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THE BRITISH ORIGIN OF JUDICIAL REVIEW OF LEGISLATION *

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This is a comprehensive survey of the origin of the power of courts to adjudge that an unconstitutional statute is not law. This power is often referred to as peculiarly American in origin. Not that no idea of such a power had elsewhere been conceived but that it existed only in embryo until Americans, after their secession from the British Empire, developed it into a working institution. The evidence accumulated in this survey is very persuasive to the contrary. It discloses, I think, that the institution was much more fully evolved in British thought and practice before the American Revolution than is commonly supposed. So fully developed indeed that it seems more correct to say that it was of British home country creation, although Americans as British colonial subjects warmed to it, and as independent Americans gave it the most expansive application of any people in the world.

Being a comprehensive survey, much that is included has already been covered by other writers. Whether I have dragged enough other bits from their hiding places to pay the reader is for him to say. One thing is certain, not all the evidence here adduced has ever before been integrated into a single piece. To enable students little advanced in law to gather the full import of the various episodes detailed, I have made explanations here and there that will be tiresome to the initiated.

The remote germ of thought that evolved into judicial review of legislation in the British Empire and in the United States was brought

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into the world by Sir Edward Coke, Chief Justice of the Court of Common Pleas in England, in the course of his opinion in *Dr. Bonham's Case*, in 1610. Among a multitude of reasons for the court's decision he said: "When an Act of Parliament is against Common Right and Reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void."¹ This reflects an extravagant laudation, frequent with early English law writers, of the Common Law as the perfection of right and reason. Taken literally the passage assumes that Parliament is not an unlimited legislature, that it lacks power to enact a statute that is contrary to fundamental principles of the Common Law. Since neither the Common Law nor any other body of law ever does any adjudging, Coke's expression that the Common Law will "adjudge such Act to be void" was a figurative statement that English judges would refuse to give effect to an act of Parliament that they adjudged to be contrary to some fundamental principle of the Common Law.

Reporting *Calvin's Case*,² decided two years earlier, Coke stated that he and the other judges spoke of "a law eternal, the Moral law, called also the Law of Nature" and that Parliament could not take from a man "that protection which the law of nature giveth unto him." This "law of nature," a sixteenth century English law writer³ said, was what the Common Law lawyers called common right and reason. Belief that this vaguely conceived natural law operated as a part of the law to be administered by courts, and indeed as a higher law limiting man's powers to make law, had found place in the thought of the ancient world, of the middle ages, persisted two centuries after Coke, and has not yet totally disappeared.⁴ Common to all its guises is the thought of natural and inalienable rights of man secured by a higher law which human law makers are powerless to take away. Even Blackstone in his Commentaries, published first in 1765 to 1769, while emphatically asserting the doctrine of the "omnipotence" of Parliament, was unable to free himself from some sort of a "law of nature." "No human laws," he says, "are of any validity, if contrary to this."⁵ Sir Frederick Pollock, that eminent English legal historian, says, "The omnipotence of Parliament was not the orthodox theory of English law, if orthodox at all, even in Holt's time."⁶ In 1694 Chief Justice Holt had before him a case involving the inheritance of a peerage. A

1. 8 Co. Rep. 114a, 118a (1610).

2. 7 Co. Rep. 1a, 13a (1608).

3. ST. GERMAN, DOCTOR AND STUDENT (1531) Ch. 5.

4. See HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930), for the history of ancient, mediæval and modern theories.

5. 1 BL. COMM. (1765) Intro. § 2, 41.

6. Pollock, *A Plea for Historical Interpretation* (1923) 39 L. Q. REV. 165.

challenge was made to the jurisdiction of the court, and Holt replied that the judges "adjudge things of as high a nature every day; for they construe and expound Acts of Parliament, and adjudge them to be void."⁷ This was, of course, a wild extravagance, for there is no definite evidence that an English court ever squarely held an Act of Parliament void.⁸ But Coke had set an idea loose in the world, the idea that there was a higher law limiting legislatures and that courts in their ordinary administration of justice between man and man had power to give judgment according to that higher law in disregard of any legislative act inconsistent with it.

While the idea of a law of nature somehow superior to man-made laws was not new, it was new that courts should enforce that superiority. Therein lies Coke's peculiar contribution to judicial review of legislation.

Chief Justice Hobart⁹ in 1614 and Chief Justice Holt¹⁰ again in 1701 repeated and approved Coke's dictum. Coke's idea was carried to the British colonies in America both by men and by books. There is an early, isolated instance of this, which probably was unknown to the generation that produced the American Revolution and the Constitution of the United States, but it is so interesting as showing the migration of a thought that it should be mentioned. We sometimes almost forget that the British colonies in America were settled in the main by Englishmen. Samuel Symonds was born in England in 1595. He "was descended from an ancient and honorable family," in Essex, "where he had a good estate." He came to Ipswich, Massachusetts Bay Colony, in 1637. In 1657 before him as justice of the local Magistrate's Court came this case: The local legislative assembly, the town-meeting of Ipswich, voted a tax of £100 toward building or buying a house for Mr. Cobbet, minister of the gospel, to be given him as his very own—not to be turned over to his successors. Giddings and others refused to pay the tax. Browne, the town marshal, ordered so to do by the town officers, seized Giddings' household goods to enforce payment. Giddings sued Browne for damages for carrying off his "pewter dishes and platters and marking them." Justice Symonds gave judgment for one shilling damages, and five shillings, eight pence as costs. He sustained this judgment by an elaborate opinion. He declared the act of the town meeting void, as an attempt to compel Giddings and others to make a gift to another private person. There-

7. *King v. Earl of Banbury, Skinner*, 517, 526-7 (K. B. 1694).

8. For an examination of the evidence, see Plucknett, *Bonham's Case and Judicial Review* (1926) 40 HARV. L. REV. 30.

9. *Day v. Savage, Hobart* (3d ed. 1671) 85 (K. B. 1614).

10. *The City of London v. Wood*, 12 Mod. 669, 687 (K. B. 1701).

fore, he held it no justification to the marshal in seizing Giddings' goods. He said he understood that the case was about:

"a fundamentall law . . . such a law as that God and nature have given to a people. . . . It is against a fundamental law in nature to be compelled to pay that which others doe give. . . . Let us not (here in New England) despise the rules of the learned in the lawes of England, who have great helps and long experience.

"1. First rule is, that where a law is . . . repugnant to fundamentall law, it's voyd; as if it gives power to take away an estate from one man and give it to another."¹¹

Justice Symonds quoted in support of his views the statement of Sir Henry Finch in his *First Book of Law*, "Laws positive which are directly contrary to the former [the law of nature and of reason] lose their force, and are no laws at all." Finch's book was the seventeenth century Blackstone.¹² It was first published in the English language in 1627.¹³

If the reader smiles at this quaint instance of judicial review of legislation, he may smile again upon reading the opinion of the Supreme Court of the United States in *Loan Association v. Topeka*,¹⁴ decided in 1875. The Court held that a Kansas statute which authorized any city in Kansas to pay out tax-raised money to private persons as a bounty to induce them to locate manufactories in the city was unconstitutional and void. The Court pointed to no provision of the Constitution of the United States nor of the Constitution of the State of Kansas as forbidding such a bounty. Talking like Justice Symonds, the Court said that the statute was an "unauthorized invasion of private right. It must be conceded that there are such rights in every free government beyond the control of the State. . . . There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist . . ."

In short, Justice Symonds' performance is exactly what any conservative, propertied man, aged sixty-two, would do if after elevation to the bench he took the dicta of English judges seriously.

The next recorded appearances of Coke's dictum in colonial courts were in arguments of counsel in cases in Massachusetts in 1761 and in Virginia in 1772. In the former a customs officer petitioned a court

11. *Giddings v. Browne*, as reported in 2 Hutchinson Papers 1. More copious extracts of the opinion, than the above, are given in McGOVNEY, *CASES ON CONSTITUTIONAL LAW* (1st ed. 1930) 8-11.

12. See 5 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1924) 343, 399-401.

13. FINCH, *LAW, OR, A DISCOURSE THEREOF, IN FOURE BOOKES* (1627). An earlier edition in law French was published in 1613.

14. 20 Wall. 655, 662-663, 22 L. Ed. 455, 461 (U. S. 1875).

for a general warrant to search any house, shop or cellar for smuggled goods claiming that such warrants were authorized by an Act of Parliament. Against the petition James Otis argued:

"As to Acts of Parliament an Act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should be made, in the very Words of this Petition, it would be void. The Executive Courts¹⁵ must pass such Acts into disuse—8 Rep. 118. from Viner."¹⁶

The court, without denying the principle asserted by Otis, issued the warrant on the ground that there was precedent both in England and in the Province for it.

In Virginia in 1772 in a suit by Indians, held as slaves, to obtain freedom, the slave-holders relied upon an act of the Assembly of 1682 which declared certain classes of Indians slaves, Mason argued on behalf of the Indians:

"Now all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. . . . Such have been the adjudications of our courts of justice. And cited 8 Co. 118.a. Bonham's case. Hob. 87. 7. Co. 14.a. Calvin's case."¹⁷

The citations "8 Co. 118.a." and "7. Co. 14.a." are still today the lawyer's mode of citing the volume and page of Coke's reports where the statements I have quoted above from *Dr. Bonham's Case* and *Calvin's Case* are found; and "7 Hob. 87" is a citation of Hobart's Reports, where Chief Justice Hobart reaffirmed Coke's dictum. It will be noted that Mason referred to the "adjudications of *our* courts," because the Virginia court was a part of the British judicial system. The Virginia court held that the Virginia statute had long since been repealed. So that in this as in the Massachusetts case the courts disposed of the issues without finding it necessary to decide whether the Act of Parliament, in the one case, or of the Virginia Assembly in the other, was void.

These instances disclose that the dictum of Coke was fermenting in colonial minds. In 1789 the same contention was made by counsel before the highest court of South Carolina:

"Statutes made against *common right and reason*, are void. 8 Rep. 118. So statutes made against natural equity are void; so also are statutes made against Magna Charta. Ibid. 118."

15. The term "executive courts" was commonly applied to Courts of Justice, as distinguished from the Legislative or "General Court."—Horace Gray.

16. Paxton's Case of the Writ of Assistance, Quincy 51, 474 (Mass. 1761).

17. Robin v. Hardaway, Jefferson 109, 114 (Va. 1772).

The statute was one enacted in 1788, after South Carolina had ceased to be a British colony.

The Court replied:

"It is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles."

The court then disposed of the case by giving the statute a construction "contrary to the strict letter" that would make it "consistent with justice, and the dictates of natural reason."¹⁸ Three years later the same court squarely held a South Carolina statute that had been enacted in colonial days void "as it was against common right, as well as against *magna charta*."¹⁹ The statute was nearly a century old, but the court said, "No length of time could give it validity, being originally founded on erroneous principles."

In eighteenth century America natural law and particularly John Locke's version of it was made use of as a justification for resistance of Acts of Parliament and as a justification for the American revolt. In this respect natural law was regarded as justifying *the people* in doing something about invasions of it. Here the primary point is that the dictum of Coke and his successors was that courts might do something about such invasions. Courts in adjudicating cases between man and man might hold a legislative act null and void because it was in their judgment contrary to natural law. When it is assumed that a statute is clearly an invasion of "natural rights" it seems, on first thought, desirable that a court should refuse to give that statute its intended effect. It has been common to people the world over when caught in the toils of some oppressive governmental system to appeal to some higher law. To them a court which assumed power to vindicate the higher law and thereby the natural rights of man would be so clearly a friend of man that criticism of such a doctrine would not occur to them. It would not be they who would charge the court with usurpation. But assume that you have a legislature established with powers granted by the people. Assume that the statute in question is enacted by that legislature, and that it is a statute clearly within the powers granted to the legislature, what then is the position of a court that takes upon itself to say that the statute is void because it is contrary to the judge's notion of the scope of "private right" with which government should not interfere? Would not a court that arrogated to itself such power make itself a dictator of the scope of

18. *Ham v. M'Claws*, 1 Bay 93, 96, 98 (S. C. 1789).

19. *Bowman v. Middleton*, 1 Bay 252, 254-5 (S. C. 1792).

permissible governmental action? Without any guide but their own opinions of what is a bad law the judges would have an uncontrolled discretion to set limits to the power of the legislature. This inevitable outcome of the doctrine seems to have been little appreciated until the nineteenth century. It then became the fashion, with some sporadic exceptions, for American courts to say that the only limits to legislative power are those written in constitutions, and except so far as written limitations embody some of the concepts of natural justice, the latter will never be resorted to to declare a statute void. The freedom with which courts in the United States interpret written constitutional limitations has enabled them to make those limitations pretty much what the judges think they ought to be. Thus notions of natural law, notions of what the legislatures ought to keep hands off, still play a part in American constitutional law.²⁰ An eminent New York judge consciously or unconsciously made this enlightening admission in 1878:

"Indeed, under the broad and liberal interpretation now given to constitutional guaranties, there can be no violation of fundamental rights by legislation which will not fall within the express or *implied* prohibition and restraints of the Constitution, and it is unnecessary to seek for principles outside of the Constitution, under which such legislation may be condemned."²¹

As I have said, Coke's idea was carried to America by books as well as by men. Colonial lawyers whether educated in England, as many were, or educated in America, had to resort to Coke's *Reports* for much of their learning, and to the other law reports in which Coke's dictum was reiterated. Both in study and in practice they also made use of the "Abridgments" which were the eighteenth century encyclopedias of English law. The three most important of these and the dates of their first editions were Bacon's *Abridgment* (1736), Viner's *Abridgment* (1741-56) and Comyn's *Digest* (1762). All of these quoted Coke's dictum in *Bonham's Case*, not as a dictum but as a veritable proposition of English law. They also quoted and cited Holt's and Hobart's reiteration of Coke's idea. Bacon's *Abridgment* even cited the passage in Finch's *First Book of Law* upon which Justice Symonds of Ipswich had relied.

20. See HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930); Dodd, *Extra-Constitutional Limitations Upon Legislative Power* (1931) 40 YALE L. J. 1188; Corwin, *The "Higher Law" Background of American Constitutional Law* (1928-1929) 42 HARV. L. REV. 149, 365; Reeder, *Constitutional and Extra-Constitutional Restraints* (1913) 61 U. OF PA. L. REV. 441; Grant, *The "Higher Law" Background of the Law of Eminent Domain* (1931) 6 WIS. L. REV. 67.

21. Andrews, J., in *Bertholf v. O'Reilly*, 74 N. Y. 509, 515 (1878). Emphasis added.

Wood's *Institutes*, next to Coke's *Institutes*, was the leading textbook on English law prior to Blackstone's *Commentaries*. In its many editions ²² from 1720 to 1754 it contained this statement:

"Acts of Parliament that are against Reason, or impossible to be performed, shall be judged void."

The ninth and tenth editions, 1763 and 1772, respectively, stated

"Acts of Parliament that are against *common* Justice and Reason, or impossible to be performed, shall be judged void."

William Samuel Johnson, whom we shall see is an important figure in the history of judicial review of legislation, began his study of law in Connecticut in 1747. He accepted as his guide the advice of Judge William Smith to law students:

"Give Woods Institutes a second or third reading. . . .

"Then to fill up and enlarge your Ideas you may read Bacon's Abridgment of the Law . . . In reading this Abridgment . . . I would advise that you constantly refer from the abridgment to Wood and from Wood to the Abridgment, because I would have these Books the Basis or Foundation of all your Studies." ²³

Thus British colonials in America became familiar with the idea that courts might exercise a power to hold statutes invalid which they judged to be contrary to some higher law. It was an easy transition to the next stage. What if there was a *written* higher law expressing bounds which the legislature was forbidden to exceed? The uncertainty as to whether there was a higher law limiting the legislature would disappear. How much more plausible it would be for courts to enforce definite written limitations than the supposed limitations of the natural law, unwritten and undefined.

This step was taken by British colonial courts in America and in 1727 by the Privy Council as the highest appellate court in the British colonial judicial system. McCrady brought to modern attention what may have been an instance of such action by Carolina courts as early as 1693.²⁴ On January 18 of that year it was voted by the General Assembly of that colony as a grievance:

"Inferior Courts takeing upon them to try adjudge & Determine the power of assembly for ye Validity of Acts made by them. . . ." ²⁵

22. I am indebted to Arthur C. Pulling, Director of the Harvard Law Library for checking all the ten editions, except the seventh, which was not available.

23. GROCE, WILLIAM SAMUEL JOHNSON (1937) 18-19.

24. MCCRADY, HISTORY OF SOUTH CAROLINA UNDER THE PROPRIETARY GOVERNMENT 1670-1719 (1897) 242.

25. SALLEY, JOURNALS OF THE HOUSE OF ASSEMBLY OF SOUTH CAROLINA FOR THE FOUR SESSIONS OF 1693 (1907) 17.

Beyond that brief record in the Assembly's journal historians have been unable to throw any light on the episode. "We have no record of these courts, nor do we even know how they were constituted and who presided in them."²⁶ We do know for certain that the judges of these courts were British colonial subjects. They may have been lawyers as well read in the dicta of English judges as had been Justice Symonds of Ipswich a generation earlier. It may be that they were relying upon a supposed over-riding natural law in adjudging and determining the validity of acts of the Assembly. Or it may be that they were enforcing a written constitutional limitation on the power of the Assembly. The Charter of Carolina of 1665, in granting power to the proprietors to make laws with the consent of the Assembly, imposed the restriction "That the said laws be consonant to reason, and as near as may be conveniently, agreeable to the laws and customs of this our realm of England."²⁷

It is this same limitation on the Connecticut colonial legislature that the Privy Council enforced by judicial decision thirty-four years later. It lies only in conjecture, however, what were the grounds of action of the "Inferior Courts" of Carolina in 1693. The modernity of the language of the Assembly in stating its grievance is quite remarkable, that these courts *adjudged and determined the validity* of legislative acts.

That colonial courts had power to adjudge and determine the validity of colonial statutes was distinctly recognized in an official opinion²⁸ of Sir William Thomson, Solicitor General of Great Britain, April 5, 1718. The opinion stated that a statute of Carolina which levied a heavy import duty on British goods was not "consonant to reason" and "by no means agreeable to the laws of Britain," referring to the limitation in the Carolina Charter of 1665, quoted above. He then said that "the power of making laws, by the charter to the proprietors, is, in this instance, exceeded." One mode by which the traders might seek redress, he suggested, was "to contest the payment of the duty upon the supposed invalidity of the act, as being unreasonable, and if determined against them there, to appeal to the King in council." That is, attack the statute in a court of Carolina and if determined against him "there," take an appeal to the Privy Council in its judicial capacity, invoking its appellate jurisdiction over colonial courts. He thought, however, that "it would be too tedious and too

26. McCrady, *op. cit. supra* note 24, at 245 n.

27. 2 POORE'S CHARTERS (1877) 1392.

28. CHALMERS' OPINIONS (Am. ed. 1858) 586.

expensive for every particular trader" to prosecute such a suit, and advised that steps be taken to bring about a repeal of the statute.

A learned historian²⁹ has recently referred to an episode in the royal province of South Carolina, after the division of Carolina, further investigation of which discloses strong evidence of the actual exercise by a colonial court in 1724, of a judicial power to hold an unconstitutional statute void. Since this instance has never been mentioned in any of the voluminous writings on judicial review of legislation, I shall set out the evidence found in the manuscript journals of the Commons House, the lower chamber of the South Carolina legislature.

On December 22, 1726 a question was put in the Commons House and voted in the affirmative, "that the opinion of the Generall Court in Charles Town of the 22nd of August One thousand Seven hundred & twenty four was contrary & repugnant to a clause in an Act of the Generall Assembly of this Province. . . ." ³⁰

On January 18, following, Thomas Hepworth, Chief Justice of the General Court, frequently called the Supreme Court of the Province, rose in his place as a member of the Commons House, stated that he had been sick in bed when the above question had been voted upon and requested that he "be heard to Justify himself on the proceedings of the G[eneral] Court" that had been questioned. His remarks are not recorded. His reasons were voted insufficient to induce the House to expunge from the record the action already taken.

What the Chief Justice's reasons were are disclosed, however, in further proceedings in the afternoon of the same day. The House then took into consideration "some parts of the Representation of the Judges of Charles Town signed by Thomas Hepworth Esq. & Chief Justice" and two assistant justices. It was voted that some parts of it reflected upon the honor of the House and that the representation be rejected. Thereupon a report of a committee on grievances was approved and ordered spread on the minutes. It contained the following:

"Your Committee . . . Report they have rec'd & read the Representation of the Charles Town Judges wherein as they conceive is contained some things which we believe the Judges themselves scarce understand & therefore no reflection on the Committee if they are at a loss to guess at their meaning & also several Positions of a dangerous Tendency to this Province, as first the whole Government is arraigned for passing Laws as 'tis

29. I WALLACE, *HISTORY OF SOUTH CAROLINA*, 276.

30. This and the following quotations are from the manuscript journals of the Commons House, in the custody of the Historical Commission of South Carolina.

suggested contrary to the Kings Instructions & Repugnant to the Laws of England. Secondly the Judges Suggest they have a power of dispensing with all such Laws at pleasure & that they are Sole Judges & Interpreters of our Laws which your Committee are of opinion is assuming a power Superior to that of this house & equal with that of the whole Legislative body united."

At that time South Carolina was a royal province. What local autonomy she had was conferred by the Crown's commission to her governors, the constitution of the province. In it was imposed the limitation on her legislature that its enactments should not be repugnant to the laws of England.

From the record given above it appears that the grievance of the Commons House was not that the justices had given merely extra-judicial mutterings about a violation of the constitution. The evidence is strong that the General Court has rendered a judicial decision in which it had held an act of the legislature void on constitutional grounds. The Chief Justice spoke of it as the "proceedings of the General Court." The question acted upon by the Commons House condemned "the opinion of the General Court." While technically opinion and decision are not the same thing, even lawyers often, and laymen habitually, use these words as synonyms. The committee report shows that the court claimed a power "of dispensing with," that is, of treating as naught, a provincial statute that they found to be repugnant to the laws of England and of that repugnancy they were the judges and interpreters. One thing is certain. The power of courts to hold an unconstitutional statute to be a nullity was clearly asserted. The only uncertainty is whether the court actually exercised the power in a judicial decision, and the evidence is very strong that it did. [While this essay was in press additional evidence has been obtained showing conclusively that the incident of 1724 was an actual decision of the court in the case of *Dymes v. Ness*. See page 48 *infra*.]

We come now to the well-known instance of the exercise of this power by the Privy Council acting in its capacity of the highest appellate court in the British colonial judicial system.

In the case of *Winthrop v. Lechmere* in 1727 the Privy Council on an appeal from a Connecticut court held a statute of Connecticut void because in its judgment the statute was beyond the power of the legislature as marked out in the Charter of Connecticut. That Charter was the constitution of the government of Connecticut. The Privy Council was the highest court of colonial Connecticut just as the Supreme Court of Connecticut is the highest court in the state of Connecticut today. It is immaterial that it did not sit in Connecticut, and

it is equally immaterial that it was also the final court of appeal from the local courts of all other British colonies. The important point is that a court having authority to determine questions of Connecticut law had before it the question whether an act of the Connecticut legislature was contrary to the Charter which gave that legislature its powers, and the court held that it was in violation of the Charter and, therefore, void.

Because what records we have of remarks made in the Convention of 1787 that framed the Constitution of the United States do not show that the case of *Winthrop v. Lechmere* was mentioned, although power in courts to hold statutes invalid was there mentioned at least twenty times, it has been objected³¹ that the case contributed little to the prevalence in America of the idea of judicial review of legislation. When the importance of that decision to all land owners in many of the American colonies and the great stir caused by the decision both in Connecticut and Massachusetts are considered, it is impossible to assume that it was not well and widely known to Americans of the Revolution. I shall treat of it at length, and incidentally disclose definite historical proof that it was widely known in America at the close of the colonial period.

I shall further disclose that the precedent of *Winthrop v. Lechmere*, judicial enforcement of constitutional limitations on legislatures, has been followed by the Privy Council down to the present day and that British colonial courts throughout the Empire came to exercise the same power.

First, something should be said of the Privy Council as an appellate court. Just as the Supreme Court of the United States now hears appeals from the judgments of the highest courts in Hawaii, the Philippine Islands, Alaska, Puerto Rico and the Canal Zone, in the last resort,³² so the Privy Council was the court of appeal from the judgments of the highest courts in all of the British colonies. This was never doubted in most of the colonies, and the doubts of Massachusetts, Connecticut and Rhode Island disappeared early in the eighteenth century.³³ Appeals lay as a matter of right in all civil cases where the amount in dispute exceeded £300, until 1746, and after that, £500, in cases in which fines exceeding £200 were imposed, and in some other special types of cases,³⁴ with some variation

31. See the answer to this objection in HAINES, *AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (2d ed. 1932) 52, 58.

32. In some instances appeals from these courts come to the United States Supreme Court after an intermediate appeal to a Circuit Court of Appeals of the United States, sitting in continental United States.

33. Schlesinger, *Colonial Appeals to the Privy Council* (1913) 28 *POL. SCI. Q.* 279-297, 433-450.

34. *Id.* at 285.

from these general rules. Moreover, the Privy Council had a discretion to allow an appeal, upon petition, where an appeal did not lie as a matter of right.³⁵

These judicial appeals were heard by "the Committee" of the Council, usually called in the Council's records "the Committee for Appeals" until 1734 or 1735, after which it is referred to simply as "the Committee." All members of the Council were technically eligible to sit in this Committee, three being a quorum, but there is much evidence that a Committee when hearing judicial appeals contained one or more of the judges of the highest courts in England.³⁶ It was not until Parliament enacted the Judicial Committee Act of 1833, however, that membership was confined by law to the most eminent judges of the United Kingdom. Since 1895 certain eminent colonial judges have been eligible. We are dealing here with a court of long standing, which still is the highest court of appeal in the British colonial system.

It heard appeals on the record of the lower court, transmitted from America, on the briefs of legal counsel and their oral arguments. So great were the court costs, the fees of counsel, and the delays attendant upon appeals across the Atlantic in days of slow communication, that only 265 appeals were carried to the Privy Council from all thirteen of the American colonies during the last century of the American colonial period.³⁷ Between 1735 and 1776, litigious Rhode Islanders carried up 59 appeals from their local courts.³⁸ All of these Rhode Island appeals as well as nearly all from the other American colonies presented ordinary legal questions, not involving any question of the validity of colonial statutes. Considering that there were no more than 265 appeals in all from the American colonies it is not surprising that only four of them presented constitutional issues. The first case of the latter sort was *Winthrop v. Lechmere*, appealed from Connecticut.

John Winthrop, the plaintiff in *Winthrop v. Lechmere*,³⁹ was the son of Waite Winthrop of Boston who had been a Major General in Connecticut and later Chief Justice of the Superior Court of Judicature

35. Schlesinger, *loc. cit. supra* note 33, at 279 *et seq.*

36. *Id.* at 439; 2 TURNER, PRIVY COUNCIL, 1603-1784 (1928) 422.

37. Schlesinger, *loc. cit. supra* note 33, at 446.

38. Hazeltine, *Appeals from Colonial Courts to the King in Council, with Especial Reference to Rhode Island*, AM. HIST. ASSN. REP., 1894, 299, 337.

39. The source material on this case is extensive. 5 Massachusetts Historical Society Collection (6th series, 1892), 440-496, contains the brief on behalf of Winthrop before the Privy Council, and for the decree of the Privy Council in full, see *id.* at 496-509, and 7 Col. Rec. of Conn. (1873) 571-579. For extensive correspondence covering Connecticut's attempt to get some reconsideration of the case and throwing much light upon the legal and economic issues, see *The Talcott Papers* in 4, 5 Connecticut Historical Society Collection, *passim*, especially 4 (1892) 143-150, 167, and 5 (1896) 74-87.

of Massachusetts, where he spent his later years. John's grandfather was the John Winthrop who was the founder and first governor of Connecticut, and John's uncle was Fitz John Winthrop who also had been a governor of Connecticut. When the Major General died in 1717 he left no will, but he did leave two children, our John and his sister Anne, and very valuable lands both in Massachusetts and in Connecticut. Anne had married Thomas Lechmere, a merchant of Boston, who seems not to have been a great financial success.

A Connecticut statute of 1699 directed that the land of a person who died without a will should be divided equally among all the children except that the eldest son should have a double portion, subject to the widow's dower interest for her lifetime unless her dower was barred by a marriage settlement as it had been in this case. Under this statute Anne claimed one-third of her father's Connecticut land. John claimed the whole of it under the common law rule of primogeniture. Complicated litigation followed in the Connecticut courts, only part of which need be noted to understand the case as presented to the Privy Council in England by Winthrop's appeal. At the outset in 1718 the Connecticut Court of Probates granted to Winthrop administration of his father's estate. In this capacity he refused to make an inventory of the real estate, insisting that the Court of Probates had jurisdiction over the personal estate only. After failing in several suits in the Superior Court to force partition of the land, Lechmere and his wife, Anne, petitioned the legislature in 1725 to grant a new trial in the Court of Probates. This was granted and on the new trial Winthrop's letters of administration were revoked and administration granted to Lechmere. On appeal the Superior Court affirmed this new decision. Lechmere proceeded to make an inventory and appraise the real estate and his inventory was approved by the Court. Lechmere failed to get possession of any of the personalty and there being a small debt due from the estate and being in doubt whether as administrator he had authority to sell any of the land, probably because of some assumed defect in the probate law, in 1726 he applied to the legislature, which granted him full power and authority to sell so much of the land as was necessary to pay the debts of the deceased. Thus Anne and Thomas were well on their way to get one-third of Waite Winthrop's land.

John Winthrop had been treated pretty roughly by the Superior Court and by the legislature. When on March 22, 1725, the Superior Court had affirmed the action of the Court of Probates granting administration to Lechmere, Winthrop asked that Court to grant him an appeal to the Privy Council. This, he says, "was in a contemptuous

manner denied him, tho' often demanded and insisted on; the Court saying that they were not under your Majestie's government, and their Charter knew nothing of your Majesty in Councill, and that" he "might come and tell your Majesty that they denied him an appeal."

Secondly, when Lechmere had applied to the legislature for authority to sell some of the land, Winthrop had appeared and remonstrated. The Assembly put him under three days arrest and fined him £20. His remonstrance probably was not a humble one. So it was a *cause celebre* in Connecticut, likely to be long remembered not only because of the distinguished family of the principal actor, and his embroilment with the legislature, but also, as we shall see, because the issue involved was of the utmost importance in the economics of the colony.

Winthrop petitioned the Privy Council to allow him an appeal. He employed two of the ablest lawyers at the English bar, Sir Philip Yorke, who was then Attorney General and later became Lord Chancellor Hardwicke, and Charles Talbot, then Solicitor General and soon afterwards Lord Chancellor.

Winthrop's petition adroitly mentioned the distinction of his ancestors, that he had always supported the royal prerogative, and had "taken all proper occasion to put" the people of Connecticut "in mind of the terms and conditions of their Charter, which was so obtained for them by your petitioner's ancestor as aforesaid and which they have of late years seemed too much to forget," and complained of the many "illegal" and "extraordinary" proceedings against him.

The petition for the privilege of appeal was successful. An Order in Council granted "an appeale to his Majesty in Councill, from the said two sentences past in the Superior Court of Connecticutt, on giving the usuall security here in the sume of 100 lb. sterg. to prosecute the appeale to effect, and to abide the determinacion of his Majesty in Councill thereupon."

The appeal clearly was a judicial appeal from specific decisions of the Superior Court of Connecticut. The pleadings and the brief of counsel for the plaintiff, Winthrop, put in issue the validity of two Connecticut legislative acts (1) the Act of 1699, concerning intestate estates, and (2) the resolution of the legislature in 1726 which authorized Lechmere to sell some of the Winthrop land. The vital portion of the argument of Winthrop's counsel was that the intestacy law of 1699 was:

"an absolute act, made in the infancy of the Province, and long since out of use . . . tho' if this law was not obsolete, we insist (secondly) that the same is void in it self as being not war-

ranted by the Charter, and can no ways influence the present case. For by the Charter their power of making laws is restrained and limited in a very special manner, (viz.t) such laws must be wholesome and reasonable, and [not] contrary to the laws of this realm of England. . . . By the common law of England, which is what the Charter has a view to, it is undoubted that real estate descend to the eldest son . . . and it is against reason as well as law that an only daughter should be coheir with an only son. We therefore insist this law is null and void, as being contrary to the law of this realm, unreasonable, and against the tenour of their Charter, and consequently the Province had no power to make such a law and the same is void."

In the conclusion of the brief the final prayers are seven. The first five are that various proceedings and orders adverse to Winthrop be declared void, reversed or dismissed, and those favorable ordered to stand, and, then,

"Sixthly, That the Order of the General Assembly empowering the said Lechmere to sell the appellant's lands, and the order of the Superior Court founded thereon, dated 27 Sept, 1726, allowing of Lechmere's making such sale, and the sale itself, may be declared null and void, and expurged the record; and generally

"Seventhly, That all which Mr. Lechmere hath done under the said administration, together with the said law for settling intestate's estates may be declared void, and that the appellant is entitled to succeed to the real estate of his father as heir at law, according to the common law of the land."

The Decree of the King in Council, February 15, 1727, recites that argument of the case was heard before "the Lords of the Committee for hearing Appeales from the Plantations" and that they "humbly" reported their opinion to the King sitting in his Council, eighteen members of the Council being present. Then, after reciting that report, the Decree concludes:

"His Majesty, taking the same into his royal consideration, is pleased with the advice of his Privy Councill to approve of the said report, and confirm the same in every particular part thereof, and pursuant thereunto to declare that the aforementioned act entituled An Act for the Settlement of Intestate Estates is null and void, and the same is hereby accordingly declared to be null and void and of no force or effect whatever. And his Majesty is hereby further pleased to order"

that all the Connecticut judgments adverse to Winthrop "be and they are hereby reversed and sett aside" and that all proceedings favorable to Anne and Thomas Lechmere be discharged and set aside; and, finally,

"His Majesty is further pleased to declare, that ye aforementioned Act of Assembly passed in May, 1726, empowering the said Thomas Lechmere to sell the said lands, is null and void."

The ground upon which the Privy Council by this Decree declared the Act of 1699 null and void appears in the Committee report which the Decree affirmed:

"the said Act for the Settlement of Intestates Estates should be declared null and void, being contrary to the laws of England, in regard it makes lands of inheritance distributable as personal estates, and is not warranted by the Charter of that Colony."

The argument for Winthrop had prevailed. The Privy Council sitting in its judicial capacity, hearing an appeal from several judgments of the courts of a colony, had held two Acts of the legislature invalid because beyond its power as defined in its written constitution. Two future Chancellors of England had prevailed upon a British Court to establish this precedent which was to have far-reaching consequences. There are reasons for believing that the prime mover was Sir Philip Yorke. We shall see this great English lawyer giving currency repeatedly to the doctrine of judicial annulment of legislation. It could not have had a more impressive sponsor. He was successively, Solicitor General, 1720 to 1724, Attorney General, 1724 to 1733, Chief Justice, 1733 to 1737, and Lord Chancellor, 1737 to 1756.

It has sometimes been supposed that this proceeding before the Privy Council was an ordinary disallowance of statutes, merely an executive or legislative repeal,⁴⁰ but although there is one passage in the brief for Winthrop in which the prayer is that the Act of 1726 be "repealed," this is out of tenor with all the other expressions of the brief.

Counsel for Winthrop showed clearly that they were not asking a disallowance of the statutes in question when they said:

"The laws of Connecticut are not by their Charter directed to be laid before the Crown for their approbation or disallowance, so that there is no other way to avoid any laws they shall make but

40. The first reaction of Governor Talcott of Connecticut was that the action taken was a disallowance. In his draft of an address to the King, apparently unsent, he used these words: "Youre Excelent Majesty in Counsell was pleased to declare that the law . . . should be vacated, and that it was thereby Repealled and made Void" and "tis humbly prayd it may not now be disallowed" after being in force for a century. 5 Connecticut Historical Society Collection (1896) 419, 420. As late as 1740, Francis Wilks, agent for Connecticut, wrote Governor Talcott that if the case had been properly conducted on Lechmere's part, "that law wou'd never have been repealed." *Id.* at 330. On the other hand John Winthrop, doubtless because he was fully aware of the theory upon which his counsel had proceeded, understood that the Privy Council had held the statute void from the date of its enactment. 4 Connecticut Historical Society Collection (1892) 393-394.

by seeing if they are agreeable to the powers of their Charter, which if they are not, then we apprehend they cannot be considered as any laws at all, since a formal repeal of them cannot be had otherwise than by voiding the Charter."⁴¹

In arguing that the disallowance power of the Privy Council did not extend to Connecticut, counsel was on debated ground.⁴² But whether right or wrong his making that argument shows clearly that action other than a disallowance was sought. Disallowance would not have served Winthrop's purpose. It would have operated as a repeal from the time it was communicated to the colonial authorities. The statutes would have been validly operative in the meantime and the Connecticut judgments rendered in accord with them would have remained unaffected.

What counsel sought and what they obtained was a judicial judgment reversing judgments of lower courts because those judgments were founded upon legislative acts which were held to be void from the date of their enactment because contrary to a limitation in a written constitution, as interpreted by the Court.

This early instance of judicial nullification of legislation because adjudged to be in conflict with a written constitution exhibits many of the defects that have frequently appeared in later cases. In the first place, the litigation was wholly between private parties, and the government of Connecticut was not heard with respect to a law deemed vital to the economy of the Colony. On the part of Lechmere the appeal was poorly defended by counsel little acquainted with the history of the legislation involved or the economic issue at stake.⁴³

The result might have been different had it adequately been shown that the statute of 1699 had been but the enactment into positive law of a custom that had prevailed from the beginning of the Colony, of dividing intestate estates among all the children, and that to declare in effect that the rule of primogeniture had been in force from the beginning would throw into confusion the titles to much of the land in the Colony.

The result might have been different had it adequately been shown that the rule of the statute was far better suited to the economic condition of the Colony than the rule of the Common Law. When

41. 5 Massachusetts Historical Society Collection (6th series, 1892) 488.

42. In 1734, speaking of Connecticut, Rhode Island and of Maryland under her proprietary charter, the Board of Trade said, "their laws are not repealable by the Crown: but the validity of them depends upon their not being contrary, but as near as may be, agreeable to the Laws of England." 5 Connecticut Historical Society Collection (1896) 447. But see the later theory, *infra*, p. 36.

43. Paris to Allen, July 26, 1738. 5 Connecticut Historical Society Collection (1896) 78.

Belcher later was sent to England to attempt to get the Privy Council to reconsider its decision. Governor Talcott instructed him to point out that the people of Connecticut were almost wholly dependent upon agriculture, that younger sons had very little opportunity for other employment, that by "dividing inheritances, all were supply'd with land to work upon," and "By means of this custom his Majesties subjects are here increased, the younger brethren do not depart from us, but others are rather encouraged to settle among us, and it's manifest that New England does populate faster than the Colonies where the land descends according to the rules of the common law."⁴⁴

It is obvious that Winthrop was on the side of the "economic royalists" of the eighteenth century, insisting upon the rule that favored the preservation of large estates and opposing a law which the people of Connecticut deemed necessary to the general welfare of the community.

Moreover the limitation in the Connecticut charter was given the most drastic of several possible constructions, the construction that most crippled the legislature. The rule imposed upon all British colonial legislatures that they should not pass laws contrary to or repugnant to the "laws" of England was of doubtful meaning throughout the Empire. Did the "laws" of England mean all the law of England, not only all English statutes but the Common Law as well? Or did it have one of several meanings less than that, which it is unnecessary here to detail? If it meant the former, the Colonial legislatures were held down to rules of law deemed to be suited to the social and economic conditions of an old and settled country, however ill-adapted they might be to the different social and economic conditions in the colonies. The former position was never consistently acted upon by the Imperial Government and was at last expressly repudiated by the Colonial Laws Validity Act of 1865. Parliament therein, after declaring that no Act of Parliament was binding upon a colony unless made applicable by express words or by its necessary intendment, further declared that "No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of *England*, unless the same shall be repugnant to the Provisions of some such Act of Parliament" or some order or regulations made under authority of some such Act of Parliament.

The grant of legislative power and its limitation was expressed in the Connecticut Charter in these words: "to Make, Ordain, and Establish all manner of wholesome, and reasonable Laws . . . not Contrary to the Laws of this Realm of *England*." In *Winthrop v. Lechemere* the Privy Council held that this limitation denied power to the Connecticut

44. For fuller discussion of the economic issue involved, see Andrews, *The Connecticut Intestacy Law* (1894) 3 YALE REVIEW 261, 268.

legislature to enact a rule of inheritance differing from the rule of the Common Law of England. When, ten years later, the appeal in *Philips v. Savage* was pending before the Privy Council, involving the validity of a Massachusetts intestacy law like that of Connecticut, Lord Chancellor Hardwicke, a member of the Privy Council, who as Sir Philip Yorke had been Winthrop's counsel, stated that the decision in *Winthrop v. Lechmere* had been wrong in point of law. He is reported to have said that

"he had . . . offer'd all that he cou'd for his Clyent. . . . That tho' he had prevail'd therein for his Clyent, Yet, with very great Deference to those Lords who judg'd in that Case, he was not satisfied in his own private Opinion, with that determination in Winthrop's Case." ⁴⁵

Philips v. Savage, the next case putting in issue the validity of a colonial statute, was an appeal from a Massachusetts court and was decided by the Privy Council in 1737. Henry Philips died without a will and without widow or children. The surviving next of kin were his only brother, Gillam Philips, his mother, two sisters and the children of a third sister. The probate court of Suffolk County, Massachusetts, ordered the real estate as well as the personal estate to be divided into five equal shares and so distributed among these next of kin in accordance with a Massachusetts statute of 1692 and later additions thereto.

Gillam Philips having pleaded that he was sole heir-at-law to his brother, and "that no act of that Province could vary the common law of the realm, or change or alter the course of descents" appealed to the Governor and Council, the court of last resort in the Province, pleading that the statute and the order of the probate court were "repugnant or contrary to the laws of the realm of England, and consequently *ipso facto* void." The Governor and Council denied this contention and affirmed the decision of the probate court. On Philips' petition, the Privy Council granted the privilege of appeal. Before that court he contended that the grant of legislative power and the limitation on it in the Massachusetts Charter of 1691 was identical with that in the Connecticut Charter and that the Massachusetts statute of 1692 varied as greatly from the common law rules of descent as had the Connecticut statute of 1699. He cited *Winthrop v. Lechmere* as a decisive precedent in his favor.

But the brief in reply, on behalf of Faith Savage, one of the sisters, was most intelligently drawn. It contended

⁴⁵. Paris to Allen, July 26, 1738. 5 Connecticut Historical Society Collection (1896) 81.

- (1) that to tie colonial legislatures down to making laws "perfectly agreeable to the law of England" would render their powers "absolutely useless;"
- (2) that the statute in question was adapted to economic conditions in the colony, for if the eldest son, or as here the eldest brother, took all the land "younger children must rove about the world for bread." "Descents must be governed by the circumstances of every country;"
- (3) "Public general inconvenience is no inconsiderable argument in law" and to declare this law void after it had been acted upon for forty-five years "in thousands of instances" would produce "multiplied confusions."

The Privy Council affirmed the decision of the Massachusetts courts, and thereby held the statute valid.⁴⁶ The decree of the Privy Council did not mention *Winthrop v. Lechmere*. It is evident, however, that the Council had come to the conclusion that that decision was erroneous. This does not mean that the Council had decided that it did not have power to pass upon the validity of the statute, for it assumed jurisdiction in this case in which the validity of the statute was the sole issue. It merely decided that its former interpretation of the charter provision, "not repugnant to the laws of the realm of England," was too narrow.

It has sometimes been supposed that the difference in the outcome of the Massachusetts and Connecticut cases was due to the facts that the Massachusetts charter, unlike that of Connecticut, expressly required all statutes to be sent home for disallowance or approval, and that the Massachusetts law of 1692 had been confirmed by the Privy Council, in its administrative capacity, in 1695. Confirmation made the statute immune to subsequent administrative disallowance, but it would give it no immunity from judicial annulment on the ground of lack of power in the legislature to enact it. As Jonathan Belcher, agent for Connecticut, had been told in 1729 by the "best" lawyers in England, "the King [in Council] cannot by any after acts ratify that for a Law to you [Connecticut], which you had not an original power to make."⁴⁷

The vital difference was that the Massachusetts case had been so much better presented that the Privy Council changed its interpretation of "repugnant to the laws" of England.

46. The brief before the Privy Council on behalf of Gillam Philips is in Massachusetts Historical Society Proceedings, 1860-62, 64; the brief for Faith Savage, *id.* at 69; and the decree of the Privy Council is in Massachusetts Historical Society Proceedings, 1873-1875, 101.

47. 4 Connecticut Historical Society Collection (1892) 167.

In 1745 on the appeal of another case from Connecticut, *Clark v. Tousey*,⁴⁸ the Privy Council applied this new interpretation to the Connecticut charter and sustained the Connecticut statute of 1699, thus overruling on this point their decision in *Winthrop v. Lechmere*. This action is a clear confirmation of the view that the statute had not been disallowed or repealed by the Privy Council in *Winthrop v. Lechmere*. If it had been that would have been the end of it. Having, however, been declared void because unconstitutional, it was an unrepealed statute that became operative when the Privy Council overruled its former decision.

The final victory of Connecticut was largely due to the employment of better lawyers. The General Assembly of Connecticut had voted a loan of £500 to Tousey to enable him to defend the intestacy law before the Privy Council, and had instructed their agent in England to employ the ablest counsel obtainable to assist him.⁴⁹

We come now to the fourth case in which on the appeal of a colonial court decision to the Privy Council the validity of a colonial statute was in issue. The statute involved was the so-called Two Penny Act of 1758 of Virginia. The case was entitled *Camm v. Hansford and Moss*, and popularly known as the *Parson's Cause*. This and other litigation over the Two Penny Act is of great significance in showing that late in the eighteenth century the power of the Privy Council acting judicially to pass on the validity of colonial legislation was understood in America, and also that this power in the appellate court implied a like power in the colonial courts from which appeals were taken.

Moreover, the history of the Two Penny Act illustrates so well not only the power of judicial annulment but other devices in the British colonial system for the control of legislation, that an account in some detail is justified. This is true notwithstanding all the devices failed in this instance.

A brief attention to the background of the statute and of the controversies raised by it is necessary. When details that at first seem strange, and peculiar to a past era, are understood, the essential issues turn out to have a modern familiarity. It may be recalled that Virginia had then had an established government for a century and a half, that

48. The proceedings of the Privy Council in this case are printed in full in 9 Colonial Records of Connecticut (1876) 587-593. The statement in the text above is a logical inference of the grounds of decision. All that appears in the report of the decree is that Clark's appeal was "dismist." His appeal was from a decision of a Superior Court in Connecticut which had affirmed an order of a Probate Court for the division of an estate in accordance with the statute of 1699. The decision of the Probate Court had been made shortly after the decision in *Winthrop v. Lechmere* by the Privy Council, but before news of that decision had reached Connecticut. See 5 Connecticut Historical Society Collection (1896) 87, n., and 342-343.

49. 5 Connecticut Historical Society Collection (1896) 87-88, n.

she was well advanced socially and economically, and that many of the Virginia statesmen of the Revolution and post-Revolution period were then living, some of them participating in the events that center around the Two Penny Act. Two features seem at first sight to remove the circumstances from present day experience. First, that the currency of the colony was not on a gold or silver standard exclusively but partially on a tobacco standard; and second, that the clergy involved in the controversy were clergy of an established church, maintained by public taxes levied upon all inhabitants, the separation of church and state not coming in Virginia until after Independence. Coins of various nations were in use but insufficient. Common mediums of exchange were tobacco warehouse receipts and ordinary commercial bills of exchange which were "accounted . . . as ready money."⁵⁰ The latter were private notes payable either in money or in tobacco. Tobacco was stored in public warehouses and inspected, and "inspectors' notes" given the depositors. By transfer of "inspectors' notes," "tobacco debts" were paid.⁵¹ A similar currency is the silver certificate, in every American's billfold today, which states on its face, "This certifies that there is on deposit in the Treasury of the United States of America one dollar in silver payable to the bearer on demand."

In 1696 the annual salary of every minister of the Church of England in Virginia had been fixed by statute at 16,000 pounds of tobacco "with cask." An Act of 1748⁵² for support of the clergy reenacted this with an addition of four per cent for shrinkage. This act of 1748 had been confirmed by the Privy Council. Parenthetically it may be said that a minister's salary was not his only emolument. This same statute required every parish, in which provision had not already been made, to purchase and set apart to the minister a good and convenient tract of land of not less than two hundred acres, with "one convenient mansion house, kitchen, barn, stable, dairy, meat house, corn house, and garden, well pailed, or inclosed with mud walls," and to levy the cost on the taxpayers.

Not only were the salaries of ministers measured in terms of tobacco, but taxes and officers' fees were on that basis, and private contracts contained not "gold clauses" but tobacco clauses, that is, the amount payable was in terms of a quantity of tobacco.

It will be recalled that from 1755 to 1763 Virginia was engaged with the other British colonies and the mother country in the French

50. Preamble of statute of 1748. 6 LAWS OF VIRGINIA (Hening, 1819) 85.

51. These notes were not only legal tender in payment of tobacco debts, but the sole legal tender for that purpose. *Id.* at 165. See the whole of this Act of 1748 for elaborate provisions to protect this currency. *Id.* at 154.

52. *Id.* at 88, 89.

and Indian War. While the Assembly in 1755 was voting bonuses to the militia officers and men, who had fought in Braddock's Defeat, including £300 to Colonel George Washington, this was no sign of affluence, for at the same time extraordinary poll taxes and extraordinary land taxes were being levied, and treasury warrants were being issued to pay for erection of fortifications on the frontier because "the distressed circumstances of the people, and the great scarcity of gold and silver coin in this colony" prevented immediate payment.⁵³ Bills of credit or treasury notes were being emitted, and this "paper money" declared legal tender. Besides the war, nature had been unkind. A statute of 1755 recited "a great scarcity of Indian corn in this colony, occasioned by the long drought" and fixed the price of this staple bread stuff to protect the "poor and necessitous."⁵⁴ Other legislation might be cited to show that the legislature thought the colony in a serious state of depression.

This is the setting of the Two Penny Acts. Their purpose was to devalue tobacco as a standard of value. They compare with the legislation by the Congress of the United States in 1933 and 1934 under which the gold dollar, the standard of value, was debased, and promises to pay in gold coin of the old standard were made payable in any currency of the new and lower value.

The Two Penny Act of 1758 had as a forerunner the Two Penny Act of 1755,⁵⁵ which began with a "whereas by reason of the great drought," and made tobacco debts payable at the option of the debtor in current money at the rate of two pence for each pound of tobacco legally due. This act by its terms was to expire in ten months. The clergy claimed that this statute bore more hardly upon them than upon other tobacco creditors. In vain they had interceded with the Governor to veto it,⁵⁶ and eighteen of them wrote the Bishop of London to exert himself to get it disallowed by the Privy Council. A letter signed by eight of them characterized the act as "glaringly inconsistent with natural equity, the Rights of the Clergy, the common Liberty of the subject."⁵⁷ Naturally these claimants of vested rights expressed their disbelief in the wisdom of popular legislatures. They said:

"It is our most deliberate Judgment that the Power of the greatest King on Earth & his most Honorable Privy Council (who Educated & Practiced in affairs of Gov't) dwell in the seats of Learning & Liberty & are the grand Props & Supports thereof,

53. 6 LAWS OF VIRGINIA (Hening, 1819) 528.

54. *Id.* at 553.

55. *Id.* at 568.

56. PERRY, HISTORICAL COLLECTIONS RELATING TO THE AMERICAN COLONIAL CHURCH (1870), Vol. I, Virginia, 438.

57. *Id.* at 434.

must always be a better security to private property, than could be found in the Sole, uncontroled, unassisted power of any assembly on this continent.”⁵⁸

When the Act of 1755 was passed it was expected that the market price of tobacco would rise to three or four pence a pound. The clergy complained that for thirty years the price had been low and that they “ought in justice to have the benefit of the rising market.”⁵⁹ In fact two pence a pound was more than the clergy had commonly realized from their tobacco.⁶⁰ It is probable that the expected rise in price did not occur,⁶¹ and perhaps for that reason the clergy did not push their complaint against the Act of 1755.

When the Act of 1758 was enacted the price of tobacco was in fact rising and the crop of 1758 sold for at least three times the statutory price.⁶² This Act, like its forerunner, permitted a debt of one pound of tobacco to be discharged by payment of two pence in money. The clergy regarded the statute as taking away two-thirds of their salaries for the year. Moreover these were salaries earned before the Act was passed. This resulted from the fact that by prior laws, not changed in these respects by the Act of 1758, the parish taxes were not levied until a year's parish obligations had accrued and the amount ascertained. Thus the levy for the salary of the Reverend John Camm in Yorkhampton Parish for the year September 1, 1757 to September 1, 1758 was not required to be made before December 1, 1758, nor paid over to him until May 31 following collection—in this case May 31, 1759. Thus, the services entitling the Reverend John Camm, and likewise other ministers, to a year's salary had been rendered before the Two Penny Act of 1758 was enacted on October 12, but the salary was not legally due until several months afterwards. Parish levies for the minister's salary and other parish expenses were laid in an equal amount of tobacco per person on every taxable person, called a “tithable” in the language of Virginia statutes. Every person over sixteen years of age, free or slave, was a “tithable,” except white women and such poor folk as the county court might excuse for charitable reasons.⁶³ Obviously a father paid for himself and his dependent sons over sixteen years of age, and the slave-owner for all his slaves over that age. The clergy sought to prove that these Two Penny Acts relieved the rich more than they did the poor, saying, “Now it is manifest, that the rich man who pays for instance for 100 tithables (& some have several

58. 1 PERRY, *op. cit.* *supra* note 56, at 438.

59. *Id.* at 441.

60. *Id.* at 448.

61. *Id.* at 509.

62. *Id.* at 465.

63. 6 LAWS OF VIRGINIA (Hening, 1819) 40.

Hundreds), must save 100 times as much by the law as the Poor man, who has but one tithable . . ." ⁶⁴ The rich, however, were usually tobacco creditors as well as tobacco debtors—thus landlords commonly received rent in terms of tobacco. The Two Penny Act of 1758 ⁶⁵ applied to nearly all tobacco debtors—"any person or persons, from whom any tobacco is due by judgment, for rent, by bond, or upon any contract, or for public, county, or parish levies; or for any secretary's, clerks, sheriffs, surveyors, or other officers fees" may, if he so chooses, pay in money at the rate of two pence for each pound of tobacco due.

After the bill for this act had passed the lower house by a large majority, and the more conservative upper house had failed to thwart the popular will, a deputation of the clergy called on Deputy ⁶⁶ Governor Fauquier and represented to him that the proposed bill was contrary to reason and common justice and "gently" reminded him that to sign it would be contrary to his instructions from the home government. He refused to consider these points and according to one of the deputations said "the sole point with him to be considered was what would please the people." ⁶⁷ Fauquier declined to veto the bill, and thus another control device had failed. A convention of the clergy was called which agreed to send the Reverend John Camm to England to petition the Privy Council to disallow the statute. Some merchants of London trading in Virginia joined the Virginia clergy in petitioning for disallowance. ⁶⁸ The Board of Trade, on reference of the statute to it, applied to the Bishop of London for his opinion. This deeply interested adviser replied ⁶⁹ that the course of legislation in Virginia evinced a design to undermine the established church, to diminish the prerogative and the influence of the crown; and that "the Deputy Governors and the Council seemed to act in concert with the people." The manifest injustice of the law, said the Bishop, makes it a plain case for disallowance. The Board of Trade thereupon advised the Privy Council that the statute was unjust, had been enacted in violation of Article XVI of the Crown's instructions to the Virginia Governor, and ought to be disallowed. ⁷⁰ On August 10, 1759, the Privy Council disallowed the statute. ⁷¹ Notice of disallowance first reached the Governor on June 27, 1760 and was then proclaimed in the Colony. Meantime the Two Penny Act of 1758 which by its terms was to remain in force

64. 1 PERRY, *op. cit. supra* note 56, at 443.

65. 7 LAWS OF VIRGINIA (Hening, 1820) 240.

66. Lord Loudon was the titular governor but an absentee, and his lieutenant, Fauquier, was the real governor.

67. 1 PERRY, *op. cit. supra* note 56, at 509.

68. 4 Acts of the Privy Council, Colonial Series, 1745-1766 (1911) 421.

69. 1 PERRY, *op. cit. supra* note 56, at 461-3.

70. *Id.* at 458.

71. 4 Acts of the Privy Council, Colonial Series, 1745-1766 (1911) 421.

for one year only, had expired October 12, 1759, but the taxes to pay the ministers' salaries for the year 1757-1758 had been collected in accordance with its terms, and the collectors had either paid or tendered the ministers' salaries in money, likewise in accordance with the statute. Since a disallowance operated as a repeal from the date notice of disallowance was received in the colony, the collections, payments and tenders in money were all lawful because the statute had been in valid operation from its enactment to the notification of disallowance. But the clergy had not yet grasped at the last straw. One more device for thwarting the legislation remained to be invoked. This was the power of courts to hold a statute invalid from the time of its enactment, because of a constitutional lack of power in the legislature to enact it.

The clergy claimed that the statute was unconstitutional for two reasons, (1) a legislative act contrary to natural justice is void, and (2) this statute was signed by the Governor in violation of Article XVI of his instructions. The first ground was not much urged. The second raised this constitutional question: Were the Crown's instructions to a royal Governor constitutional limitations on the legislature of which he was an essential part? Article XVI of the Virginia Governor's instructions forbade him to assent to any act repealing any former law unless the repealing act contained a clause suspending the repeal until "his Majesty's pleasure be known."⁷² The Two Penny Act partially repealed the Act of 1748 by which ministers' salaries were payable in tobacco, and it contained no suspending clause, but by its terms was immediately operative.

Was it true as alleged by the clergy that the fact that the Governor's assent was given in violation of his instructions made "the law null and void at and from the making thereof"? To test this constitutional issue five ministers brought separate suits in the Virginia courts planning, if necessary, to carry an appeal to the Privy Council in its judicial capacity. Each sued the collectors of his parish to recover as his salary the market price of 16,000 pounds of tobacco. The evidence taken in one case indicated that the market price was about six pence a pound, three times that fixed by the Two Penny Act. In the suit brought by the Reverend James Maury in the Hanover County Court the magistrates "adjudged the twopenny act to be no law."⁷³ The date of this decision was November 5, 1763. Whether this is the first instance so far discovered in which a British colonial court held an act

72. Quoted in Appellant's Brief, before the Privy Council, 872 Hardwicke Papers 218, transcript in the Library of Congress.

73. Letter of James Maury to John Camm, Dec. 12, 1763, in FONTAINE, *MEMOIRS OF A HUGUENOT FAMILY* 419; letter of Wm. Robinson to the Bishop of London, Aug. 17, 1764, in 1 PERRY 497; Camm's pamphlet, "A Review of the Rector Detected or the Colonel Reconnoitered," quoted in (1910) 19 WILLIAM & MARY COLL. Q. 23-24.

of a colonial legislature invalid depends upon the final conclusion upon the episode in Carolina of 1693 and that in South Carolina of 1724. As I have shown above the evidence is strong that the latter was a genuine instance. While we have adequate contemporary evidence of the fact that the Virginia court adjudged the Two Penny Act to be no law, the reasons the court assigned are now unknown. It is, of course, possible that the court believed that the disallowance by the Privy Council made the law void *ab initio*, but this is highly improbable because the legal effect of a disallowance was well understood in Virginia. While the clergy attempted to argue that this disallowance was a peculiar one, and of no effect unless it was retrospective, the language used by the Privy Council had been that of an ordinary disallowance. The Reverend John Camm himself could have had no doubt of this. When the Board of Trade was considering the clergy's petition that the statute be disallowed, the Earl of Halifax, President of the Board, had told him that the Board would be willing to advise that the act "ought to be declared null and void *ab initio* provided a precedent could be produced for the use of such words,"⁷⁴ but no precedent could be found in exercising the power of disallowance.

The ground of the decision by the Hanover County Court must have been either that the act, in the opinion of the court, was contrary to natural justice, or more probably that it was no law because the governor signed it in violation of his instruction. It is immaterial that the court was wrong in its interpretation of the constitution of Virginia, the bald fact is that a colonial court assumed power to hold a statute void on a constitutional ground.

In two of the suits, other county courts held the statute valid.⁷⁵ In a fourth the hearing was postponed⁷⁶ until the decision of the General Court should be announced in the fifth suit, one brought by the Reverend John Camm.

The General Court consisted of the Governor and the Council, and was the highest judicial tribunal in Virginia. In Camm's case it held the statute valid.⁷⁷ The Court consisted of twelve members, two of whom declined to participate because interested in the outcome, and the Governor did not vote, as was his custom when there was no tie. The result was that the constitutionality of the statute was decided by a 5 to 4 vote, as has happened so frequently in the Supreme Court of the United States in recent years. The point chiefly argued was the effect of the fact that the Governor's signing the bill was a violation of

74. I PERRY, *op. cit. supra* note 56, at 510.

75. *Id.* at 479-482, 496-497.

76. I HENRY, *LIFE OF PATRICK HENRY* (1891) 45.

77. April 10, 1764.

his instructions. Commissary Robinson, the highest Church official in Virginia, reported to the Bishop of London:

"The result was that their Honors Corbin, Randolph, Lee & Carter were of opinion that the Governor and Assembly had no right to pass such an Act. Their Honours Blair, Taylor, Bird, Thornton & Burwell, that the Act was valid till the King's pleasure was known here, that is to all the purposes to which it was ever, or could be supposed to extend."⁷⁸

While only four voted to hold the statute invalid for lack of power in the legislature to enact it, there is no intimation that any member doubted the power of the court to so hold. The court split on the question whether an instruction to the Governor was a constitutional limitation on the legislature.

Blair, of the General Court, was John Blair, Senior. His son, John, had studied law in England, and was at the time Camm's case was decided a member of the House of Burgesses, and then thirty-two years of age. Eighteen years later, as a member of the Court of Appeals, the successor to the General Court as the highest court in Virginia, John, Junior, joined with the other judges in declaring that that court had power to declare void an unconstitutional act of the state legislature. It was this same John Blair, Junior, who was a member of the Convention that drafted the Constitution of the United States, of the Virginia Convention that ratified it, and later an Associate Justice of the United States Supreme Court. His familiarity with the doctrine of judicial review of legislation dates from the case of the Two Penny Act, the validity of which was a raging controversy in the colony for a half-dozen years when he first came into public life. Such bits of biography show the progress of ideas.

From the decision of the General Court in *Camm v. Hansford and Moss*, Camm took an appeal to the Privy Council as he had expected to do from the beginning. There was no doubt in the minds of the Virginia clergy of the power of the Privy Council in its judicial capacity to hold the statute void from the date of its enactment, if it agreed with them on the constitutional issue, of which they were confident. At the time of the disallowance Camm understood members of the Board of Trade to recommend him "to seek a certain remedy at law."⁷⁹ Lord Chancellor Hardwicke, of the Privy Council, was quoted as saying at that time, that if the statute were before the Council by way of a judicial appeal they would adjudge it to be no law.⁸⁰ Commissary Robin-

78. I PERRY, *op. cit. supra* note 56, at 495.

79. *Id.* at 511.

80. *Id.* at 510; Appellant's Brief, before the Privy Council, 872 Hardwicke Papers 217.

son in Virginia wrote in 1764 that he thought all controversy would subside, and no serious political effect would result, "on finding the act adjudged no law by the highest judicial Authority: the most Honorable the Privy Council."⁸¹ The English lawyers employed by Camm before the Privy Council cited *Winthrop v. Lechemere*, 1727, saying that on that appeal from Connecticut the Privy Council "judicially declared two Acts of Assembly passed in that province void."⁸²

Charles Yorke, son of Lord Chancellor Hardwicke, ably argued the case for the defendants. Replying to the argument that the statute was against natural justice he said that Camm's case having been heard in the General Court on demurrer, presenting solely the question of law, without trial of the facts to show that tobacco was worth more than two pence a pound, there was no evidence in the record that the statute worked any hardship; that the law was general, applying to all tobacco debtors, and moreover, "it is not to be presumed that the Legislature of the Country would have made the law, if they had not been convinced of the necessity of it."⁸³

On the principal constitutional issue his argument was this: The Commission to the governor of Virginia gave him "with the consent" of the Council and Assembly "full power . . . to make . . . laws . . . for the public peace, welfare, and good government" of the Colony, not "repugnant, but as near as may be agreeable to, the laws and statutes of this our Kingdom of Great Britain" provided that all laws enacted be sent home within three months, for "approbation or disallowance" and in case of a statute disallowed and the disallowance signified to the governor it shall "from thenceforth cease, determine and become utterly void and of none effect."⁸⁴ "As to the Law in Question tending to suspend the Act of 1748, which had received the Royal Approbation, a Power given by the Crown to make Laws implies a Power to suspend, or even repeal former Laws, which are become inconvenient or mischievous, as the Law of 1748 was, otherwise a Country at the Distance of 3000 Miles might be subjected to great Calamities, before Relief could be obtained." "As to the Governor's Consent being contrary to his Majesty's Instructions to him" these are "private Directions," not promulgated to the people, nor lodged among the public records. The Governor may be "called upon to explain" a departure from them but the people know his authority only by his commission, and "by his Assent," given in accordance with his commission "the

81. 1 PERRY, *op. cit. supra* note 56, at 499.

82. Appellant's Brief, 872 Hardwicke Papers 221.

83. Respondent's Brief, 872 Hardwicke Papers 267.

84. *Id.* at 234-235.

law is in force till his Majesty's Disapprobation arrives and is notified." ⁸⁵

This is a statesmanlike point of view, and in accord with accepted doctrine. On the merits, it seems that the decision should have gone against the clergy. The decree of the Privy Council, delivered December 3, 1766,⁸⁶ was

"that the said judgment given in the General Court of Williamsburg in the Colony of Virginia on the 10th day of April 1764 be affirmed and the said petition and appeal therefrom be dismissed."

On its face this seemed to be a decision on the merits, but there is some reason for doubt. Yorke, for the defendants, had argued that Camm had instituted his suit below in a wrong form of action. He had brought an action of trespass on the case instead of an action of debt! Technically, this objection seems to have been sound.⁸⁷ Moreover there is a scribbled note on Yorke's copy of his brief indicating that the appeal was dismissed on this technical ground. The Virginia clergy seem to have understood it, and complained that the Privy Council had seized upon this point to avoid decision on the merits, for fear of adding to the disaffection in America manifested that very year by resistance to the Stamp Act. A decision against the clergy might have alienated this conservative and loyal group; while a decision for them would further have alienated the Virginia politicians and populace in general.

The five law suits brought over the Two Penny Act of 1758, culminating in Camm's appeal from the General Court to the Privy Council, were of interest not to the litigants alone. Arrayed against the clergy were the Governor, Council, and House of Burgesses and naturally popular interest was aroused, for every taxpayer was affected. "The litigation dragged on for six or seven years, accompanied by an acrimonious war of pamphlets and public letters in which the issue was threshed-out from every angle." ⁸⁸ It is no longer a secret how the public men of Virginia on the very eve of the Revolution had become indoctrinated with the idea of appeal to the courts for the determination of constitutional questions.

85. Respondent's Brief, 872 Hardwicke Papers 265-7.

86. For this date and the substance of the Order in Council, quoted above, I am indebted to Professor William A. Morris, who consulted the original records in the Public Record office for me.

87. Camm had sued for a pecuniary penalty, under the Virginia statute of 1748, by which a collector became liable for twice the value of the tobacco which he had refused to pay when due. 6 LAWS OF VIRGINIA (Hening, 1819) 154, 172.

88. Scott, *The Constitutional Aspects of the "Parson's Cause"* (1916) 31 POL. SCI. Q. 558, 561; and see Tyler, *The Leadership of Virginia in the War of the Revolution. Part II. The Two Penny Act* (1910) 19 WILLIAM & MARY COLL. Q. 10-41.

That Charles Yorke argued for the validity of the Two Penny Act in *Camm v. Hansford and Moss* is no indication that he believed that the Privy Council lacked power to hold it invalid. Indeed, six years earlier (1760) he had given an official opinion as Solicitor General expounding this as a normal function of the Privy Council. His learned father was then still living and the son could not have been ignorant of the father's views and their acceptance by the Privy Council in *Winthrop v. Lechmere*. This opinion by Solicitor General (Charles) Yorke⁸⁹ was very broad in its terms. It was addressed specifically to the question whether the Privy Council in its executive-legislative capacity could disallow parts of a Pennsylvania statute without disallowing the whole of it. On this point the opinion advised that in exercising the power of disallowance "the Crown must either accept or reject the whole." To this was added a very significant statement:

"At the same time we are of opinion that there may be cases in which particular provisions may be void *ab initio* though other parts of the law may be valid, as in clauses where any act of Parliament may be contraversed or any legal right of a private subject bound without his consent. These are cases the decision of which does not depend on the exercise of a discretionary prerogative, but may arise judicially and must be determined by general rules of law and the constitution of England. And upon this ground it is, that in some instances whole acts of assembly have been declared void in the courts of Westminster Hall, and by His Majesty in council upon appeals from the plantations."⁹⁰

This assertion that the Privy Council had more than once judicially held colonial statutes invalid, and the more surprising assertion that other courts in England had done so may not be the exaggeration that at first it appears to be. Law reporting was very incomplete in the eighteenth century. There may have been unreported cases that would substantiate the Solicitor General's statement. We do know that the statement is that of the man who at the time he made it was regarded as having succeeded to the leadership of the English bar, upon William Murray's elevation to the bench as Lord Chief Justice Mansfield. About this time Lord Mansfield spoke of Charles Yorke's "great knowledge of the law, erected on general and enlarged principles of science, unknown to the generality of [the] profession."⁹¹ We know

89. While officially the opinion was by Attorney General Pratt (afterwards Lord Camden) and Solicitor General Yorke, it is highly probable that it was written by the latter. See 2, 3 YORKE, LIFE AND CORRESPONDENCE OF PHILIP YORKE, EARL OF HARDWICKE, LORD HIGH CHANCELLOR OF GREAT BRITAIN (1913), 2 at 572, 3 at 366, 504.

90. 5 Statutes at Large of Pennsylvania, 735-736 (1898).

91. Quoted in 2 YORKE, *op. cit. supra* note 89, at 572.

also that William Blackstone applied to Charles Yorke for manuscript cases and thanked him for notes "very material for his purpose."⁹²

Leaving speculation aside, we have positive knowledge that a few years later one of the "Courts of Westminster Hall," the Kings Bench, held invalid because unconstitutional a legislative decree of the King in Council, issued by the Crown under a supposed power to legislate for the colony of Grenada, and the same court years later assumed power to do exactly what Charles Yorke asserted in 1760 it had already done. But of this, later.

Charles Yorke's opinion looked at as a general assertion of power in courts to enforce limitations upon legislatures by holding statutes exceeding those limitations to be void was a re-assertion of the argument of his father in *Winthrop v. Lechmere* and of an official opinion of his father as Attorney General, given in 1732. The latter was with respect to the power of the Privy Council to disallow certain acts of the Massachusetts legislature complained of by clergymen of the Church of England residing in the colony. The Attorney General (later Lord Chancellor Hardwicke) had to report that it probably was too late to disallow them. This depended upon whether they had been referred to the Privy Council soon after their enactment. If so, the three year period for disallowance as fixed in the Massachusetts charter had expired. It was contended, however, that these statutes were "void in their original" [origin], "void in themselves, as being Repugnant to the Charter." But, said the Attorney General, that cannot be decided in a disallowance proceeding though it would be a different matter, he said, if the statutes were questioned in an appropriate judicial proceeding.

"If they were really void in themselves on this account, yet no Extrajudicial Declaration that they are so would be conclusive, but the only Method of bringing that Matter to a Determination would be by some Judicial Proceeding."⁹³

This reference to "some Judicial Proceeding," probably meant a suit in a Massachusetts court raising the issue, followed if necessary by appeal to the Privy Council in its judicial capacity, as in *Winthrop v. Lechmere*. The distinction between disallowance, which repealed a statute operative until repealed, and a judicial holding that it was invalid from its enactment had become clearly recognized. Thus in 1767 a committee of the Privy Council recommended to the King in Council that an act of the Massachusetts Assembly, to compensate persons in-

92. 2 YORKE, *op. cit. supra* note 89, at 572; n. 7.

93. Opinion of Yorke and Talbot, 1732, printed fully in 3 PERRY, *op. cit. supra* note 56 (Massachusetts), at 274-288, 287.

jured in the Stamp Act riots and pardoning the rioters, be disallowed, "without prejudice to the Consideration of any question touching the Nullity of the Act now under Consideration, ab initio, whenever the same may judicially come into question."⁹⁴

Whatever doubts one might have of the acceptance by English lawyers of the doctrine of judicial annulment of legislation, in the eighteenth century, if we knew only of *Winthrop v. Lechmere*, as the single instance in which the Privy Council judicially held a colonial statute void, our doubts disappear when we reflect upon *Philips v. Savage*, *Clarke v. Tousey* and *Camm v. Hansford and Moss*, all instances in which the Privy Council assumed jurisdiction of cases where the issue was the validity or invalidity of colonial statutes, and when, in addition, we weigh the several instances in which the highest British law officers endorsed the doctrine, and the instance last adduced in which the Privy Council referred to judicial proceedings as the proper mode of getting a statute declared null *ab initio*.

On May 22, 1767, the Privy Council referred to their forty year old decision in *Winthrop v. Lechmere*, in a communication to the House of Lords.⁹⁵ As we have seen, this decision was known in Virginia and cited in the *Parson's Cause*. Obviously it was remembered in Connecticut, and in Massachusetts, from which came the appeal in *Philips v. Savage* involving the same issue. Moreover the opinions of the Attorneys-General and Solicitors-General touching colonial questions were known in the colonies.

We have a clear cut and direct bit of evidence that this British doctrine was fully grasped by a colonial mind. William Samuel Johnson, agent of Connecticut, in England, reported to the Governor of that Colony a very interesting discussion had by him with Lord Hillsborough, in 1768. This discussion is doubly interesting, for it not only shows that a Connecticut colonial understood the distinction between executive disallowance of a colonial statute and a judicial decision that a statute is invalid, but it also adds one more to the long list of framers of the Constitution of the United States who are known to have been familiar with judicial review of legislation before they participated in drafting the Constitution. William Samuel Johnson was to become a delegate from Connecticut to the Convention of 1787. American historians who have sought to show how many members of that convention are on record as having been familiar with the doctrine of judicial review of legislation prior to the Convention have omitted Johnson. On the basis of his discussion with Lord Hillsborough he must be added to the list. What manner of man was Johnson is told

94. 5 Acts of the Privy Council, Colonial Series, 1766-1783 (1912) 87.

95. *Id.* at 88.

in the character sketches which Pierce of New Hampshire drew up of his fellow members in the convention of 1787.

"Dr. Johnson is a character much celebrated for his legal knowledge; . . . and certainly possesses a very strong and enlightened understanding. . . . He was once employed as an Agent for the State of Connecticut to state her claims to certain landed territory before the British House of Commons; this Office he discharged with so much dignity, and made such an ingenious display of his powers, that he laid the foundation of a reputation which will probably last much longer than his own life."⁹⁶

Johnson ranked high among the members of that Convention, as shown by his appointment on committees, including the Committee on Style and Arrangement which polished the Constitution into its final form. In the light of Johnson's knowledge of the doctrine of judicial review of legislation, it is very significant that it was he who moved in the Convention to insert the words "this Constitution" before the word "the laws" in what is now Article III, Section 2, of the Constitution, which reads,

"The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their Authority."

Johnson is not recorded in any of the extant memoranda of the debates in the Convention as having said one word in it about power in courts to pass upon the validity of legislation. That several other members spoke of it, we know; but always there is the possible inference that the silent members were ignorant of the doctrine. It is a bit astonishing that at this late date Johnson of the Convention is identified with the Johnson who nineteen years previously had discussed the doctrine with Lord Hillsborough with marked comprehension, the very man who in the Convention moved to insert the words, "this Constitution" in Article III which, by reason of the presence of these words, seems expressly to authorize the federal courts to pass on the conformity of Acts of Congress and of state legislatures to the limitations imposed by the Constitution.

I shall briefly explain what the Johnson-Hillsborough discussion was about. Lord Hillsborough had but recently been appointed Secretary of State for the Colonies. Johnson called upon him "to recommend the Colony of Connecticut to his Lordship's favor." He was met with complaints that the colony did not keep the Ministry fully

96. 3 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911) 88.

informed of its affairs. From this Lord Hillsborough slipped into an intimation that Connecticut laws should be sent over as soon as passed. Johnson saw that this implied that Connecticut laws were subject to disallowance by the Privy Council, and called attention to the fact that the Connecticut Charter granted by Charles II conferred legislative power without reservation of a power of disallowance. Hillsborough said "there were many things which the King could not grant . . . particularly the power of absolute legislation," obviously meaning "absolute" in the sense of not subject to disallowance. This was touching a tender subject. The Charters and colonial claims of their privileges and immunities under them raised many sore points. In the House of Lords the year before, a Lord had exclaimed "Can anybody doubt whether we now understand the American Charters after having studied them all last winter?" And Lord Mansfield had said that there was no need to consult charters on the subject of disallowance, "because this was a prerogative of the Crown, which the King could not grant away nor divest himself of, even by the most express words."⁹⁷ Lord Hillsborough may not have known of the Mansfield opinion, and Johnson although he knew it, maintained the contrary. The following quotation from Johnson's letter to the Governor of Connecticut begins with the transition from this question of executive disallowance, to the question of the power of courts to hold Connecticut statutes invalid under the limitation expressed in the charter's grant of legislative power "to Make, Ordain, and Establish all manner of wholesome, and reasonable Laws . . . not Contrary to the Laws of this Realm of *England*."⁹⁸

"Finally, upon this point, his Lordship said, these were matters of nice and curious disquisition, and required a longer time for full discussion than he could then well spare; he seemed, however, to yield the necessity of any royal approbation as requisite to the validity of our laws, but still insisted that (admitting the validity of King Charles' grant) they ought to be regularly transmitted for the inspection of the Privy Council, and for *disapprobation*, if found within the saving of the charter, *repugnant to the laws of England*; that those who claimed under the charter must admit the force of that limitation of their legislative powers, at least, and that alone would render it necessary that their laws should be transmitted and inspected here. Upon which I begged leave to observe to his Lordship, that the Colony did not apprehend that any extrajudicial opinion of his Majesty's Ministers, or even of the King's Privy Council, could determine whether any particular act was within that proviso or not; that this could only be

97. Letter of Wm. Sam'l Johnson to William Pitkin, April 11, 1767. 9 Massachusetts Historical Society Collection (5th series, 1885) 226.

98. 1 POORE'S CHARTERS (1877) 255.

decided by a court of law, having jurisdiction of the matter about which the law in question was conversant; that though perhaps we should not contend, but that, if the General Assembly should make a law *repugnant* to a *statute* of Great Britain (not in the sense of *diverse form* [from?], but *flatly*, and in *terms contradictory* to it,) such law, by the *saving in the charter*, might be void, yet a *declaration* of the *King in Council* would still make it neither more nor less so, but be as *void* as the *law itself*; because its being void or not depended merely upon the *restraining clause* in the charter, not upon any *authority reserved to the Crown*, or the Privy Council, to *decide* about it, from which they were by other words in the same charter clearly and expressly *excluded*; that therefore the only method which could be taken in such case must be for the persons aggrieved by such act to bring their action at law, in such manner as to bring in question the validity of such act of Assembly, when the court before whom the trial should be, could fairly and legally determine upon it; that this might be done in the courts of law in the Colony, and I doubted not would be very fairly decided there, and leave no room for an application here, or, if the contrary should ever happen, the interposition here (if any) I conceived must be in the judicial only, not by any means in the official way.”⁹⁹

Thus Johnson denied the power of the Privy Council to exercise an executive disallowance of any Connecticut statute even on the ground that it was void because in violation of the express restriction of the Charter. The constitutionality of a Connecticut statute, he claimed, was exclusively a judicial question, to be decided by courts in litigation between man and man. This he said could appropriately be done by colonial courts, and by the Privy Council in its judicial capacity as a court of appeals from colonial courts, if a colonial court should fail to discharge this function properly.

“The interposition here,” that is, by the Privy Council, he said, “if any” must be in the “judicial” not in the “official way,” that is, in the course of deciding appeals from colonial courts, not by executive disallowance. The words, “if any” show Johnson’s reluctance to concede that it often would be necessary to go beyond the colonial courts to get a colonial statute repugnant to the colonial charter held void. Obviously a learned Connecticut lawyer would have in mind the performance of the Privy Council in *Winthrop v. Lechemere*. Consequently, elsewhere in his letter he says he did not stress the “judicial power of the Privy Council” which was “so delicate a subject.”¹⁰⁰

So William Samuel Johnson assumed that the courts of Connecticut would entertain a suit in which the validity of an act of the Con-

99. 9 Massachusetts Historical Society Collection (5th series, 1885) 259-260.

100. *Id.* at 260.

necticut legislature was brought in question and that they "could fairly and *legally* determine it." For as able a lawyer as Johnson it was an easy deduction that if the appellate court, the Privy Council, would entertain that issue on appeal it was proper for the lower colonial court to consider and decide it, otherwise the lower tribunal would be risking reversal on an issue which it did not pass upon. This point must have weighed with the Virginia courts, both inferior and highest, in passing upon the validity of the Two Penny Act. If the courts of one colony had the power there is no reason why those of other British colonies should not. The Attorney General of Barbadoes in an official opinion in 1729 assumed that the courts of that island colony had it. Doubt had been raised as to the validity of a tax statute. He advised local officials to levy the tax to avoid being penalized, adding that so doing "will at the same time leave everyone at liberty to try, if he pleases the validity of it, in the courts of law."¹⁰¹

The proceedings and decision of the Privy Council in *Winthrop v. Lechmere* were not published in print and though we have evidence that that decision was well known in Connecticut, Massachusetts and Virginia it may not have been universally known. Benjamin Whitaker, chief justice of South Carolina, 1739-1750, seems not to have known it in 1742 or 1743. He clearly understood that the legislature of South Carolina was subject to a constitutional limitation that its enactments should not be repugnant to the laws of England but he doubted whether courts could enforce that limitation by adjudging void a statute that violated it. He appears even not to have known of the proceeding in his own court in 1724 under Chief Justice Hepworth when, as it appears, that court assumed power to hold a South Carolina statute void for such repugnancy.¹⁰² The decisions of that court, as of colonial courts generally, were neither officially nor unofficially reported. Precedents were not published and available as they are now. In 1742 Whitaker seems to have thought that the only device for the thwarting of colonial statutes repugnant to the laws of England was disallowance, or repeal, of them by his Majesty in Council, that is, by the Privy Council in its executive or administrative capacity. Yet the following year he was still in doubt.

In a memorial to the governor, September 16, 1742, he said:

" . . . altho the Judges of the Courts of Common Law in Great Britain are the proper Expositors of Acts of Parliament, yet in the Plantations in America which are dependent Governments and are only impowered to make Laws, under certain Conditions, Limitations and Restrictions, the Judges in America are bound

101. CHALMERS' OPINIONS (Am. ed. 1858) 236.

102. *Supra*, pp. 10-11.

to observe the Laws that are passed by the General Assembly, till they are repealed by the King. For though such Laws may sometimes be made contrary to his Majesty's Royal Prerogative; or his Instructions to his Governors, or may be repugnant to the Laws of England, yet it is conceived Such Laws are not *Ipso facto* void, in themselves, but only voidable by his Majesty's disallowance or repeal, who 'tis humbly apprehended has reserved to himself the Sole power of Judging of Such Contrariety, or repugnancy. . . ." ¹⁰³

In his letter to McCulloch, Commissioner of Quit Rents, in February following he puts the question as still to him an open one:

"All Acts of Assembly are made by an Authority derived from the Crown which enables the Governor Council and Assembly to make laws provided they are as near as may be agreeable but not repugnant to the Laws of England.

"Now sometimes Acts have been made in the Plantations not only Contrary to the Kings Instructions and the Prerogative of the Crown but disagreeable or repugnant to the laws of England.

"The Question is whether these laws are void when they are first made, or only voidable by his Majesty's Disallowance and may be put in practice till his Majesties Pleasure shall be signified that the same are repealed? and whether the Judges of the Courts when they are given in Evidence or pleaded in Cases depending before them ought to adjudge them *ipso facto* void, or only voidable, and so to be put in practice 'till they are repealed by his Majesty?" ¹⁰⁴

Chief Justice Whitaker's musing puts statutes enacted contrary to royal instructions to governors on the same footing as statutes repugnant to the laws of England. The Privy Council had never held that the former were constitutional limitations enforceable by judicial decision. The repugnancy clause was found in charters and governors' commissions, which were regarded as the constitutions of the colonies, whereas instructions to governors to veto or refuse assent to certain types of laws were not published, and indeed governors were often ordered not to communicate them to assemblies, and they were regarded as enforceable only by executive action, by reprimand or removal of a governor who disobeyed, or by executive disallowance of an act assented to by a governor in violation of an instruction. The power of disallowance of course extended to the repeal of repugnant laws for it could be exercised on any ground whatsoever, whereas judicial annulment extended only to unconstitutional laws.

103. Ms. Journal of the South Carolina Council, September 17, 1742.

104. Ms. Public Records of South Carolina, XXI, 136-137.

The extensive exercise of the power of disallowance made resort to judicial annulment rarely necessary and no doubt clouded other colonial minds than Chief Justice Whitaker's with respect to the new device created by the Privy Council by its decision in *Winthrop v. Lechmere*. Yet sporadically here and there during the colonial period the concept kept cropping out that subordinate colonial courts as well as the highest colonial appellate court should exercise the function of passing on the constitutional validity of the acts of colonial legislatures.

I have already discussed the migration to colonial America of Coke's idea that courts should hold even acts of Parliament void when in their judgment they were contrary to common right and reason. James Otis in 1761, as we have seen,¹⁰⁵ contended that a colonial court should do so. We have seen also that it was contended by the colonists on the eve of the American Revolution that Parliament had only limited power of legislation over the colonies. It was contended that the British Constitution denied to Parliament power to levy internal taxes in the colonies for revenue only, as distinguished from taxes operating as regulations of the external commerce of the colonies. What would courts have done if it had become accepted doctrine that Parliament was subject to constitutional limitations? A very distinguished Virginia judge, Edmund Pendleton, gave his answer in 1766, when he wrote:

"For my own part, I never have or will enter into noisy and riotous companies on the subject [of the Stamp Act] . . . As a magistrate . . . having taken an oath to decide according to law, [I] shall never consider that Act (Stamp Act) as such, for want of power, I mean constitutional authority in Parliament to pass it."¹⁰⁶

Evidently Pendleton's thought was that in a private suit in which it might be contended that a legal instrument was not enforceable because it lacked the stamp required by the Stamp Act a Virginia court should hold that the lack of a stamp was immaterial because the Act of Parliament requiring it was unconstitutional and void.

In tracing the origin and development of this British doctrine of power in courts to decide upon the validity of statutes, we have seen it exercised by an inferior Virginia court;¹⁰⁷ we have seen that the highest court in Virginia assumed that it possessed the power, while holding a statute valid by a 5 to 4 vote;¹⁰⁸ we have seen strong evi-

105. *Supra*, p. 5.

106. Edmund Pendleton to James Madison, Senior, February 15, 1766, in 1 RIVES, MADISON (1859) 71, n.

107. *Supra*, p. 27.

108. *Supra*, p. 28.

dence that the highest court of South Carolina exercised the power in 1724;¹⁰⁹ and we have seen it exercised by the highest court in the British colonial system. We have seen British colonial lawyers in America asserting and endorsing it, among others, James Otis of Massachusetts, William Samuel Johnson of Connecticut and Edmund Pendleton, a Virginia magistrate. Later¹¹⁰ we shall review the abundant evidence that British colonials in America soon after they became independent Americans by their secession from the Empire practiced the doctrine in their courts before the adoption of the Constitution of the United States, and we shall see abundant evidence that the doctrine was well known to the framers of that Constitution and was approved and adopted by them.

The Privy Council's assumption of power in its judicial capacity to pass upon the validity of a colonial statute was novel in 1727. Its power to do so has never been doubted since. Its later use of the power seems to have been rare, if any, until after the middle of the nineteenth century, but when it then began to make use of it with respect to legislation in British India, Canada and Australia it did so without any new grant of power. The Judicial Committee Act of 1833¹¹¹ had more definitely defined the membership of the Judicial Committee of the Privy Council, that is, it had determined what officials were eligible to sit in the hearing of judicial appeals as distinguished from the more numerous membership of the Council as an adviser of the Crown in matters other than judicial appeals, but there had been no legislation whatever enlarging its powers as a court beyond what the Privy Council acting in its judicial capacity had traditionally possessed. It regarded its power of judicial annulment of legislation as an inescapable function of a court that has jurisdiction of suits between man and man where one may rely for judgment upon a statute of a limited legislature and the other pleads that the statute is not within that limited power. In 1878 the Privy Council on an appeal from a British Indian court said:

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. . . . The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question."¹¹²

In 1880 a learned Canadian writer described the dual capacity of the Privy Council as still persisting, as British institutions have a way

109. *Supra*, pp. 10-11.

110. The reference is to a chapter, not here included, of the projected book, referred to in the footnote to the title of this essay, p. 1, *supra*.

111. 3 & 4 Wm. 4, c. 41 (1833).

112. *Queen v. Burah*, 3 App. Cas. 889, 904 (1878).

of doing, and also disclosed that British colonial courts throughout the Empire had come to pass upon the validity of colonial statutes.

"It is the primary condition of all legislation by subordinate and provincial assemblies, throughout the British Empire, that the same 'shall not be *repugnant* to the law of England.' This condition is enforced in two ways: firstly, as has been elsewhere shown, by the right and duty of the Crown to disallow any act that contravenes this principle; secondly, by the decision of the local judiciary in the colony, in the first instance, and ultimately of her Majesty's Imperial privy council, upon an action or suit at law, duly brought before such a tribunal, to declare and adjudge a colonial, dominion, or provincial statute, either in whole or in part, to be *ultra vires* and void, 'as being in excess of the jurisdiction conferred upon the legislature by which the same was enacted, or at variance with some Imperial law in force in the colony; or otherwise, by a similar decision, to confirm and approve of the legality of the act the validity of which had been impugned.

"The power of interpreting colonial statutes, and of deciding upon their constitutional effect and validity, is a common and inherent right, appertaining to all her Majesty's courts of law before which a question arising out of the same could be properly submitted for adjudication."¹¹³

No historian, no English scholar has traced the spread of this doctrine through the Empire. The earliest instance my imperfect search has disclosed of the exercise of the power outside of the colonies that became the United States of America is by the Supreme Court of Van Diemen's land in 1847. That there may have been earlier instances is suggested by the following incident.

An act of Parliament in 1823 in making provision for a legislature in New South Wales imposed the limitation that it should pass no law without first obtaining a certificate from the Chief Justice of the Colony that the proposed law "is not repugnant to the Laws of *England*."¹¹⁴ In place of this absolute veto, an Act of Parliament of 1828¹¹⁵ substituted a suspensory veto, by providing that every law that passed the legislature should be sent to the Supreme Court of the Colony whose representation that the law was repugnant to the organic act or to the laws of England would suspend the law until reconsidered by the legislature, who by resolution might repass it and make it an effective law, "any Repugnancy or supposed Repugnancy . . . notwithstanding," subject, as usual, to disallowance by the Crown.

113. TODD, PARLIAMENTARY GOVERNMENT IN THE BRITISH COLONIES (2d ed. 1880) 302.

114. 4 GEO. 4, c. 96, § 29 (1823).

115. 9 GEO. 4, c. 83, § 22 (1828).

Sir George Murray's dispatch transmitting the new law to the colony stated:

"Without such a previous reference [of a proposed law] to the Judge, he might have found himself often required in open court to deny the validity of a colonial Ordinance on the ground of its repugnancy to the law of England. . . . Provision is thus made for fully learning the views of the judges upon the law, and for preventing their refusing to execute any law which may be passed after a full consideration of their objection."¹¹⁶

Obviously Murray in 1828 assumed that colonial courts possessed power to pass on the validity of colonial legislation in cases litigated before them, unless the power was expressly taken away by Parliament. He thought the new provision completely did so.

On the last point it seems the Supreme Court of Van Diemen's land formed a different opinion. The organic act for that colony contained the same terms as the Act of 1828 for New South Wales, just mentioned. In 1847 the Supreme Court of the colony held a statute of the colony void *ab initio*, in spite of the fact that the statute had been referred to the Court before it went into effect and no objection to it had then been made. This decision was given in the case of *Symons v. Morgan*.¹¹⁷ Morgan had been convicted before a police magistrate, on an information by Symons, of keeping a dog without a license in violation of the Dog Act and appealed to the Supreme Court. The Supreme Court held the Dog Act invalid on the ground that it levied a license tax without specifying the purposes for which the proceeds of the tax were to be used, as required by the organic act.

The two justices of the Supreme Court pointed out the distinction between the Imperial Parliament and the Colonial Legislature, the latter being subjected to numerous limitations by the organic act, the "constitution" of the Colony, as Justice Montagu termed it. The Court assumed that a colonial court had a power of judicial annulment of colonial legislation unless, as Chief Justice Pedder conceded, express provision to the contrary should be found in an act of the Imperial Parliament. He said, "It might be admitted for the purpose of this argument" that the present organic act should be construed as excluding judicial annulment by the colonial court in cases of statutes to which the judges had made advisory objections, for it provided that where the legislature should adhere to a statute in spite of the judges' objections, the statute would become effective notwithstanding its re-

116. British House of Commons, Sessional Papers, 1847-48, Doc. 566, 88.

117. Very full account of this case is given in the documents (including the opinions of the judges) in British House of Commons Sessional Papers, 1847-48, Doc. 566, 52-112.

pugnancy to the organic act or to the laws of England. But these words, he said, did not take away the power of judicial annulment of a statute against which the Court had filed no advisory objections.

In the opinion of the Court there is no reference whatever to Chief Justice Marshall's famous opinion in *Marbury v. Madison* in 1803, nor the slightest allusion to the practice of courts in the United States. The Supreme Court of Van Diemen's Land confidently spoke as if acting upon a principle firmly established in British usage. The Chief Justice referred to an opinion¹¹⁸ of Attorney General Yorke and Solicitor General Talbot in 1730, on the limited powers of the legislature of Connecticut, quoting the passage, that "if any laws have been there made, repugnant to the laws of England, they are absolutely null and void," as justifying a colonial court in determining whether the statute in question was one that the colonial legislature "had not power to enact." The opinion of Yorke and Talbot given in 1730 was a brief reiteration of their argument in *Winthrop v. Lechmere*. It had won over the Privy Council in 1727, and the theory of their argument was as applicable to a subordinate colonial court as it was to the Privy Council.

It must not be assumed that the actors in this episode in Van Diemen's Land in 1847 were men of small intelligence and little learning. The contrary is true. Under the organic act the judges of the Supreme Court, appointed by the Crown, were required to be barristers in England or Ireland of not less than five years standing. Justice Montagu had been on the bench fourteen years, and Chief Justice Pedder for eight years and the Colonial Governor, though denying that under the organic act the judges had the power assumed, conceded that the Chief Justice "stands deservedly high in the colony." Also the Attorney General and the Solicitor General who opposed the judges, both with respect to the power of judicial review and the interpretation of the provision of the organic act to which the judges held the Dog Act repugnant, did so in able opinions. Space does not permit even a summary of their intelligent discussion of the advantages and disadvantages of permitting courts to pass upon the validity of statutes. The colonial administration feared that several other statutes, including important revenue laws, might likewise be held invalid. The Solicitor General of the colony listing several laws that seemed open to the same objection added:

"I think it impossible to say that there may not be many other grounds on which the court may not, on argument be bound to declare many other Acts void, if the principle is to be admitted

118. CHALMERS' OPINIONS (Am. ed. 1858) 341.

that such argument may be advanced, that the authority of a law is always liable to be questioned; that every Act is to be subject to run the gauntlet of the acute and the subtle, and often sophistical dialectics of the court, and to depend for its obligation, not on its own intrinsic sanction, but on the effect which the argument of an astute advocate may happen to have on the mind of a Judge." ¹¹⁹

When, later, Canadian and Australian courts took up the practice of passing upon the validity of the acts of their legislatures they never doubted. They entered into no explanation of their possession of the power. They evidently regarded it as an established, though previously seldom used, British colonial institution. ¹²⁰

As we have seen Solicitor General Charles Yorke in 1760 had said that not only the Privy Council had a power of judicial review of colonial legislation to be exercised in appeals from colonial courts but that also "acts of assembly have been declared void in the courts of Westminster Hall;" ¹²¹ and the learned Canadian author have quoted refers to the function as "appertaining to all" British courts before which a case involving the constitutionality of a statute may come.

This is borne out by the action of the Court of Queen's Bench and the Exchequer Chamber in England in 1869. The Privy Council being the court of appeals from colonial courts, it naturally is rare that a case involving the validity of a colonial statute comes before other courts in England. But this occurred in *Phillips v. Eyre* in 1869 a suit brought in the Queen's Bench by an inhabitant of the Colony of Jamaica, while temporarily in England, against Eyre, a former governor of Jamaica who had become a resident of England. It was a civil action for damages alleged to have been caused by the defendant's falsely imprisoning the plaintiff, during an insurrection. Eyre pleaded a statute of the colony passed after Phillips' imprisonment which fully exonerated Eyre and others for all acts done in good faith in suppression of the insurrection. He further pleaded that the legislature of the colony had authority to pass this statute. The plaintiff accepted this issue and challenged the validity of the statute. The Queen's Bench, Chief Justice Cockburn presiding, held the statute valid, and a good defense.

On appeal to the Exchequer Chamber, that Court affirmed the judgment, after deliberating on the question of validity of the statute. The Court consciously recognized this question as the turning point of the case, saying:

119. *Loc. cit. supra* note 116, at 94.

120. For Australia, see HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (2d ed. 1932) 578-590; for Canada, *id.* from 598 to 609.

121. *Supra*, p. 32.

"Nor are we called upon to offer any judicial opinion as to the lawfulness or propriety of what was done [by the defendant] in the present case, apart from the validity and legalizing effect of the colonial Act."¹²²

Thus the court asserted that it had power to give a judicial opinion on the validity of the statute, and it proceeded to do so. That the court held the statute valid is immaterial. It could not properly have entertained the issue if it was not prepared to hold the statute invalid had it been convinced that the legislature had acted beyond its powers.

There is the still more remarkable instance of judicial review of legislation by the King's Bench in *Campbell v. Hall*.¹²³ This occurred in 1774 on the eve of the American Revolution. In this case, not a colonial statute but a legislative act of one of the legislative organs of the central government of the Empire was held void because beyond the power of the legislative body that enacted it.

The Island of Grenada was a British colony conquered from the French and ceded to Great Britain by the treaty of peace, February 10, 1763. By a proclamation of the Crown on October 7, 1763, a promise was given to the inhabitants that a general assembly would be set up in the colony with local legislative power, and on April 9, 1764, a governor was appointed with a commission authorizing him to call an assembly. Thereafter, on July 20, 1764, the Crown by an Order in Council imposed an export duty on certain commodities shipped from Grenada. A shipper who had paid duties, later finding the Collector in England, brought suit against him in the King's Bench. The question was, Was the legislative act, the Order in Council, imposing the duties, valid legislation? The King's Bench did not hesitate to decide the question, and held the legislation invalid, because beyond the power of the legislative organ that enacted it. It might be thought that this was merely an exercise of judicial power to control the executive, but not so. The King in Council had and still¹²⁴ has an undoubted power to legislate for conquered colonies, as distinguished from colonies peaceably settled by British subjects. Lord Mansfield, delivering the opinion of the court elaborately demonstrated this point. He said that while Parliament had power to legislate over a conquered colony, as over any other, yet the King "without concurrence of Parliament," that is, the King in Council, had power by Order in Council to make laws for such a colony, provided only they were not contrary "to fundamental principles" or to any applicable act of Parliament. This legisla-

122. 6 L.R. 1 Q. B. 16 (1870).

123. 1 COWPER 204 (1774); THAYER, CASES ON CONSTITUTIONAL LAW (1895) 40.

124. JENKYNs, BRITISH RULE AND JURISDICTION BEYOND THE SEAS (1902) 6.

tion did not, he said, violate those limitations, and if it had been enacted before the promise of a local assembly had been proclaimed it would have been valid. But under the constitution of the Empire, when the King in Council grants even to a conquered colony the privilege of local legislation this grant is irrevocable except by act of Parliament or forfeiture of the grant by a judicial proceeding. An Order in Council, thereafter, attempting to make a law for the colony is "contradictory to" the grant "and, is, therefore, void." Thus the Privy Council was one of the imperial legislatures over conquered colonies, and the decision was that an act of this legislature, in the circumstances, was beyond its constitutional powers. In the course of argument, Lord Mansfield remarked from the bench that this was "one of the greatest constitutional questions that, perhaps, ever came before this court."¹²⁵

The germ of thought that Sir Edward Coke had loosed into the world in 1610, that courts in cases litigated before them would declare acts of legislation void when these transcended some higher law, had evolved into a doctrine that a British court would, in like cases, hold void a statute enacted by a limited legislature when the court adjudged that the statute transgressed the limits. This function was not peculiar to any particular court but was possessed by any court properly having jurisdiction of a suit in which such an issue could be made by the litigants.

Why is it then that British courts have never held an Act of Parliament void? The answer is almost too obvious to need expression. In the course of the long evolution of the British government, Parliament emerged as a legislature subject to no constitutional limitations whatsoever. Judicial power to decide whether a limited legislature has exceeded its limits has no application at all to a legislature whose powers are unlimited.

During the American colonial period British judges and lawyers had evolved a doctrine, not developed to perfection to be sure, but ready to be taken up and made much or little of by our colonial ancestors when after Independence they sat about establishing new governments.

Considering that the highest function of the Supreme Court of the United States is to determine the validity of state and national legislation under the Constitution, statues of Sir Edward Coke and Lord Chancellor Hardwicke might appropriately be erected in the Supreme Court building in Washington. Hardwicke, the most distinguished British lawyer of the eighteenth century, had given Coke's vague idea definite application to legislation enacted by legislatures subject to limi-

125. 20 HOWELL, STATE TRIALS (1814) 306.

tations expressed in written constitutions. He got the precedent established upon which Americans have builded.

APPENDIX

At page 11 above, it appears that the judges of the General Court of South Carolina in their representation to the Commons House declared that they had power to dispense with any law of the province that was "contrary to the Kings Instructions & Repugnant to the Laws of England" and that they were the "Sole Judges and Interpreters." They said this in defense of "proceedings" in their court. Thus they clearly asserted that courts have power to hold that a statute in conflict with a written constitutional limitation is void. All that remained to establish that this is our earliest known instance of judicial annulment of a statute on a constitutional ground was proof that the court's proceeding was the decision of a litigated case. Positive proof is supplied by the following extract from the manuscript Journal of the Commons House of Assembly for December 22, 1726.

"It being proposed that the Report of the Com'ittee of Grievances might be now read & taken under consideration, and on motion

"The Question was put whether the house should Resolve it's selfe into a Com'ittee of the whole house to debate the sd. Report

Carried in the Negative

And then the house proceeded to take under consideration the Report of the Com'ittee of Grievances & severall papers and paragraphs of Laws being read on wch. the sd. Report was founded & the Representation of the Judges of Charles Town Court being allso read the further debate & consideration of the sd. Report was postponed untill the afternoon and then

"The house adjourn'd till two of the Clock in the afternoon.

"The house mett according to adjournment.

"The house resumed the debate on the Report of the Com'ittee of Grievances & on motion that a Resolution of the Judges of Charles Town Court should be forthwith laid before the house. Geo. Smith & Benja. Whitaker Esqrs. were order'd to go to the Office of the Clerk of the Crown to procure the said Resolution or a Copy thereof & the date [sic: debate] on the said Report was postponed untill the sd. Resolution be laid before the house

"Geo. Smith & Benja. Whitaker Esqrs. laid before the house a book of Rules, Orders & proceedings of the Court in Charles Town wherein was incerted an opinion of the Court in the case of

Dymes agt. Ness in an Action of the case for five hundred pounds which Opinion Runs as follows.

Dymes

Ca :

August the 12th 1724.

agt

£ 500

Dam :

Ness

'Tis the opinion of the Court that where a party claims the benefit of the County Court Act as that he lives out of the Jurisdiction of this Court the matter ought to be disclosed to the Court by pleading specially to the Jurisdiction and not on motion Suggestion or otherwise. By order of the Court

Law : Coulliette C.C.P.

And the above opinion of the Court being read the Question was put whether the sd. opinion of the Court is contrary & Repugnant to a clause in an Act of the Generall Assembly of this Province intituled an Act for authorizing the General Court in Charles City & Port to excercise several powers & Priviledges allowed to the County and Precinct Courts in this Province & some other Regulations which clause declares that the Cheif Justice & Assistant Judges shall permitt any person either Plaintiff or Defendt. desiring leave of the Court to be heard to plead their own cause without obliging him or them to fee a Council or Attorney for that purposs.

Carryed in the Affirmative" ¹²⁶

¹²⁶. The author is indebted to Mr. A. S. Salley, Secretary of the Historical Commission of South Carolina, for supplying a requested copy of this document.