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The Imperial Constitution of the Law Officers of the Crown: Legal Thought on War and Colonial Government, 1719-1774.

The rule of conquest came to receive different applications for different parts of the British Empire. How this happened, and who was responsible for it happening, are the interests of this article. Calling upon court reports, parliamentary records, and correspondence between various officeholders in the early Hanoverian government, attention will be drawn in particular to the attorney general and the solicitor general (the law officers of the crown) and the advice they offered upon the governance of colonies between 1719 and 1774. Focusing upon the conventions that pertain to war and conquest in Ireland, the Caribbean, India, and North America, this article reveals inconsistency in doctrine, but consistency in the procedures by which law officers of the crown acquired influence over proceedings in the houses of parliament and in the courts of common law and equity. Just as often in their formal capacities as in their informal capacities, the attorney general and the solicitor general were pivotal to the development of the imperial constitution, in constant response, as they were, to the peculiar demands of various colonies and plantations in the British Empire.

Keywords: imperial constitution; crown law officers; conquest; British Empire; Ireland; Bengal; Jamaica; Grenada; Quebec; America.

I. Introduction

One is able to account fully enough for the English imperial constitution of the period between 1603 and 1714 by referring only to words that begin with the letter c. One can think first of the crown, and then all of the formats to which its graces were lent: councils, committees, courts, corporations, and Commons. Over some of these entities, the crown retained great influence, just short of total power; over others, the crown had negligible influence, just short of total powerlessness.[1] Casting forward to the period between 1794 and 1914, one mainly has to come to terms with the colonial office and the civil servants posted to it, along with its secretarial presence in the ministry and parliament, to account for the imperial constitution – an imperial constitution that was fine-tuned in commissioned reports and dispatches, but instrumentalised through orders in council and statutes.[2] Between 1714 and 1794, after the age of *personal* power but before the age of *bureaucratic* power, one encounters a different constitutional setting again: an extraordinarily *political* one. The clout of monarchical power had been dullened, but still endured under the first three Georges. Officeholders did far more of the crown's bidding for empire in this period, as they took on greater responsibilities in accordance with new, if changing, standards of accountability. Parliamentarians made big declarations of the power of their own institution, bluffs seldom called, while judges talked of rights and liberties, less frightful than previous generations had been, of the king's displeasure.[3]

If this, for Frederick Madden and David Fieldhouse, was the 'classical period' of the British Empire, which saw plenty of 'dynamic change' in 'periods of apparent stability or equipoise', where might one look for its constitution taking shape?[4] Should it be the Board of Trade, akin to a standing committee of lords, selectable from the Privy Council? Or should it be parliament, which consulted the Board of Trade as something of an advisory body, and was developing the bigger legislative agenda for all things maritime and mercantile in this period? If so, which part of parliament, it follows to ask, had the strongest grip on constitutional matters of empire? Was it the Commons as a voting assembly, or was it the Lords as its moderator, or was it the king's ministers, some in cabinet with secretaries of state and, between 1768 and 1782, a dedicated colonial secretary? What, then, about the judiciary? Were the common law courts of Common Pleas and King's Bench, hearing actions in private law from the colonies, any real standard bearers, or was it the Privy Council, functioning as a court of appeal in receipt of numerous queries on complicated points of jurisdiction, that held the greater sway? Maybe it was the Admiralty, hearing prize cases and instances in accordance with its own flexible jurisprudence, that did more? Or perhaps Chancery, that slow-moving court of discretionary equity where the Lord Chancellor presided over the thorniest disputes within and between colonies, set out the most lasting criteria for imperial matters?

Thinking about the influence of each of these institutional entities separately is an interesting exercise, but little distance is gone by measuring one against another. That is because often they worked together to fashion out the Hanoverian imperial constitution. Any serious suggestion otherwise moves back towards a historiographical trend that continues to see historians succumb to the temptation of maligning as 'unconstitutional' the operation of some component or other of this system (usually, either to prove or disprove that the American revolution was justified). Divesting from an accusatory style of juridical history, the kind made classic by Charles Howard McIlwain, we might rather remove the word *unconstitutional* from our lexicon and say instead that all workings of the British Empire were constitutional if sometimes *inconsistent*.[5] It follows from this that more of our attention can fix upon the contexts inside of which legal ideas were made malleable, compliant with differing standards of consistency. Now, from here, what this essay will explore is the work behind the scenes, and across these institutional entities, of a particular set of officeholders.

Attorney general and solicitor general were the two foremost law officers of the crown. Brought into constitutional existence as personal counsel capable of appearing for the monarch, they had evolved, by the end of the seventeenth century, to become the legal advisors for the crown in most of its capacities: in ministry, in council, in parliament, in court.[6] Necessarily chameleonic, the best of them shared the same traits: they were familiar with all forms of law practised before the judiciary, they were sensitive to the politics of the time, they were loyal to the crown, and they were aloof to give the appearance of remove. The solicitor general was underling to the attorney general, and while this did not automatically confer blindness of deference, the job was easier for both of them when they got along. Called upon to perform the same duties, they collaborated on many things, and almost always they arrived at the same legal interpretations, if however differently, sometimes, they got there. Sometimes their work was of a very informal nature. Passed a legalistic query, say, from a borough or a plantation, the attorney general and solicitor general were expected to form an opinion without ceremony, doctrine, or long lists of precedent. This was guidance and benediction, rather than law.[7] Sometimes their work was formal, however. Whenever touchy disputes concerning the interest of the government went to trial in one of the superior courts, the attorney general or solicitor general, and sometimes both depending on the case, were appointed to counsel. Whenever the politics of parliament got heated on a matter of constitutional principle, the law officers of the

crown were always to be found lurking around as well, with their direct involvement as legal authorities ensured by the convention that at least one of them (and, with increasing likelihood, both) sat in the House of Commons. In turn, and what is particularly interesting about this period, members in the Commons came to look upon them as their own lawyers, and would often send them bills for drafting, editing, or commentary. As a result, as ministers, members, and counsel all at once, the line between colleague and client was always blurred for the law officers of the crown (a point made particularly well by R. A. Melikan).[8] Often they fell prey to 'immediate political influence' (a point driven home by E. P. Thompson in *Whigs and Hunters*).[9] And always, throughout this period, they participated in a great game of musical chairs. Usually the attorney general and solicitor general vied with each other for a higher position like Lord Chancellor or Chief Justice. This was a career trajectory that demanded a very different kind of personal loyalty to those who took a seat in the Commons with other professional motivations in mind; and it was a trajectory which ensured that every single rung upon the ladder, in view of Westminster Hall, had to be grasped gently.[10] For those who made it, stellar careers sat waiting at the top; just as often, however, dishonourable reputations collected along the way impeded their progression upwards.[11]

Law officers of the crown were confounded regularly with new legal questions darted in from the outskirts of the British Empire. The points of law differed vastly from place to place. In Ireland, popular nostalgia for a Catholic monarch, combined with demands for greater parliamentary autonomy, demanded fresh equivocation on the conquered status of England's closest overseas dependency. In the Caribbean, where plantations were collected through a succession of wars and settlements, the royal prerogative poised itself awkwardly in relation to legislatively autonomous slaveholding societies. In India, crown and parliament followed a corporation deep into the politics of the country, which was justified through an innovative brand of legalism vesting the East India Company with a proxy state personality that was to be regulated in the interests of 'the public'. From the mainland settlements of the Atlantic, subjects of the crown called sometimes for the legislative interventions of parliament while at other times spurning the same, inconsistency which, in turn, called into question the justice and choosiness of parliamentary proceeding. This article will show how all of these crises together – for they cannot be removed from each other – pushed the chambers of parliament and the courts of law to reach new conclusions about conquest: who it was for, and what it entailed. There was plenty of inconsistency about these conclusions, especially when it came to the colonial applications they were to receive, it is shown. The other contribution of this article, offered more for constitutional historians, is to reveal how a bridge between parliament and the judiciary was actively laid by the solicitor general and the attorney general in both their formal and informal capacities, as well as their past and present capacities, in this period.

II. Omens from the Atlantic

A young lawyer for the borough of Lewes, Philip Yorke, got a special sense of the shape of controversies to come from the Atlantic as a law officer of the crown long before becoming Lord Hardwicke. Indeed, he had been rewarded with the position of solicitor general thanks to his calculated showing of faith in a bill unrivalled, at the time, for its desperation to signal the constitutional superiority of the British parliament away from the realm. In an impassioned performance, his maiden speech, before the House of Commons at the start of March 1720, Yorke spoke in favour of the bill 'for better securing the Dependency of the Kingdom of Ireland upon the Crown of Great Britain'. Passed, this declaratory statute would ultimately confirm that the island 'is, and of Right ought to be subordinate unto and dependent upon the Imperial

Crown of *Great Britain*, as being inseparably united and annexed thereunto'.[12] Product of the labour of law officers present, it was championed by those in waiting.

It would not be Ireland and the liberties of its people that consumed the more of Yorke's attentions as solicitor general and then, after 1724, as attorney general. It would be Jamaica. By the criteria set out in Chief Justice John Holt's jurisprudence between 1693 and 1705, Jamaica had been a 'conquered colony'. That meant that it was not the common-law alternative, variously considered 'new', 'uninhabited', and 'settled', where the laws of England were carried with subjects automatically. Jamaica, by *Blankard v Galdy* (1693), and nuanced through *Smith v Brown and Cooper* (1705), was a conquered province where the laws of England did not automatically extend; instead, the laws were 'what the king pleases'.[13] Into the early eighteenth century, however, the constitutional consequences of this conquest were disputed by a growing number of merchants, planters, and inhabitants in Jamaica. They felt themselves the victims of an unlawful and arbitrary denial of complete access 'to the benefit of the common and statute laws of England, as free-born subjects thereof'.[14] So they might pass their own laws, then.

Concessions of legislative autonomy to the colony since the Restoration had only been temporary, but they had been consecutive enough to give the indication of permanence. Eventually the limits of local legislative power were called into question over revenues. When puzzlement broke out in 1721 over the lifespan of a series of overlapping local revenue acts passed by the Jamaican assembly in 1683, 1688, and 1703, the Board of Trade turned to Yorke, along with the attorney general, Robert Raymond, for advice. Together they offered their take on the merits of the statutes, along with a note of encouragement, for the Jamaican legislature. Their message to the Jamaicans was to consolidate their laws afresh.[15]

In this way was the next Jamaican revenue act, passed on February 5th, 1723, justified, but the new legislation would do far more than the law officers anticipated. Part of its problem stemmed from a confusing preamble that declared the colony to be founded both by conquest *and* settlement. Besides jumbling up concepts that were just developing into terms of art to gauge the legal receptivity of colonies, this extraordinary piece of legislation also presumed to decide which procedural elements of English law, including *habeas corpus*, might transfer from England to Jamaica.[16] Aghast, the Board of Trade turned back to the law officers of the crown, because (among other things) the act of the Jamaican assembly seemed to raise old questions anew about the colony's legislative autonomy relative to 'its dependence upon the authority of the Crown of Great Britain', issues about which Yorke had been famously outspoken in relation to Ireland.[17] By this stage, promoted to attorney general, Yorke and the new solicitor general, Clement Wearg, had to consider 'whether Jamaica is now to be considered merely as a colony of English subjects, or as a conquered country', in relation to the application of taxes. The dichotomy they spelled out was plain:

> if, we apprehend, [Jamaica was] a colony of English subjects, they cannot be taxed, but by the Parliament of Great Britain, or by and with the consent of some representative body of the people of the island, properly assembled by the authority of the Crown; but, if it can now be considered as a conquered country, in that case, we conceive, they may be taxed by the authority of the Crown.[18]

In this was the basic outline of a controversy about the operation of the imperial constitution which, in half a century's time, would galvanise the thirteen American colonies into revolution. This is something the attorney general and the solicitor general could never have known, of

course. Still they recognised in the question a matter 'of great weight and importance' for the wider Atlantic context, and therefore asked politely of the Board of Trade to provide more materials, so as 'to enable us to judge' on the matter. The validity of Cromwell's original conquest from 'the Crown of Spain' in 1655 was no longer important. What raised 'the chief difficulties' were questions about different types of taxes, besides whether the Jamaican legislature enjoyed a perpetual or temporary existence. Hidden in all this were the makings of new criteria for colonial governments, which hinted at the principles of evolution from 'conquered' to 'settled'.[19] Whatever the evidence (which went unsaid) in support of this interpretation (which was explicitly inconclusive), this was not binding law. Its importance lay in the future.

Chief Justice of the King's Bench from 1733, and Lord Chancellor from 1737, Hardwicke had a style of delivering equity, stylistically like facts, that attracted the awesome admiration of an ambitious chancery lawyer, William Murray, himself solicitor general from 1742. So came to be intertwined the destinies of two of the most outstanding lawyers of their generations. As a law officer of the crown, Murray refined his skills by following Hardwicke's example, and he relished every chance to develop arguments before him. One of the cases bringing Murray and Hardwicke together was a drawn-out intergenerational dispute over boundaries between the Penns and the Baltimores. When, after 70 years of quarrelling, the matter came into the Court of Chancery, Murray appeared for the plaintiffs, the Penns. To the Penns, Hardwicke was ultimately more sympathetic in a decision so characteristic of the equity that Murray had come to admire: knotty with principles, choosy with precedents, and decisive when it came to the evaluation of old intentions. For all that Hardwicke appeared to side with the Penns, however, his judgment was one above all for the crown.[20]

Like Yorke, Murray was able to get a sense of Atlantic legal controversies in advance of them reaching crisis point as a law officer of the crown. One such omen was Nova Scotian. Amid uncertainty about whether or not Governor Lawrence was obliged to establish an assembly in the Province, the Board of Trade asked Murray, now attorney general, along with the solicitor general, Richard Lloyd, to consider the validity of legislation passed by governor in council pending the installation of an assembly. In April 1755, the pair urged generally that the royal commissions and instructions heralding the creation of assemblies functioned to suspend gubernatorial legislative power until such an assembly be installed. Commissions and instructions for governors, the likes of which would be inspected if not drafted by law officers of the crown before their promulgation by the crown, had to be taken seriously for the provisions they carried, in Halifax no less than anywhere else in the Atlantic Empire, in other words.[21] Murray and Lloyd gave nothing away about what logic or precedent allowed them to arrive at this interpretation. Ultimately their idea became a contentious rule of thumb for *all* placeholder administrations accrued by military victories during and after the Seven Years War, with a major exception for those in India, where the link between crown and corporation required different conventions of war and government.

III. Conflicts of Arms and Interests in the Indies

War was formally declared between Great Britain and France in 1756, and the hostilities would have important ramifications for both North America and India. One key difference between Atlantic and Indian theatres of the war, however, was the perceived independence of non-European participants in the fighting. Whereas the French settlers in Quebec, for example, were able to ally the Algonquians to their side, as the English did the Iroquoians, indigenous participation in the war was subsidiary to that of the settlers, and was small in scale within the

scope of the overarching cause. At least this is how things stood in comparison to south Asia. On the sub-continent, Indian communities, ever more sharply becoming disaggregated into ethno-religious groups, fostered sophisticated independent armies of their own.[22]

Emerging as one of the East India Company's main adversaries on the eve of the Seven Years War was the nawab of Bengal, Siraj ud-daula. In a violent act of protest against the company's growing military presence following the Mutiny Act around Calcutta, the nawab seized Fort William in June of 1756. He would hold it for the next few months, just as the European conflict was spreading across the subcontinent. The fort was regained by British and company forces in early 1757, but bafflement followed about the division of spoils and the restoration of the fort itself. As the Battle of Plassey, which led to the capture and execution of Siraj ud-daula, got underway in June of 1757, news first reached the directors of the East India Company in London about the fresh uncertainties attending to Calcutta. Their alarm is easy to understand. Having parted with considerable wealth to put up a decent showing in the war, they now faced the prospect of being prevented from recuperating their losses. For this reason they petitioned the king to enquire 'whether such Districts of Land, and the Plunder and Booty which may be conquered and taken by your Petitioners Forces upon any Occasion, either at Land or upon the Sea, […] belong unto your Majesty [or to the company]'.[23]

This was perfect fodder for the law officers of the crown. The petition never reached the king; it fell upon the desk of William Pitt, who in turn passed it onto George Hay, the king's advocate general, along with Charles Pratt (later Lord Camden), attorney general, and Charles Yorke (later Lord Morden, son of Hardwicke), solicitor general.[24] Of them, it appears to have been Yorke who accepted chief responsibility for setting out four tenets of the 'general Rules of Law and His Majesty's Royal Prerogative', on August 16, 1757:

> 1st. That all such Places as are retaken, return to the old Dominion; and consequently […] Calcutta, within the former territorial Limits, must be restored to the East India Company.
>
> 2d. That all such Places, as may be newly conquested in this Expedition, accrue to the Sovereign, and are vested in His Majesty, by Right of Conquest.
>
> 3d. That with respect to the moveable Goods retaken, the Property of all such was altered by the Capture, and totally lost in the original Owners [i.e. the company] […]; and consequently every Thing within that Description belongs to His Majesty […]
>
> 4d. That by stronger Reason, all Moveables and Plunder of every Kind first taken and acquired from the Enemy. […] are vested in His Majesty […][25]

The third of these recommendations was most damning for the company. Alone it would have reduced it to an intractable position. These general customs were prefaced, however, by a suggestion that half of the booty taken at Fort St George be reserved for the company by the king. All was not lost, therefore. Ultimately this advice was heeded by the king-in-council, and two weeks later, Yorke and Pratt were directed by the sign-manual to prepare 'a Bill for our Royal Signature', to proclaim that one half (or 'Moiety') of all plunder and booty taken at Calcutta be set aside for the company, guaranteeing also, subject to the king's consent, the return of some portion of those things retaken from crown subjects by the *nawab*.[26] That a draft to this effect promptly informed a supplementary charter of September 19th suggests something of the heavy weight given to the opinion at the height of war.[27]

The passage of the new charter was not sufficient to lay the matter entirely to rest. Weeks later in the middle of November, on the back of the capture of Chandannagar and the Battle of Plassey, Yorke and Pratt were referred another petition from the company with seven further questions about the division of plunder in the context of the war against France and the war against Siraj ud-daula.[28] Increasingly, these were being considered as separate wars, with different rules applicable, both by the company and the offices of attorney and solicitor general. On this occasion, their rumination upon these queries would culminate in a far more detailed series of recommendations for the king, dated December 24th, 1757.

Yorke and Pratt wished to expel all lingering doubts about the subdivision of prize, distinguishing, firstly, between campaigns conducted partially and wholly by the company, and secondly, between campaigns for recuperation and for gain.[29] This they did succinctly and authoritatively, relative anyway to the second half of the report, where the authors were necessarily more circumspect and cautious. It was an unfamiliar task to probe the limits of corporate sovereignty in India and the foundational rights of the crown in extra-European territories contested by separate interests. This necessitated further reflection on the weight of past charters and the purpose of future charters. This approach is not all that surprising, for not only were company charters the only coherent sources of law specific to the questions at hand, but moreover, as legal instruments, they were more easily modified and reissued on their own advice than any unusual regulating bill might be drafted, debated, and passed at the height of war. It was sensible, in view of the company's own constitution of charters, that a key proposal to emerge from the report was to confine the company to making captures within only those regions identified as their loci of trading operations within previous charters. But this came with a crucial qualification: this restriction would not apply to 'such Places as have been, *or shall be* acquired by Treaty, or Grant from the Mogul, or any of the Indian Princes, or Governments'. For those acquisitions, the king's letters patent could not prevent 'the Property of the Soil vesting in the Company by the Indian Grants' ('subject only to Your Majesty's Right of Sovereignty over the Settlements').[30] That left only the matter of war and restitution. The company's right 'to restore Conquests', Yorke and Pratt suggested, was implied by 'the Royal Charters'. But new conquests seemed to be, to them, of a different nature. There, 'the Property, *as well as the Dominion*, vests in Your Majesty, by Virtue of Your known Prerogative', and the only way for the company to 'derive a Right to them [is] through Your Majesty's Grant'.[31] In other words, fair *contracts* vested title in the company (enjoyed, however, of the crown); but fair *conquests* vested title in the crown (from whom, only, could title originate). To this was added an important rider, which exposed just how novel and untested the East India Company's position in the imperial constitution had become by this time: 'that it is not warranted by Precedent, nor agreeable to sound Policy, nor to the Tenor of the Charters which have been laid before us, to make such a General Grant, not only of past, but of future contingent Conquests, made upon any Power, European or Indian, to a Trading Company'.[32] Notwithstanding such reservations, it shows flexibility indeed that Yorke and Pratt would still wind off their report with a recommendation that a new clause be inserted into the next charter, 'enabling [the company] to make Cessions of new Conquests', in relation to its war against Siraj ud-daula. All that had to go with it was an express reservation that 'any Settlements or Territories conquered from the Subjects of any European power' went to the crown.[33] Corporate wars were bad, but should be permitted, in other words. Once more, this was a recommendation consistent enough with the king's feelings to find its way into letters patent prepared three weeks later, which made the explicit distinction between the company's war 'against the *French*' and its war 'against the Nabob of *Bengal*'.[34]

These guidelines, percolated from the law officers of the crown into the charters, were observed close to the letter in India before doubts emerged, once more, at the outset of 1761. This followed a stand-off between the captain of the royal regiment at Madras, Eyre Coote, and the company's former governor at Madras and president at Fort St George, George Pigot. Upon seizing the factory of Pondicherry from the French and their Indian allies, crown and company were once again estranged. Obedient to his briefs from London, Coote unquestionably presumed the fort to fall to the crown. But Pigot protested. As the company had been busy amplifying the claims of a rival *nawab* (who looked favourably, in return, upon the company), some thought the fort and its booty could divert straight to the company without first travelling through the crown.[35] Yorke was a keen spectator throughout all this from London, but his interventions were never required. Coote, '[c]onceiving His Majesty's Royal Prerogative to be insulted', threatened the withdrawal of all support and supplies from the company at Pondicherry; this was enough to panic Pigot about the prospect of 'answering to His Majesty for the Consequences'.[36] The two made up, and their joint occupation of Pondicherry continued until its delivery to France in the Treaty of Paris in 1763. In relation to this and all of the other Asian conflicts that were part of the war from 1759 onwards, the solicitor general remained generally satisfied that all relevant guidelines relating to company acquisitions and the interests of the crown had been spelled out in the company charters for which he and Pratt had been indirectly responsible.[37]

There was at least one scenario, about the legal effects of conquest, that these guidelines had not foreseen. Upon the triumphant return to England of Robert Clive, whose efforts had secured for the company so many of its gains during the course of the Seven Years War, another legal issue peculiar to south Asian circumstances surfaced. Throughout 1757, Clive had been a supporter of Mir Jafir's claim to the throne of Siraj-ud-daula; Mir Jafir, upon becoming the new nawab, rewarded Clive with an annual salary (jagir) worth about £27,000 to commence in 1759, which was understood, by Clive if nobody else, as a lifetime salary akin to a title of nobility held under the Bengali nawab. Within a few years, the directors of the company came to see this income differently. They desired the revenues to fall to the corporation, and so claimed the jagir from Clive's agents in Calcutta. Clive, in response, asked the directors that he be able to retain this salary for ten years. When this was refused on April 27th, 1763, the matter went to law.[38]

At first, Clive hoped to use the Court of Chancery to compel the company to reveal its accounts and profits in relation to the jagir. Rather than moving quickly with all documents into court, the directors instead approached two London solicitors for advice. They both suggested, by the end of the year, that Clive's claim was bad and that the court had no jurisdiction anyway. This, at any rate, was the advice of the up-and-coming Edward Thurlow, who had just taken silk at the inner temple, but was not yet a law officer of the crown.[39] Clive then did himself a service by delivering a letter to each of the proprietors, which he published as a pamphlet in early 1764, to rally support to his cause.[40] Through this propaganda campaign, Clive was elected to the position of governor and commander-in-chief of Bengal in March of 1764. This position he accepted, but delayed to take up until the next election of directors was held in late April, for the new cohort, he thought, might be more favourable to him.

Clive mobilised his best political contacts to support his claims upon the jagir at this time. One of these was Fletcher Norton, who had been attorney general in George Grenville's ministry (1763-5), and solicitor general under Lord Bute's before him (1762-3). Norton felt, contrary to Thurlow, that Chancery *did* have jurisdiction to hear the case, and so pressured the company to settle with Clive for the best terms.[41] The second of these contacts was Charles Yorke, the

attorney general before Norton, who said much the same thing as Norton did, if occasionally with greater confidence. For Yorke, there was 'no doubt' that the court would support Clive's claim 'to the rent or jaghire demanded'. This assertion was outfitted with an analogy drawn to the relations between grantor, payer, and grantee of rents in England.[42] With two veteran law officers of the crown on his side, Clive had turned the tables.

The directors of the company, in turn, sought advice from the best lawyers they could secure: John Dunning and James Eyre. Dunning, a few years off from accepting the position of solicitor general himself, felt that Clive had no case, but also felt that Chancery had no jurisdiction. Eyre, recently one of the counsel for John Wilkes in a high-profile case, rather expected that Chancery would accept jurisdiction only to award for the company and not the employee, an opinion he justified by way of recourse to conquest. 'I am inclined to think that the Plaintiff's true title is in the Sword', he wrote, 'but this he could not rest upon, because the benefit in that case, must go, according to the law of nations, to those whose sword it was'.[43] It was plain that the ownership of the sword, for Eyre, fell to the company, but this ran in the opposite direction to contemporary official thought about conquest and the crown after 1757: swords were wielded by sovereigns, not subjects.

In the end, the newly elected directors did come around to Clive's side. Risking not only a decision against them in the Court of Chancery, but also a public relations disaster, they settled out of court on 16th May, 1764, and agreed to pay out the jagir for ten years.[44] Past, present, and future attorney generals had sufficiently influenced the matter before the Lord Chancellor was ever required, in the end, to develop any rule at equity for this dispute and others like it.[45]

Within weeks, Clive was back in India to oversee the expansion of the East India Company. From October 1764, company forces were turned upon disaffected 'country powers' formerly favoured by the French around Bengal. After securing key victories here, Clive then entered into treaties with the nawabs of Awadh and Bengal in August 1765, and subsequently accepted the role of diwan, controller of all revenues in Bengal, from the Mughal emperor, Shah Alam II, in return for reserves near Allahabad and an annual salary of approximately £325,000. This was gigantic in comparison to the jagir. Legally, once more, what just happened was for anyone to say. Clive made no personal claim for his part this time around. If all of this fell to the company, what interest, if any, did the crown have? Facing armed resistance in India, but at a time of peace for Europe, the corporation secured for itself through treaty an acquisition of unprecedented size on the back of petty wars. As diwan of Bengal, what the directors and proprietors of the East India Company regarded as a 'right of a Civil Office which they exercise under the Mogul', was estimated to yield a surplus value of some £2 million or more for the company revenue every year.[46]

As the gravity of this acquisition came to be comprehended in Westminster over the course of the 1766, several members in the ministry (coalesced at first around Lord Chatham, and after October around Lord Grafton) were stirred into discussions about what came to be called, in a very public-law kind of way, 'the territorial revenue' of Bengal. They saw the diwan as a conquest which therefore fell to the crown by default, not to the company – an opinion which had the blessings of Lord Chancellor Camden, formerly Charles Pratt. Over and above the reasons for seeing this as a conquest and deferring thereby to the 1757 opinion, it was also taken into consideration that the charter of 1758 had only ever permitted the company, with the approbation of the king-in-council, to 'cede' and 'restore' new conquests from the country powers. It was also put forward that Shah Alam II had been brought into a definitive state of submission in 1764 by Hector Munro, a colonel holding a commission from the king whose

troops generated the favourable treaty conditions from which Clive afterwards capitalised.[47] For these reasons combined, several in the ministry began to press for a 'declaration of right' to the 'territorial revenues' from late 1766.

When the matter of Bengal revenues came before the House of Commons on April 14th, 1767, a new point of contention was debated: namely, whether or not the diwani income should be seen in terms of contract (or 'treaty') or otherwise in terms of conquest, and therefore, whether the revenues fell to the company or the crown, respectively, in accordance with the dichotomy spelled out by Yorke and Pratt way back in 1757. What made the question all the more interesting was the fresh difference of opinion between Yorke and Pratt on the applicability of that rule to these circumstances. The pair had never been close, but had grown more estranged upon Yorke taking his place among the Whigs in opposition. Law sat inside politics, not outside, over squabbles like this. Now Yorke took issue with Lord Chancellor Camden, when he favoured the interpretation that the diwani income fell to the company by treaty. Not everyone agreed. Fletcher Norton, no longer attorney general but hopeful somewhat of a comeback, threw his lot behind the ministry on the question. He saw 'the territories' as 'the fruit of a successful war', which therefore fell to the crown. If they had been acquired without the delegated prerogative powers of war and peace, Norton added, then the company was 'no better than robbers and plunderers', and 'their conquest […] ought to be returned to the country powers'. Yorke, who likewise found himself in-between appointments, responded with a list of precedents at common law which revealed that the crown and the company might defer their case to the courts for resolution. The best way to go about this was to present an information against the company to show its profits. Until such time, Yorke admitted that 'right of the India Company to their possession' was good. This was because Bengal, like other parts of India, had fallen to the company, 'not from the effect of our arms', but rather with the 'gratitude' of local rulers, which was all very different to the Atlantic.[48]

IV. Crisis after Conquest in the Atlantic

Addressing the diverse inhabitants of his new acquisitions in the Caribbean and North America, George III issued a royal proclamation on 7th October, 1763.[49] Edited by the law officers of the crown, this advertised some of the practical consequences immediately entailed by the imposition of British sovereignty, and heralded the introduction of new governments, in a gesture of the 'will' and 'pleasure' of the king. It did little more than lay out a series of guidelines, however, the obedience of the king's subjects to which would be secured by a series of dispatched officials on royal commissions while everyone anticipated more considered policies for specific application in due course.[50]

When confusion surfaced about the reception of English laws, concerns were most pronounced in the province of Quebec. French Canada brought the law officers of the crown, past and present, into play. William Murray, now Lord Mansfield as Chief Justice of the King's Bench, was disturbed enough at the tenor of conversations on Canada to address his friend, Grenville, in an especially frank letter of December 1764:

> Is it possible that we have abolished their laws, and customs, and forms of judicature all at once? – a thing never to be attempted or wished. The history of the world do[es]n't furnish an instance of so rash and unjust an act by any conqueror whatsoever: much less by the Crown of England, which has always left to the conquered their own laws and usages, with a change only so far as the sovereignty was concerned. […] For God's sake learn the truth of the case, and think of a speedy remedy.

As Mansfield explained to Grenville, the 'fundamental maxims' were, firstly, 'that a country keeps her own laws, till the conqueror expressly gives new', and, secondly, that English settlers 'in a waste country', may enjoy 'such part of the laws of England as is adapted to, and proper for their situation'. The problem was, as Mansfield knew, the presumption that such a rule was straightforward in every circumstance. Certainly never, in Mansfield's mind, could the anti-Catholic legislation of England be seen in any way as appropriate for Quebec, for example; a hard-line interpretation left no room for discretion, however.[51]

Concerns of this kind became more widespread after the disbandment of the Grenville ministry. When, in April 1766, then-attorney general, Yorke, with the help of the solicitor general, William de Grey, filed a detailed report for the Board of Trade on the civil government of Canada, they agreed almost to the letter with Mansfield on these 'maxims' of the common law. Yet still the pair endorsed the radical overhaul of the judiciary, accompanied by the introduction of English criminal law but the retention of French civil law.[52] This implied a change of policy that was unsavoury to some in the cabinet (none more incensed than Lord Chancellor Northington), and the proposed reforms stalled.[53]

Members in the Commons were distracted, at this time, with what they felt to be a bigger question: how to deal with American dissatisfaction over the Stamp Act. Much of this conversation, along with the solution, was a throwback to the solicitor-generalship of Philip Yorke, representing a fusion of Jamaican and Irish problems felt nearer the outset of the Hanoverian period. In statutory language can the voice of law officers, past and present, be made out with some clarity, if one is trained to look for it. Responding to the defiance, 'against Law', of colonists claiming exemption from duties and taxes of its imposition, the Declaratory Act (1766) confirmed that the 'Colonies and Plantations in America have been, are, and of Right ought to be, subordinate unto, and dependent upon, the Imperial Crown and Parliament of Great Britain'. Like the act for Ireland (1720) upon which this one for America was based, no mention of conquest was necessary in order to declare that the king-in-parliament enjoyed 'full Power and Authority to make Laws and Statutes of sufficient Force and Validity to bind the Colonies and People of America, Subjects of the Crown of Great Britain, in all Cases whatsoever'.[54] It further befits the narrative of this article to note that, whereas for the Irish occasion, it had been Philip Yorke who showed off his mastery of the law to defend the right of parliament to do as it wanted in Ireland, this time, it was his old protégé, Mansfield, who played an identical part. Mansfield took it upon himself to spell out to the House of Lords that the statute books could be trawled for hundreds of laws applicable to Calais, the Isle of Man, and elsewhere, regardless of whatever rules could be said to attach to 'conquest'. And this power applied to America too, Mansfield thundered.[55]

Parliament was therefore satisfied of the subordination of the American colonists to the imperial parliament, and of their dependency on the crown, to enact further legislation applicable to them. The clearest indication of this came in a handful of laws passed in 1767 introducing new taxes on imports and organising for commissioners to collect revenues. Inspiring protests, pamphlets, and petitions in America, these statutes also led to the installation of a specialised ministerial portfolio, the 'secretary of state for the colonies', to supervise the implementation of these and other legislative initiatives for the colonies.[56] The duties quickly proved too unpopular to retain, and moves got underway from 1770 in the House of Commons to repeal them. In a compromise, parliament retained duties on one 'luxury item', tea.[57] A tactlessly antagonistic consequence of this, however, was the competitive advantage it

provided to the East India Company over domestic merchants and smugglers in America. That made the corporation play its role as imperial scapegoat at Griffin's Wharf.[58]

The point of this digression is to show how paradoxical frontier politics could often be, and moreover how strange the applications of law-officer opinion could become, in this context. The East India Company's consignees were maligned from October 1773 in newspapers and on the bulletin boards of Boston, New York, Philadelphia, and Charleston. But the company was held up as an exemplar in the west of the Appalachians and the south of the Great Lakes by land speculators like Samuel Wharton, George Croghan, and George Washington.[59] With hopes fading, among aspirational colonial proprietors, of securing great chunks of crown land at the source, entrepreneurs of this kind began to ache for ways of acquiring land that did not require the consent of the British government in the early 1770s.[60] The most pressing problem faced by American land companies, of course, was the crown's claim to pre-emptive rights of purchasing, if not disposing, Indian lands (as Murray, as attorney general, had reminded the Privy Council in 1754, and as was later re-advertised in the Royal Proclamation of 1763).[61] An inventive means of skirting this convention was to resurrect the 1757 opinion of Yorke and Pratt, holding *contracts* to vest title in the company, and *conquests* to vest title in the crown. Culled of its wider considerations about coordinating crown and company armies for perceivably separate wars against Frenchmen and Bengalis, the original report of the law officers was abridged and sent across the Atlantic where it was misarticulated in a great game of Chinese whispers. Conquest had no part to play in this apparently 'true Copy' of the 1757 report made in April 1772.[62] As irrelevant as the prospect of corporate warfare had become to the American context in this period, still this 'most respectable opinion' came to represent, if only to misled enthusiasts, a rendition of the firmest principles of English law applicable to the Indian lands.[63]

V. Revenue and Reform in India[64]

By the time the question of the East India Company's territorial acquisitions through treaty and conquest returned to the House of Commons in March of 1773, the issue had succumbed to the hurly-burly of factional politics.[65] This gave the flight of shuttlecocks to sundry old opinions of the law officers. It was the prime minister, Lord North, who set the standard in response to a prepared statement of William Dowdeswell that the crown had no right to interfere in Asia.[66] 'Sir, many men', he declared, 'far my superior in abilities, in learning, and knowledge of the laws, have declared […] that such territorial possessions as the subjects of any state shall acquire by conquest, are virtually the property of the state, and not of those individuals who acquire them'. Bashfully, he admitted that he was 'only reciting the opinion of others as well as myself', although he failed to specify specifically *which* law officers of the crown he was favouring. This kind of doffing to the sanctity of law-officer opinion was popular in the Commons. For another example, George Dempster, a Scottish proprietor in the company, waded into the dispute by noting that '[s]everal gentlemen, well skilled in the laws of their country, have advanced it as their opinion, that the Company have an undoubted, a clear, and an exclusive right to the territories possessed in India, whether acquired by conquest, or otherwise'. Dempster too levelled nothing of juridical substance though, before parting with the searing accusation that 'a gentleman in my eye', one recently placed 'in office', had changed his mind on the question upon switching factions (none other than Fletcher Norton, speaker of the House of Commons from 1770).[67] Eventually, the Member for Cockermouth, George Johnstone of the British Navy, returned to 'the territorial acquisitions' of the company in this way:

> A late chancellor [Yorke/Morden], I remember, who did honour to the post he occupied, declared himself in favour of the Company's exclusive right of territory. However, this is not the place for such points to be determined. As trustees for the public, we are parties concerned, and cannot decide in the public's favour against the Company. Westminster-hall is the place for such decisions.[68]

Two weeks later and another proposal to regulate the financial affairs of the company was tabled, finally inciting Edmund Burke to speech on the matter, who lacked nothing, true to character, in oratorical spirit. Part of his performance involved reading from a document which contained the opinions of two former law officers of the crown: one, likely Charles Yorke, which posited that the diwan was akin to a Bengali 'office', and the other, likely William de Grey, which posited that the crown had no legal claim to the territories but that it should claim them anyway. These he read disingenuously, only to make a spectacle of the opacity and contradiction of legal thinking on the issue, if ironically to prepare the way for his own view that the crown had 'no right' to anything in India, regardless of how the company had come into its source of revenues.[69] Norton was offended at this. He answered Burke by reading from a document of his own: the 1757 opinion of Yorke and Pratt. This he repeated before admitting to have become uncertain about the rules of conquest in application to trading companies, shying away from the finer points of the matter in want, he said, of more information.[70]

When the ministry back-flipped, with the resolution of the Commons that the territories should 'remain' in the possession of the company, it fell to present law officers of the crown, and not past ones, to explain why.[71] This was inspired by the introduction of three general resolutions into the House by General Burgoyne, which included the addition of yet more concepts into the constitutional categories at play in the dispute:

> 1. That all acquisitions, made under the influence of a military force, or by treaty with foreign princes, do of right belong to the state.
>
> 2. That to appropriate acquisitions so made, to the private emolument of persons entrusted with any civil or military power of the state, is illegal.
>
> 3. That very great sums of money, and other valuable property, have been acquired in Bengal, from princes, and others of that country, by persons intrusted with the military and civil powers of the state; which sums of money and other valuable property have been appropriated to the private use of such persons.[72]

Speeches then followed, which were carried away with the feelings of shame that ran hard, in this period, against Clive. Responding, the solicitor general, Alexander Wedderburn, was nothing if not idiosyncratic by his complaint that the committee's findings were not 'manly' enough to inspire any serious regulations. Worst of all ('nugatory and ridiculous') was the imprecision of legal language in the first resolution:

> To what time does this go? To what period? At what place? and in what quarter of the world? […] And then "belong to the state!" What is the state? The hon. Gentlemen says that he does not decide what the state is; he leaves it for future discussions: but, Sir, what does this mean? It is impossible you should vote it; because it decides the right of the crown to the territorial possessions, which you have already put off for six years, if you say the state; or if you say the Company is the state […] But, Sir, this motion gives to the state acquisitions, which beyond all reasonable doubt do of right belong to the

> individual; for it makes no distinction, the words "under the influence" is so unlimited.[73]

On this day, and with these very remarks of Wedderburn, the legalese about the East India Company in parliament changed. No longer would any distinction between treaty or conquest matter to the members of North's parliament. Every 'event', as the attorney general Thurlow explained, was 'the same in all'.[74] While Thurlow (who was deeply critical of the company) may have been speaking against Wedderburn (who stood behind it) here, the pair seem to have been of one mind that it was now time to move away from the dichotomy first spelled out by Yorke and Pratt in 1757.

The distancing of parliament from these criteria was associated with moves to collapse the question of the company's acquisitions into a scandal far more befitting the chastisement of the Commons: one about employee emoluments, about private gain rather than corporate gain, about the 'public' conduct of the company's appointments in India, about Clive and others of his type. And these were finally the issues to attract more aggressive legislative interventions from the House of Commons (if greater trepidation, as a result, in the House of Lords). While some, like Lord Mansfield, Chief Justice of the King's Bench, expressed concern about the abuse of 'legislative power' that these moves appeared to represent, a majority in both chambers, in the end, came around to the need for parliament to intervene.[75]

The East India Company's final and pitiful act of defiance before submitting to the statutory stranglehold of the government was a petition requesting all previous petitions be withdrawn. These they asked to be replaced with a request for the 'legal decision' by which parliament had reached the conclusion that the crown enjoyed some right to the territorial acquisitions, for it was this 'pretended source', the directors continued, from which 'the undue interposition and the various oppressions […] have flowed'.[76] All this inspired were a few murmurs in the Commons, none of which from mouths of the king's law officers. That left nothing in the way of a regulating bill, introduced by Lord North on May 18th, becoming an act of parliament on June 21st, 1773.[77]

VI. War and Government in Quebec and Grenada

Placing Quebec in the imperial constitution asked different things of law officers of the crown during the early 1770s. Distress about the governance and administration of law in the province of Quebec after the Royal Proclamation of 1763 circled around five issues: the composition of the legislature, the extent of gubernatorial powers, the coexistence of French civil law and English criminal law, the practicality of harmonising the laws of real property, and the provision of religious liberty to Roman Catholic subjects. In preparation for these ambiguities to be addressed by an act of parliament, the advice of the solicitor general and the attorney general was requested late in 1772.

Emphatic about different things, still the pair were of the same mind in one aspect. In his report of December 6th, Wedderburn implied a need to modernise the meaning of conquest to have use 'in more civilized times, when the object of war is dominion'. Doing so entailed a greater distinction between 'force' and 'right', in favour of an understanding of conquest based on a right that can be expressed while preserving as many of the 'privileges' of conquered subjects as may be possible.[78] Thurlow, while admitting to some confusion about the theories of conquest in circulation relating to Quebec, likewise appeared to favour a benign theory of conquest (something he attributes more so, however, to 'the law of nations and treaties', than

to English legal principles).[79] How far that may be applicable to these circumstances is not entirely spelled out, with Thurlow instead using his report to distance himself from the interpretation of his predecessors, Yorke and de Grey. In particular, Thurlow disagreed with their distinction between Canadian civil law and English criminal law (which he considered arbitrary in discussions about conquest).[80] The question was even referred to the king's advocate general, who likewise developed an opinion and drafted a series of bills. Ultimately, these were mostly overlooked in favour of Wedderburn's proposals, which made their way to the colonial secretary, Lord Dartmouth.[81] For the whole of 1773 and the first part of 1774, Dartmouth worked on three different draft versions of a bill. It is fair to say he struggled to correlate the observations of Wedderburn with those of Lord Mansfield, all while appearing to address the wishes of cabinet, and sorting through the petitions from Quebec: this was work more befitting of a nineteenth-century colonial office undersecretariat than a lone, eighteenth-century colonial secretary.[82]

The resultant bill was first presented to the House of Lords on May 2nd, 1774, and passed without much dissent. A divided House of Commons was sterner in opposition and presented the bigger challenge for Lord North and his law officers Wedderburn and Thurlow. It was the serjeant-at-law John Glynn who took it upon himself to oppose Thurlow in particular on the ramifications of conquest. For Glynn, it was ideal that all new conquests 'vested in the King, Lords, and Commons', but this could only be achieved once parliament had 'interfered'. This was an argument for a literal reading of a provision in the Royal Proclamation guaranteeing to all new subjects the benefit of English laws and customs, and it was a point made by way of comparison to Wales and Ireland (places 'conquered' where 'our laws had been established').[83] Wedderburn responded. The conquests of Wales and Ireland did not automatically introduce the laws of England there upon conquest, he said; rather, that had been the accomplishments of parliaments called by Henry VIII and James I/VI. It was 'a cruel and barbarous policy', the solicitor general concluded, to impose foreign laws upon 'the conquered' without any degree of compromise.[84] Other points of disagreement for participants in the debate on the Quebec bill in the Commons concerned lines of demarcation and the introduction of *habeas corpus* and oaths for officeholders, divisions which were gradually ironed out for the bill to pass into law on June 22nd.[85] The resultant Quebec Act (1774) introduced a mixed legal system and provided for the religious liberty of Catholics.[86]

That Mansfield should have taken particular interest in the Quebec bill throughout April, a month before it was presented to both houses of parliament, can of course be explained by its relevance to a trial scheduled to begin at the Court of King's Bench shortly after this. Pleas had been entered in London throughout 1773, and arguments first made during the Easter term of 1774, concerning affairs in the 'ceded island' of Grenada, which, being Christian though Catholic and conquered after 1763, fell somewhat into the same boat as Quebec. Important to this particular case was not the applicability of statutory law, but rather the issue of prerogative taxation. When the planter, Alexander Campbell, brought an action to recover the amount paid to a crown customs officer, he proposed to call the king's jurisdictional bluff, and in the process demanded a special verdict that would finally expose what conquest should entail for king and parliament in the British Empire and, more importantly, how new conquests compared to the old ones. Only in some ways relevant to the unfolding American constitutional crisis about the imposition of taxation, *Campbell v Hall* (1774) also raised issues surrounding the personal prerogatives of the conqueror, as king, in relation to his role in parliament. Part of this involved the question of what conquest entailed, and for whom; part of this involved the question of how royal proclamations, instructions, and letters were to be interpreted by colonial governors addressed by them.

The attorney general, Thurlow, made important contributions towards the end of the trial, but really it was Mansfield in control. Judgment for the plaintiff on 28th November was noticeably more consistent with the opinions of law officers than the relevant precedents of common law from between 1608 and 1705.[87] Indeed, Mansfield's report went somewhat further than was strictly necessary, taking the chance, as all the major Chief Justices of the King's Bench had before him, to offer a ruling thick with dicta.[88] In six conclusions, Mansfield sketched out the platform for a new and improved doctrine of conquest within the imperial constitution:

> 1st, A country conquered by the British arms becomes a dominion of the king in right of his crown, and therefore necessarily subject to the legislative power of the parliament of Great Britain.
>
> 2dly, The conquered inhabitants once received into the conqueror's protection become subjects […]
>
> 3dly, Articles of capitulation upon which the conquest is surrendered, and treaties of peace by which it is ceded, are sacred and inviolable, according to their true intent.
>
> 4thly, The law and legislation of every dominion equally affects all persons and property within the limits thereof, and is the true rule for the decision of all questions which arise there […]
>
> 5thly, Laws of a conquered country continue until they are altered by the conqueror […]
>
> 6thly, If the king has power (and, when I say the king, I mean in this case to be understood "without concurrence of parliament") to make new laws for a conquered country, this being a power subordinate to his own authority, as a part of the supreme legislature in parliament, he can make none which are contrary to fundamental principles; none excepting from the laws of trade or authority of parliament, or privileges exclusive of his other subjects.[89]

It was Mansfield's clarification of the relationship between crown, parliament, and colonial legislatures that would give *Campbell v Hall* its relevance into the bureaucratic era of colonial officialdom and commissions of enquiry.[90] In two royal proclamations and a commission to the governor issued before the imposition of the royal tax for which Campbell sought his refund, the king had heralded a local legislature and thereby inadvertently divested himself of his personal powers to raise a tax in the process. In basic outline, that meant the king's power to create laws by his prerogative alone was disqualified by his earlier endorsement of the installation of a legislative assembly for Grenada. Thereupon only such laws as were passed by the imperial parliament, and those passed subordinately 'by the assembly with the governor and council', were valid in conquered countries.

Mansfield would never dare cite his own opinion from 1755 in support of his preferred way of reading royal proclamations drawn up by law officers. Instead, he relied upon that hesitant and noncommittal motion of Yorke and Wearg, from 1724, upon the legal receptivity of legislatively autonomous Jamaica. Now this was not, by any strict definition, law, nor indeed was the opinion even developed with places like Grenada in mind. But Mansfield did not care. Yorke and Wearg, he said, must have been thinking that Jamaica was not conquered after all,

but instead complied with the criteria of a 'new' or 'uninhabited' colony; therefore, the old opinion of the law officers of the crown was relevant not only to Grenada specifically, but also relevant to new and forthcoming cessions more widely.[91]

Few assessments of Mansfield's choosiness and interpretative freedom when it came to his sources of law in *Campbell v Hall* (1774) ever made it into print that were as scathing as Jeremy Bentham's *Plea for the Constitution* (1803). And insofar as legal history entails the art of restraining from passing judgment on those who passed judgment, space can still be allowed for wide-eyed critics of the period, few better than Bentham, to appraise for us instead. For Bentham was able to see, better than probably anyone writing in the 'meridian', the imperfections that resulted from the piecing together of an imperial constitution by careerist officeholders, politicised parliamentarians, and judges with experience as both. For Bentham, conquest should never have become so suggestive of all these administrative conventions in the first place. That it did so was the 'mistake' of 'his Majesty's careless servants', in their needless gesturing towards the establishment of colonial legislatures in conquered Grenada, when framing the Royal Proclamation of 1763. Upon the merits of this singular 'error' was *Campbell v Hall* brought to Lord Mansfield's consideration. Before this, Bentham acknowledged, only out-of-date dicta and a 'non-judicial opinion' of crown law officers pointed to some right of the crown to legislate without parliament over an English colony regardless of the method of its acquisition. To Bentham it all reeked of a conspiracy between the king's 'law servants' and a few 'audacious crown-lawyers', who were all seemingly out 'to oust parliament of its rights', by drafting royal instructions, and then uniting behind a literalistic and positivistic reading of those documents in court.[92]

VII. The Imperial Constitution of the Law Officers of the Crown

War and colonial government were matters of state of the highest importance. In contemplation of their legal aspects, some inconsistency and a bit of flexibility could sometimes be helpful in the shaping of an imperial constitution. And so it was, before the onset of a more 'orderly' period in 1801 – when roaming law commissioners and calculating colonial office undersecretarial assistants emerge onto the scene – that the British Empire was governed on the basis of consecutive decisions made by individuals faced with new and unfamiliar crises. Among such individuals, the attorney general and solicitor general were key figures between 1719 and 1774, although the same might be said for a range between 1661 and 1931.[93] Charged with convincing the courts and the parliament both that whatever policies towards the colonies and plantations had been deemed, often by themselves, fittest to adopt were consonant with established constitutional principles and also in the interest of the crown in one or other of its capacities, their roles were most peculiar. Here was a very specific mandate. And its impact upon the governance of the British Empire manifested in a number of different ways, as this article has proposed to show in relation to conquests abroad.

In 1724, the attorney general and the solicitor general offered no precedents or principles to support an equivocal suggestion that concessions of legislative autonomy to colonial administrations impeded the powers of the prerogative in relation to those administrations. Alone that would have been difficult to interpret were it not for the admixture of certain legal principles handpicked without attribution from the jurisprudence of conquest. Fifty years later, this became one of the most important sources of law behind Lord Mansfield's decision in *Campbell v Hall* (1774), a decision which pointed the common law world towards a direction that would not be paved out properly until a new cohort of cessions were collected from the purse of Napoleon.

In 1757, the attorney general and solicitor general offered no precedents or principles to hold that conquests and treaties performed in foreign jurisdictions conferred different kinds of benefits upon the subjects carrying them out on behalf of the crown. While this opinion subsequently informed the substance of royal charters, it showed itself to be less adaptable to those debates inspired by Indian affairs within parliament about the justness of intervening into the affairs of the corporation. It was discovered during the course of the decade between 1763 and 1773 that the criteria set out in the 1757 opinion had problems. For one thing, it was too rigid to be of any practical use. For another thing, it hinged far too much on an interpretative capacity, found lacking by anyone in a parliament stacked with vested interests, to distinguish between modes of acquisition in India. Just as the solicitor general and the attorney general began to turn their back on the report of their predecessors, parliamentarians chose to reframe their line of questioning about India in response to the reports of select and secret committees. In this way, the parameters of the debate surrounding the East India Company were changed entirely. It is quirky that, while all of this was happening, the discarded report of Yorke and Pratt was given new life by American land companies for a few years. Woe was it, though, for them, that its tenets were so soon irrelevant in the new constitutional predicament of the early Republic, whatever the later efforts of American judges to breathe new life into them.

In 1766, the attorney general and solicitor general offered no precedents or principles to justify the *post bellum* distinction between French civil law and English criminal law in relation to conquered Quebec. When, six years later, a new administration was forced to consider again its obligations towards Quebec as a conquered province, this time, during a process of drafting and editing a bill for Quebec throughout 1773 and early 1774, the new solicitor general's standalone advice was heeded more faithfully than that which had been offered by his colleagues. The input of the king's law officers, past and present, into the resultant Quebec Act (1774) was weighty. That they all differed so widely on certain key questions, and therefore, that the statute represented a mutation of all these opinions, might go some way to explain its short lifespan.

To observe all of this is emphatically not to make the argument that the attorney general and the solicitor general were the only ones shaping the imperial constitution in the eighteenth century. It is not to argue that they were winging it. It is not to argue that they were conspiring to 'oust parliament of its rights', or anything else of similar sensation. The argument here is for constitutional historians of the British Empire and later Commonwealth to become more aware of the motivations of individuals who, upon developing legalistic opinions, then presented these opinions as a positive kind of law. Scholars focusing upon the historical experiences of Ireland, India, America, Canada, or the Caribbean can all be forgiven for making out the utterances and benedictions of law officers to be 'rulings' and 'judgments'; after all, those individuals we are studying, like Murray, flicking the switches and turning the knobs of high government in the judiciary or parliament, often felt like their opinions were akin to 'rulings' and 'judgments'. It may be tempting for us to say, like Bentham, that they were wrong to do so. What is more important, however, is the asking of why they tried in the first place.

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Akins, T., ed. *Selections for the Public Documents of the Province of Nova Scotia*. Halifax: Charles Annand, 1869.
Basye, A. H. "The Secretary of State for the Colonies, 1768-1782", *American Historical Review* 28, no. 1 (1922): 13-23.
Bayly, C. A. *Imperial Meridian: The British Empire and the World, 1780-1830*. London: Longman, 1989.
Bentham, J. *The Works of Jeremy Bentham*. Edinburgh: William Tait, 1838-1843.
Benton, L. and L. Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850*. Cambridge, MA: Harvard University Press, 2016.
Bilder, M. S. *The Transatlantic Constitution: Colonial Legal Culture and the Empire.* Cambridge, MA: Harvard University Press, 2008.
Black, B. "The Constitution of Empire: The Case for the Colonists," *University of Pennsylvania Law Review* 124 (1976): 1157-1211.
Bourke, R. *Empire and Revolution*. Princeton, NJ: Princeton University Press, 2015.
Bowen, H. V. *Revenue and Reform: The Indian Problem in British Politics 1757-1773*. Cambridge: Cambridge University Press, 2002.
Bryant, G. J. *The Emergence of British Power in India, 1600-1784: A Grand Strategic Interpretation*. Boydell: Woodbridge, 2013.
Cavanagh, E. "Infidels in English Legal Thought: Conquest, Commerce, and Slavery in the Common Law from Coke to Mansfield, 1608-1774", *Modern Intellectual History* 15, no. 1 (2018).
Chaffin, R. J. 'The Townshend Acts Crisis, 1767-1770', in Greene and Pole, A Companion to the American Revolution, 134-50.
Chalmers, G., ed. *Opinions of Eminent Lawyers on Various Points of English Jurisprudence*. Burlington: G. Goodrich and Co., 1858.
Charters Granted to the East-India Company from 1601. London, 1773.
Clive, R. *A Letter to the Proprietors of the East India Stock*. London: J. Nourse, 1764.
Cobbett's Complete Collection of State Trials (*ST*). London, 1809-28.
Cobbett's Parliamentary History (*PH*). London: Hansard, 1806-20.
Connors, R. ed. *Philip Yorke's Parliamentary Journal* (Oxford: Blackwells, forthcoming 2019.
Del Papa, E. M. "The Royal Proclamation of 1763: Its Effect upon Virginia Land Companies", *Virginia Magazine of History and Biography* 83, no. 4 (1975): 406-11.
Edwards, J. L. J. *The Law Officers of the Crown*. London: Sweet & Maxwell, 1964.
Elofson, W. M. "The Rockingham Whigs in Transition: The East India Company Issue, 1772-1773", *English Historical Review* 104, no. 413 (1989): 947-74.
Greene, J. P. "The Case of the Pistole Fee The Report of a Hearing on the Pistole Fee Dispute before the Privy Council, June 18, 1754", *Virginia Magazine of History and Biography* 66, no. 4 (1958): 399-422;

Greene, J. P. and J. R. Pole, eds. *A Companion to the American Revolution*. Oxford: Blackwell, 2000.
Greene, J. P. *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788*. Athens: University of Georgia Press, 1986.
Griffiths, J. A. G. *Politics of the Judiciary*. Manchester: Manchester University Press, 1977.
Hargrave, F., ed. *Collectanea Juridica: Consisting of Tracts Relative to the Law and Constitution of England*. London: E. and R. Brooke, 1791.
Historical Manuscripts Commission, *The Manuscripts of the Earl of Dartmouth*. London, 1887.
Holdsworth, W. S. 'The Early History of the Attorney and Solicitor General', *Illinois Law Review* 13 (1918-9): 602-19.
Johnston, W. R. *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century*. Durham, NC: Duke University Press, 1973.
Journals of the Assembly of Jamaica. Jamaica: Alexander Aikman, 1811.
Keith, A. B. *Constitutional History of India*. London: Meuthen and Co., 1936.
Keith, A. B. *Constitutional History of the First British Empire*. Oxford: Clarendon Press, 1930.
Lambert, S., ed. *The House of Commons Sessional Papers of the Eighteenth Century*. Wilmington: Scholarly Resources, 1975.
Laski, H. 'The Technique of Judicial Appointment', *Michigan Law Review* 24, no. 6 (1926): 529-43.
Lawson, P. *The Imperial Challenge: Quebec and Britain in the Age of American Revolution*. McGill-Queen's University Press: Montreal and Kingston, 1989.
Lemmings, D. *Law and Government in England during the Long Eighteenth Century: From Consent to Command*. Basingstoke: Palgrave Macmillan, 2011.
Lemmings, D. *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century*. Oxford: Oxford University Press, 2000.
Lenman, B. and P. Lawson. "Robert Clive, the 'Black Jagir', and British Politics', *Historical Journal* 26, no. 4 (1983): 801-29.
Lieberman, D. *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain*. Cambridge: Cambridge University Press, 1989.
Macmillan, K. *The Atlantic Imperial Constitution: Center and Periphery in the English Atlantic World*. Basingstoke: Palgrave Macmillan, 2011.
Madden, F. and D. Fieldhouse, eds. *The Classical Period of the British Empire, 1689-1783*. Westport, CT: Greenwood Press, 1985.
Malcolm, J. *The Life of Robert, Lord Clive*. London: John Murray, 1836.
Mallet, D. *The Life of Francis Bacon, Lord Chancellor of England*. London: A. Millar, 1740.
48:
Marshall, P. "Lord Hillsborough, Samuel Wharton and the Ohio Grant, 1769-1775", *English Historical Review* 80, no. 317 (1965): 717-39.
Marshall, P. *The Making and Unmaking of Empires: Britain, India, and America*. Oxford: Oxford University Press, 2005.
McIlwain, C. H. *The American Revolution: A Constitutional Perspective*. New York: Macmillan, 1923.
McIlwain, C. H. *The High Court of Parliament and Its Supremacy*. New Haven: Yale University Press, 1910.
Melikan, R. A. 'Mr Attorney General and the Politicians', Historical Journal 40, no. 1 (1997): 41-69.
Parkes, J. *A History of the Court of Chancery*. London: Longman, 1828.

Reid, J. P. “In the First Line of Defense: The Colonial Charters, the Stamp Act Debate and the Coming of the American Revolution”, *New York University Law Review* 51, no. 2 (1976): 177-215.
Robinson, R. and J. Gallagher with A. Denny, *Africa and the Victorians: The Official Mind of Imperialism*. Basingstoke: Palgrave Macmillan, 1982.
Schlesinger, A. M. “The Uprising Against the East India Company,” *Political Science Quarterly* 32, no. 1 (1917), 60-79.
Shortt, A. and A. G. Doughty, eds. *Documents Relating to the Constitutional History of Canada, 1759-1791*, 2nd ed. Ottawa: J de L. Taché, 1918.
Smith, W. J. ed., *The Grenville Papers: Being the Correspondence of Richard Grenville Earl Temple, K. G., and the Right Hon: George Grenville*. London: John Murray, 1852.
Sosin, J. M., “The Yorke-Camden Opinion and American Land Speculators”, *Pennsylvania Magazine of History and Biography* 85, no. 1 (1961): 38-49.
Stern, P. J. *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* Oxford: Oxford University Press, 2011.
The Opinions of Mr. James Eyre, Mr. Edmund Hoskins, Mr. E. Thurlow, and Mr. John Dunning, on the Subject of Lord Clive’s Jaghire. London: T. Evans, 1773.
Thomas, P. D. G., ed. ‘Parliamentary Diaries of Nathaniel Ryder, 1764-7’, *Camden Miscellany*, 4th series, 23, no. 7 (1969): 229-351.
Thompson, E. P. *Whigs and Hunters*. London: Penguin Books, 1990.
Ward, J. M. *Colonial Self-Government: The British Experience, 1759-1856*. London: Macmillan, 1976.
Wharton, S. *Plain Facts: Being an Examination Into the Rights of the Indian Nations of America to Their Respective Countries*. Philadelphia: R. Aitken, 1781.
Williams, E. N., ed. *The Eighteenth Century Constitution: Documents and Commentary.* Cambridge: Cambridge University Press, 1965.
Wilson, L. B. ‘A “Manifest Violation” of the Rights of Englishmen: Rights Talk and the Law of Property in Early Eighteenth-Century Jamaica’, *Law and History Review* 33, no. 3 (2015): 543-75.

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[1] Compare Stern, *Company-State*, and Macmillan, *Atlantic Imperial Constitution*. These are profitably read with Keith, *Constitutional History of the First British Empire*, and Keith, *Constitutional History of India*, 1-58. That so assiduous and perspicacious a constitutional historian as Keith would refrain from contemplating India and the Atlantic together is as noteworthy as the historiographical reality that, still, seventeenth-century historians of the British Empire must continue to separate these regions from each other.

[2] Benton and Ford, *Rage for Order*, esp. 13-8, which discovers a ‘vernacular constitution’, worked out after a series of commissions of enquiry were launched to investigate the capabilities of colonial governments to administer their own unique legal problems. The authors explore the process whereby dozens of bureaucrats and mid-level officials worked thanklessly, sometimes absorbed in the minutest details, to reach findings giving some appearance of constitutional uniformity to colonial governments in very different predicaments. This is profitably read with Ward, *Colonial Self-Government*, and Bayly, *Imperial Meridian*. The pioneering study to explore the constitutional operation of an empire by parliament and the colonial and foreign offices was Robinson and Gallagher with Denny, *Africa and the Victorians.*

[3] See Williams, *The Eighteenth Century Constitution*; Thompson, *Whigs and Hunters*; Lemmings, *Law and Government in England*; Bourke, *Empire and Revolution.*

[4] Madden and Fieldhouse, *The Classical Period of the British Empire*, xxxi.

[5] McIlwain, *The High Court of Parliament*; McIlwain, *The American Revolution*; Black, ‘The Constitution of Empire: The Case for the Colonists’. These are profitably read with subtler, more modern treatments, like Greene, *Peripheries and Center*, and Bilder, *The Transatlantic Constitution.*

[6] Holdsworth, ‘The Early History of the Attorney and Solicitor General’; Edwards, *The Law Officers of the Crown*.

[7] This is, of course, a matter of interpretation. While it may be appropriate for historians to interpret the importance of the reports of the attorney and solicitor general relative to the willingness of individuals to act upon the advice contained within them, it is altogether a different consideration of the sincerest historians of the British

constitution to consider any of this to be strictly or positively 'law'. I am recalling the expression 'benediction' in relation to law officer opinion from a memorable conversation in Cambridge with P. G. McHugh.

[8] Melikan, 'Mr Attorney General and the Politicians'.

[9] Thompson, *Whigs and Hunters*, 188-9, 190-218.

[10] For insights into the operation of this professional world and the intellectual tradition within which the king's law officers operated, consult Lemmings, *Professors of the Law*, and Lieberman, *The Province of Legislation Determined*. For modern concerns about the tradition, entrenched in the late seventeenth century, of reserving the highest positions in the judiciary for law officers as a reward their loyalty, see Laski, 'The Technique of Judicial Appointment'; Griffiths, *Politics of the Judiciary*, 17-24.

[11] Mallet, *The Life of Francis Bacon*, 48: 'The offices of Attorney and Solicitor-General have been rocks upon which many aspiring Lawyers have made shipwreck of their virtue and human nature. Some of those Gentlemen have acted at the bar as if they thought themselves, by the duty of their places, absolved from all the obligations of truth, honor, and decency'. Clearly taking aim in this passage at Sir Edward Coke, Mallet always wrote with an eye for current affairs.

[12] 6 Geo. I, c. 5; *Cobbett's Parliamentary History* (hereafter *PH*), 7: 642-3.

[13] *Blankard v Galdy* (1693) 91 E(nglish) R(eports), 357; *Blankard v Galdy* (1693) 90 ER 1089; *Smith v Brown and Cooper* (1705) 91 ER 566. Hereafter, as the modern English reports contain information about the other sources, only the ER citation will be given.

[14] Petition to Queen Anne (18 May 1711), *Journals of the Assembly of Jamaica*, 2: 29-30. For a recent exploration of the 'rights talk' among Jamaican colonists fearful of the despotic misuse of the laws of escheat, see Wilson, 'A "Manifest Violation" of the Rights of Englishmen'.

[15] Opinion of Richard West (2 March 1722), Chalmers, *Opinions of Eminent Lawyers*, 429-30; Opinion of Raymond and Yorke (5 March 1722), *Calendar of State Papers Colonial* (CSPC) *America and West Indies* (A/WI) *(1722-3),* 25.

[16] Jamaican Revenue Act (5 February 1723), in Madden and Fieldhouse, *Classical Period*, 226-7.

[17] Opinion of Yorke and Wearg (18 May 1724), Chalmers, *Opinions,* 215-32. See also *Calendar of Treasury Papers (1720-28)*, 273; *CSP C A/WI (1724-5)*, 98.

[18] Opinion of Yorke and Wearg (18 May 1724), Chalmers, *Opinions,* 230-1.

[19] See also *Rex v Vaughan* (1769), 98 ER 308.

[20] *Penn v Lord Baltimore* (1750) 27 ER 1132.

[21] Opinion of Murray and Lloyd (29 April 1755), and Governor Lawrence to the Lords of Trade and Plantations (8 December 1755), Akins, *Selections for the Public Documents of the Province of Nova Scotia*, 710-2.

[22] Bringing a European war into post-Aurungzeb India called upon royal armies, corporate armies, and native armies facing off on many fronts, sometimes in uneven combinations, and sometimes on their own. See Stern, *Company-State*, 61-82, 185-206. See also Marshall, *The Making and Unmaking of Empires*, 119-57; Bryant, *The Emergence of British Power in India*, 44-106.

[23] Petition of the United Company of Merchants of England trading into the East Indies to the King (19 July 1757), Lambert, *The House of Commons Sessional Papers of the Eighteenth Century*, 26: 5.

[24] Hardwicke's son, Charles Yorke, later Lord Morden, attempted to follow a similar progression to his father (Solicitor General, 1756-62; Attorney General, 1762-3; Lord Chancellor, 1770). But then so did Pratt, later Lord Camden (Attorney General, 1757-63; Chief Justice of the Common Pleas, 1763-6; Lord Chancellor, 1766-70), and with the stronger allies in government, he would eventually receive his promotions earlier. The addition here of George Hay (Advocate General, 1755-6), into the mix, a position inconsistently appointed throughout the long eighteenth century and tending more personally to the king's interests, appears not to have been more than nominal in this and other matters of state on this question.

[25] Although the third measure represented a serious blow to the company, it was prefaced by a recommendation that the king reserve half of the booty taken at Fort St George for the company. See Copy of His Majesty's Advocate, Attorney, and Solicitor Generals Report (16 August 1757), 1-2, comparing the draft in the British Library (hereafter BL), Hardwicke Papers, MS 35917, 14-5.

[26] Letter to Our Attorney or Solicitor General (31 August 1757), BL MS 35917, 19.

[27] Letters Patent (19 September 1757), *Charters Granted to the East-India Company from 1601* (London, 1773), 457-9.

[28] Referred Queries (16 November 1757), BL MS 35917, 22-5.

[29] Copy of the Attorney and Solicitor Generals Report (24 December 1757), Lambert, *Sessional Papers*, 26: 6-7, seeing also BL, India Office Records (hereafter IO) A/2/7, 99-108.

[30] The important qualificatory phrase 'or shall be' is italicised here to indicate that was added by Yorke at the stage of the final draft, which may tentatively be deduced by readers comparing this tabled version of their report with the copy found in BL 35917, 34.

[31] Ditto in respect of the phrase 'as well as the Dominion': comparing BL MS 35917, 34; Lambert, *Sessional Papers*, 26: 7-8.

[32] Lambert, *Sessional Papers*, 26: 7.
[33] Lambert, *Sessional Papers*, 26: 8.
[34] Letters Patent (14 January 1758), *Charters*, 460-4. This charter acknowledges that the company regained some losses but also made some new gains from 'Princes, or Governments, in India'. Through treaty, the company may cede or restore all such territories 'acquired by Conquest […] or which shall be acquired, by Conquest, in Time coming', but this right does not extend to any 'Settlements, Fortresses, Districts or Territories, conquered from the Subjects of any *European* Power' (460, 462-4).
[35] Draft petition, BL MS 35917, 165-72.
[36] Eyre Coote to George Pigot (21 January 1761), BL MS 35917, 57-9.
[37] See, for example, Case no. 60 on the Right of the King to Settlements Plunder &c. Taken in the East Indies (18 June 1761), BL IOR/L/L/6/1, 76-8.
[38] The details of this dispute are obscure, which has led to some confusion over the role of the courts in facilitating a settlement. A good summary of this dispute may be found in Malcolm, *The Life of Robert, Lord Clive*, 2: 216-24. For political context, see Lenman and Lawson, 'Robert Clive, the "Black Jagir", and British Politics'.
[39] According to Thurlow, Chancery could not decide upon any matter lying 'within the full and absolute jurisdiction of another imperial crown'. Recognising that India might be considered a 'conquered country', Thurlow suggested, with vagueness, that this might award 'real rights, though not by direct process, yet by compulsion', to people within the realm. However, this approach Thurlow considered unsuitable for any appraisal of Clive's claim, which had been founded not by the laws of England but by the use of force abroad, and as such, 'must be decided by the sword'. See Report of Edward Thurlow (December 1763), *The Opinions of Mr. James Eyre*, xiii. By comparison, in his more abbreviated report, Hoskins (16 Nov 1763) rather suggested that the matter be resolved 'under the jurisdiction of the courts of the Great Mogul'. See *Opinions of Mr. James Eyre* (et al.), iv.
[40] Clive, *A Letter to the Proprietors*.
[41] Report of Fletcher Norton (2 May 1764), in Hargrave, *Collectanea Juridica*, 1: 249.
[42] Report of Charles Yorke (2 May 1764), in Hargrave, *Collectanea Juridica*, 1: 247: 'this question ought to be determined between his lordship and the Company upon the same principles as the like question would be determined arising between the owner of the lands in England subject to a rent, and the grantee or assignee of that rent, in a case where both parties derived from the same original grantor'.
[43] Report of James Eyre (1 May 1764), *Opinions of Mr. James Eyre*, I; comparing that of Dunning (30 April 1764), xiv.
[44] Malcolm, *The Life of Robert, Lord Clive*, 2: 236-7.
[45] 20 years later, much of this band would get back together, and team up with other past and present law officers, to rework their opinions, in shuffled-around capacities, in *Nabob of Arcot v East India Company* (1791) 29 ER 545; *Nabob of the Carnatic v East India Company* (1791) 30 ER 392.
[46] For this expression, see the report compiled shortly after this time into the company's claim kept in the Chatham Papers, National Archives (hereafter NA), PRO 30/8/99, 247.
[47] Chatham Papers, NA PRO 30/8/99, 247-8.
[48] Thomas, 'Parliamentary Diaries of Nathaniel Ryder', 339.
[49] New France fell to royal and colonial arms in 1759-60, which was followed by a series of stunning victories, mostly in the Caribbean, in 1762, before the Seven Years War was brought to a halt in 1763. In preparation for peace between Spain, France, and Great Britain, each of these new 'conquests' were put onto the negotiating table as possible 'cessions'. The resultant Treaty of Paris handed Britain the biggest gains, including a number of 'ceded islands' in the Caribbean, all parts of North America formerly claimed by the French, and Florida from the Spanish.
[50] Royal Proclamation (7 October 1763), in Shortt and Doughty, *Documents Relating to the Constitutional History of Canada*, 1: 163-8.
[51] Mansfield to Grenville (24 December 1764), in Smith, *The Grenville Papers*, 2: 476-7.
[52] Report of Yorke and de Grey (14 April 1766), in Shortt and Doughty, *Documents Relating to the Constitutional History of Canada*, 1: 255: 'There is not a *Maxim* of the *Common Law* more certain than that a Conquer'd people retain their antient Customs till the Conqueror shall declare New Laws. To change at once the Laws and manners of a settled Country must be attended with hardship and Violence; and therefore proceed gently and indulge their Conquer'd subjects in all local Customs which are in their own nature indifferent […] in Canada; because it is a great and antient Colony long settled and much Cultivated, by French Subjects'.
[53] For this context in detail, see Lawson, *The Imperial Challenge*, 81-107.
[54] 6 Geo. III, c. 12, comparing 6 Geo. I, c. 5.
[55] *PH* 16: 176. For Mansfield, any 'notion' that conquest was relevant to a discussion about the authority of parliament and the dependence of the colonies upon the crown was 'of a very modern date' (referring in this instance to the opinion of 1724 of Yorke and Wearg).
[56] Basye, 'The Secretary of State for the Colonies'.
[57] Chaffin, 'The Townshend Acts Crisis, 1767-1770'.

[58] 13 Geo. III, c. 44.
[59] For the involvement of these characters in the reproduction of the 1757 report, see Sosin, 'The Yorke-Camden Opinion'. See also Schlesinger, 'The Uprising Against the East India Company'; Reid, 'In the First Line of Defense'.
[60] For an interesting exploration of the old-fashioned politics of patronage surrounding the Ohio grant, see Marshall, 'Lord Hillsborough, Samuel Wharton and the Ohio Grant'.
[61] Greene, 'The Case of the Pistole Fee'; Royal Proclamation (7 October 1763), Shortt and Doughty, *Constitutional Documents Relating to the History of Canada*, 1: 167: 'And We do hereby strictly forbid, on Pain or our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained'. For the struggles of the Ohio, Illinois, and Loyal land companies, see Del Papa, 'The Royal Proclamation of 1763'.
[62] 'The Opinion of the late Lord Chancellor Cambden [sic] and Lord Chancellor York [sic] on Titles derived by the Kings Subjects from the Indians or Natives' (1 April 1772), NA CO 5/1352, 78: 'In respect to such places as have been or shall be acquired by Treaty or Grant from any of the Indian Princes or Governments; Your Majesty's Letters Patents are not necessary, the property of the soil vesting in the Grantees by the Indian Grants; Subject only to your Majesty's Right of Sovereignty over the Settlements as English Settlements and over Inhabitants as English Subjects who carry with them your Majesty's Laws wherever they form Colonys and receive your Majesty's Protection by Virtue of your Royal Charters'.
[63] Wharton, *Plain Facts*, 9. It took long after the Declaration of Independence before 'the opinion of those great law officers' would be disrobed of its relevance in the United States of America, when it was reimagined by the Chief Justice John Marshall as the locus of a rule about 'whether the King's subjects carry with them the common law wherever they may form settlements'. This is interesting not only because of the far better sources of law available to Marshall that he *overlooked* in support of this axiom, but also because the question actually offered little to the idiosyncratic jurisprudence he was developing in relation to Indian proprietary rights in the first place. See *Johnson v. M'Intosh* (1823) 21 US 599.
[64] This section title is an expression of deference to Bowen, *Revenue and Reform*.
[65] The intractability of the controversy says little for the aptitude of this composition of the Commons to address affairs of constitutional principle – an interpretation which may stem from an overly uncharitable reading of an abbreviated parliamentary record – but it cannot but appear obvious that most who participated in this debate were disinclined to look for precedents or develop sound legal arguments, and preferred, instead, to stand behind singular opinions and parrot. A hint of the complexities involved in these politics may be gleaned from Elofson, 'The Rockingham Whigs in Transition'.
[66] Reading from a 'foreign publication', William Dowdeswell issued the following announcement: 'Respecting those territorial acquisitions the English East India Company hath made in Asia, every dispute relative thereto must be settled by that Company itself, the crown of England having no right to interfere in what is allowed to be the legal and exclusive property of a body corporate belonging to the English nation'. *PH* 17: 801.
[67] *PH* 17: 807.
[68] *PH* 17: 808-13. Yorke held the position of Lord Chancellor for just three days before taking his own life, so the legend goes, out of guilt for betraying those unfairly dismissed by the king to make way his ascent into office. See, for example, Parkes, *History of Chancery*, 342-3. For more reliable perspectives, which seem to indicate haemorrhaging as a result of opiate overdose and/or stomach ulceration, see Hardwicke Papers, BL Add MS 35428, 196-21, 132-40. These accounts are canvassed and placed into context within Connors, *Philip Yorke's Parliamentary Journal.*
[69] *PH* 17: 821: 'that the Company's possessions were not gained by conquest, and therefore the crown can have no right to them; or granting them to be all gained by conquest, that even then the crown has no right to them'.
[70] *PH* 17: 823-4. Surely it was the Irish veteran of the Seven Years War, Colonel Isaac Barré, who summed things up best on whether 'the crown should seize upon the territorial possessions of the East India Company'. His honest admissions of having no clue what any of the quoted opinions took to mean, and of his sufferance, once again, of being 'out-flanked by the law', could not have been unique to him (825).
[71] *PH* 17: 831-5.
[72] *PH* 17: 856.
[73] *PH* 17: 865. Meredith himself had been clear on this, however. 'I have no scruple to avow my poor opinion where that right lies. Tis in the crown; and the right to control it in the people. But whether the crown assumes itself, or delegates to others, the exercise of its rights, I hold it as the first principle of this constitution, that there can be no sovereign power whatever, the execution of which is not amenable to the representatives of the people. On this ground I claim the right of an English member of parliament to enquire into all public transactions: where there is public merit, to give reward and honour; where delinquency, to detect, to censure, and to punish' (860).
[74] *PH* 17: 869.

[75] Mansfield appeared before his fellow Lords in defence of Clive and the East India Company on June 17th. He insisted that if even 'individuals' like Clive were guilty of some crime or other, then 'the Company, as a company, were innocent', and moreover, parliament, he added, 'had no right to set aside charters and render invalid parliamentary acts, unless in cases of extraordinary emergency, or of extraordinary delinquency'. *PH* 17: 908-9.
[76] *PH* 17: 922.
[77] 13 Geo. III, c. 63. This established new official appointments for India, including a chief justice, three judges, a governor-general, and a council of four. However tied up with the company's affairs these men would remain, their conduct was now accountable to a regulatory statute, which was very much a sign of things to come.
[78] Report of Solicitor General Alexander Wedderburn (6 December 1772), Shortt and Doughty, *Documents Relating to the Constitutional History of Canada*, 1: 425.
[79] Report of Attorney General Edward Thurlow (22 January 1773), Shortt and Doughty, *Documents Relating to the Constitutional History of Canada*, 1: 440-1, 444: 'new subjects, acquired by conquest, have a right to expect from the benignity and justice of their conqueror the continuance of all these old laws, and they seem to have no less reason to expect it from his wisdom. It must, I think, be the interest of the conqueror to leave his new subjects in the utmost degree of private tranquillity and personal security; and, in the fullest persuasion of their reality, without introducing needless occasion of complain and displeasure, and disrespect for their own sovereign'.
[80] Report of Attorney General Edward Thurlow (22 January 1773), Shortt and Doughty, *Documents Relating to the Constitutional History of Canada*, 1: 442.
[81] James Marriot's Plan of a Code of Laws (n.d.), Shortt and Doughty, *Documents Relating to the Constitutional History of Canada*, 1: 445-83. For context and the comparative appraisal of the content of these reports, see Lawson, *Imperial Challenge*, 117-25.
[82] See the collected and abbreviated records of correspondence at Historical Manuscripts Commission, *The Manuscripts of the Earl of Dartmouth*, 2: 556-69.
[83] *PH* 17: 1363.
[84] *PH* 17: 1362.
[85] See Lawson, *Imperial Challenge*, 126-45.
[86] 14 Geo. III, c. 83. If this compromise was to avoid repeal later on, then its terms would need to stand up to the next generation of English and French Quebeckers. In the end, they did not, but that forms part of a story about the development of Canadian constitutionalism and colonial self-government more befitting the long nineteenth century. Compare 31 Geo. III., c. 31.
[87] Mansfield expressed his dislike for the 'loose doctrine' of John Holt's jurisprudence, and refused to hear any arguments depending upon Edward Coke. *Cobbett's Complete Collection of State Trials* (hereafter *ST*), 20: 287, 294-5, 308. For the fullest account of Coke's improvisations in *Calvin's Case* (1608), see *ST* 2, seeing also 7 *Co(ke) Rep(orts)* 1a. See also Edward Cavanagh, 'Infidels in English Legal Thought'.
[88] *ST* 20: 324.
[89] *ST* 20: 322-3. What reeked most of the constitutionalism of the times was the awkward double meaning of the crown as both *king* and *king-in-parliament* in relation to the legislative autonomy of the colonies (which was something many American legal thinkers were struggling with around the same time). Pertaining more to the wider European geopolitical circumstances of the times was the conflation here of *cession through public treaty* and *conquest by military action*. Whatever Mansfield might have said about these separately at trial, his ruling made synonyms out of conquest and cession; or, rather, his remarks drained all in the common law that was relevant to conquest and provided for the transfusion of similar ideas into the principles governing the transactions of high diplomacy.
[90] For this, see Ward, *Colonial Self-Government.*
[91] This had first if equivocally been suggested by Mansfield himself, *pro* Dunning and *contra* Wedderburn, in *Rex v Vaughan* (1769), 98 ER 308. It is not clear in this report what brought Mansfield to the conclusion that Jamaica was not conquered but 'uninhabited', which appears to not to have been considered in *Campbell v Hall* for reasons pertaining, perhaps, to the great departures his ruling took from Holt's earlier statements on the same island.
[92] Bentham, *A Plea for the Constitution*, in *The Works of Jeremy Bentham*, 4: 268.
[93] The leading study on the extension of British foreign jurisdiction during the nineteenth century, for example, shows the law officers hard at work in every chapter. See Johnston, *Sovereignty and Protection*. Earlier in the century, amid all that 'reordering', the contributions of the law officers were profound as well, which is acknowledged (if somewhat downplayed) throughout Benton and Ford, *Rage for Order*. Consider too the work of law officers of the crown at centre as well as the peripheries. Self-governing colonies installed their own law officers, and developed reliance upon them to the fullest extent possible, while remaining obedient to the superior legislative powers of the crown and parliament; in London into the twentieth century, law officers of the crown played a serious role in designing concessions of full autonomy to new nations too.