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THE UNPUBLISHED SOURCES FOR EARLY AMERICAN LEGAL HISTORY*

CHARLES J. HILKEY**

Any one who has had experience in the investigation of materials for American Colonial Legal History will readily agree with Dr. Morris's contention that the published source material is entirely inadequate. For the most part, the printed digests and reports deal with the post-Revolutionary Period. The project of the American Historical Association, therefore, will supply a long felt need not only for those especially interested in legal history, but also for those desiring to investigate further social and economic development. With the bringing to light of facts long disregarded in interpreting the development of the past, much of the already published sources will take on new meaning, and much of the history thus far written will require revision. Just as legal history cannot be written without considering facts that influenced the community socially and economically, so social and economic history cannot be written without due consideration of the various interests that influenced early courts in adjusting controversies. The project will doubtless mark the beginning of a new point of view in the interpretation of past development, in practically every phase of American life.

The bibliographical work already done by Professors Greene and Morris deserves special commendation. This undertaking can be carried much farther as soon as the material in various public archives, in libraries, and in private collections is systematized and indexed. A reliable guide to the material — both published and in manuscript form — has been one of the greatest needs thus far felt by those interested in consulting the sources. Professor Eldon James has succinctly summarized the difficulties thus far encountered by the investigator:

“The future historian of American law is thus confronted with a maze of widely scattered primary source material, largely unorganized, in manuscript and in print, through which he will find few clues. Unless more is done to survey the record sources, to prepare bibliographies, and to edit and

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print the fundamental source material, it is to be feared that we shall wait a long time for our American legal history".¹

It is to be hoped that the American Historical Association will establish a sort of clearing house for the listing and description of source material. Members of the Association might be invited to stimulate the interest of custodians of public archives, librarians, and private individuals in furnishing information with respect to any source material they may have or which may come to their attention. For example, a clue is being followed which may lead to the discovery of a notebook kept by a Georgia lawyer who practiced in the Superior Courts of the State before the printed reports of the Supreme Court began with its establishment in 1846. It is said that he kept very accurate notes covering the cases decided in his circuit and that in the course of a few years the manuscript became widely known and used by the members of the bar of the circuit. There may be many similar manuscripts in existence, and a central place for cataloguing and describing such material would be of great assistance to those making a survey of the sources available.

The task of investigating the unpublished material in early Massachusetts has been difficult although much has been done to classify and index the manuscripts to facilitate their use. The papers in the Early Files Room of the Suffolk County Court House comprise over twelve hundred volumes, including many miscellaneous undated papers. These papers are a veritable storehouse of information for both the legal and the social historian. The papers covering the period of the First Charter, ending in 1686, include twenty-nine volumes. It would seem that the legal history of Colonial Massachusetts should be divided into three periods rather than two. During the Presidency of Joseph Dudley, provision was made for admission to the bar and the oath of attorneys was prescribed. In the Commission of Dudley is found an instruction for the administration of English Law. The President and Council were authorized to administer justice "So . . . that the Forms of Proceedings in such Cases and the Judgm't thereupon to be given be as Consonant and agreeable to the Laws and Statutes of this Our Realm of England as the present State & Condition of our Subjects inhabiting within the Limitt aforesaid & the circumstances of the place will admit." Similar

¹James, *Some Difficulties in the Way of a History of American Law* (1929) 23 ILL. L. REV. 683, 688.

language is contained in the first and second commissions of Governor Andros. It is interesting to compare Justice Story's statement of the adoption of the common law by the colonies as including "only that portion which was applicable to their situation." The Inter-Charter Period ended with the establishment of the Province Government in 1692.

The papers in the Early Files Room contain in most instances complete histories of the cases decided from the date the writs first issued out of the lower courts to the final disposition of the controversies in the Court of Assistants or in the General Court. Besides the more formal procedural papers, there are to be found, among other things, both trial briefs and appeal briefs, though they did not bear those names in the early colonial period. An early statute, requiring appeal briefs, evidently gave considerable encouragement to those desiring to engage in the conducting of cases before the courts. From the time of this Act these briefs appear among the papers relating to appeal cases. Many were written and signed by attorneys and others were written by attorneys and subscribed by the parties. Since these briefs were required only in appeal cases, these are original papers, and often the signatures of the parties are easily distinguishable from the hand in the body of the papers. There were also reply briefs, but these are not so numerous since such papers were not required. The briefs are instructive as being sources for the citation of law that was deemed to be controlling, and also as indicating what social and economic arguments were thought to move the appeal tribunals. Of course, the arguments were addressed to both the judges and the jury, since appeals were usually decided by juries. It is quite amazing to note the number of verdicts that might be required to effect a final settlement of a hard fought case. In one instance, which is rather extreme, an action was brought in the County Court for the recovery of the small sum of seventeen pounds and ten shillings. The plaintiff received a verdict and judgment for a portion of the claim, and the defendant appealed to the Court of Assistants, where the judgment of the lower court was affirmed by the jury. The appellant then attained the appeal jury and was successful in securing a reversal and costs by the jury of attaint. The original plaintiff then brought an action of review in the County Court and received a favorable verdict. The defendant again appealed to the Court of Assistants, and the jury of appeals reversed the judg-

ment and gave the appellant costs. Thereupon the appellee attainted the jury and in the attaint proceeding the jury affirmed the verdict of the appeal jury with costs. Even after this long drawn out controversy, extending over several years, there could have been a petition filed for a hearing in the General Court.

Among the Archives at the Capitol Building are three hundred and twenty-four volumes. There is one volume of Council Records, the other Council Records being scattered through the various volumes in the Archives or found among the papers in the Suffolk Files. The papers in the Archives are especially valuable for the first Charter period, because during that time the General Court frequently acted as a judicial tribunal and heard and determined cases. After the judicial system became well developed, the General Court ceased to act as an appeal court and very likely never really considered itself as a part of the regular judicial system. The error is often made of stating that it was the final court of review. However, it was considered as a sort of guardian of justice, and insisted on its authority to assume jurisdiction of any case that enlisted its interest or was deemed to merit its intervention. Some years after the assistants and deputies separated into two houses, an act was passed which provided that in case of disagreement between the two chambers over the decision of a case, the matter should be decided by a joint meeting of both houses. Since the deputies outnumbered the magistrates, this arrangement was a source of controversy throughout the entire Commonwealth period. Those who seek evidence of a class struggle in the disputes between the deputies and magistrates can find abundant material in the long and arduous dispute arising over this provision. The magistrates attempted over and over again to secure the repeal of this act, but the deputies always vigorously opposed any change. Both sides claimed justification from the patent. The issue in this controversy really came down to the question whether a litigant was entitled to a trial by jury or whether he must submit to the final decision of the deputies. Often complaints were heard that men's estates were taken away without trial by jury. The deputies finally proposed that each house should consider and determine cases separately and that the agreement of both should be required for a final determination. This proposal was rejected by the magistrates, and so the controversy was not settled during the period of the First Charter. It is quite clear that the magistrates

could see little use in re-trying cases that had already been adjudicated in the Court of Assistants, and their efforts were often directed toward limiting the number of cases that could be brought before the General Court. Nearly twenty years prior to the vacation of the Charter, the magistrates attempted to exclude new evidence from hearings where the cases had already been decided in the Court of Assistants, but the deputies insisted on hearing any new testimony that was offered. The General Court remained throughout the period a judicial tribunal with paramount powers, and the papers in the Archives thus assume an unusual importance in the investigation of case law.

The Archives also add much to the statute law, for here is found explanatory matter underlying the various enactments. In writing legal history statutes cannot be disregarded, but must be woven into the fabric of the whole. This is especially true in a social order such as early Massachusetts, where the separation of powers, whatever meaning the tenet may have had later, was still in its rudimentary development. The magistrates sat as the upper house of the legislature; they comprised the Court of Assistants; they acted as judges in the County Courts and in the courts for the trial of small causes. The deputies, too, were not without judicial experience. Besides acting as judges in the General Court, they were often chosen associate judges in the County Courts, appointed justices in the courts for small causes, and were subject to jury service. In such a system, statute law has a significance entirely different from that generally accorded it in later periods. Where there were no reports of decisions and the doctrine of *stare decisis* was undeveloped, the law was largely made up of legislation and community reaction to social and economic facts as evidenced by verdicts of juries.

In the Early Files Room at the Suffolk County Court House are the records of the Superior Court of Judicature consisting of thirty-four volumes which contain brief histories of the cases that came before the court. While a good deal of the material is in brief memorandum form, much of it is more extended, and one finds cases disposed of upon demurrers, motions for non-suit, pleas in abatement and in bar, special verdicts, and other similar proceedings. Of course, the material in these records will have to be supplemented by facts gathered from the papers in the Suffolk Files and from many other sources.

Mention should be made of the Chamberlin Collection at the Boston Public Library, and of the Pynchon Journal in the Library of the Harvard Law School. The former contains many useful manuscripts and also published material which is difficult to secure elsewhere. The latter throws much light upon the development of local law and is one of the few sources available for records of cases disposed of in the courts for small causes.

There are County Court Records, Probate Records, Admiralty Court Records, Inferior Court Records, Town Records, Proprietors' Records, and other records and manuscripts too numerous to list here. Practically all the source material, both printed and in manuscript form, for the First Charter Period in Massachusetts, has been read and copious notes taken thereon. A considerable amount of the material in the Inter-Charter and Province Periods has been investigated and noted. Notes on the material for the First Charter Period are now being arranged and it is hoped that the task of presenting the conclusions will soon be completed.

There will doubtless be a difference of opinion as to the best method of investigating and writing American Legal History. Since the colonies were largely isolated communities which were continually developing amid forever-shifting scenes of economic and social life, it is submitted that the most logical plan would be to make use of and present the material in each of the colonies separately. After this is done, some one in the future may be in a position to write a general history of American Colonial law. For the present the history should be written from the particular to the general — from the bottom upward and not from the general to the particular — from the top downward. The present is the time for prospectors and miners. Artists may use the precious metals later. In presenting the results of the various studies style will have to be sacrificed to truth; cleverness to fact.