] Colonial and local Situation, made and passed at any Time before the Colony of Nova Scotia was planted by his Majesty's Subjects, and a Civil Government and Constitution with Legislative Powers were given and established therein by his late Majesty King George the Second."[51]

This proviso has nothing to do with the first convocation of the legislature in October 1758. It refers instead to the official Advertisement of March 1749 (which culminated in the founding of Halifax three months later), and the Commission and Instructions to Governor Cornwallis in April. This misconstruction has led to the false surmise that the political opposition in the New Brunswick Assembly, who in 1796 reintroduced the failed declaratory bill of the previous session, "had learned that 1758 was the reception date observed in Nova Scotia itself."[52] On the contrary, if any such date was observed – and the possibility (certainly by the 1790s) was remote – it was 1749, and the text of the Declaratory Bills provides evidence of this fact.

It is wrong to suggest that the second of the two bills, while omitting all reference to the unintentionally mistaken 1750 date, apparently proposed 1758 in its stead. The document in question will not support such a reading. The unsuccessful sponsors of the Declaratory Bills quite naturally viewed the English and British statutes enacted between 1660 and 1749 as legal birthright rather than legal baggage. It was, after all, only reasonable to propose the adoption of English law as it stood when permanent, effective settlement began in the province of which New Brunswick was formerly a part. The pre-Loyalist "old settlers" who

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[49] *Supra*, note 47.

[50] *Supra*, note 47, p. 167.

[51] Quoted, *supra*, note 47, p. 166.

[52] *Supra*, note 47, p. 167.

sponsored and supported the Declaratory Bills may be forgiven for not wanting to deliver up their lives and liberties to tory oligarchs from Massachusetts whose political sympathies were pre-Restoration.

Legally, however, there was no case to answer. The governor and his advisers had acted from self-interestedly political motives. The constitutional crisis was therefore an episode in the continuing struggle between conservatives wanting to assert the legislature's right to decide what the law should be, and reactionary tories wanting to maintain or augment executive privilege. Although it may perhaps be pleaded in Chipman's defence that he was himself a member of the House of Assembly at the time, it is hard to dissent from Professor Buckner's conclusion. He asserts that Chipman supported the decision to adopt 1660 as the date of reception for English statute law into New Brunswick, "because the choice of this date precluded the application to the colony of subsequent laws limiting the power of the monarchy and thus placed more authority in the hands of the crown in New Brunswick than the crown possessed in Britain."[53] It is, in any case, over-generous to conclude that the decision "was based upon a thoughtful interpretation of colonial constitutional law, and one which was commonly held in the late eighteenth century."[54] The latter statement is palpably untrue, except perhaps of Massachusetts, the example of which may be presumed to have inspired Chipman's hermeneutic. It was certainly not true of Nova Scotia, nor indeed of the mother country.

The "General observations," which Chipman drafted and Carleton signed and delivered, were an *ad hoc* confection with a political origin and purpose. The incestuous oligarchy – it comprised the entire executive and judicial branches of the government – would neither allow the question to be settled wholly according to common law principles, nor risk committing it officially to the House of Assembly for statutory declaration. Once the political decision had been taken by the Governor and Council, Solicitor-General Chipman, as Governor Carleton's *de facto* chief legal adviser,[55] was charged with producing a credible historical rationale for a legal fiction. Chipman's sophistry, however, undercut both the legal and the historical bases of reception at common law while affecting to uphold them. As a political document with far-reaching constitutional implications, not only for the new tory-Loyalist utopia of New Brunswick but also for the old royal

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[53] P. Buckner, "Chipman, Ward" *Dictionary of Canadian Biography*, VI (1987), p. 138. It might be advocated in Chipman's defence that his premise that 1660 was the year in which the plantations began to be mentioned in English statutes – in other words, when they began to extend *proprio vigore* – carries a degree of verisimilitude: the first such statute was apparently the *Shipping and Navigation Act*, (1660) 12 Car. 2, c. 18.

[54] Bell, *supra*, note 48, p. 201.

[55] Not *de jure*: was Attorney-General Jonathan Bliss (another Massachusetts lawyer) not consulted because he had never been a favourite of Governor Carleton?

province of Nova Scotia, Chipman's composition demonstrated that there was less to be feared from gullible colonial administrators of the military persuasion than from unscrupulous, office-jobbing lawyer-politicians.

The reception controversy and the constitutional crisis of the 1790s in New Brunswick proves conclusively that 18th century legislators by no means regarded the year 1758 as a terminal date for the reception of English law in to Nova Scotia. In the old province, nevertheless, constitutional development as it affected reception law followed a quite different course. No omnibus bill declaratory of which British statutes were in force in the province was ever introduced, much less enacted. This was because those English and British statutes (or sections thereof) which were deemed to be applicable or necessary were separately and individually enacted by the legislature from its very commencement.

Between 1754 and 1758, however, the Supreme Court strove to apply common law principles to the reception question whenever the matter came judicially before it. This was the case because there existed no legislature which could, if it so desired, establish the reception date "by express legislative declaration." If the fact that no such Act was passed is evidence of Chief Justice Belcher's success in resolving the reception question in favour of 1749, then the legal character of New Brunswick's Declaratory Bills amounts to proof. The paradox of New Brunswick's receiving English law as of 1660, while greater Nova Scotia received it only as of 1749, seems to have been lost on historians of constitutional law.

How could New Brunswick have a different, and far earlier, reception date than Nova Scotia, where the Governor and Council had never exercised their residual judicial and legislative powers so arbitrarily as to prescribe a fictitious date for the reception point of English statute law? The rationale for the year 1758 when the Legislature first convened, if pursued to its logical conclusion, would yield a reception date of 1786 for New Brunswick. The rationale for the year 1660, moreover, would inevitably yield the same reception date for Nova Scotia as for New Brunswick. Indeed, a declaratory bill retrojecting the terminal date some ninety years would have been necessary, had not the Nova Scotia legislature had the foresight to begin enacting immediately those English and British statutes required as the basis for its own system of laws.

The problem was, that before 1758, Nova Scotia had a constitution but no legislature with which to enact laws. The reception question therefore became paramount, but was settled in the Supreme Court by the chief justice acting in his judicial capacity. It was not resolved by the Governor and Council, as in New Brunswick, where the judges could successfully evade judicial due process by acting in their executive and quasi-legislative capacity. Supreme Court judges in Nova Scotia also sat at the Council board, but they did not behave so despotically and irresponsibly as did their New Brunswick counterparts. The premises on which the argument for 1758 rests could certainly be challenged on historical grounds, no less

for Nova Scotia than for New Brunswick, for in neither case was 1758 the date of settlement.

None of the 18th century British or colonial authorities justified the view that the actual date of the first convocation of the colony's legislature was a factor of decisive importance in arriving at a proper reception date. This was an inference drawn much later by constitutional lawyers ignorant of both the legislative history and the case law. The common sense view, on the other hand, deriving from the common law criterion of settlement, is that the reception date depends on the grant (or otherwise effective regrant) of a constitution. For New Brunswick this principle would yield a date of 1784, when the colony was erected into a separate government. For Nova Scotia it would yield a date of 1749, or, arguably, 1719, when the first Commission and Instructions were issued to Richard Philipps, Cornwallis' predecessor as Governor.

The reception of English statute law is not known to have been the subject of judicial pronouncement in Nova Scotia again until the 1820s. In 1823, a probate appeal was sent down from the Court of Chancery to the Supreme Court.[56] The reference was heard by three of the four judges, including the octogenarian Loyalist Chief Justice, Sampson Salter Blowers, whom Lieutenant-Governor the Earl of Dalhousie had unsuccessfully tried to appoint Master of the Rolls in 1818.[57] The question to be adjudicated on behalf of the widow-administratrix-respondent was "whether the share of a child under the provincial statute of distributions, is a vested interest at the death of the intestate, or remains a part of the intestate's estate."[58] The case turned on whether the Caroline Statute of Distributions of 1670, which had been enacted in Nova Scotia, took priority over the statute of 1 James 2, which not only revived and continued the earlier Act but also altered it materially. The latter statute had not been similarly enacted.

Cochran v. *Cochran* was reported from junior barrister Beamish Murdoch's own shorthand notes. Indeed, he published it ten years later as an Appendix to

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[56]*Cochran* v. *Cochran*: RG 36 "A" box 117, file 595, doc. 3 ("Case for the Opinion of the Supreme Court," 12 Apr. 1823); RG 39 "C" (HX), box 168, file "Miscellaneous 1823", PANS. It was in fact a test case, Bliss, counsel for one of the complainants, pointing out "that it was an amicable suit brought to obtain the decision of the judges": B. Murdoch, (1832) 2 *Epitome*, p. 292. The *Cochran* reference is highly significant for the development of inheritance case law, which is doubtless the reason why Murdoch reported it in the first place and subsequently transcribed the report for publication in his *Epitome*.

[57]Commission book under date 30 November 1818: RG 36, vol. 76[e], p. 145, PANS. The *Cochran* reference took place a mere two years before the appointment of the first lawyer to serve as Master of the Rolls; his several predecessors had been laymen.

[58]B. Murdoch, (1832) 2 *Epitome*, p. 288. As the respondent was the widowed second wife of the intestate, Thomas Cochran *père*, the action verged on the "wicked stepmother" scenario.

the second volume of his *Epitome*.[59] The lawsuit featured the élite of the Nova Scotia bar. Counsel for the respondent, the widow of Thomas Cochran Sr., was James W. Johnston, subsequently Solicitor- and Attorney-General, Premier, Judge in Equity, and ultimately Lieutenant-Governor. Counsel for the complainants, Cochran's surviving children, were Samuel George William Archibald, K.C., who also became Solicitor- and Attorney-General and ultimately Master of the Rolls, and William Blowers Bliss,who became a puisne judge. The common law judges sitting for the reference were unanimous in their view that the statute of 1 James 2 was not in force in Nova Scotia because the legislature had not enacted it. This statute would have given each of the siblings an equal share with their mother in the deceased, unmarried and childless eldest son's portion of their father's estate. Although the provincial statute of distributions provided that the surviving children might divide their dead brother's portion equally among themselves, the Chief Justice went so far as to claim that not even the relevant section of the provincial Act of 1758 made any difference. The widow of the intestate, as next of kin, was sole heir-at-law of his deceased children, which construction held under the Caroline Statute of Distributions[60] as well as the common law.

This was an extreme position to take, not merely because the statute of 1 James 2 had not been enacted, and therefore had not been received and was not in force, but because the provincial probate law already provided for the equitable distribution of an intestate estate. Blowers, however, seemed to be arguing that the statute of 1 James 2 was not in force because it had been passed after the planting of his native Massachusetts: "[t]his province was part of Massachusetts, and was conducting itself by their law formerly."[61] This was an allusion to the fact that the government of the province of Massachusetts Bay, after Sir William Phips' capture of Port Royal in 1690, considered Acadia a dependency by right of conquest, subsequently confirmed by royal charter.[62] Blowers thus dispensed not only with the operative English statute, but also with Nova Scotia's own statute of distributions. He also implicitly rejected "the principle that the distinction between legal and equitable estates was of no practical value in Nova Scotia[,] as in England."[63]

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[59]*Ibid.*, p. 287ff: "[Appendix] *No. VI. - Supreme Court at Halifax - Sittings after Michaelmas Term, December 11, 1823.* The case reported was meant to be explanatory of a section in Book II, Chapter 9, "Title by Inheritance": *ibid.*, p. 188.

[60]Statutes of England, (1670) 22 & 23 Car. 2, c. 10.

[61]*Supra*, note 58, p. 291.

[62]B. Murdock,*A History of Nova Scotia, or Acadie*, (Halifax 1865), p. 197.

[63]A. B. Sprague, "Some American Influences on the Law and the Law Courts of the Province of Nova Scotia from 1749 to 1853" (1936), p. 36: typescript, PANS. A revised and edited version of this William Inglis Morse History Prize-winning essay is published as the lead article in *Nova Scotia Historical Review*, XII, 2 (December 1992), pp. 1-31.

It has long been recognized that the substantive law of probate in Nova Scotia represents an extension not of English but of Massachusetts law.[64] Chief Justice Belcher himself said as much in his marginal note on the original probate Act of 1758. He pointed out that the Massachusetts Act of 1692 had been confirmed in the course of a probate appeal to the Privy Council in 1738, wherein he had acted as junior counsel for the respondent, in whose favour judgment was rendered.[65] It is to Belcher that credit must go for introducing the probate law of his native Massachusetts into Nova Scotia. This is ironic in view of his reputation for advocating the indiscriminate reception of English statute law, both criminal and civil. In *Cochran* v. *Cochran*, in any case, a later chief justice also from Massachusetts seemed to draw from the maxim, "where the equities are equal the law prevails," a decision which abrogated the provincial statute of distributions, while it affirmed the course of descent at common law. Murdoch, who was well aware that the order of intestate succession in late Roman law was the same as prevailed in the former Thirteen Colonies, implicitly criticized the judgment in *Cochran* v. *Cochran*: "Thus our law," he was to write later in the *Epitome*, "by dividing the inheritance among all the children of an intestate, and by abolishing most of the unnecessary and artificial distinctions between real and personal property, has relieved us from the unjust rules of primogeniture and from much subtilty [*sic*] of legal definition."[66]

Indeed, the most material result of *Cochran* v. *Cochran* was that in 1829, the provincial statute of distributions was amended and enlarged by the legislature so as to copy explicitly the ameliorating provisions of the statute of 1 James 2.[67] This fact was alluded to twenty-five years later by then Chief Justice Brenton Halliburton. As senior puisne judge at the time of the *Cochran* reference, he evidently considered the matter to turn on whether one or both of the English statutes involved had been enacted locally.[68] Murdoch, who was to dedicate the *Epitome* to retiring Chief Justice Blowers, appreciated the impact on reception law jurisprudence in Nova Scotia of the latter's thirty-five-year-long tenure as chief justice. Halliburton, who not only succeeded Blowers as chief justice, but also had shared the bench with him for twenty-five years, summed up his predecessor's views by stating that Blowers

> inclined to the opinion, that those statutes only which were in amelioration of the

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[64]On this subject generally, see *ibid.*, p. 33ff.

[65]*Supra*, note 46, p. 12 fn. (a); Smith, *supra*, note 19, pp. 562ff.

[66]*Supra*, note 33, p. 35.

[67]*An Act ... for the Settlement and Distribution of the Estates of Intestates*, S.N.S., (1829) 10 Geo. 4, c. 11 [s. 2: "Shares of children dying intestate after death of their father"].

[68]*Uniacke* v. *Dickson et al.* (1848), 2 N.S.R. 287 at 292 (Ch. Ct.), Halliburton CJ. The British statutes concerned had to be "re-enacted" despite the fact that they were both pre-settlement as well as pre-legislature.

> common law, and increased the liberty of the subject, were in force here; and though (as we have no reports of the decisions) my memory does not enable me to mention any particular case which he decided upon that principle, I well recollect that he was invariably influenced by it in all cases to which it was applicable.[69]

Cochran v. *Cochran* was certainly not a case in point; it was the statute of 1 James 2 which ameliorated the common law, not the statute of 22 & 23 Charles 2, which rather affirmed it. The conclusion may nevertheless be drawn that between 1797 and 1833, the period of the Blowers incumbency, the conventional general rule that all Acts of Parliament made in affirmance or amendment of the common law before the settlement of the colony were in force there, prevailed in Nova Scotia.

During the course of argument in *Cochran* v. *Cochran*, William Blowers Bliss had occasion to observe that the statute of distributions in New Brunswick copied that of 1 James 2, which, being a post-Restoration statute, would presumably had to have been enacted in order to be in force there.[70] Seven years later, in *The King* v. *McLaughlin*, the Supreme Court of New Brunswick *in banco* had to determine whether the pre-Restoration statute of 33 Henry 8, which gave the Crown a security lien on the real estate of bond debtors, extended to and was in force in that province.[71] The full bench rejected the hypothesis advanced by counsel for the defendant that Nova Scotia was a conquered colony to which the statute law did not extend. This argument was dismissed on the basis that "the English authorities" assumed priority of discovery if not of settlement, the decisive event being the grant to Sir William Alexander in 1621. This view had been put forward by the justices of the Inferior Court of Common Pleas as long ago as 1755, and suggests that Nova Scotia might have chosen a reception date even earlier than New Brunswick's "implausibly early" date of 1660.[72] The court was unanimous in determining "the true principle to be as laid down by Lord Mansfield in *Lindo* v. *Lord Rodney* (1782) that each colony at its settlement takes with it the common law and all the statute law applicable to its colonial condition."[73]

The extension and receptibility of the statute of 33 Henry 8 did not depend on the fact that it was pre-Restoration, but on whether it was pre-settlement and

[69] *Ibid.*, p. 290.

[70] *Supra*, note 58, p. 291. The New Brunswick statute concerned was (1786) 26 Geo. 3, c. 11 – s. 14 of which incorporated the provisions of the unenacted British statute, (1685) 1 Jas. 2, c. 17.

[71] (1830), 1 N.B.R. 218ff. The English statute judicially considered was (1541) 33 Hen. 8, c. 39. For an analysis of the case see Bell, *supra*, note 48, pp. 198-99.

[72] Bell, *supra*, note 48, p. 197.

[73] *Supra*, note 71, p. 221, Chipman J; quoted by Halliburton CJ, *supra*, note 68, p. 289.

obviously applicable to the New Brunswick situation. Although *The King* v. *McLaughlin* includes a judicial determination of the criteria for extending English statute law, it certainly does not argue in favour of choosing 1660 as New Brunswick's reception date. Justice Ward Chipman does no more, in his concurrence with Chief Justice Saunders and Judges Bliss and Botsford, than endeavour to explain why a reception date of 1660 was originally adopted as an *ad hoc* rule of thumb. By no means does he attempt to justify the bizarre and unwarrantable practice which seems to have obtained in the forty years between his father's time and his own. His words nevertheless are frequently quoted as the most succinct statement of the 1660 hypothesis and its legal consequences over the first four decades of New Brunswick's existence as a separate jurisdiction.[74]

Chipman was not dissenting from the unanimous judgment of the court. His comments neither support the traditional view nor do they lend any credence to it. The period of colonial settlement, which "limits the extension of acts of Parliament," was a matter neither of inference nor arbitrary construction but of historical record. Whether New Brunswick is to be regarded as a New England Planter colony settled in 1765 or a Loyalist colony planted in 1783, one does not need to resort to historical speculation or legal fiction in order to rule out 1660 as

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[74]Bell, *supra*, note 48, *passim*, but especially p. 198 n. 16. Chipman *père*, who himself served as a puisne judge of the Supreme Court from 1809 to 1824 – he was replaced on his death by his son and namesake – would have had ample opportunity to implement the "reception policy" which he had developed in 1786. There was, however, an alternative view:

> Their Lordships are unaware that there was, in 1660, any technical rule of draftsmanship governing the geographical area to which an English Act of Parliament was presumed to apply where its terms were silent on that point. The question whether such an Act applied outside England ... must depend in such circumstances on the intention of its framers, to be deduced from the nature of its subject-matter and substantive provisions. It would presumably have no such external application if its subject-matter were beyond question of merely insular and domestic import.

(*A.-G. Alta. et al.* v. *Huggard Assets Ltd. et al.*, [1953] A.C. 420 at 441, [1953] 3 D.L.R. 225 at 233 (P.C.) Lord Asquith [quoted in L. B. Z. Davis, *Canadian Constitutional Law Handbook* (Aurora, 1985), p. 641 (§100.249)].

If an Act passed in 1660, the year in which – hypothetically, for the sake of legal argument – the "North American colonies were deemed generally to have come into existence," did not extend, then *a fortiori* any Act passed before 1660, when none of the British North American colonies standing in 1786 had yet come into existence. What Hogg [*supra*, note 1, p. 23 n. 4] calls "the idiosyncratic basis" of the 1660 doctrine is the fact that all the former New England colonies, whence New Brunswick's tory-loyalist oligarchy originated, were well planted by that time. The "discretionary judgment" on which the extension of English statute law to New Brunswick was based, therefore, was itself grounded in highly speculative inference and extrapolation. For a post-*McLaughlin* New Brunswick perspective on Nova Scotia's reception of English statute law, see *Milner* v. *Gilbert* (1847), 5 N.B.R. 617 at 621-22, 624. This reported judgment provided the even more idiosyncratic basis of the 1497 doctrine, quoted by Gall (*supra*, note 6 at 52, n. 5) from Saint John lawyer Eric Teed, who wrote, "New Brunswick has English law by virtue of the discovery of John Cabot in 1497 who claimed down to Virginia. ... The Maritimes have English law by virtue of English discovery of settlement prior to the French settlement, not by virtue of conquest." Bell (*supra*, note 48, p. 199) states that the *McLaughlin* precedent "was implicitly followed in *Milner* v. *Gilbert*, where the junior Chipman, as Chief Justice [since 1834], had occasion to reiterate his earlier opinion."

"the soundest choice for a reception date."[75] As in Nova Scotia in 1758, so in New Brunswick in 1786, the significance of the date of the first convocation of the legislature is that English and British statutes, regardless of their date of passage through Parliament, had to be enacted by the colonial legislature if they were to remain in or come into force. In other words, English statute law was on the same footing as Nova Scotian statute law, 1758-1784, which was declared not to apply to New Brunswick and was therefore subject to retrospective re-enactment.[76] This would amount to a repeal by implication of all English statute law which had been "received" in Nova Scotia because New Brunswick did not "receive" Nova Scotian statute law.

The King v. *McLaughlin* should have become the leading case in New Brunswick reception law. Perhaps the reason why it did not is that its purport has been generally misunderstood. The judgment may never have been openly contradicted in the New Brunswick courts, but it was misinterpreted and misapplied and the wrong inferences were drawn from it. This occurred not only in *Scott* v. *Scott* in the New Brunswick Court of Appeal as recently as 1970[77] but also, most conspicuously, in *Uniacke* v. *Dickson* in the Court of Chancery of Nova Scotia as long ago as 1848.[78] It is remarkable that James Carter, the young English barrister who in 1834 replaced Ward Chipman as puisne judge, and who sixteen years later would also succeed him as chief justice, expressed the view in 1835, "that of the statute law of England which existed at the original settlement of this province, so much is in force here as is adapted to the circumstances of the province."[79] Although at issue were the Henrician statutes of uses and enrolments, Chief Justice Chipman, in delivering the judgment of the Court, made no mention of the putative reception date of 1660. Another judge pointed out that in deciding the question of the extension and adoption of English statute law, the bench had "no very definite rule to guide" them.[80] Nevertheless, both statutes

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[75]Bell, *supra*, note 48, p. 197.

[76]S.N.B., (1791) 31 Geo. 3, c. 2. The proviso to this Act, which still forms part of the basic law of New Brunswick, stated that it "shall have no retrospective force or operation": Bell, *supra*, note 48 at 198, n. 15.

[77]*Ibid.*, p. 200. It would be less sophistical to argue that the Statute of Tenures, (1660) 12 Car. 2, c. 24, was passed in the same year as the Restoration rather than *after* the Restoration. The grounds on which the Privy Council had decided seventeen years earlier (*supra*, note 74) that the same statute did not extend to Alberta, however, were discretionary rather than technical. Although the New Brunswick Court of Appeal's "definitive pronouncement" endorsing "the *McLaughlin* precedent" brought it finally under the umbrella of stare decisis, the 1660 canon is nevertheless as gross a misconstruction of the leading case in reception law as is the 1758 reading of *Uniacke* v. *Dickson* (see *infra*).

[78]*Supra*, note 68.

[79]*Doe d. Hanington* v. *McFadden* (1836), 2 N.B.R. 260 at 276.

[80]*Ibid.*, p. 277, Parker J.

were declared to extend to and be in force in the province. As in *The King* v. *McLaughlin,* which was not referred to, the decision was made on the basis of applicability and adaptability to local circumstances, not of temporal legislative priority.

Two years after the decision in *The King* v. *McLaughlin*, which he appears not to have treated at all, Beamish Murdoch began publishing his four-volume *Epitome of the Laws of Nova-Scotia.*[81] He justified the enterprise by writing in the Preface to the first volume published in 1832, that the usefulness of such a commentary was in part suggested to him by "the uncertainty as to what English acts are or are not in force here."[82] Indeed, his principal aim, as stated in the Preface, was to redact the entire statute law of the province while connecting it "with such English law as is in force here or necessary to be noticed." Murdoch was perhaps less radical in his approach to the subject than his professionally more successful contemporary, Thomas Chandler Haliburton. In the second volume of Haliburton's, *Account of Nova-Scotia*, published in 1829 (the same year he was to become a chief justice of the remodelled Court of Common Pleas), he stated that neither the common law nor the statute law "in every respect, ought to be in force in a new settled country."[83] The exception was statutes made in affirmance or amendment of the common law. This was an inference from the rule laid down by Blackstone, and it was up to judges (in default of legislation) to decide whether or not an Act of Parliament was necessary and applicable to the state of the colony.

Murdoch, however, took the more sophisticated view that the reception of English law into Nova Scotia occurred in three ways: customary usage, legislative enactment or judicial decision. Although he does not attempt to assign relative weight to these alternatives, the third was historically the most significant. His treatment of the common and statute law of England as one of the five sources of the law of Nova Scotia is preliminary to Section vii of the Introduction, wherein Murdoch considers, *How far the Laws of England are in force in this Colony.*

In attempting to provide a rationale for the extension of English law, Murdoch observes that "much doubt exists as to the degree in which the English common or statute law are [*sic*] valid in the colony, except those parts of it which have met

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[81]Halifax: Joseph Howe, 1832-33; 2 *Epitome*, p. 296 [Index, *s.v.* "English statutes"]. Concerning Murdoch's views on reception, see first of all, P. Girard, "Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his *Epitome of the Laws of Nova-Scotia*" *Law and History Review*, XI (1993) [forthcoming].

[82]1 *Epitome*, p. v.

[83]*Supra*, note 43, p. 344.

with an express legislative or judicial recognition or rejection."[84] The extension of English law forms the exception, not the rule, and where the legislature is silent then the courts must speak. If that remained the highly unsatisfactory *status quo* seventy-five years after the House of Assembly first met in 1758, then how much more so between 1754 and 1758, when the legislature did not yet exist and the question had to be thrown into the Supreme Court for judicial determination. Murdoch also implicitly rejects the notion of there being a common law basis for receiving English statute law. It seemed doubtful to him whether any English laws not expressly naming the colonies "have any validity here, until they have been adopted into our local jurisprudence by distinct legislation or general recognition and usage."[85] The idea of an omnibus reception date was quite foreign to him. The most which could be said for 1758 was that it was the earliest date on which English and British statutes became capable of provincial legislative enactment, without which they would have had no validity and technically could not have remained in force.

Murdoch's so-called British authorities, which are appended to Section vii, are two in number: (i) George Chalmers's *Opinions of Eminent Lawyers, On Various Points of English Jurisprudence, Chiefly Concerning the Colonies, Fisheries, and Commerce, of Great Britain*, published in London in 1814; and (ii) Blackstone's *Commentaries*. Chalmers was an expatriate Scottish lawyer who had practised law in Maryland for a dozen years before the Revolution. He fled the colony as an active Loyalist, and then spent most of the remainder of his career as chief clerk to the Committee of the Privy Council for Trade and Plantations.[86] Chalmers' two-volume digest, which Murdoch evidently preferred to Blackstone's *Commentaries* contains thirty pages of legal opinions, ranging in date from 1720 to 1767, under the heading, "How far the king's subjects, who emigrate, carry with them the law of England: *First*, The common law; *Second*, The statute law."[87]

These "eminent lawyers," of course, were the various attorneys- and solicitors-general, whose opinions had been "collected, and digested, from the originals, in the Board of Trade, and other depositories." It was from Chalmers' digest that Murdoch drew, verbatim, the report of the law officers in *Rex* v. *Young*, although the digester misread the opinion as stating that subjects emigrating *do* carry with them the statute law. Murdoch parenthetically restored the operative word missing from Chalmers' transcript of the report. The text may have been "extra-judicial," but was certainly not "vague," to use Murdoch's own adjectives.[88]

[84] 1 *Epitome*, p. 34.

[85] *Ibid.*, p. 35.

[86] G. A. Cockroft, *The Public Life of George Chalmers*, (New York, 1939), *passim*.

[87] Vol. 1, pp. 194ff. [§III].

[88] 1 *Epitome*, p. 34.

Indeed, Murdoch's personal view seems to derive from the same source as the general theory enunciated by the law officers in 1757, that the statute law as a rule does not extend; its reception depends on the circumstances of the case, the colony's constitution, customary usage and legislative acts. However extra-judicial it may have been, this legal opinion was authoritative since it came from two future lord chancellors and was much anthologized.[89] It probably influenced the legislators of 1758 to commence enacting those English and British statutes, or sections thereof, which were requisite to their perception of the province's legal needs. Thus, the scope for the Supreme Court's exercise of "powers of a legislative description, in adopting or rejecting different parts of the English law"[90] was reduced.

If common law principles were not to be brought to bear on the attempt to establish a reception date, then it becomes clear that 1758 was a terminal date in the opposite sense to how it has generally been understood. It was really a *terminus post quem*, a date *after which* no existing Acts of Parliament were deemed to be in force unless and until they had been enacted by the provincial legislature. Establishing a reception date by "express legislative declaration," therefore, meant that English and British statutes, regardless of their date of passage through Parliament, were subject to retrospective re-enactment by the colonial legislature. Such a principle was implicit in the judgment delivered sixteen years later in *Uniacke* v. *Dickson*. But whether the judges handing down the decision had read Murdoch and been influenced by his theories on the validity of English statute law is a moot point.

Uniacke v. *Dickson*[91] has the unenviable distinction of being cited in most of the constitutional law texts, where it is generally misconstrued or misapplied. It is accurately described as the leading case in reception law in Nova Scotia, but no attempt has been made to analyse it or investigate the origin and evolution of its precedential status. What commends it as a formally reported decision with a unique significance for Nova Scotian constitutional law is its lucid exposition of a view current at the time, which afterwards became the view that prevailed. This case would have remained an unremarkable and doubtless unreported action for foreclosure had not the Attorney-General interposed on behalf of the Crown to recover a bond debt. Thomas Dickson, a collector of impost and excise, had defaulted on the debt which had been incurred subsequent to the execution of the mortgage to James Boyle Uniacke. In 1842, the Crown had successfully brought

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[89]See, for example, treatises cited in the list appended to *The King* v. *McLaughlin* (1830), 1 N.B.R. 218 at 225.

[90]*Ibid.*

[91]The original record of the action, which is virtually complete: RG 36 "A" box 305, files 1495, 1504 [supplemental bill], PANS.

an action against the mortgagor in the Supreme Court,[92] as on the equity side of the English Court of Exchequer. Although the equity jurisdiction of the Court had been transferred to the High Court of Chancery in 1841, its crown revenue jurisdiction remained intact. The exchequer jurisdiction of the Supreme Court of Nova Scotia, moreover, was "general and inherent."[93] Even if the nominal parties to the action had colluded to cover the mortgagor's property, there was no bar to foreclosing a legal mortgage. Exceptions may have been possible through equitable lien or equitable execution favouring the judgment creditor over the mortgagee, but these doctrines were scarcely known to equity jurisprudence in Nova Scotia.

The Attorney-General, preferring to rely on strictly legal remedies, had no choice but to apply to the Master of the Rolls to be made a co-respondent with the mortgagor, on behalf of the Crown as chief creditor. The Master of the Rolls, Archibald, who had amended the bill of complaint to permit the Crown to act as intervenor, died while the cause was *sub judice*. His successor as Master of the Rolls, Stewart, having acted at the bar for the complainant, was thus disqualified from presiding. He was not able to deliver judgment as "responsible Adviser and Judge," to quote the language of the *Chancery Practice Amendment Act* (1833). Lieutenant-Governor Sir John Harvey, as *ex officio* chancellor, was therefore obliged to summon the chief justice and the senior puisne judge of the Supreme Court to serve as *ad hoc* judicial assistants ("legal advisers"). However singular the proceedings, there can be no doubt that Chief Justice Halliburton and Judge Hill were well qualified for the task at hand, as both were experienced Masters in Chancery.

The Crown's defence depended entirely on two English statutes, 33 Henry 8, c. 39 and 13 Elizabeth, c. 4, "which gave the Crown a lien upon the real estate of certain public officers as a security for the fulfilment of their bonds," but neither of which had been enacted in Nova Scotia. "To what extent the laws of the

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[92]*The Queen* v. *Dickson*: RG 39 "J" vol. 44 at 29 [judgment], PANS.

[93]See, generally, B. Cahill, "The Court of Exchequer (1775): The Stillbirth or Short Life of a Prerogative Court in Eighteenth-Century Nova Scotia," R.G. Bonnel, ed., *Facets of the Eighteenth Century: Descriptive, Social and Normative Discourse*, (North York, 1991), p. 11ff. The origin of the crown's bringing forward the statutes of Henry and Elizabeth in defence of its right to act as intervenor between mortgagee and mortgagor was the crown revenue action *The King* v. *Smith* (1810), Wight. 34, 145 E.R. 1164, at 1168 (Ex. Ch.), in which McDonald LCB found for the defendant. Halliburton CJ instanced the action *Casberd et al.* v. *The Attorney-General* (1819), 6 Price 411, 146 E.R. 850 (Ex. Ch.), a precedent-setting case concerning the nature of an equitable mortgage, in which Richards LCB decreed for the complainants and in which the statute of 13 Eliz. was judicially noticed: (1848), 2 N.S.R. 187 at 292-93. It is significant that both of these actions – especially the latter – antedated the transfer of the equity jurisdiction of the Court of Exchequer to the High Court of Chancery. On the subject of equitable relief against the crown, available from 1668 on a bill brought in the Court of Exchequer against the Attorney-General, see P. W. Hogg, *Liability of the Crown*, 2nd ed. (Toronto, 1989), p. 4-5.

mother country prevail in the colonies settled by her descendants," observed Chief Justice Halliburton, "is a question which has occasioned much discussion, without producing any rule approaching to precision for our guidance."[94] The chief justice adduced the non-enactment of the statutes concerned, and the Crown's proceeding successfully in the first instance in the common law court and under provincial statutes. He viewed the above as strong arguments that the statutes of Henry and Elizabeth were neither necessary nor applicable, so that there were not even grounds for deciding whether either of them was in force in Nova Scotia. Crown debtors, whether bonded public officials or not, had customarily been proceeded against in the Supreme Court. There was also a strong presumption, deriving from Blackstone, against the Revenue Acts extending to the colonies since they were deemed especially unnecessary and inapplicable.[95]

Halliburton, moreover, believed that the two statutes adduced had already been ameliorated – they had not been repealed – by an Act of Parliament passed in 1841.[96]2 The chief justice concluded that the Crown had no defence, either under the English statutes even if valid, or at common law. Dickson's title held, and so did Uniacke's mortgage. The chief justice's reasoning appears not to have saved him from a glaring blunder in his summation: "The question [of reception] is a new one here," he remarked, "and I have been little aided by precedent, in coming to a decision upon it."[97] Can the elderly chief justice, whose own lifetime intersected Belcher's, have been altogether ignorant of the indigenous precedents? Indeed, the law officers' report on *Rex* v. *Young* was easily available in Volume 1 of Murdoch's *Epitome*. It is significant that Halliburton both knew and read into the record the report of Judge [then Chief Justice] Chipman's classic formulation in *The King* v. *McLaughlin*. He thereby applied , however unintentionally, Murdoch's dictum that "the decisions of the Supreme Court of New Brunswick are well worthy of our attention."[98]

Concurring in the judgment delivered by the chief justice was William Hill.

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[94]*Supra*, note 68, p. 288.

[95]See for example Murdoch, 1 *Epitome*, p. 39 (quoting Blackstone).

[96]In fact it was *An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fiats in Bankruptcy*, (1839) 2 & 3 Vic., c. 11; the citation "(5 Victoria, Cap. 11)," which appears in the report, 2 N.S.R. 287 at 291, is erroneous. The statutes of Henry VIII and Elizabeth are both specifically mentioned in s. 8 of the Act, which could not have extended to the colonies because it did not even extend so far as Ireland (s. 14) – which had lost its own parliament years before. "Remedial statutes are to be construed liberally," Murdoch stipulated (1 *Epitome*, p. 24), but if the defective statutes did not extend, neither then would the remedial one.

[97]*Supra*, note 68, p. 295. On the other hand, it may be that the Chief Justice was simply referring to the fact that the English statutes had – to his knowledge – not been judicially considered before.

[98]*Supra*, note 8, p. 191. Halliburton nevertheless arrived at a conclusion diametrically opposed to that of Chipman, namely that the Henrician statute extended to and was in force in New Brunswick.

As senior puisne justice of the Supreme Court, he effectively disposed of the Crown's case by asserting that "neither of these statutes was applicable and necessary to our state and condition when the province was first settled, nor at any time since, and the rights of the Crown are amply protected and secured by the common law."[99] This was, indeed, clearly demonstrated by the judgment of the Supreme Court in *The Queen* v. *Dickson*. The pure Blackstonian rationale for the decree of the Court of Chancery in *Uniacke* v. *Dickson* was that there is

> no precise rule, nor can we expect to find any direct decision, as to what imperial statutes extend to the colonies discovered, peopled and settled by British subjects. The question seems to be, and indeed must of necessity be, left open to be decided in each particular colony and case, by the Courts established in those colonies.[100]

Hill cites the same judgment of Lord Mansfield as did Chipman in *The King* v. *McLaughlin*, and was familiar enough with the standard British authorities to recognize that Blackstone dissented from the unrestricted extension posited by the influential late 17th century precedent, *Blankard* v. *Galdy*. However, he seemed no less unfamiliar with the indigenous Nova Scotian case law than did Chief Justice Halliburton himself. It was bad enough that this was presumably the first occasion on which either statute had been brought to the attention of the Supreme Court. It was fatal to their validity that the subject-matter had already been legislated upon in the various provincial Revenue Acts without the necessity of adopting either of them. Just as colonial laws which did not meet the dual standard of agreeableness and non-repugnance were subject to disallowance and consequent repeal, so imperial laws which did not meet the dual standard of applicability and necessity were subject to non-reception.

Whatever the politics and the personalities of the case, the essential misunderstanding of *Uniacke* v. *Dickson* as a leading constitutional decision has been that it prescribed a reception date of 1758. The reported text of the judgment as delivered, however, does not warrant such an inference. Whatever else the decision in *Uniacke* v. *Dickson* may have accomplished, it did not select and designate the date of institution of a local legislature in the colony as the effective date for the discontinuance of English statute law. The correct inference to draw from *Uniacke* v. *Dickson* is that there was no unitary reception date for English statutes, a conclusion based on the general theory that non-extension was, and had always been, the rule. No English statute, regardless of its date of enactment, was good law unless it had been [re-]enacted by the legislature or judicially recognized by the courts of Nova Scotia. If the reception of English law had indeed been "automatic" and continuous down to 1758, then there would have been no need for the Assembly at its first and subsequent sessions to enact any

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[99]*Supra*, note 68, p. 302.

[100]*Ibid.*, p. 299, Hill J.

English or British statutes at all, and no reason for the courts to have previously adjudicated on their validity.

The process by which *Uniacke* v. *Dickson* acquired its precedential status cannot be delineated clearly. One might say that it was decided on the basis of 17th, 18th and early 19th century English precedents, several of which were mediated through 19th century New Brunswick case law (*The King* v. *McLaughlin*). Forty years after, by which time the Nova Scotia Reports had begun to index "Cases Cited,"[101] the precedent-setting process appears to have been completed. *Uniacke* v. *Dickson* became the leading case in reception law almost by default, because no alternative or comparable early judgments were officially reported. The first series of law reports covering the Supreme Court does not antedate 1834,[102] and the 18th and early 19th century cases were unknown except to jurisprudents such as Murdoch.

The gradual nature of the process by which *Uniacke* v. *Dickson* established its pre-eminence (filling a vacuum in the sources of constitutional law) is shown by the 1888 Supreme Court case, *The Queen* v. *Porter*. In this case, the principle enunciated by Chief Justice Halliburton was applied to invalidate a locally unenacted statute of 13 George 2 on the grounds that it was neither necessary nor applicable and was, therefore, neither receivable nor in force.[103] Congdon's weighty *Digest* of 1890, which ran some thirty-eight columns of English and British statutes judicially noticed in all the reported cases before 1889, gives pride of place to *Uniacke* v. *Dickson*: " ... none of the Statute Law will be received except such parts as are *obviously applicable and necessary* [emphasis added]."[104] Writing in the third edition of his highly influential treatise, *The Law of the Canadian Constitution*, the first edition of which had been published in 1892, Judge Clement spoke thus of *Uniacke* v. *Dickson*: "In Nova Scotia, one decision may be considered classic upon this question, and subsequent decisions there have practically been but the application of the principles enunciated in it."[105]

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[101](1886-87), 19 N.S.R.

[102](1834-1851), 1 Thom. 2nd; 1 N.S.R. An Official Reporter was not appointed until 1845; *Uniacke* v. *Dickson* was the first Chancery case to have been reported, although the Master of the Rolls is known to have handed to the Reporter – Alexander James, a junior barrister who was eventually to become Judge in Equity – "a number of valuable decisions in Chancery": (1855), 2 N.S.R. viii.

[103](1888), 20 N.S.R. 352 at 357-58, Ritchie, J. "Held, that the statute is not in force in this province, not being obviously applicable and necessary to our condition, and the legislature of this province, in legislating upon the subject of *certiorari*, having adopted the provisions of many English statutes while omitting to re-enact the provisions of the Act in question"[synopsis].

[104]F. T. Congdon, comp., *A Digest of the Nova Scotia Common Law, Equity, Vice-Admiralty and Election Reports: ...*, (Toronto, 1890) [Cong. Dig.], p. 1336.

[105]W. H. P. Clement, *The Law of the Canadian Constitution*, 3rd ed. (Toronto, 1916), p. 276.

Uniacke v. *Dickson* preceded, by a mere three years, the publication of the first of the modern series of the *Revised Statutes of Nova Scotia*. This exemplifies the close connection that might exist between statute law revision and the reception of English statute law. The commissioners appointed to "consolidate and simplify the laws of the province" stated in their final report to the Lieutenant-Governor in January 1851 that the law of factor and agent had been the subject of two Acts of Parliament. The first of these Acts had been "adopted" by the Legislature in 1836, while the second Act altered and amended the first. The commissioners had drafted a single chapter capturing the essence of both.[106]

By "adoption," the commissioners certainly did not mean that the provincial legislature had enacted a statute law declaration bill. What actually took place was that the Act of 1836 bore the same title and was modelled as closely as possible on the corresponding imperial statute, (1823) 4 Geo. 4, c. 83. The chief alterations, such as "bankrupt" to "insolvent," were demanded by conventions of technical nomenclature.[107] The legislative machinery and method of reception adverted to in the first series of the *Revised Statutes* demonstrate an unbroken continuity with the original collocation of 1767. The adoption of an imperial statute meant enacting a law modelled on a prototypal Act of Parliament. It constituted a reception, if not an extension, of ordinary English or British statute law. The date of passage of the original, exemplary Act of Parliament was altogether immaterial. Its adoption through imitative enactment not only proved both its necessity and applicability, but also demonstrated that there must have been an unsatisfactory lacuna in the statute law of the province which could be most satisfactorily filled from that source. As Murdoch wrote in the "Introduction" to the *Epitome*, the second of the five sources of the law of Nova Scotia (enumerated in order of descending legal priority) "is to be sought in those portions of the common and statute law of England, as have been adopted into our own code by provincial usage, enactment or decision."[108]

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[106](1851), 1st R.S.N.S. xi. The statutes concerned were N. S. (1836) 6 Wm. 4, c. 94 and Imp. (1823) 4 Geo. 4, c. 83 and (1825) 6 Geo. 4, c. 94.

[107]The reason was that no court in pre-Confederation Nova Scotia possessed jurisdiction in bankruptcy; the English *Bankruptcy Act*, (1825) 6 Geo. 4, c. 16, was deemed to extend and be in force *proprio vigore*: Murdoch, (1833) 3 *Epitome*, p. 145. In 1854 the Reform government of James Boyle Uniacke attempted to enact a provincial bankruptcy law, but their efforts were blocked by the Tory majority in the Legislative Council; one of the five commissioners – a Tory lawyer MLA and future judge of the Supreme Court – appointed to prepare the act on the subject of bankruptcy was "not satisfied of the indispensable necessity of a bankrupt law for Nova-Scotia": RG 4 "R" box 8 [7 March 1854], PANS.

[108](1832) 1 *Epitome*, p. 30. However good an epitomist he may have been, Murdoch was a woeful historian of constitutional law, for elsewhere on the same page he says that "a constitutional form of government was erected in 1758." The correct date, of course, was 1749 (or 1719 – depending on whether one's perspectival *idée fixe* is Halifax or Annapolis Royal); *representative* government was established in 1758.

Beamish Murdoch himself revisited the subject of imperial laws validity in an 1863 lecture to the Law Students' Society. His purpose was to point out "the rules by which we are to be guided in ascertaining what portions of the English Common and Statute Law, and decisions of the British courts, are to be held obligatory in the tribunals of justice in this province."[109] Murdoch linked the question of enlarging the scope of *stare decisis* to comprehend the decisions of British courts to that of reception, because the judgments in such cases might well turn on statutes which had not been adopted in Nova Scotia. Thirty years after the *Epitome*, when the subject had still been up in the air, Murdoch was able to accept "as a rule very generally agreed on, that Acts of the British Parliament passed subsequently to the establishment of our own colony and more especially those enacted since we have had a local representative legislature do not bind us, unless they expressly include the colony in terms."[110] A better summing-up of Nova Scotia's first century of reception law jurisprudence could hardly have been given.

Murdoch went even further by positing "rules" to help determine whether any particular English or British statute extended to and was in force in Nova Scotia. These negative rules of reception – "criteria of invalidity" might be a more accurate formulation – were threefold: (i) *posteriority*, which means that Acts of Parliament passed after the first convocation of the Legislature did not as a general rule extend to Nova Scotia; (ii) *non-applicability*, which means that impractical, inappropriate or unnecessary statutes did not extend; and (iii) *supersession*, which means that a colonial statute abrogated an imperial one, insofar as they differed, and amounted to a retrospective declaration that the English or British statute never extended to or was in force in Nova Scotia (in other words, repeal by implication).[111]

Of these guidelines, the first is the most significant historically. It reveals the true origin of the 2 October 1758 reception-deadline hypothesis, which was extrapolated from *Uniacke* v. *Dickson*. Indeed, thanks to the constraints imposed by stare decisis, this guideline has always undermined an historically sensitive understanding of the arguments on which that leading constitutional decision was based. Although he praises *en passant* both Chief Justice Halliburton and Judge Hill – then both deceased – Murdoch conspicuously ignores *Uniacke* v. *Dickson*. In this case, the judges took a somewhat different line from Murdoch's later views and followed his earlier thinking in the *Epitome*. Murdoch rather offhandedly

[109]*Supra*, note 8, p. 187.

[110]*Ibid.*, p. 190.

[111]*Ibid.*, pp. 192-93.

allows that the cases reported in Nova Scotia "are of course to be consulted."[112] Perhaps "Nova Scotia's Blackstone" was paying off old scores. The meeting at which Murdoch delivered his lecture was presided over by William Blowers Bliss, then senior puisne, who had been involved as counsel in the *Cochran* reference forty years before, and who, although he took no par in the proceedings, was junior only to Hill when *Uniacke* v. *Dickson* was *sub judice*.

Two years later, in any case, Parliament settled an important aspect of the reception question once and for all by enacting the *Colonial Laws Validity Act*. This Act defined the conditions under which Acts of Parliament might extend to the colonies.[113] Thenceforth, no statute would extend to any colony unless made applicable to it "by the express Words or necessary Intendment" of the Act. Although its operation was not retroactive, the *Colonial Laws Validity Act* effectively terminated what the late W.B. Lederman called "the automatic reception of ordinary English ... law."[114] The *Colonial Laws Validity Act* confirmed the *status quo post* 1696, when, according to Professor Barnes, only those imperial statutes extending *proprio vigore* were in force in the colonies.[115]

The paradox that the leading case in reception law was adjudicated not in Nova Scotia's Supreme Court but Court of Chancery raises the spectral question of the 'reception' of equity – a question which has been improperly posed because it is based on false assumptions.[116] Equity was qualitatively different from law, whether common or statute, and could neither be received nor rejected. Nova Scotia's Court of Chancery was the oldest in the country; its power and authority to exercise equity jurisdiction originated in the 1749 Commission to Governor Cornwallis, which both posited the existence of the jurisdiction, and instructed him to establish courts of judicature wherein it might be exercised.

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[112]*Ibid.*, p. 194. When Murdoch delivered his lecture (August 1863), Nova Scotia Supreme Court cases were not being officially reported – a fact which Murdoch lamented.

[113]Imp. (1865) 28 & 29 Vic., c. 63. It was, according to Davis, "intended to be a liberating statute, releasing colonial legislatures ... from subservience to British statute law unless such statute law applied expressly or by necessary implication to the colony" (*supra*, note 74, p. 965 [§152.02]); its operation, of course, was not retroactive.

[114]W. R. Lederman, "The Extension of Governmental Institutions and Legal Systems to British North America in the Colonial Period" *idem*, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada*, (Toronto, 1981), p. 69.

[115]*Supra*, note 6, p. 8.

[116]See for example Côté, *supra*, note 2, p. 57. For a very thorough treatment of the subject in the colonial context and from the perspective of a coordinate jurisdiction, see the unpublished paper by H. T. Holman, "The Early History of the Court of Chancery on Prince Edward Island" [ca. 1980], typescript, 84 p. Reception law jurisprudence of Prince Edward Island, which formed part of Nova Scotia from 1763 to 1769, is even more uncertain than Nova Scotia's: Hogg, *supra*, note 1, pp. 22, 23, 33-34.

It is misconceived to propose, as does Côté, that "equity was an integral part of English law and therefore introduced as part of the general reception of English law."[117] It was rather the inherent jurisdiction of a superior court, and the prescribed remedies automatically became available once the colonial court of equity had been established. To argue that equity is an integral or special part of English law is to retroject modern notions of 'fusion' and concurrent administration to a period when law and equity were alternative, competing and sometimes conflicting jurisdictions. It is of course a truism that where no Court of Chancery existed, which was the state of affairs in Upper Canada for nearly the first fifty years of its existence, no equitable remedies were available – "with what injustice one can well imagine."[118]

The situation in Nova Scotia, however, where no such hiatus in the administration of civil justice existed, was quite different. The reception of English law had nothing to do with conferring equity jurisdiction on a court established by virtue of a prerogative instrument, such as the Governor's Commission, which encompassed the grant of inherent jurisdiction in the phrase "according to Law and Equity." To interpret "law of England" or even "laws" "as referring to all the body of law, including equity,"[119] is to confuse unnecessarily the legislative and judicial aspects of reception with the jurisdiction of a prerogative court possessing inherent equitable powers, such as the Court of Chancery, a tribunal which, on one famous occasion at least, had to determine whether a pair of pre-Restoration English statutes were good law in Nova Scotia. Such was the matrix within which *Uniacke* v. *Dickson* was decided.

The general and inherent jurisdiction of a prerogative court in the colonies, and the reception of English law which might be judicially considered by such a court, are two quite different issues; otherwise, the subject would have been explicitly addressed either in the Commission or in the Instructions, as was the erection and jurisdiction of the courts. If one must have recourse to the maxims of equity to classify *Uniacke* v. *Dickson*, then one could perhaps say that equity would not allow a statute to be a cloak for fraud. While equity clearly may not depart from the statute law, the very thrust of *Uniacke* v. *Dickson* was to determine whether the English statutes adduced by the crown respondent were valid and pertinent. There was, so to speak, no law for equity to follow.

Whether the scope of common law comprehends all judge-made law, including the doctrines of equity is beyond the scope of this study. However, it is clear from *Uniacke* v. *Dickson* that Nova Scotia's reception law is quintessentially judge-made,

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[117] *Ibid.*, p. 57.

[118] *Ibid.*

[119] *Ibid.*, p. 58.

because this leading case involved the adjudication of equitable claims, or perhaps arbitration between equitable claims and legal ones. Professor Barnes argues not only that the difference between common law and statute law hindered the development of any uniform doctrine of reception, but also that the absence of any such doctrine prevented a consensus emerging in Nova Scotia "until a century or more of judicial and legislative activity and the emergence of responsible government made the issues moot."[120]

The consensus to which he refers is the *ratio decidendi* of *Uniacke* v. *Dickson*, which was the culmination of Nova Scotia's first century of reception law jurisprudence. The legal principle enunciated by Chief Justice Halliburton in this case, namely, that reception of the statute law must be construed so narrowly as to exclude every Act of Parliament which is not obviously applicable and necessary,[121] may be traced back directly to the law officers' report on *Rex* v. *Young* nearly 100 years before. It also anticipates a recent statute law reception case in the former Trial Division of the Supreme Court of Nova Scotia, in which the Elizabethan statute on fraudulent conveyances was held to be in force, as meeting the dual criterion of applicability and necessity.[122] On that occasion the judge attempted to determine the nature of the English statute by asking whether it was a "codification of the common law that, like the common law, should be applied."[123] If Murdoch and his *Epitome* had been among the "authors and works judicially noticed," the judge would have known that Lord Mansfield, two centuries earlier, had given his opinion that the statute "introduced no new rule but was merely declaratory of the common law principles against fraud."[124] If *Bank of Montreal* v. *Crowell* was decided on those principles of imperial laws validity enunciated in *Uniacke* v. *Dickson*, then the leading case was itself decided on traditional 18th century grounds. These reasons had subsequently been

[120]Barnes, *supra*, note 6, p. 8.

[121](1848), 2 N.S.R. 287 at 289: "As it respects the common law, any exclusion formed the exception; whereas, in the statute law, the reception formed the exception." The absence of any statutory reception of English law meant that the Supreme Court had to exercise broad discretionary judgment.

[122]*Bank of Montreal* v. *Crowell et al.* (1980), 37 N.S.R. (2d) 292 at 297 (T.D.).

[123]*Ibid.*, p. 448.

[124](1833) 3 *Epitome*, p. 18. It is important to note, however, that Murdoch characteristically invokes the doctrine of *stare decisis* rather than common law or statutory reception: "We are also bound by a rule of great importance, in the observation of such decisions of the Courts of Law in the mother country, as elucidate the doctrines of the Common Law, define the privileges and prerogatives of the Crown, or throw light on statute law in force among us, either British or Provincial Acts": *supra*, note 8, p. 191. Murdoch specifically disclaims that the Elizabethan statutes against fraudulent conveyances had been "incorporated" into provincial law. The passage in the *Epitome* continues, "We can therefore in general take the English decisions as fully binding, ..." The King's Bench action to which "Cowp. 434" refers was *Cadogan* v. *Kennett* (1776), 98 E.R. 1172, Mansfield LCJ.

formulated and given classic expression by Murdoch in the *Epitome*.

Although the Elizabethan statute had not been incorporated into Nova Scotian law through legislative enactment, Murdoch concluded that it was virtually in force in the province. As the statute simply confirmed "a principle of natural justice and equity," Murdoch presumed that Nova Scotia's courts "would not hesitate to recognize the same rules."[125] This supposition had been followed by the trial judge, who observed that the courts had consistently (though perhaps not exclusively) held that the statute of Elizabeth was in force in Nova Scotia.[126] Indeed, Judge Hallett went so far as to state that the statute had been "adopted as the law of this Province by the Courts," meaning that it had already been judicially determined that the statute "was applicable and necessary in this Province *and is therefore in force* [emphasis added]."[127]

This was but a contemporary variation on the theme developed by Chief Justice Halliburton "that it is the province of the Courts to declare what is the law."[128] English statutes might therefore be "received" either by means of legislation (adoption through imitation) or adjudication. The latter option means that reception law is judge-made law and fully subject to *stare decisis*, however imperfectly the binding precedents may be known or understood. A terminal date of reception, such as might have been declared statutorily, was not only not requisite; it was redundant. The absence from Nova Scotia of a statutory reception of English law by no means renders inevitable, or even possible without making nonsense of history, the declaration of a precise date of reception calculated from common law principles.

Extension and reception, although their practical effect was the same, naturally imply two quite different perspectives – the one imperial, the other colonial. The statute law extended *from* Britain, and was received *into* the colonies.[129] Of the Nova Scotian experience, one may only conclude that the reception of English statute law into the colony was individual rather than collective. Reception was not an indivisible moment, but a continuing process. The courts determined whether a particular imperial statute was or was not in force. They did not fix either the date or the mode of reception. That was the province of legislation alone, and no omnibus declaratory bill was ever enacted. Indeed, judicial decision

[125](1832) 2 *Epitome*, pp. 213-14.

[126]*Supra*, note 122, p. 447 *et seqq.*; cf. J. E. Côté, "The Introduction of English Law into Alberta" (1964) 3 Alta. L. Rev. 262 at 281 ["Table of English Statutes in Force in Canada"].

[127]*Supra*, note 122, p. 449.

[128](1848), 2 N.S.R. 287 at 291.

[129]Holdsworth (*supra*, note 16, p. 240 *et seqq.*) quite properly considered the extension of English law as a "legal effect" of the westward expansion of England.

was the primary medium of reception.

Most scholars of constitutional law are aware that the courts played a significant role, but the nature and extent of that role have been seriously misunderstood. Elizabeth Brown, for example, attributes to the colonial courts the notion that the Commission or Instructions to the governor had introduced those English laws which were necessary and applicable,[130] but such a view formed no part of reception law jurisprudence in the colonial period. The constitutional documents on which it is based do not warrant such a reading, which is anachronistic and falsely inferential and wreaks considerable violence on both text and context. The legislative criteria of agreeableness and non-repugnance articulated in the governor's Commission did not incorporate a standard "which in practice would be construed as a grant of the laws of England."[131] The Commission addressed the question not of the extension of English statute law, but of conflicts between prospective colonial legislation and imperial acts potentially in force *proprio vigore*. As no colonial law enacting an English or British statute could possibly be disagreeable or repugnant thereto, the colonial legislature, once established, might resort to the expedient of copying (adoption through imitation). Whatever else it may have been, the dual legislative standard of agreeableness and non-repugnance did not constitute a *de facto* extension of English statute law. All that was granted was a law-making body, and a minimum standard for the laws to be enacted by it.

What Brown elsewhere misleadingly calls a "colonial re-enactment by reference statute"[132] – a formulation which perfectly captures the reality of colonial Nova Scotia – was really statutory reception on the Upper Canada model. This is usually referred to in American jurisprudence as a "reception statute." It

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[130]*Supra*, note 32, p. 102. Brown perhaps means only those statutes which extended and were in force *proprio vigore*, such as the *Security of the Sovereign Act*, (1714) 1 Geo. 1, st. 2, c. 13, which prescribed the form of the promissory oaths to be taken by government officials, and which was four times mentioned specifically in the Commission to Governor Cornwallis (6 May 1749). Clearly this Act extended much farther than the satellite "kingdom" of Ireland, its reception there forming the subject of the final section xxxiii. Three earlier English statutes mentioned in the Commission, which were also deemed by the Lords Commissioners for Trade and Plantations, who drafted the instrument, to extend *proprio vigore*, were the *Popish Recusants Act*, (1672) 25 Car. 2, c. 2, which prescribed the Declaration against Transubstantiation, the *Offences at Sea Act*, (1536) 28 Hen. 8, c. 15, which limited the jurisdiction of the Governor in his *ex officio* capacity of Vice-Admiral, and the *Sea Service Act*, (1661) 13 Car. 2, st. 1, c. 9, which was repealed and replaced by an omnibus Act later in the year of Halifax's founding. These English laws extended and were in force – *proprio vigore*? – not because they were pre-settlement, pre-Restoration or pre-anything, but because they were presumptively applicable and necessary. (For the full text of the Commission to Governor Cornwallis, T. P. Akins, comp., *Selections from the Public Documents of the Province of Nova Scotia*, (Halifax, 1869), p. 497 *et seqq.*)

[131]*Ibid.*, p. 133.

[132]Brown, *American Law*, *supra*, note 32, pp. 17-18 and Part iv.

might be generically denominated a "statute law declaration act." Such an Act was passed in North Carolina the very year Halifax was founded, but was disallowed, as were the majority of the few other reception statutes enacted in the Thirteen Colonies before the Revolution.[133] That such Acts were generally post-bellum and observed as the reception date the year 1607, suggests that in pre-Revolutionary America the reception of English law was non-statutory.[134] Clearly, a basis exists for the comparative study of reception law jurisprudence in colonial Nova Scotia and colonial America: "The scholar interested in the history and theory of the doctrine of reception," admonishes Phillips, "would situate it within the long history of reception disputes in the Thirteen Colonies."[135]

A criticism could also be offered against Barnes' implausibly broad construction of the *Plantation Trade Regulation Act*. This Act allegedly "governed the applicability of English statute law to the colonies,"[136] but in fact had nothing to do with the extension of English law. Its concern was that in case of a conflict of laws, the imperial Act should prevail. No colonial Act could conflict with an Act of Parliament which extended *proprio vigore* to the colonies, except on pain of disallowance by Order-in-Council and perforce repeal by the very legislature which had enacted it. The mistaken assumption underlying Barnes' interpretation is that only those statutes which extended *proprio vigore* were in force in the colonies, a situation which did not obtain until the passage of the *Colonial Laws Validity Act* in 1865. Otherwise, the corpus of English statute law potentially exportable to the colonies would have been quite drastically reduced.

The nomenclature of imperial laws extension would make a study in itself, which is beyond the scope of this paper. "The process is usually described as 'reception'," states Professor Hogg, "although 'adoption,' 'migration,' 'incorporation' and 'introduction' are ... occasionally used."[137] The terms "transplantation" and "importation," are also encountered. The historically and

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[133] *Ibid.*

[134] E. H. Pollack, *Fundamentals of Legal Research*, 1st ed. (Brooklyn, 1956), pp. 10-11; the passage is cited in the *Supplement* to the penultimate edition of the *Oxford English Dictionary*, III (1981), p. 1103, as an authority for the use of "reception" as a quasi-technical term in law. Clearly the usage belongs to American rather than to British English, and is now fully established in Canadian, although it tends not to occur in the law dictionaries.

[135] *Supra*, note 6, p. 102. Such a study would involve both comparison and contrast, as the American War may well have changed British attitudes towards colonial statutory reception of English statute law. Writing of the ante-bellum disallowance of the North Carolina reception statute, Brown (*American Law*, p. 17 n. 28) states, "This attitude was in marked contrast to the treatment accorded two comparable Canadian re-enactments by reference: Upper Canada (Ontario) in 1792 and British Columbia in 1867."

[136] *Supra*, note 6, p. 8.

[137] *Supra*, note 1, p. 21, n. 1.

constitutionally correct term for Nova Scotia must be "adoption," although analysis of the phenomenon has been bedeviled by the assumption of the *a priori* necessity of positing a deadline for reception. This false assumption can lead to bizarre conclusions, as is evident from the following statement occurring in a purportedly "historical account" of "The Extension of Governmental Institutions and Legal Systems to British North America in the Colonial Period": " ... if an ordinary English statute was passed after the date of reception for a colony, it was not received there, no matter how suitable it might be for overseas conditions."[138]

If this is a valid general rule, then an exception such as Nova Scotia, a colony which did not have a deadline for reception and where the judicial criterion *was* suitability, conspicuously disproves it. Such naïvety betrays the amateur historian's fallacy of trying to deduce "is" from "ought," practice from theory and the real world from the ideal. There is ample judicial and legislative authority in Nova Scotia for receiving particular British statutes, regardless of their date of passage through Parliament. There is none for a "cut-off" date of reception. The fact that Nova Scotia's Supreme Court was determining what the law was for four years before the legislature met, inaugurated a tradition of reception law jurisprudence which had nothing whatsoever to do with the chimera of a fixed, terminal, reception date ascertainable at common law.

[138]*Supra*, note 114, *loc. cit.* On the other hand – if one extrapolates from the Nova Scotian rather than the Ontarian colonial experience – an ordinary English statute passed *before* the hypothetical "date of reception" would not be "received" *unless* it were applicable and necessary. Hogg (*supra*, note 1, pp. 23-24) is perhaps on more solid theoretical ground when he argues that the probable dates of reception derived from applying the test of "date of institution of a local legislature in the colony" "are quite artificial and are really cut-off dates, marking the end of a period of continuous reception, the latest date of reception, rather than a single event." Unfortunately, however – to paraphrase Bell (*supra*, note 48, p. 196) – it would be superfluous to challenge on historical grounds the historical premises on which the argument for 1758 is based, for the hypothesis is undoubtedly incorrect on legal grounds: *Uniacke* v. *Dickson* did not establish "that English law was received in Nova Scotia as of 1758"; rather, it established that English [statute] law was generally not receivable as of 1848.