# COLONIAL MARYLAND LEGAL HISTORY

In colonial Maryland, no single group held a monopoly on the lawmaking power. The British crown, the British parliament, the proprietor, the colony's governor, the governor's council, judges and the colonial general assembly all established rules, resolved disputes and invoked government to enforce their decisions. Each lawmaking body in turn was limited not only by the other bodies but by practical concerns. The nature of the issue and the way in which it arose affected which body engaged in lawmaking activity and how the bodies interacted. Groups such as Indians, women, indentured servants and slaves, excluded from direct participation in lawmaking, acted in ways that influenced the laws that related to them.

Smith's article defines nine sources of law for colonial Maryland:

1 - the charter as implemented by commissions, instructions and conditions of plantation
2 - the acts of the provincial assembly
3 - the acts of parliament
4 - common law of England to the extent it was received in the colony
5 - local custom and usage
6 - judicial commissions and instructions to administrative officers
7 - judicial practice in procedural matters, including rules of court
8 - decisional laws of various courts of Province
9 - Proclamations and conciliar orders issued by executive authority, or royal proclamations extended to colony

The Charter begins in a preamble that refers to Cecil, son and heir to George Calvert. The father is mentioned because he was the driving force behind the new colony. George Calvert, the first Lord Baltimore, was a highly respected councillor, but his proposed marriage of the king to Spanish royalty did not succeed and drew suspicion of Catholicism. He then announced his Catholicism, withdrew from court intrigues and threw his energy into commercial enterprise. He had some experience with lands in Ireland and an unsuccessful ventures in Newfoundland, Canada (Avalon). He traveled to Virginia in search of new lands to colonize and he applied for lands north of Virgina, but he died before the grant was accomplished.

The Charter next refers to Calvert's zeal for the propagation of the Christian faith. This in fact is political dynamite. It takes us back three generations of British monarchs to Henry VIII and his claim to be the head of the church in England. How serious is the language on religion in the Charter to be taken?

In 1632, Cecil Calvert, the second Lord Baltimore, received a charter for a proprietary colony north of the British Crown's grant to the Virginia Company. The colony was named "Maryland" in honor of the King's wife, Henrietta Marie. Calvert planned the colony as a commercial venture, and he enlisted the support of Catholic coreligionists who sought to escape the political discrimination they faced in England. To attract settlers to his new lands, the second Lord Baltimore offered to grant land for a small annual quitrent to anyone who transported men between the ages of sixteen and fifty to the colony. He recruited a small group of gentlemen, mostly Catholic, and a larger band of labouring men, mostly protestant, whom he sent in 1633 on two vessels, the Ark and the Dove, to establish a colony in Maryland. English officials counted 128 persons on board as the vessels left London, but the ships stopped at the Isle of Wight to pick up two Jesuit priests and several Roman Catholic laymen. Persons leaving England were required to take an Oath of Supremacy which denied papal supremacy and could not be taken by any Catholic priest. An early promotional tract said nearly 200 people embarked.

Lord Baltimore's settlers first came ashore at St. Clement's Island in the Potomac river opposite the mouth of St. Clement's bay. They erected a cross and celebrated mass to mark the commencement of colonization on New Year's day, 1634. That date now serves as a reminder that familiar words and concepts often meant something quite different in colonial times, because until 1753 the new year began on March 25th.[1]

## THE CHARTER

1. History of charters:
   What is a Charter? A charter was a form of conveyance - an irrevocable descendable grant. In medieval times, land was conveyed by livery of seisin and the charter was merely presumptive evidence of the transaction and a record of its terms. This idea could be generalized to find the charter as a record and public acknowledgment of the transfer from one party to another of dominion in whole or in part. Thus, we find the various charters to communities such as the Charter to London of William I and of Henry I. The borough charter marks the step to a grant to a community rather than to an individual. The Charter states the various conditions on which property is held, and by so doing classifies the sort of property that may be held. The property might be an intangible, such as the right in Anglo Saxon times to hold certain kinds of jurisdiction. A charter might be drawn up to settle a dispute (see Magna Carta). Early company charters were to give a body the right to associate and to set up a governing body, but to make privileges more effective it was usually established that none could follow the trade unless a member of the chartered group. Under Elizabeth, the English repel the Spanish Armada and English seafarers begin to consider projects of colonization. In the sixteenth century and after came the practice of an exclusive license to trade overseas, parceled out by area. In America the charter was not only to trade but to colonize.

2. Relationship of Charter to Inhabitants: What is the significance of a grant when existing inhabitants are recognized? Cabot "discovered" America in the 1490s which was the basis of the English claim to America. Supposedly his voyages vested rights in the soil of the world in the king who then can grant rights to others. King Charles I granted the charter which was the basic document establishing the framework of legal authority in colonial Maryland. In the political theory of the early seventeenth century, overseas possessions were part of the royal demesne. But royal power clashed with Parliament and the political scene in England was one of great turmoil. The monarchy gave way to Cromwell's Protectorate, the Protectorate was succeeded by the Restoration of the monarchy under Charles II and finally the Glorious Revolution of 1688 brought William and Mary to the throne under circumstances conducive to a rise in the power of parliament. The rapid reversals of political and religous dominance had unsettling effects in the colony as well.

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[1] The New Style or Gregorian calendar was promulgated by Pope Gregory XIII in 1582, but England and its possessions followed the Old Style calendar for another 170 years. In addition to beginning the year on March 25, the Old Style calendar was ten days behind the New Style, so that Old Style March 25 was April 4 in the New Style calendar. The difference widened to eleven days in 1700. The English Calendar (New Style) Act of 1750 took effect in 1752 with the day following September 2 becoming September 14. The year 1753 began the following January 1.

Citations in this book include both Old Style and New Style years; e.g. March 1, 1633/4. References to days in the month are left in the Old Style to prevent confusion.

The British Parliament also asserted its authority over the colonies. By 1659 Parliament was asserting its authority to legislate for the colonies. Colonists decided for themselves on the applicability of parliamentary statutes that preceded the founding of the colony or that did not mention any colonial impact, but all understood that they were bound by parliamentary laws that specifically stated they applied to the colonies.

The charter refers to a country not yet cultivated and planted, though in some parts inhabited by certain barbarous people. This gives rise to great disputes in two directions - First, the recognition of native inhabitants raises questions of power to make these grants. The Spanish and international law from an early time recognized that the Indians held title to the land - their failure to accept Christianity did not affect these rights. Therefore, only purchase from the indians would legitimately transfer title. At the same time, the European nations were quite willing to make claims vis-a-vis other European nations, but the grants were effectively as to lands to be acquired. The colonists accepted this proposition and the first act was to purchase the land from the Yoacomaco who were eager to sell because threatened with ouster by the Susquahanna anyway. "From the beginning, the English treated groups of Indians as separate nations or separate tribes, never as subjects of the Crown." There is an ambivalence toward the Indian. Any rights that the king conveyed were his own, and that did not necessarily convey rights of the Indian. The British subject held his possessions of the crown and not of the Indians, but it still might be necessary to deal with the Indians to acquire the land. The point is that the grantees were subjects of the King and any rights acquired by them were to be for the King and not on an individual basis.

While the grant includes the soil, fishing and mining rights, they remain in question with the Indian. On the other hand, the patronages of advowsons are the rights to name the minister to the living which in turn is assumed to be supported by the people. This is clearly only a Christian right. This is particularly tricky as patronage for a Catholic. The grant talks in terms of spreading the faith -- but the faith cannot be Catholicism.

Second, Englishmen had already explored the Chesapeake. Indeed, the Secretary of the Virginia Colony, William Claiborne started a small trading post in the province on Kent Island in 1631, but Claiborne did not have a royal grant.[2] Since Claiborne in fact cultivated land on his settlement in Kent Island, he claimed not to be under the charter. This legal dispute forms the background for many of the troubles of the early colony.

3. Boundary Lines: The language is confidant, but some of the locations were by no means clear at the time. There would be disputes over many areas, most famously with the Penns over the northern border, but also frequent questions with Delaware and Virginia.

4. Grants of Power:

Baltimore is Lord Proprietor - granted the land unlike the other forms of government in America, the commercial company or direct royal government. The powers granted are those of the Bishop of Durham which was a palatinate of extensive power because of its situation on the border beyond the effective reach of the king and a necessary ally to prevent invasion.

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[2] Although Kent Island lay within the royal grant, Claiborne claimed his occupation gave him rights superior to Lord Baltimore there. The dispute led to a brief skirmish on the water in 1635 where Claiborne's men were defeated. Claiborne's efforts to secure redress in England failed, and Kent Island came under proprietary control.

He holds of the king, though his obligations in free and common socage are mild -- two arrows and one fifth of gold and silver. While these are regular obligations, feudal law held other levies for particular occasions could be appropriate.

The lawmaking power in the proprietary colony of Maryland appeared to be vested in Cecil Calvert, the second Lord Baltimore. Under the charter, he held all the land and could grant it to others under such conditions as he pleased. He appointed all judges and other governmental officials. The charter granted him power to enact laws and to promulgate ordinances which did not deprive any person of life, limb, or real or personal property, and to enact laws which could have that affect "with the advise assent and approbation of the Free-men of the said Province."[3]

How, mechanically, was the legislative process expected to work?

Lord Baltimore had to stay in England to protect his rights against the intrigues in the court. At such a distance from his colony, he was forced to rely upon his brother, Leonard Calvert, whom he

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[3] In constituting them "the true and absolute Lords, and Proprietaries" of the colony, the charter for the proprietary colony of Maryland specifically granted Cecil Calvert, the second Lord Baltimore, and his heirs

> "free, full, and absolute power to ordain, make, enact, and under his and their seales to publish any Lawes whatsoever, appertaining either unto the publike State of the said Province, or unto the private utility of particular Persons, according unto their best discretions, of and with the advise assent and approbation of the Free-men of the said Province, or the greater part of them, or of their delegates or deputies, whom for the enacting of the said Lawes, when, and as often as neede shall require, We will that the said now Lord Baltemore, and his heires, shall assemble in such sort and forme, as to him or them shall seeme best: . . . And likewise to appoint and establish any Judges and Justices, Magistrates and Officers whatsoever, at sea and Land, for what causes soever, and with what power soever, and in such forme, as to the said now Lord Baltemore, or his heires, shall seeme most convenient: Also to remit, release, pardon, and abolish, whether before Judgement, or after, all crimes or offences whatsoever, against the said Lawes: and to doe all and every other thing or things, which unto the complete establishment of Justice, unto Courts, Praetories, and Tribunals, forms of Judicature and manners of proceeding do belong: although in these Presents expresse mention be not made thereof;n and by Judges by them delegated, ;to award Processe, hold Pleas, and determine in all the said courts and Tribunalls, all actions, suits, and causes whatsoever, as well criminall as civill, personall, reall, mixt, and praetoriall; . . . Provided neverthelesse, that the said Lawes be consonant to reason, and be not repugnant or contrary, but as neere as conveniently may be, agreeable to the Lawes, Statutes, Customes, and Rights of this our Kingdome of England.
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> . . . the said now Lord Baltemore and his heires, by themselves, or by their Magistrates and Officers in that behalfe duely to be ordained as aforesaid, may make and constitute, fit and wholesome Ordinances, from time to time, within the said Province, to be kept and observed, as well for the preservation of the Peace, as for the better government of the people there inhabiting, and publikely to notice the same to all persons, whom the same doth, or any way may concerne; . . . . So as the said Ordinances be consonant to reason, and be not repugnant nor contrary, but so farre as conveniently may be agreeable with the Lawes and Statutes of our Kingdome of England, and so as the said Ordinances be not extended, in any sort to bind, charge, or take away the right or interest of any person, or persons, of, or in their Life, Member, Free-hold, Goods or Chattels."

appointed governor of the colony. The governor in turn relied upon the Catholic gentlemen who came to the new land as his councillors. The ability of this group in turn was checked by several forces. First, the policies in Maryland could not offend the Crown. Any attempt to establish a Catholic colony or to discriminate against Protestants would have brought the wrath of the king and parliament down upon the colonists. Second, the charter restricted the enactment of laws to those which had the assent of the freemen of the Province, so the Catholic minority had to work with the protestant majority. Indeed, the free men of the colony used the power of assent to secure the power to initiate laws.

What is the status of an "unreasonable law"? There is a limit on lawmaking power stated in the charter but no express mechanism to review it. What then is the effect of the provision in the charter?

The Charter shifts then from the grants to Lord Baltimore to provisions directed at the inhabitants and others who might go to Maryland. They need some relief and protections from English laws.

What is the status of English law?
Laws and Ordinances of Baltimore are not to be repugnant or contrary, but as near as conveniently may be, agreeable to the Laws, Statutes, Customs and Rights of England. But that may refer to positive law limits on Baltimore, and not necessarily the normal extent of English law. It also recognizes the existence of differences necessary in the different situation of the new world. Note license to do some things that raise questions in England - e.g. leaving the country, fortifying castles, etc.

What rights are established by the clause on allegiance? The subjects of the King transported to Maryland remain subjects still, and their descendants are subjects to the king. They are called "Denizens" here, which is as far as the King can go in grant of royal favor, although later charters make them citizens which is parliamentary concern. Here we go back to "Calvin's Case" in 1608. Elizabeth I's successor, James I was also king of Scotland. Prior to his accession, the throne of England and Scotland were in different hands, but he unites the two countries with two separate parliaments into a kingdom with a single king. Thus English and Scotch are subjects of one king, though with different parliaments. James also pressed the royal prerogative to the maximum in claiming power.

Baltimore has legislative rights, but people of Maryland need rights too. What rights do they get?
Not only are they permitted to transport themselves to Maryland, have property rights of English citizens, but they can import goods and other merchandise which are generally allowed to be sold. Also power to export goods without discriminatory taxation.

The Charter then returns to grants to Baltimore - levy to train men for war, power of martial law, power to confer titles not in use in England and to erect towns, boroughs, etc. These are things that the crown gives charters for. Here they are to derive from the Proprietor. Similarly the naming of ports to which port law will apply. Although fishing and forestry rights are preserved, they are not to damage the interests of Baltimore or the inhabitants of the province.

What rights of taxation does Lord Baltimore have? Specific export taxes provision. Also individuals are to hold of him in feudal sense which will lead to obligations to Baltimore rather than the King.
What are the rights of taxation left? King gives up certain rights to tax for lands, tenements, goods or chattels, or goods in harbors for a discharge price. But King cannot surrender the rights of parliament.

The Legislature:

1638 Reject proprietors laws. [Calvert says many things unsuitable to the people's good and no way conducing to your profit, and rejected whole because thought it was all or nothing. Still passed laws which should be just as good] Commission vesting executive and judicial power in governor, and delegated ordinance power. Assembly tries parties to Claiborne battle and condemns Smith to death and colonists innocent from self-defense. Laws passed, but only titles remain. Attainder of Claiborne.

1639 Letter of August 1938 allowing Governor to decide on validity of laws made locally until rejected by Proprietor. Governor and Council together constitute the Provincial Court. Basic act to last to next assembly or three years if no assembly called.

1640 More particular laws passed, some with no expiration stated while others to last two years or next assembly

1642 All enacted laws to endure only to the next assembly. Later seession that year votes all bills to endure three years or until the next meeting of Assembly.

1649 Assembly Letter on the time of troubles which rejects the proposed perpetual body of laws sent by proprietor

1650 Governor and Council sit separately from the delegates of freemen. (1651 Governor Stone away, and acting Governor Green pronounces Charles II king. Result despite repudiation is the Commissioners from Parliament)

1654 Legislature to be called within three years

1658 Lower House votes to constitute self 4 delegates per county, elected by freemen; laws generally back to the three year limit

1660 Upper and Lower House confrontation - Fendall's rebellion as he resigns commission from Proprietor and accepts from Assembly, but Restoration does him in. Baltimore or Upper House still often drafting the laws throughout the period.

1671 St. Mary's City given separate representation (2 members) - allegedly because they would send governor supporters who had lost in county elections

1675 Governor not considered a member of Upper House according to Carr.

1689 Protestant Association request granted to become a royal province

1692 First Legislature called by royal governor Copley establishes permanent committee structure. Growth in legislative power vis-a-vis governor.

1722 Resolves

Issues: What is the function of the Assembly, and how does it change?

(Why did the assembly reject the Proprietor's laws in 1638? Why did Baltimore accede to their laws at that time? How does the assembly or any legislature operate to get specific laws enacted? Advice and assent, growth on English parliamentary model with no proprietarial concession, functioning body with standing committees)

What is the relationship of the Upper and Lower Houses and how does it change?

(What were the advantages and drawbacks of separating into two houses in 1650? Catholic proprietor obtains coherent working body with veto power in proprietary hands without having the Governor exercise that veto. Lower house obtains a coherent unity. Division early and shift in composition of Privy Council, with division also enhancing separation of powers of judicial and legislative. Nevertheless, the court party domination in upper house was a constant conservative force.)

What is the impact of enactments -- when are they valid and for how long?

(Early concern in part from potential to prorogue and not meet the assembly. Thus short term laws help hold the governor's feet to the fire. Codifications more likely to follow the royal period. Copley in 1692 repeal all prior laws, pass new ones with 68 of the 85 laws to be perpetual rather than temporary.)

Franchise:

All freemen originally. Personally attend or send a proxy.

1637/8 excuse Jesuit priests from attending because Assembly tries Smith and priests cannot participate in trying capital cases.

1642 Weston seated although not a property holder

1645 Informal exclusion of Catholics from voting.

1648 Margaret Brent not permitted to sit in legislature despite property and position as attorney-in-fact for the Governor

1650 For several years swing between representative assemblies and anyone can attend. Legislation determines that delegates to be elected, and that the appointed members of Council will sit as a separate body (including from time to time gentlemen by separate writ)

1654 Formal exclusion of Catholics from vote

1658 Franchise restored to Catholics

1670 Governor only gives warrants for elections to persons with 50 acres or 40 pounds sterling; this policy adopted by statute in 1678 (real fight is to control governor's power over calling elections and sending out writs)

1718 Catholics disenfranchised again

What is the relationship between the legislature and the people?

(Franchise starts as all freemen, which shifts power to protestants early as indentured men become free; women, servants, slaves and minors always excluded, but freehold required in 1671 and ultimate exclusions on religious grounds)

2. The Court System:

KING IN COUNCIL[1]

COUNCIL[2] ---------- PROVINCIAL COURT[3]

CHANCERY[4] ADMIRALTY[5]

Court of Delegates[6]

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[1]Appeal to King in Council in cases over 300 pounds sterling, established at least with the advent of the royal period and not let go.

[2] The Privy Council gets commissions from Proprietor and then King, but need to get individuals of wealth, ability and loyalty in era when loyalties shifting, wealthy returning to England and death at an early age meant great turnover in the seventeenth century. Towards the end of Calvert proprietorship, the Council had become identified with him, but the royal colony replaced Catholics with Protestants. Later councillors became an essentially hereditary elite -- often served in general assembly before going to council, were native born and attached to the state.

[3] Originally Governor and Council. They initially are sitting as court. In 1649 or 1650 the Governor and Council begin to sit separately in the legislature. They gradually take over the function of the House of Lords including appellate jurisdiction - writ of error - curiously enough from their own decisions (though Carr says Governor not part of Upper House after 1675). Judges did not go on circuit, as English judges did, but could have special commissions.

[4] Governor was the Chancellor (1634-1661) then separate office (1661-91) then Chancery set up as court separate from Provincial Court, until 1699 when reunification and Governor resumes as Chancellor until revolution.

[5] Governor is judge of admiralty with assistance of associates in Provincial Court. 1684 Admiralty gets a separate constitution, although still presided over by member of Provincial Court.

[6] Jurisdiction over probate and administration of estates was done by the Provincial Court or a specially selected justice (usually the Secretary for the Province) until 1673. Philip Calvert, as Chancellor from 1661 - 1682 personally responsible, and his personal position makes the distinctions of authority difficult - i.e. when is he acting over probate as justice and when is he Commissary and heading Prerogative Court. The Prerogative Court had responsibility for succession to land as well as personal property unlike the English ecclesiastical court of the ordinary which only controlled chattels. It also had powers of enforcement not open to the British ecclesiastical court. While it had official jurisdiction over the orphans of testators, local county court supervision was more efficient and practical. Until assets inventoried and creditors paid, administrator controls estate under supervision of Prerogative Court, but when process finished and shares determined the final accounts sent to county courts which issued orders including those dealing with estates of orphans. The statute of 1673 laid out the structure. The commissary general of the Prerogative Court was chief official and there was review by court of delegates, a

Chancellor

Judge on Chancery court, but also judge of Probate (head of Prerogative Office) known as commissary. 1692-99 Chancellor rather than governor as chief judge on chancery and separate judges, but then reverse and return to governor and councillors until 1720.

Chancery Court

Same people as the provincial court, just change of hat.

1661 Philip Calvert temporary governor for a year, retains chancery, head of provincial court, and Council membership 1661-82 while Baltimore's son Charles becomes governor

1692 Provincial Court separates from Council, but Governor and Council constitute the Court of Appeals. Separate chancery court also set up for short period.

Early Courts of Brief Duration

Hundred Courts
Manorial Courts
Mayor's Courts and Recorder's Courts (St. Mary's and Annapolis)
Market Courts (courts of hustings and piepowder)

County Courts -- justices of the peace
Probate Judge

Justices of the Peace

Presided over the Hundred courts which lasted only to mid-seventeenth century
Demand surety of those who broke the peace
Arrest, examine and imprison
1662 took oath of servant girl on paternity of child
1676 imprison runaway servants
1678-84 power to try Sabbath offenses
1692 fine sabbath offenses, trial of damages done by cattle
1694 bond
1696 fine persons who swore (amount and time limits change)
1704 seize illegally imported goods, order whipping of negro with a gun
No record of single justice actions.

County Courts

Begin as the Governor and Council in St. Mary's, then as new counties develop, the original court becomes the Provincial Court for the whole province and each county gets its own county court

By 1694 exclusive civil jurisdiction under 1,500 pounds tobacco, concurrent up to 10,000 pounds. Anything over 1200 pounds subject to review on writs of error. Values tend to be in the cash crop - tobacco - rather than in the scarce monetary units of pounds sterling. Criminal cases not involving life and limb. Here, unlike England, petty theft was not a capital offense and could get county court justice with whipping and fines.

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court specially constituted and commissioned for each appeal. 1695 statute requires orphan juries to report on all orphans. 1715 law shifts to county court power to replace improper guardians. See Carr, "The Development of the Maryland Orphan's Court."

Prior to 1678 could remove from county court to provincial court matters (1) by writ of certiorari before trial; (2) by habeas corpus ad faciendum et recipiendum before trial and issue joined so case tried above; (3) after judgment by appeals for a trial anew; and (4) after judgment by writ of error which specified review of specific rulings. The difference between appeals and writ of error was largely eliminated in 1678.

The Attorneys:
When people could not make it to court, they would appoint others to be in court for them to protect their interests. These were the "attorneys-in-fact". Their essence is to act as proxies rather than to make legal arguments or pleadings. Then we see as the century turns in Day's article, the professional attorney emerging who has studied in the inns. Also the Court limiting who can appear before it.

There are few individuals with any legal learning and little in the way of law books available. No one in the society wants to take a lot of time to develop any professional class. While general assembly takes on some cases, the governor and council begin as the court for the province. The same group function in various guises as the various courts of the English system, following English divisions without having separate individuals in those roles.

In time, the increasing population leads to decentralization of justice into the hands of county courts. Throughout the seventeenth century, however, the judicial positions are part time positions of the local gentry. While the provincial court becomes more professional and gets a high caliber of attorney, the county courts remain somewhat of a backwater.

English system begins with writ from Chancery directed to the sheriff. Maryland uses mesne process - the capias ad respondum to begin the action, or attachment of property in some cases. Pleading then with declaration, plea, replication. Still the point was to reach a single issue which could then be put to decision maker. Not much evolution in rules of evidence, but could still raise insufficient evidence for essential elements. Although the writs of error attacked the declaration, there are no reviews of judicial instructions which is where we normally find the substance of the law stated. Thus, Smith says that the opinions of the Provincial Court sound largely in procedure rather than substance. (1690 Somerset trial jury charge to read the documents and bring in a verdict).

p. 397 judgement in misercordia and capiatur pro fine instead of amercement. Final process at decision uses capias ad satisfaciendum (commit debtor to prison until debt paid), with some fieri facias (order sheriff to take debtor's goods and sell them to pay creditor) and eligit. Real actions habere facias possessionem and habere facias seisinam.

In England, Ecclesiastical courts governed administration of personal property at death, and morals offenses like fornication and adultery, as well as marital law. These functions in Maryland were placed in secular hands which added to enforcement and may have led to substantive differences as well.

The Archives are the original records. There were no published reports of decisions until Harris and McHenry in 1809. That greatly affects what there is record of. Further, while some lawyers were trained, the judges often had less legal training. The justices of the peace were the local gentry and the Provincial Court for much of the time was the Governor's Council and had other tasks. That also explains cases in which court called upon Dulany to give opinions in cases in which he was not engaged.

# THE RECEPTION OF ENGLISH STATUTES AND COMMON LAW

1. 1639 statute directs Governor to act as judge in civil cases according to the "laws or laudable usages of the province" or otherwise according to laws or laudable usages of England in the same or like cases as near as he shall be able to judge."

Note the scepticism on his knowledge of English law and usage. Also laws of province appear to prevail while usages of the province raise questions.

2. 1732 judicial oath demands administration of law "according to the laws, customs and directions of the acts of assembly of this province so far forth as they provide and where they are silent according to the laws statutes and reasonable customs of England as used and practiced in this province."

Not all English statutes or customs, but only those that are customs used and practiced in this province.

What are the advantages to the colonists of the English statutes and common law? -- law is applicable without potential veto of the proprietor, law as in the common law may be seen as a limit on the prerogative power.

But how is a judge to determine whether a particular custom in England is part of the common law?

3. Griffith vs. Griffith's Executors

Widow under will leaving her estate in farm during widowhood with all other real and personal estate devised to children. She did not renounce the will in timely fashion, but now sues for third of the personal estate. Issues - is wife entitled to dower in personal property and, if so, can she recover even though she failed to renounce the will. 1699 statute allowed widow to elect to take bequest or renounce and get the intestate third. 1704 & 1715 statutes specify that where testator leaves a considerable part of personal estate to spouse, she must choose whether to take what is bequeathed or renounce for a third. [Statute does not apply because no part of personal estate was left her].

English law by time of Blackstone permits total exclusion of wife from personal property. This occurs over a century by common law, and is buttressed by statutes to make it apply to areas still not covered.

One issue is whether the right to a third of personal property is common law, or merely a custom of a particular area in England.

A second issue is whether the common law that governs is what pertained when the colony was founded or whether it continued to develop and includes the status of the law at the time of the Revolution.

A third issue is whether the legislative apparent assumption of its common law status freezes the development or makes it a usage of the province to override. Is this the "custom of England as practiced in the province?"

The separation of real and personal estate in jurisdiction for probate in England because of the ecclesiastical court's jurisdiction meant there was an entirely different background and cast to the issue there.

Blackstone says Henry II writ de rationabili parte bonorum, secured by Magna Carta and Finch says law of land in reign of Charles II. Glanvil, Magna Charta, Fleta, Yearbooks and Fitzherbert agree that wifes share was by common law. Remained the case in York, Wales and London until recently when statutes enacted at turn of eighteenth century which allows devising all chattels with no wife taking.