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# Appeals to the Privy Council Before American Independence: An Annotated Digital Catalogue

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### Recommended Citation

Sharon Hamby O'Connor and Mary Sarah Bilder. "Appeals to the Privy Council Before American Independence: An Annotated Digital Catalogue." *Law Library Journal* 104, no.1 (2012): 83-97.

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## ***Appeals to the Privy Council Before American Independence: An Annotated Digital Catalogue\****

Sharon Hamby O'Connor\*\* and Mary Sarah Bilder\*\*\*

*Between the later seventeenth century and American independence, appeals from colonial high courts were taken to the Privy Council in England. These appeals are the precursors of today's appeals to the U.S. Supreme Court. Their legal and policy issues can be reconstructed from the outcome of the appeals, the briefs of crown law officers, related Privy Council documents, and handwritten notations on these materials. This article describes Appeals to the Privy Council Before American Independence, an annotated digital catalogue of appeals from the thirteen colonies with links and digital images providing access to this material, now compiled from a variety of repositories.*

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¶1 For more than two centuries, an important source of American constitutional law has been missing. Between the later seventeenth century and American independence, appeals from colonial high courts were taken to the Privy Council in England. These appeals are the precursors of today's appeals to the U.S. Supreme

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\* © Sharon Hamby O'Connor and Mary Sarah Bilder, 2012. The authors owe special thanks to Ann Buxbaum, Nandini Chatterjee, Mitch Fraas, Jane Gionfriddo, Paul Grant-Costa, Bruce Kercher, Elizabeth Mancke, Catherine O'Connor, Ron O'Connor, Jim Phillips, and Philip Stern for comments and assistance. Michael Palmisciano (J.D. candidate, Boston College Law School, class of 2013) provided assistance with footnotes. In addition, we note with gratitude the financial support of the Ames Foundation and the technical support of Professor Charles Donahue (Harvard Law School). At the Harvard Law Library, we are grateful to Annie Jo Cain, Stephen Chapman, and Douglas MacDonald for their technical expertise. We are also indebted to Robert Palmer for his willingness to expedite digitization of the Privy Council's *Register* and related documents.

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Court. No one, however, has ever published reports of the Privy Council appeals or even a comprehensive, accessible list of cases. Although the Privy Council never wrote explanatory opinions in appeals, the legal and policy issues can be reconstructed from the outcome of the appeals, the briefs of crown law officers, related Privy Council documents, and handwritten notations on these materials. *Appeals to the Privy Council Before American Independence* will be an annotated digital catalogue of appeals from the thirteen colonies from 1696 to 1776, with links and digital images providing access to this rich array of material. When the catalogue is launched in 2012, scholars, lawyers, and the general public will be able to better understand the transatlantic contours of colonial American law.

¶2 This issue of *Law Library Journal* commemorating Morris L. Cohen is a particularly appropriate location for a description of this catalogue, since Morris was a key player in its creation. Without his personal support, advice, and encouragement, the project would never have gotten off the ground. Indeed, but for a feeling of obligation to Morris's memory and indefatigable spirit for undertaking and completing overwhelming projects, we might not be nearing the end ourselves. In honor of Morris, this article has two purposes. It serves as a permanent place to describe the annotated digital catalogue, explain the difficulties and decisions involved in its development, and propose its significance for future scholarship. It also records Morris's important contributions and insights, especially noting his belief—one we share—that the preservation of historical documentation and the future of public access lie in collaborative teams of librarians, traditional scholars, and information technology specialists.

¶3 We begin with a brief description of the Privy Council and its relation to the colonies, with a summary look at the appeals process itself. We then outline the problem that lack of access to appeals documentation has presented for scholars, how the annotated digital catalogue will address that issue, and the benefits it may hold for future scholarship in a digital world. We close with a tribute to Morris—without whom there would have been no beginning and no catalogue.

### The Privy Council and the Appeals Process

¶4 Over many centuries, the Privy Council of England evolved from the monarch's most trusted inner circle into a formal body of advisers, counseling the sovereign on administrative, legislative, and judicial matters. By the dawn of the eighteenth century, its power was waning as the power of Parliament ascended. Nonetheless, the Council and related subsidiary bodies continued to have responsibility for the administration of the growing number of English colonies. The boundaries of the Council's jurisdiction varied, depending on the particular constitutional structure of each colony and the vagaries of contemporary politics in England.<sup>1</sup>

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1. See Mary Sarah Bilder, *English Settlement and Local Governance*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 63, 88–90 (Michael Grossberg & Christopher Tomlins eds., 2008) (discussing the role of the Privy Council in the American colonies). See also the items listed in the book's accompanying bibliography. *Id.* at 602, 608–09.

¶5 By this time, the constitutional relationship of colonial law to the laws of England had been settled at a workable level. (*Settled* may be too fixed a term, the relationship remaining one of evolution and negotiation for as long as colonization lasted.) Colonial laws were subject to the repugnancy principle. A law could diverge for reasons of colonial circumstance from the laws of England, but it could not be *repugnant* to them. Of course, what repugnancy meant in any specific context was a legal and political decision.

¶6 In an effort to ensure compatibility between English and colonial law, the charters of most colonies required that colonial legislation be sent to the Privy Council for review. The Council could disallow a law; approximately 8563 were sent for review and 469 (5.5%) disallowed.<sup>2</sup> James Madison, among others, wanted the new American government to have a similar power over state laws. Review and disallowance, however, vanished from American constitutional law when the Philadelphia Constitutional Convention rejected such proposals.<sup>3</sup>

¶7 A second method of Privy Council oversight involved review of the decisions of the highest court in each colony. At the end of the seventeenth century, a shifting subset of the Council, usually including the Chief Justice of King's Bench or Common Pleas, heard appeals argued by leading English counsel, often the Attorney General or Solicitor General, who in their professional lives also took on cases of private litigants.<sup>4</sup> This principle of review would find life in the United States after independence in the appellate powers of the Supreme Court.

¶8 Scholars have attempted to study these appeals. The most-studied appeals have been the few that involved the Privy Council's decision to invalidate directly the acts of a legislature. The remaining appeals usually provided relief from alleged arbitrary or procedural error in colonial courts. In 1950, Joseph H. Smith published the most exhaustive study of the appellate process, *Appeals to the Privy Council from the American Plantations*.<sup>5</sup> A handful of other scholars in the nineteenth and twentieth centuries addressed the topic,<sup>6</sup> and a growing number show renewed interest today.<sup>7</sup>

¶9 Thanks to this scholarship, an outline of the appellate process emerged, including its early ambiguities. As England first grappled with an appeal procedure for the colonies, there was a lack of precision about what constituted an appeal.

2. ELMER BEECHER RUSSELL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL* 221 (Octagon Books 1976) (1915).

3. ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 135–54* (2010). See also Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. (3d ser.) 215 (1979).

4. Bilder, *supra* note 1, at 90.

5. JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* (1950).

6. See, e.g., GEORGE ADRIAN WASHBURN, *IMPERIAL CONTROL OF THE ADMINISTRATION OF JUSTICE IN THE THIRTEEN AMERICAN COLONIES, 1684–1776* (1923); Harold D. Hazeltine, *Appeals from Colonial Courts to the King in Council, with Especial Reference to Rhode Island, in 1894* ANN. REP. AM. HIST. ASSN. 299; Arthur Meier Schlesinger, *Colonial Appeals to the Privy Council* (pts. 1 & 2), 28 POL. SCI. Q. 279, 433 (1913).

7. See, e.g., MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830* (2005).

Thus, arriving at a precise count of appeals is difficult. An appeal might not be from a final decision of a colonial high court adjudging a case between private litigants—it might be a petition of complaint or request for assistance in obtaining justice, rather than an “appeal” in the strictly legal sense. Cross appeals, revivals, and confusion over the proper body holding appellate jurisdiction further complicate attempts to count these cases.<sup>8</sup> Scholars differ on their precise number due to these vagaries in definition and to differing spans of years. From the thirteen colonies, Arthur Schlesinger notes 265 cases from 1680 through 1780;<sup>9</sup> Joseph Smith documents 231 appeals from 1696 to the Revolution.<sup>10</sup>

¶10 The appeals procedure was administered by the Council, though there were inevitable exceptions to the procedural norms. Appeals from the colonies usually were admitted if they involved at least a specified minimum monetary amount (though ecclesiastical and seizure cases required no minimum), were requested promptly from a final judicial decision, and included proper security by the appellant in case of affirmance. If an appeal was denied in the colony by its highest judicial authority, the appellant could petition the Council to be heard. If the appeal was admitted, an order of reference to the Committee for Hearing Appeals from the Plantations (a body variously named over the years) would issue with notice to the respondent.

¶11 Usual practice called for the colonial court to send to England sealed copies of the proceedings. The Committee of the Council then set a date for a hearing at which counsel for the parties were heard. Following the hearing, the Committee would submit its report to the full Council for confirmation. An Order in Council would issue with the result, and a copy would be sent with instruction to the colony in which the appeal arose. Cases not pursued by the appellant within twelve months could be dismissed for nonprosecution.

¶12 To shepherd this process along, litigants usually engaged agents, often solicitors in England. The agents prepared the draft of the case to be submitted, engaged counsel to be heard as advocates before the Committee, saw to the printing and filing of the printed case, and attended the Council as the matter made its way to conclusion. A few surviving bills of costs enumerate the many steps from petition to Order in Council.

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8. In addition, the Privy Council heard a small number of appeals from royal commissions on boundary disputes and on the long-running controversy between the Mohegans and the colony of Connecticut which began with a royal commission. Paul Joseph Grant-Costa, *The Last Indian War in New England: The Mohegan Indians v. the Governour and Company of the Colony of Connecticut, 1703–1774* (2008) (unpublished Ph.D. dissertation, Yale University) (available through ProQuest’s Dissertations and Theses; subscription required for access). We have not dealt with that class of appeals in this project. A number of recent articles address the Mohegan case. See, e.g., Mark D. Walters, *Mohegan Indians v. Connecticut (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America*, 33 *OSGOODE HALL L.J.* 785 (1995); Craig Bryan Yirush, *Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704–1743*, 29 *LAW & HIST. REV.* 333 (2011). Additional material can be found at the *Yale Indian Papers Project*, YALE UNIV., <http://www.library.yale.edu/yipp/> (last visited Oct. 24, 2011).

9. Schlesinger, *supra* note 6, at 446.

10. SMITH, *supra* note 5, at 667–71 (total resulting from adding figures in tables 1–5).

¶13 Of course, delays arose—hearings were postponed, extensions granted, proceedings lost at sea—but the general outline of the process was followed, sometimes with advice from administrative bodies such as the Lords Commissioners for Trade and Plantations (commonly known as the Board of Trade). From this lengthy and expensive procedure,<sup>11</sup> many types of documents resulted: petitions of appeal and petitions for leave to appeal, orders of reference, committee reports, Attorney General and Solicitor General opinions, Board of Trade representations, printed cases, Orders in Council, formal entries in the Privy Council’s *Register*, as well as private and public correspondence.

¶14 Strikingly, this long list of documentation does not include formal opinions of the Privy Council. After the Committee’s report, only an Order in Council would be issued. The lack of formal written explanations of reasoning was not uncommon in the courts of England or the colonies at this time. Case reports were usually compiled after the fact from the work of reporters who wrote up the reasoning given by judges from the bench *seriatim* or from informal memoranda provided by judges. For the Privy Council’s appellate process, no reporters or judges filled this function.

### The Problem of the Privy Council and American Law

¶15 In 1814, George Chalmers explained the difficulty raised by colonial appeals decided by the Privy Council: “[Because] appeals from our foreign dominions lay to the king in his council,” instead of to the courts, almost no reports of cases had been written and materials were not “accessible to research.”<sup>12</sup> Chalmers understood this problem better than most. Though Scottish by birth, he had practiced law in Maryland, and then returned to London, where he served as a chief clerk to the Privy Council for nearly four decades.<sup>13</sup> Acutely aware of the mass of unpublished papers bearing on the transatlantic relationship, Chalmers realized that William Blackstone did not cover law related to the colonies in his *Commentaries on the Laws of England* precisely because of its inaccessibility.<sup>14</sup>

¶16 Similarly, Ephraim Kirby, one of the first American law reporters, noted the problem presented by unpublished reports of legal cases in his 1789 volume of Connecticut court cases. In not preserving and publishing “proper histories,” “the principles of their decisions were soon forgot, or misunderstood, or erroneously reported from memory.”<sup>15</sup>

¶17 Fortunately, the legal arguments made by counsel in the appeals do appear in the *printed cases*, documents that today we would think of as briefs. Precisely

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11. Schlesinger reports that the average length of time from first appearance at the Privy Council to issuance of an Order in Council was twenty-two months. Schlesinger, *supra* note 6, at 447–48.

12. 1 GEORGE CHALMERS, OPINIONS OF EMINENT LAWYERS, at i (Burt Franklin 1971) (1814).

13. Alexander Du Toit, *Chalmers, George*, in 10 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 870, 870–72 (H.C.G. Matthew & Brian Harrison eds., 2004).

14. 1 CHALMERS, *supra* note 12, at i.

15. MORRIS L. COHEN & SHARON HAMBY O’CONNOR, A GUIDE TO THE EARLY REPORTS OF THE SUPREME COURT OF THE UNITED STATES 2 (1995) (quoting EPHRAIM KIRBY, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, at iii–iv (1789)).

when a printed case became a customary or required component for the hearing of an appeal before the Council has yet to be determined. In 1731, a requirement that the printed case be signed by counsel went into effect.<sup>16</sup> In 1774, too late to have an impact in the thirteen colonies, they were required to be delivered to the Privy Council office one week before the hearing.<sup>17</sup> Supplementing arguments from these printed cases are insights to be gleaned from the reports of the Committee for Hearing Appeals and from documents requested by that Committee.

¶18 Study of the appeals has been impeded by the lack of easy access to the printed cases and related documents, scattered as they are in multiple repositories on both sides of the Atlantic and catalogued in a variety of manners. For over two centuries, not only the legal principles but the very appeals themselves have often been forgotten. Chalmers did not possess the means to publish the records of the appeals. He noted, however, that if such information had been available, Blackstone could have sketched the boundaries of colonial law with “an inquisitive spirit, and a liberal hand.”<sup>18</sup>

¶19 Attempting to solve the problem Chalmers identified by creating the annotated digital catalogue of appeals has presented many challenges. First, no comprehensive list of appeals from the thirteen colonies existed. Each action of the Council was recorded by its clerk in the Council’s *Register*, which is preserved in The National Archives at Kew (TNA). When we began the project, the *Register* had not been digitized and thus could only be consulted at TNA.<sup>19</sup> To construct a list in the United States meant using instead *Acts of the Privy Council, Colonial Series (APC)*, a six-volume summary of Council actions related to the colonies compiled from the Council’s *Register* in the early twentieth century. Unfortunately, the *APC* volumes were literally crumbling in the stacks, victims of the acidic paper of the period.

¶20 In addition, funding for the project was uncertain. Time, travel to locate and photograph relevant documents, and ultimate publication were all at issue. The choice of rendering the results as a print or a digital product was looming as digital bibliographic and documentary works were just coming into prominence. In a world where analytical law review publications still remain the coin of the realm, devoting so much time to a project that did not fit neatly into standard scholarly categories defied conventional wisdom.

¶21 With the publication of a reprint of the *APC* and the generous support of the Ames Foundation, some of these challenges were overcome. As time passed, the decision to create a digital product became an easy one. The option to add material

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16. Order of Mar. 3, 1731, *reprinted in* 3 ACTS OF THE PRIVY COUNCIL OF ENGLAND: COLONIAL SERIES 310 (W.L. Grant et al. eds., 1910) [hereinafter 3 ACTS OF THE PRIVY COUNCIL].

17. Order of June 20, 1774, *reprinted in* 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND: COLONIAL SERIES 397 (James Munro & Almeric W. Fitzroy eds., 1912).

18. 1 CHALMERS, *supra* note 12, at i.

19. In 2011, Robert C. Palmer, Cullen Professor of History and Law at the University of Houston, completed digitization of the Privy Council’s *Register* for our relevant span of years and began digitization of the miscellaneous Privy Council documents at TNA classified as PC1. All are now or will soon be available at ANGLO-AMERICAN LEGAL TRADITION, <http://aalt.law.uh.edu> (last visited Oct. 24, 2011).

in the future and the ability to share it instantaneously on a worldwide basis were decisive factors.

### The Catalogue: Its Description of Appeals

¶22 At present, no consistent name has been applied to the genre of digital lists with linked sources. We decided to call this project an *annotated digital catalogue*. The core of the database is a *catalogue*—a simple list. *Digital* describes both the technology and the flexibility of access. *Annotated* emphasizes the substantive editorial comments as well as the links to other databases.

¶23 The annotated digital catalogue provides the following information for each appeal:

- the colony from which the case was appealed;
- full and short name of the appeal as compiled from the *APC* entry;
- references to its entries in the *APC* with links to the *APC* entries;
- references to entries in the Privy Council's *Register* with TNA request number (PC2) for the *Register* and links to the *Register* online at *Anglo-American Legal Tradition* (<http://aalt.law.uh.edu>);
- the names and dates of lower court actions as given in the *APC*;
- the names of participants and their status, occupation, and relationships if known;
- vessel names if any; and
- the subject matter and disposition of the case if given.

¶24 Because the Privy Council's *Register*, with its fuller entries, was only available at TNA at the time of our initial compilation, we relied on the *APC*, still the most useful finding aid for the *Register*, as the core resource in creating the catalogue. As a consequence, any errors of the *APC* editors will reappear in the catalogue. Furthermore, the sketchy nature of the material in the *APC* often obscures the real issue in an appeal. What appears to be an action to recover a debt is really an issue of currency valuation; what looks to be just another family dispute in fact questions the validity of a statute regarding inheritance. Nonetheless, this is a start for scholars who will want to delve deeper into each case.

### The Catalogue: Its Printed Cases and Related Privy Council Documentation

¶25 To the description of each appeal, the catalogue adds links to its appearance in the *Register* and the *APC*. Beyond that, the search for records to date has been restricted to a quest for printed cases and miscellaneous Privy Council documents at TNA. Images for these are provided, though they should not be presumed to exhaust the documentation that exists for any particular appeal.<sup>20</sup>

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20. Related documents can be identified through both print and online collections. An important Internet resource is BRITISH HISTORY ONLINE, <http://www.british-history.ac.uk> (last visited Oct. 24, 2011). It includes the Journals of the Board of Trade and Plantations, 1704–1782 and the Calendar of State Papers, Colonial. The Calendar of State Papers, Colonial is also available by subscription through ProQuest's Colonial State Papers. This ProQuest database also includes TNA collection CO1



¶26 The printed cases are perhaps the most important digital annotations to the catalogue. They are instantly recognizable as ancestors of modern Supreme Court briefs. Each begins with the facts of the appeal and concludes with the legal reasons each side advanced in its own cause. The oft-reappearing names of the crown counsel who were engaged convey a small, elite, and intellectually exciting world of transatlantic legal argument. The printed cases bring the appeals to life.

¶27 The printed cases also emphasize the importance of lawyers' arguments in understanding court decisions. Early Supreme Court reporters initially included these arguments before summarizing the Supreme Court's decision. Today, we focus exclusively on the decision, but the printed cases for the appeals remind us of an earlier focus on lawyers' arguments rather than on judges' reasoning. Our notion of what count as constitutional law sources is based on a later fixation on published opinions that does not work well for eighteenth-century transatlantic legal sources.

¶28 The number of printed cases prepared for each appeal and the manner in which they were distributed remain a mystery. Roscoe Pound suggests that fifty copies of these cases were produced for each appeal, but we have been unable to locate his source.<sup>21</sup> Smith disputes this number, contending that "it became customary for the parties to distribute printed 'cases' to the Lord President and those law lords likely to attend at the hearing."<sup>22</sup> Paul Leicester Ford, referring to similar appeals for prize cases, states that "only enough of these briefs were printed to give the Commissioners and the opposing advocates each a copy; and this probably limited the edition to a dozen or fifteen copies . . ."<sup>23</sup> To date, the greatest number of copies found of a single printed case is seventeen, for the respondent's printed case in a 1765 appeal from Pennsylvania.<sup>24</sup> This number, however, is a significant outlier. For only two other appeals have we located as many as four copies of a printed case—*Philips v. Savage* (Massachusetts 1734) and *Rolfe v. the Proprietors of Bow* (New Hampshire 1762).

¶29 At present, the annotated digital catalogue contains printed cases for fifty-five different appeals, some with multiple copies, totaling 155 individual documents, the earliest dating from the late 1720s.<sup>25</sup> For many appeals, the printed cases for both the appellant and respondent have been located. In others, the papers of only one party have been found. Many include handwritten notations and underlining, some attributable and others a mystery. All have a similar look and feel,

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(Privy Council and Related Bodies: America and West Indies, Colonial Papers). Court records from the colonies and papers of involved participants are other examples of fruitful sources.

21. ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 67 (1941).

22. SMITH, *supra* note 5, at 289.

23. PAUL LEICESTER FORD, *LIST OF SOME BRIEFS IN APPEAL CAUSES WHICH RELATE TO AMERICA TRIED BEFORE THE LORDS COMMISSIONERS OF APPEALS OF PRIZE CASES OF HIS MAJESTY'S PRIVY COUNCIL, 1736-1758*, at 3-4 (Burt Franklin 1971) (1889).

24. The appeal is referred to as *Fothergill v. Stover* or *Pennsylvania Land Company v. Stover*. The respondent's printed case is titled *Timothy Peaceable (upon the demise of John Fothergill, Daniel Zachery, Thomas Howe, Devereux Bowley, Luke Hind, Richard Howe, Jacob Hogan, Silvanus Grove and William Heron) v. Christian Stover*.

25. The earliest printed case in the catalogue is *Forward v. Poulson* (later *Forward v. Hunt*) (Maryland c. 1727).

mirroring not only each other but also appeals of this era presented to the Lords Commissioners for Hearing Prize Appeals and to the House of Lords.

¶30 For each appeal for which a printed case has been located and viewed, information as to the holding library or libraries is provided with a link to its images if (1) the copy contains manuscript notes, (2) it is the only copy of the case located, or (3) it is one of several copies located, none with manuscript notes.

¶31 The largest collection of printed cases is in the Hardwicke Papers at the British Library, many with the notes of Charles Yorke, counsel on many of the appeals. In the United States, a substantial collection exists at the Law Library of Congress in the collection of Sir George Lee, with a smaller number at the Columbia University Law Library.<sup>26</sup> Additional printed cases are scattered about England and the United States in various repositories.

¶32 In attempting to locate printed cases, we first relied on the masterful job Joseph Smith had done in recording those cases found in his research in the 1940s.<sup>27</sup> Printed manuscript guides were gold mines of information.<sup>28</sup> Newer sources, such as electronic databases, online catalogues of historical societies and major research libraries, and the online *English Short Title Catalogue*,<sup>29</sup> were searched. Tips from librarians sometimes led to other collections where material had not yet been catalogued. Some printed cases turned up in unexpected locations, such as the Wisconsin Historical Society, having likely come into the hands of antiquarian dealers or collectors at some point in the past.

¶33 A possible source of additional printed cases may be the papers of Privy Council members attending hearings of appeals as well as papers of counsel on the appeals. As a first step, the archive entries for counsel in the *Oxford Dictionary of National Biography* were checked if they covered the years in question and if the description of the holdings held out some hope of success. The librarian at Lincoln's Inn reported that, though the library does hold some papers of counsel, no printed cases are within their collection. Charles Yorke's copies of his cases are, of course, in the Hardwicke collection. Sadly, the papers of Alexander Forrester, who is second in number only to Yorke as counsel on the signed cases located so far, do not seem to have survived.

¶34 We believe more printed cases remain extant. Their unusual nature has contributed to their "disappearance." In American archives, they may be overlooked because they appear to be English materials. For example, at the American Antiquarian Society, one uncatalogued appeal found serendipitously in the Society's collection of British broadsides had not been given cataloguing priority

26. The printed cases at Columbia were brought to this country by William Samuel Johnson, agent for Connecticut, following his protracted stay in England dealing with the land dispute between the Mohegans and landowners in the colony.

27. SMITH, *supra* note 5.

28. See CHARLES M. ANDREWS & FRANCES G. DAVENPORT, *GUIDE TO THE MANUSCRIPT MATERIALS FOR THE HISTORY OF THE UNITED STATES TO 1783*, IN THE BRITISH MUSEUM, IN *MINOR LONDON ARCHIVES*, AND IN THE LIBRARIES OF OXFORD AND CAMBRIDGE (1908); GRACE GARDNER GRIFFIN, *A GUIDE TO MANUSCRIPTS RELATING TO AMERICAN HISTORY* (1946); *A GUIDE TO MANUSCRIPTS RELATING TO AMERICA IN GREAT BRITAIN AND IRELAND* (John W. Raimo ed., 1979); *HANDBOOK OF MANUSCRIPTS IN THE LIBRARY OF CONGRESS* (1918).

29. *English Short Title Catalogue*, BRITISH LIBRARY, <http://estc.bl.uk> (last visited Oct. 24, 2011).

since it was not regarded as American. In English archives, they relate to the Privy Council's colonial, rather than its domestic, jurisdiction. In family or personal papers, their printed nature may make them seem not particularly special, because they are not in the actual handwriting of an ancestor. Collectors may also not realize that they have scholarly value. We hope this catalogue of digital images can grow with new discoveries. A significant advantage of its digital format is that new material can be easily added without owners' having to relinquish possession of their copies.

¶35 Beyond printed cases, we have found manuscript versions of printed cases for a few appeals.<sup>30</sup> To date, we have located no manuscript materials that appear to have been circulated to the Council in the manner of the printed cases—but if ever such materials are located, they can be added to the catalogue.

¶36 In addition to the printed cases, related Privy Council documents have survived and are held at TNA. The Privy Council's *Register* is in excellent condition, but miscellaneous documents such as petitions, committee reports, and other instruments are experiencing the ravages of time, as most have passed their 250th birthday. Indeed, during just the life span of this project, some of the Privy Council documents usable initially in the TNA reading room were moved to the Conservation Division for use only under supervision due to their fragile condition. The digitization of the miscellaneous Privy Council documents (referenced as PC1 at TNA) and their presence on the *Anglo-American Legal Tradition* web site will enable images of these documents to be linked from the annotated digital catalogue when it appears on the Ames Foundation web site.

## Looking Forward

### New Scholarship

¶37 A hundred years ago, the editors of the *APC* took marginal interest in the specifics of appeals from the colonies, declining to document them in detail. "Considerations of space" led them to compress "the numerous colonial appeals." The *APC* editors went on to explain their rationale: "Most of these are of no biographical or legal interest and to have given in full the complicated details of the family broils and commercial vicissitudes of the forgotten, or the record of the orders for hearing, postponements, partial hearings and further postponements, would have been neither advantageous nor possible."<sup>31</sup>

¶38 Today, the appeals may contribute to a number of ongoing scholarly efforts. On both sides of the Atlantic, historians and legal scholars have redrawn the lines of seventeenth- and eighteenth-century history. Atlantic history—accounts that encompass the transatlantic world as its participants saw it, undivided by later

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30. Examples include *Finney v. Byrne* (Delaware 1774) (draft of the appellant's case) (on file with the American Philosophical Society); *Freebody v. Cook* (Rhode Island 1754) (draft of the respondent's case) (on file with the Manuscript Division, Library of Congress); and *Kennedy v. Fowles* (New York 1742) (draft of the appellant's case) (on file with the New York State Library).

31. 3 ACTS OF THE PRIVY COUNCIL, *supra* note 16, at xii.

political divisions—dominates what was once colonial American history.<sup>32</sup> The Privy Council appeals reveal this transatlantic world. Scholars revisiting the subjects of older imperial history have brought renewed focus to the implications of having different political systems to govern territories distant or overseas.<sup>33</sup> At the same time, international scholars, particularly of Australia, Canada, New Zealand, and Africa, have focused on relationships between settlers and indigenous populations and the ways in which settler colonialism displaced and governed.<sup>34</sup> Within American legal history, there is new interest in the early development of constitutionalism, the history of judicial review, and the role of the judiciary.<sup>35</sup> Indeed, the history of the Privy Council appeals plays a prominent role in an *amicus curiae* brief recently filed in the U.S. Supreme Court.<sup>36</sup>

¶39 The annotated digital catalogue will help scholars explore what the global law of the colonial world was like by contributing to the larger international effort to uncover the record of appeals within the colonies of the British Empire.<sup>37</sup> The Division of Law at Macquarie University has an excellent site reproducing the “surviving records held in London of all the unreported appeals from the Australian colonies” to the Privy Council’s judicial committees prior to 1850.<sup>38</sup> Additional projects will permit national boundaries to fall away as cross-comparisons become possible when scholars focusing on a variety of jurisdictions post their findings on the web. As more sources become available, scholars may be able to sketch the ways in which a small group of men in London governed vast and diverse areas and

32. See, e.g., *ATLANTIC HISTORY: A CRITICAL APPRAISAL* (Jack P. Greene & Philip D. Morgan eds., 2009); BERNARD BAILYN, *ATLANTIC HISTORY: CONCEPT AND CONTOURS* (2005); *THE BRITISH ATLANTIC WORLD, 1500–1800* (David Armitage & Michael J. Braddick eds., 2002); *THE CREATION OF THE BRITISH ATLANTIC WORLD* (Elizabeth Mancke & Carole Shammas eds., 2005).

33. See, e.g., LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY* (2009); KEN MACMILLAN, *SOVEREIGNTY AND POSSESSION IN THE ENGLISH NEW WORLD* (2006); *NEGOTIATED EMPIRES* (Christine Daniels & Michael V. Kennedy eds., 2002); CHRISTOPHER TOMLINS, *FREEDOM BOUND* (2010); CRAIG YIRUSH, *SETTLERS, LIBERTY, AND EMPIRE* (2011).

34. The vast contemporary scholarship is too broad to even begin to list here. For an interesting blog on the subject, see *SETTLER COLONIAL STUDIES BLOG*, <http://settlercolonialstudies.org> (last visited Oct. 24, 2011).

35. See generally LACROIX, *supra* note 3; YIRUSH, *supra* note 33.

36. Brief for National Governors Association et al. as Amici Curiae Supporting Petitioner, *Maxwell-Jolly v. Santa Rosa Memorial Hospital*, 131 S. Ct. 996 (2011) (No. 10-283), 2011 WL 2132704.

37. For sources on later printed appeals, see JERRY DUPONT, *THE COMMON LAW ABROAD* (2001); CHARLES C. SOULE, *THE LAWYER’S REFERENCE MANUAL OF LAW BOOKS AND CITATIONS 74–75* (Boston, Soule & Bugbee 1882). For information about the later appeals procedure, see P.A. HOWELL, *THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 1833–1876* (1979). For sources on India, see Mitra Sharafi, *The Marital Patchwork of Colonial South Asia: Forum Shopping from Britain to Baroda*, 28 *LAW & HIST. REV.* 979 (2010); Arthur Mitchell Fraas, “They Have Travailed Into a Wrong Latitude”: The Laws of England, Indian Settlements, and the British Imperial Constitution 1726–1773 (2011) (unpublished Ph.D. dissertation, Duke University), available at <http://dukespace.lib.duke.edu/dspace/handle/10161/3954>; MITRA SHARAFI’S SOUTH ASIAN LEGAL HISTORY RESOURCES, <http://hosted.law.wisc.edu/wordpress/sharafi/#> (last visited Oct. 25, 2011). Additionally, Jim Phillips of the University of Toronto kindly informed us that he believes there were twelve appeals from Nova Scotia between 1749 and 1792. E-mail from Jim Phillips to Mary Bilder, Aug. 2, 2011 (on file with authors).

38. *Unreported Judicial Decisions of the Privy Council, on Appeals from the Australian Colonies Before 1850*, MACQUARIE UNIV., <http://www.law.mq.edu.au/public/redirect/?id=7791> (last visited Oct. 25, 2011).

peoples; what the world looked like from their perspective; and how their decisions related to race, ethnicity, gender, economics, politics, and countless factors yet to be discovered. Scholars will gain a firmer grasp on the ways in which the appeals (and review and disallowance) altered the lives of people in the many colonies around the world.<sup>39</sup>

¶40 In particular, we hope the project will interest and excite scholars of the Caribbean. Our searching uncovered many printed cases from the Caribbean colonies, such as Jamaica and Barbados, as well as correspondence from mainland colonies discussing the importance of the Caribbean appeals.<sup>40</sup> The history of the Caribbean appeals and the relationship to slavery and to slave societies remain relatively unexplored. Moreover, surprisingly few accounts of colonial history have sought to link the political and legal history of the Caribbean and the mainland colonies.

### Digital Resources

¶41 This project also offers one model for documentary scholarship in the digital age. When Morris Cohen began his work on the *Bibliography of Early American Law (BEAL)*<sup>41</sup> more than forty years ago, the image of the solitary scholar at work was the norm. One person could aspire to find and organize the subject matter, and carefully catalogue and arrange the information according to standard bibliographic conventions. Choices for reader access to the material were often limited to a set of standard options: sections, lists, indexes. To deal with the static nature of the print product, *BEAL* includes eight separate indexes to ensure multiple points of access. The addition of a CD-ROM version was designed to offer even more options for the user.

¶42 Today, a successful web-based project requires similar substantial thought about the user interface and significant technical skill with electronic data manipulation to accommodate flexibly the many search strategies and interests of potential users. Ideally, at the same time, the digital format should retain the significant and often overlooked advantages of the book: a permanent, reusable, sequential organization of material. Thus, in this catalogue, the descriptions of each appeal can be printed out so that users can create their own “book” version of the appeals.

¶43 In the past, the bibliographer served as the eyes of the scholar, describing each item in detail to aid those who would otherwise have to travel to view an item, obtain a photocopy, or, if they were lucky, arrange an interlibrary loan. Unlike a traditional bibliography, the annotated digital catalogue focuses on the content of the documents. The documents as artifacts—their size and watermarks, for example—are not described, though they may be evident to the careful viewer. But the

39. For an ambitious records project devoted to the Judicial Committee of the Privy Council, see *Judging Empire: The Global Reach of the Judicial Committee of the Privy Council*, PLYMOUTH UNIV., <http://www.plymouth.ac.uk/pages/view.asp?page=32920> (last visited Oct. 24, 2011).

40. The Privy Council still maintains jurisdiction over appeals from “the UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee.” JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, <http://www.jcpc.gov.uk> (last visited Oct. 24, 2011).

41. MORRIS L. COHEN, *BIBLIOGRAPHY OF EARLY AMERICAN LAW* (1998).

catalogue adds value in a new way by arranging the items and documentary images in a flexible and searchable format and by linking them to other related material.

### The Goal

¶44 More than anything, the annotated digital catalogue of appeals is a foundation for study. It aims to provide a comprehensive list of Privy Council appeals, arranged in a consistent and careful manner, reminiscent of the methods of old-fashioned bibliographies, to enable scholars to apply their skills of discovery and analysis to the data. Within that framework, it adds its own bibliographic contribution—unearthed printed cases and related Privy Council documents with their citations and images available through a single interface. With the catalogue, scholars, sitting at their desks, can accelerate the efforts for which the project was undertaken—the illumination of the colonial world.

### The Colonial Appeals Enterprise and Morris L. Cohen

¶45 This project required the diverse skills of many people. We have had the happy experience of being part of a collaborative team—historians, librarians, information technologists. We were extraordinarily lucky to have the support of the Ames Foundation and the incredible commitment to the project of its Vice President, Charles Donahue. His participation is an example of the importance of the sharing of skill sets in enabling a project to flourish. The technical support for the web presence from the staff of the Digital Lab and the Harvard Innovation Laboratory in the Harvard Law Library, thanks to its director, John Palfrey, enables us to share the results with the world at the user's convenience. Knowledge of colonial law and the appeals process, technical expertise and creativity with database design and web sites, and basic bibliographic expertise of the many librarians involved combined to make this project possible.

¶46 On a more personal note, we want to share the extent and the importance of Morris Cohen's role as an inspiring member of this collaborative team. He was there for us from the beginning. When the idea of focusing on colonial appeals first crystallized, we needed sage advice and immediately turned to Morris. He knew about appeals to the Privy Council, of course, as he knew about most everything that we ever mentioned to him. He had, however, never really thought much about where the documents related to those appeals might be. Given his insatiable curiosity, Morris immediately wanted to know. He embodied the sort of "inquisitive spirit" for this undertaking that George Chalmers had noted.

¶47 The Privy Council problem fit neatly into earlier problems that had intrigued him. As with the *Guide to the Early Reports of the Supreme Court of the United States*, an annotated digital catalogue with images of documents would help scholars illuminate the "jurisprudential core" of colonial law.<sup>42</sup> Of course, Morris found *all* early legal documents fascinating, and the printed cases presented a type of early legal publishing that he had not previously investigated. They fascinated

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42. COHEN & O'CONNOR, *supra* note 15, at xi.

him in part because their importance reminded him of his earlier pleas for the preservation of lawyers' papers as historically significant documents. Not surprisingly, creating a comprehensive catalogue with the location of extant printed cases appealed to the man who had spent years on *BEAL*.

¶48 As we faced challenges, Morris repeatedly came to the rescue. When the difficulty of working with the crumbling volumes of the original *APC* became apparent, Morris called William S. Hein and Co. and asked the publisher to reprint the set, agreeing in return to write the introduction for the reprinted edition.<sup>43</sup> When a particular issue intrigued him, he would use his own research assistants to delve into the lives of counsel arguing the appeals, to search the *Calendar of State Papers, Colonial*, or to ferret out answers to specific vexing questions. He would regularly send us e-mails about relevant books and articles he encountered. Through his wide network of colleagues, he put us in touch with librarians and historians in the United States and England who could help further the project. He even joined us at the law library at Columbia to search the rare book stacks with Whitney Bagnall, at the time the Head of Special Collections, for some long-hidden printed cases; Morris was as excited as the rest of us when they resurfaced. As late as November 2010, he continued to act as our mentor, providing helpful feedback on a mock-up of the user interface to the annotated digital catalogue.

¶49 We wish that he could have known of Robert Palmer's recent digitization of the miscellaneous Privy Council documents for the *Anglo-American Legal Tradition* web site. Morris had encouraged us to capture as many of those documents as possible, since time was rendering them more and more fragile. He would have breathed easier knowing that all of those Privy Council documents, not just the ones related to colonial appeals, are "safe."

¶50 As we near a launch date, we miss Morris in so many ways. Who else has the breadth and depth of knowledge, both historical and bibliographic, to help with the myriad decisions yet to be made? Things, large and small, we would love to ask him we now have to decide on our own. Should we include some particular set of facts, names, relationships—or not? In addition to the web site, should there be a print component to the project? Related questions continue to arise: Are peripheral documents (such as a newly uncovered broadside by a participant in one of the last cases appealed to the Council) worthy of acquisition by a law library? Why would a single volume of 1772 appeals to the House of Lords (similar in look and feel to appeals to the Privy Council) suddenly appear on eBay? So many interesting questions remain—some that Morris would have been able to answer and some that no one can answer yet.

¶51 Above all, throughout this process we were bolstered by Morris's conviction that providing access to and awareness of the material would in the end be worthwhile. As months turned into years, Morris's faith in the importance of such scholarship kept us going.

¶52 As we look forward to the new world of digital bibliography and collaborative teams, we carry Morris with us. He was devoted to organizing, cataloguing, and

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43. ACTS OF THE PRIVY COUNCIL OF ENGLAND: COLONIAL SERIES (William S. Hein & Co. 2004) (1908–12).

preserving the past—but always for exciting future uses. He was above all a delightful and generous collaborator. His enthusiasm swept away the anxieties and doubts of any daunting project. When the annotated digital catalogue of “American” appeals to the Privy Council finally launches in 2012, Morris will be there with us.