CHAPTER I

The Path of the Law— Old World to New

WHEN THE FIRST colonies were planted on the North American continent, the judicial had come to occupy a position of preeminence in the English constitution unmatched in any other European country. This position was owed not alone to the high degree of professional competence traditional in the superior courts and the respect in which their judgments were held. It derived also from the centuries-old distribution in depth of court-keeping functions, and from the fact that duties of attendance and of participation by freemen had insured popular engagement in the business of law administration. The diffusion of jurisdiction by feoffment, by royal grant, by force of ancient usage and by statute had brought into being a plethora of courts. As a result, whether in borough, manor, hundred or county, ordinary men took part in the dispensing of justice as an incident, so to speak, of daily life. Because ordinary men fared forth in such numbers to people the New World, there were to be planted here the same beliefs, indeed convictions, respecting the role of the judicial process that prevailed in England. Eighteenth century lawyers made much of the idea intimated by Chief Justice Holt that an Englishman carries his law with him to a new country.[1] This was a convenient if sometimes troublesome fiction.

[1] In Blankard v. Galdy, Holt K. B. 341 (1693), Holt is reported saying, "In the case of an uninhabited country newly found out by English subjects, all laws in force in England, are in force there. . . ." See also the reports in 2 Salkeld 411; 4 Modern 222; Comberbach 228. In Dutton v. Howell, Shower P. C. 24 (1693/4), this statement was elaborated by Sir Bartholomew Shower to the effect that when Englishmen go to an uninhabited country the common law must be presumed to be their rule for this is their birthright. The idea is made a matter of imperial constitutional law in the so-called Privy Council Memorandum, 2 Peere Williams 75 (1722), when the Master of the Rolls laid it down: "That if there be a new and uninhabited country found out by English subjects, as

Closer to truth, because demonstrable, is the proposition that what went with the adventurers was what Montesquieu called the spirit of the laws.

If in contemplating the dispositions first made in the pristine seaboard communities it seems not a little pretentious to speak of a spirit of the laws, nevertheless, as one observes the directions taken in colonial efforts to establish a rule of law, one finds exemplified the notion of Montesquieu that independently of the laws made by men, a complex of principles is unceasingly operative that determines their institutions and indeed their legislation.[2] There were many details of English seventeenth century law that appear to us to have been less than admirable, even as they did to the colonists. Yet there is no denying the suzerainty of the great fundamentals—the supremacy of the law, the prescription of certainty, the orderly determination of controversies and, above all, the dominating concept of due process. These people, high and humble, exhibited a preoccupation with operations of the law that irresistibly recalls their Norman ancestors. It was not only, as noticed, that they shared in its administration, but they were also uncommonly litigious, and in the recurrent adversarial situations vis-à-vis the Crown, in which particular and eventually all colonies became embroiled, it was to the books of the law that they turned for munitions.

These involvements with the law had implications beyond the execution of civil justice and the determination of *meum et tuum*. We are prone to forget in our times that in English jurisprudence litigated questions of constitutional right were questions of private law, raised by private law procedures and settled as matters of general law.[3] This, a legacy of the Middle Ages, was still the mode in the colonial period. All the great cases involving such issues that came from the plantations to the Privy Council for final adjudication are standing proof of this. The law at large thus assumes a position of focal importance in the life of the little polities of America, and we must therefore make some inquiry into how it was planted here and how were shaped the institutions by which it was administered. This is a phenomenon of growth

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the law is the birthright of every subject, so, wherever they go, they carry their laws with them."

The underlying notion—viz., that law is personal—is very old; *cf.* John Edward Austin Jolliffe, *The Constitutional History of Medieval England, from the English Settlement to 1485* (London: A. and C. Black, 1937), 5, 97; Heinrich Mitteis, *Der Staat des Hohen Mittelalters; Grundlinien einer vergleichenden Verfassungsgeschichte des Lehnszeitalters*, 4th ed. (Weimar: H. Böhlaus Nachfolger, 1953), 139.

[2] Montesquieu, *Spirit of the Laws* (Dublin: 1751), Bk. I, cc. 1 and 2.

[3] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan and Co., 1923), 191. Further references in J. Goebel, "Constitutional History and Constitutional Law," 559–60.

as much a matter of American intellectual as of political history, reaching its eighteenth century climax in the great appeal to the intelligence of the people when the new federal Constitution was offered to them in 1787. Except that a high degree of knowledgeability about the partition of jurisdiction and the appellate process could have been premised, the provisions in the Constitution for the judicial would never have been debated on the rare and often technical level that it was. All this will be later explored, but first of the genesis of the premise.

THE TRANSPLANTATION OF THE LAW

SAVE FOR A few leaders, what the first generations of settlers thought about the law and the institutions that served it was in particulars very different from the notions entertained by sovereign authority for which spoke the experts who drafted the first charters and later the governors' commissions, when the Crown itself took a hand in government overseas. The models for the charters were the forms used for the trading companies that themselves were variants of domestic corporate charters. One clause in these complex instruments conveyed the power to make laws, provided the same were not repugnant to the law of England.[4] This was the standard form by which certain types of corporations were vested with power to make by-laws.[5] In the chartered and proprietary colonies, all of which were to be thus limited, the clause was the warrant pursuant to which local legislatures functioned. In the royal provinces this authority was embodied in a clause of the

[4] This can probably be accounted for by the traditions established in the chartering of early overseas trading companies. John Wheeler, who was secretary of the great Merchant Adventurers Company, in his *Treatise of Commerce* (1601), 24–25, describes the authority of the governor and assistants of this company as encompassing the ending and determination of all civil cases, questions and controversies among the members as well as others who might "prorogate the Jurisdiction" of the company and its court—"without appeale, provocation or declination." This was in substance granted by the charter of Henry VII in 1505, an instrument presumably supplanted by Elizabeth's charter of 1564 which granted powers of judicature but had no such provision. The charter of Elizabeth also contained a clause requiring that ordinances be not contrary to English laws and statutes. For the two charters see George Cawston and Augustus Henry Keane, *The Early Chartered Companies (A. D. 1296–1858)*, (London and New York: E. Arnold, 1896), 249, 254. See also the charter to the Eastland Company, in M. Sellers, *Acts and Ordinances of the Eastland Company*, Camden Society *Publications*, 3d ser. (1906), XI, 142, 145; and that to the Levant Company, in R. Hakluyt, *Principall Navigations, Voyages and Discoveries of the English Nation . . .*, V, 192. On the objective of the companies to secure judicial "facilities" overseas, see W. Cunningham, *Growth of English Industry and Commerce*, I, 416.

[5] *E.g.*, workhouses and hospitals, by St. 39 Eliz. I, c. 5 (1597).

governor's commission. No such reservation was written respecting the exercise of judicial power.[6] Presumably royal officials anticipated that this would be exercised in accordance with common law standards. It is, however, conceivable that observance of these standards was deemed to be assured by the existence of the King's prerogative to hear appeals from his demesnes. Yet of this there is no evidence. For in the early decades of colonization there was only the most tentative gesture toward extending appellate authority over any of the new enterprises.[7] It is only after the Restoration that conscious efforts began to exploit this royal prerogative. So far as the continental colonies are concerned, it is not until the reforms of William III that the full impact of appellate control was to be experienced.

The net result of the early English policy, as it was projected in the charters, was that as respects anything relating to the judiciary, insofar as this rested upon colonial enactment, a certain degree of conformity with English law was expected. As respects anything on which there was no specific legislation, the colonists were initially left to their own devices. As it turned out, a truly impressive mass of detail—forms, modes of procedure and rules of substance—was put into effect without any legislative direction whatever. This free dealing with the mechanics and, indeed, the principles of justice was to give a peculiar quality to the first stage of the introduction of English law in America. Many individual peculiarities have been attributed to the effects of the frontier, as if the prospect of forests yet to be felled and the circumambient savages together were to have as immediate an impact on the texture of the immigrants' ideas as they had upon their struggles to settle and survive.[8]

[6] An exception may be construed in the short-lived Virginia charter of 1609 which provided that ordinances and proceedings, in which the governor and officials in case of necessity had discretion, must be agreeable to English law. F. N. Thorpe, *Federal and State Constitutions, Colonial Charters, and Other Organic Laws* . . . (1909), VII, 3790, 3801 (hereafter cited as Thorpe, *Constitutions and Charters*). Similar is the limited exception, because of its temporary character, in the charter to William Penn (1681) where laws relating to property "as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and Chattles and likewise as to Felonies" were to follow the general course of the law of England until altered by Penn and the freemen of the province. *Ibid.*, 3035 at 3038–39.

[7] In 1638, by the terms of the projected restoration of a corporate government in Virginia. 1 *Acts of the Privy Council of England, Colonial Series, 1613–1783*, No. 403 (hereafter cited as *APC Col.*).

[8] See the citations to adherents of the frontier theory collected in J. Goebel and T. Naughton, *Law Enforcement in Colonial New York*, xix–xx; add C. Rossiter, *Seedtime of the Republic*, 27, and Daniel Joseph Boorstin, *The Americans: The Colonial Experience* (New York: Random House, 1958), 25–26.

This phantasy does not take into account the state of affairs in the England these men had left. For the dispersion of jurisdiction already mentioned had had the result that, viewed in the large, the law of England was a composite of divers ingredients some of which were rudimentary indeed if measured by the standards of the common law—the creation of the King's courts at Westminister. The common law, of course, was the most important component of this English law. It was important in the sense that within the domain carved out by statutes, by commissions, by writs, by process mesne, and finally, and above all, by the pronouncements of its oracles, the common law courts—King's Bench, Common Bench and Exchequer—asserted and in general maintained a paramountcy in the administration of justice. There were areas where this supremacy was invaded—in the criminal law by Star Chamber, on the civil side by the Privy Council, and by Chancery, which ruled its own bailiwick of equity, remaining a rival, but in a peculiar and limited sense. The common law was the law of the reports and of the great commentaries, and because of the accessibility of this learning, assumptions have been made about the degree to which in England it had permeated or controlled the lives of the subject. This view does not take into account the myriad inferior courts that administered local enactments and a variety of usages, some of great antiquity, some reflecting, ofttimes clumsily, central court law. These were the courts frequented by masses of people for reasons of convenience and economy or because, as in the case of tenant farmers, they would otherwise have been remediless. If the procedure in some burghal courts approached in sophistication the standards of Westminster Hall, that in rural jurisdictions still abode in a relative state of innocence. All of such jurisdictions were subject to supervision by the central courts, through devices for removal of causes or by way of review. But this was so much at the whim of litigants that however important in theory, in practice control was most adventitiously exercised.

It was with this heterogeneous body of local law from the backwaters of the mainstream of the common law that the bulk of the immigrants had had immediate experience. It was from recollections of this experience, from approval or distaste of incidents of mother institutions, that the laymen who manned the courts fashioned the jurisprudence of the infant colonies.[9] In some communities where the law books of the

[9] This view of the first stage of reception was set forth in J. Goebel, "King's Law and Local Custom in Seventeenth Century New England," 416–48. There is further matter relating to early developments in New York in Goebel and Naughton, *Law Enforcement in Colonial New York*, at 64, 332–34, 386–90. Joseph Henry Smith, ed., *Colonial Justice in Western Massachusetts, 1639–1702: The Pynchon Court Record* . . . (Cambridge,

Old Testament were held in higher esteem than Dalton's *Countrey Justice* or Kitchin's *Jurisdiction of Courts Leet*—two breviaries for English local court-keepers—some rules of substance of biblical origin were enacted. But barring a very few hardy survivals, this aspect of early law-making left no lasting impress.

If the first phase of American legal development exemplifies the age-old phenomenon of the homing hearts of colonists undertaking to install in the new environment something of what they had forsaken, the second phase is a manifestation of the power of finished art to displace the artless. When lawyers in England discovered in the latter decades of the seventeenth century that the profession need not starve in the New World, the process of remaking provincial law began. Many of these immigrant lawyers were not notably proficient. But they had some training in the common law itself, and were obviously better able to extract meaning from Coke's *Institutes*, to say nothing of the case law, than some parson or planter. It thus became inevitable that the forms and practices current in the royal courts at Westminster and so the body of the common law itself should crowd out the more rudimentary practices and rules first imported and put to use. Owing to the nature of colonial record keeping, this process of displacement is most easily traced in the field of pleading and practice, in conveyancing and the application of English land law. By the beginning of the eighteenth century it is clear that in the superior courts of jurisdictions like New York and Maryland, the hegemony of the common law was assured. In others, like Connecticut, it had not yet completely established itself.

The colonial reception of the common law itself appears to have been an achievement of the bar, although in attributing this feat to the lawyers it is only proper to indicate that we have much more and better evidence of their learning and capacity than of the judges'. The lawyers were forever compelled to produce briefs. But the reporting of any decision was unusual, and it was more or less a matter of chance that here and there some individual would trouble to do so. This almost casual attitude toward native judicial pronouncements may be laid in large measure to the well-nigh utter dependence upon English case law. The reason for this dependence was not alone the availability of published abridgments and reports, but also the deference colonial lawyers were ready to pay to the opinions of courts regarded as peerless.

The whole business of propagating the common law from these

Mass.: Harvard University Press, 1961), 157, and George Lee Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (New York: Macmillan, 1960), 167–77, agree with the statement in the text.

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English sources was in its earlier stages reflexive. It is only later, when at particular junctures the ancient conception of the common law as the subjects' birthright is argued, that lawyers become self-conscious about what they had been doing. So far as Crown policy was concerned, there was every reason not to exercise compulsion that the common law as such be introduced and made effective in the colonies. Otherwise the King's prerogative over the laws in his demesnes would have come to an end, for it was a rule of law that once the common law as such was introduced, it lay with Parliament to make alterations.[10] The Crown, nevertheless, in its dealings with colonial enactments indicated clearly enough that it was intolerant of antic deviations from common law standards.[11] Beyond this, there was of course the control implicit in the exercise of appellate authority of which American lawyers became well aware. But as we shall shortly notice, this did not touch the criminal law, and because of various limitations did not directly affect the great bulk of litigation.

The making over of the law and practice in the colonies in the image of the common law was conditioned by many factors: geography, the availability of professional skill and, above all, the way in which jurisdiction was partitioned. This last deserves particular comment here, for the patterns followed in the arrangement and distribution of jurisdiction in the several colonies contributed to the establishment of distinctly American beliefs regarding the disposition of judicial power. What was done in colonial times determined arrangements in the states upon independence, and the sum of this experience was to affect profoundly the shape of the federal system.

It has been commented in a context irrelevant to our subject that "the English are past masters at holding together odd bits and pieces of incompatible systems and at drawing lines that seem quite arbitrary even to sympathetic friends."[12] No words could better describe the patchwork quilt of English law-enforcing agencies at the time when James Stuart became king. Whether or not the first builders of our commonwealths were aware of the illogic of the institutional scheme they were forsaking, they proceeded to set up their courts in a way at once rational in design and suitable to their needs.[13] Incompatibilities like

[10] Calvin's Case, 7 Coke Rep. 1 at 17b.

[11] E. B. Russell, *The Review of American Colonial Legislation by the King in Council*, 149 *et seq.* With reference to legislation regarding the judiciary, see J. H. Smith, "Administrative Control of the Courts of the American Plantations," 1210–53.

[12] B. Minchin, *Outward and Visible* (London: Darton, Longman and Todd, 1961), 343.

[13] Design emerges in the penultimate stages of organization, for it is apparent that initially in the first colonies—Virginia, Maryland and Massachusetts—the steps taken to provide for more than a single central court were contingent upon the dispersion of settlements. The country courts

the vice-admiralty jurisdiction that were thrust upon them they suffered. But historical accidents, like the probate jurisdiction and Chancery, they managed in some provinces partially to adapt and incorporate in their systems. In other provinces, as in New York and New Jersey, these jurisdictions gained foothold because the inhabitants were powerless to effect change.[14]

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were entrusted with jurisdiction sufficient to their needs and presumably with regard to the capacities of personnel. Inevitably the supervisory authority and the ultimate appellate power were reserved to an agency at the center of colonial affairs. There is a good account of the Virginia development in P. A. Bruce, *Institutional History of Virginia in the Seventeenth Century*, I, 478 *et seq.* For Maryland, see the account by J. H. Pleasants, ed., *Proceedings of the Provincial Court of Maryland, 1663–1666* (*Archives of Maryland*, 1932), XLIX, vii *et seq.* For Massachusetts, 1639–1702, see Smith, *Colonial Justice in Western Massachusetts*, at 65–88.

New York's judicial system after conquest was the first deliberately planned scheme (probably by Colonel Nicolls and the secretary of the province) and was in large degree an adaptation of the Bay Colony system. It was a scheme imposed by authority with the semblance of popular agreement. A second planned system where there was no attempt to get agreement was that instituted for the Dominion of New England into which New York and New Jersey were embodied. On both of these, see Goebel and Naughton, *Law Enforcement in Colonial New York*, at 16–23, 60–69.

[14] The fate of probate jurisdiction was various. For example, in Virginia it was placed in the county courts in 1645 where it remained. 1 W. W. Hening, comp., *The Statutes at Large, Being a Collection of all the Laws of Virginia from . . . 1619* [to 1792], (1809–23), 302 (hereafter cited as Hening, *Va. Stats.*). In Maryland the Provincial Court and the county courts exercised the jurisdiction until 1673 when the Prerogative Court was established. A court of delegates was specially commissioned to review causes. See *Archives of Maryland* (1932), XLIX, xv; E. E. MacQueen, "The Commissary in Colonial Maryland," *Maryland Historical Magazine*, 25: 190, 1930. The act of 1681 (*Archives of Maryland* [1889], VII, 195) made the Prerogative Court competent to deal even with wills that "Concerne Title to Land," notwithstanding English law and custom.

In Massachusetts probate powers were given to the county courts in 1649 and 1652, two magistrates and the recorder being given authority to take proof of wills when the county courts were not sitting. W. H. Whitmore, ed., *Colonial Laws of Massachusetts* (Boston: 1889), 200–201 (hereafter cited as *Col. Laws Mass.*). After the second charter, county Probate Courts were established from which appeal lay to governor and council, to whom the powers of Ordinary were committed by charter. On the similar development in New Hampshire, see Elwin Lawrence Page, *Judicial Beginnings in New Hampshire, 1640–1700* (Concord: New Hampshire Historical Society, 1959), 152–63. Connecticut also set up an independent Probate Court, and the jurisdiction was so far integrated that appeals lay to the Superior Court and thence to the assembly. *Acts and Laws, of His Majesties Colony of Connecticut in New-England, 1702–1729* (1729), 24, 62, 128. In Rhode Island probate and administration were vested in town councils with appeal to governor and council. *Acts and Laws of His Majesty's Colony of Rhode-Island, and Providence-Plantations in America, 1663–1736* (1730–36), 5. Pennsylvania established its Orphans Court in 1683; and despite the vicissitudes of the judiciary laws, there the probate jurisdiction remained with appeal to the Supreme Court. S.

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THE COLONIAL JUDICIARY

THE PRINCIPLE EMPLOYED in the establishment of courts was the distinction between inferior and superior jurisdiction—something that could not be carried out to logical fulfillment in England because of the dominance of property concepts of jurisdiction and of the tyranny of long history. The colonials' approach made possible an approximation of a hierarchical ordering of their courts. The inferior-superior

George *et al.*, eds., *Charter to William Penn, and Laws of the Province of Pennsylvania Passed between the years 1682 and 1700* (1879), 180 (hereafter cited as *Charter and Laws Prov. of Pa.*); 2 *The Statutes at Large of Pennsylvania from 1682 to 1801*, 17 vols. (Harrisburg, Pa.: W. S. Ray, State Printer, 1896–1915), Vol. 2–16 compiled by James T. Mitchell and Henry Flanders, Commissioners, 199; 3 *ibid.*, 14.

Equity courts as such did not exist in New England. In Massachusetts, New Hampshire and Rhode Island some equity powers were exercised in common law courts, although in 1741 a brief attempt was made in the latter colony to use a separate court. J. R. Bartlett, ed., *Records of the Colony of Rhode Island and Providence Plantations in New England*, V, 27, 76. Initially in Connecticut the General Assembly exercised equity powers, sometimes through committee. J. H. Trumbull and C. J. Hoadly, eds., *The Public Records of the Colony of Connecticut, 1636–1776*, V, 152, 444; *ibid.*, VIII, 107, 152, 213, 239, 312, 434. Pennsylvania, having originally committed equity powers to the common law courts, maintained a separate court briefly on the basis of a governor's proclamation but abandoned it; see Albert Smith Faught, ed., *The Registrar's Book of Governor Keith's Court of Chancery of the Province of Pennsylvania, 1720–1735* (Harrisburg, Pa.: Pennsylvania Bar Association, 1941). Virginia had also committed equity powers to the county courts and to the General Court which had probably exercised such before the former courts were empowered; see 1 Hening, *Va. Stats.*, 302 (1645), 345 (1647). Maryland made provision for a Chancery Court in 1638 (*Archives of Maryland* [1883], I, 49), but it would appear from the records that the Provincial Court long continued to exercise equity jurisdiction. In 1694 the royal governor set up a Chancery Court (*ibid.*, XX, 136–37, and see *ibid.*, XXVI, 283; thenceforward it remained a separate establishment.

The situation in these royal provinces was the result of the fact that the governor was commissioned as Ordinary, and since he was given custody of the Great Seal of the Province he assumed powers as Chancellor. In New York there had been early legislation giving Chancery powers to the governor (1683) and to governor and council (1691). 1 *Colonial Laws of New York from the Year 1664 to the Revolution* (1894), 125 at 128, 226 at 230 (hereafter cited as *Col. Laws N.Y.*). Lord Bellomont's Court Ordinance of 1699 did not continue this (2 *Laws of the State of New-York, Revised . . .* [1813], App. V). Governor's ordinances issued in 1701, in 1704 and in 1711 established Chancery as a separate court where the governor was Chancellor (*ibid.*, App. No. VII; Ms. Minutes Provincial Council of New York, VIII, 254, 268, and Ms. Minutes, XI, [NYSL]). On the early single court for equity and common law causes in New Jersey, see Preston W. Edsall, ed., *Journal of the Courts of Common Right and Chancery of East New Jersey, 1683–1702* (Philadelphia: American Legal History Society, 1937), introduction. As

dichotomy was in the main determined by monetary limitations of the amount in controversy in civil actions, the seriousness of the crime in criminal proceedings. The test of original or appellate jurisdiction was not chosen, chiefly, we believe, because the paradigm of King's Bench, a court of both original and appellate jurisdiction, was in the end not to be ignored. The colonists themselves fixed what may be called the structural principles of their judiciaries in the first decades after settlement and before effective controls were imposed on them by the Crown. There were marked resemblances in the several establishments, because there was some borrowing, but chiefly because the conditions precedent for action were everywhere roughly identical. When active intervention by the Crown began in the latter years of Charles II's reign, so much of the prerogative had been conveyed to so many grantees that it was only in the royal colonies that the King's mandates could operate immediately. On the mainland there was at first only one such province—Virginia. But the ambit of royal orders soon increased as one by one jurisdictions fell into the King's hands. By 1754 only the two corporate colonies, Connecticut and Rhode Island, proprietary Maryland and the Lower Counties (Delaware) were virtually immune from administrative interference by the Crown in their law-making.

in New York, when New Jersey became a royal province the Chancery rested on a governor's ordinance. R. S. Field, *Provincial Courts of New Jersey*, New Jersey Historical Society *Collections*, (1849), III, 113; William May Clevenger and Edward Quinton Keasbey, *The Courts of New Jersey: Their Origin, Composition and Jurisdiction* (Plainfield, N. J.: New Jersey Law Journal Publishing Company, 1903), 119–21.

In North Carolina the governor and council sat as a court of Chancery. For early examples, see W. L. Saunders, ed., *Colonial Records of North Carolina, 1662–1776*, I, 422, 435, 454; for later, *ibid.*, V, 654, 811. The early vicissitudes of Chancery in South Carolina are related in Anne King Gregorie, ed., *Records of the Court of Chancery of South Carolina, 1671–1779* (Washington, D.C.: American Historical Association, 1950), 5–7. The establishment by statute of the governor and a majority of the council to be a court of Chancery took place in 1721. T. Cooper and D. J. McCord, Comps., 7 *Statutes at Large of South Carolina, 1662–1838*, (1836–41), 163.

In both New York and New Jersey the governor's authority as Ordinary was exercised by surrogate. See E. B. O'Callaghan and B. Fernow, eds., *Documents Relative to the Colonial History of the State of New-York* (1853–87), VII, 830, 927 (hereafter cited as *Docs. Rel. Col. Hist. N.Y.*); Clevenger and Keasbey, *The Courts of New Jersey, Their Origin, Composition and Jurisdiction*, 128–30, 136. In the "remote" counties of New York, legislation approved by the Crown designated the Courts of Common Pleas as surrogates to take proof of wills. 1 *Col. Laws N.Y.*, 300 (1692); 3 *ibid.*, 780 (1750). For a similar diffusion of authority in New Jersey, see Clevenger and Keasbey, *The Courts of New Jersey, Their Origin, Composition and Jurisdiction*, 128–29.

In South Carolina the governor himself sat as Ordinary; see Ms. Record of the Proceedings of the Court of the Ordinary, 1764–1771, at 50 (S. Car. Hist. Soc.).