

University of Pennsylvania

From the Selected Works of Arthur Mitchell Fraas

February, 2012

From India to the Atlantic world: "Indian grants" and the Imperial Jurisprudence of the Eighteenth Century

Arthur Mitchell Fraas, *University of Pennsylvania*



SELECTEDWORKS™

Available at: http://works.bepress.com/mitch_fraas/10/

THE McNEIL CENTER FOR
EARLY AMERICAN
S T U D I E S

**“From India to the Atlantic world: "Indian grants" and the
Imperial Jurisprudence of the Eighteenth Century”**

A.M. Fraas, University of Pennsylvania

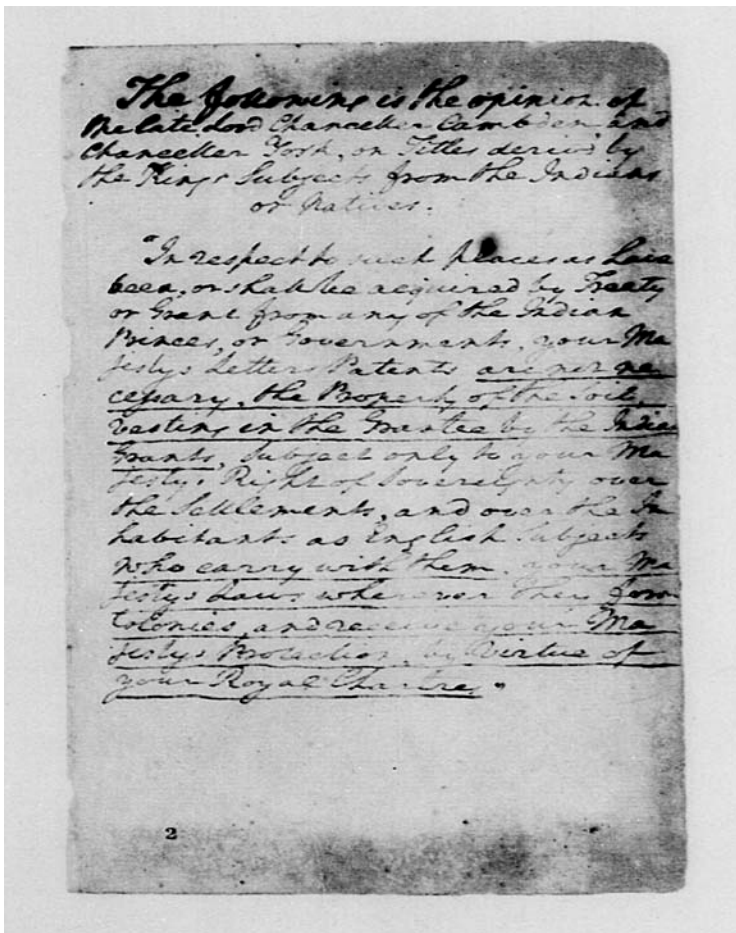
A paper presented to the Brown Bag Works-in-Progress Seminar of the
McNeil Center for Early American Studies, 1 February 2012

(This is a work in progress: please do not cite, quote or circulate without the author's permission.)

Sometime during 1773, George Washington copied a short legal opinion onto the first leaf of his diary:¹

The Following is the opinion of the late Lord Chancellor Camden and Chancellor York, on Titles derived by the King's Subjects from the Indians or Natives.

“In Respect to such places as have been, or shall be acquired by Treaty or grant from any of the Indian Princes, or governments, your Majesty's Letters Patents are not necessary, the Property of the Soil, resting in the grantees by the Indian Grants, subject only to your Majesty's Right of Sovereignty over the Settlements, and over the Inhabitants as English Subjects who carry with them your Majesty's Laws wherever they form Colonies, and receive your Majesty's Protection by Virtue of your Royal Charter.”



¹ Library of Congress, George Washington Papers: series 1b. Diary, January 1 -December 31, 1773, f. 2.

Over the next several years this excerpt spread like wildfire through the community of eager American land speculators. It served as the basis of settler and investor claims to land acquired in private treaties with Native Americans throughout the trans-Appalachian territories. Yet as subsequent historians have been surprised to learn, the opinion copied above had its roots thousands of miles away, in what is now India. Most historians have viewed the use of this 1757 Indian opinion by colonial Americans as something of a farce. Indeed, as early as 1823, in adjudicating a matter related to the opinion, Chief Justice John Marshall wrote that it was “...said to relate to purchases made in the East Indies. It is, of course, entirely inapplicable to purchases made in America.”² However, the writers of the opinion in 1757 would hardly have agreed with Marshall that the legal world of British India was “of course” irrelevant to British America.

A surge of recent scholarship has explored imperial jurisprudence in a British Atlantic context and has provided important insight into the relationships and institutions which characterized the Anglo-American legal relationship.³ This work makes clear that by the beginning of the eighteenth century, a more cohesive set of imperial legal principles emerged which bound the many parts of the British world together through a shared body of laws, practices, and constitutional rules, the growing dissemination of metropolitan legal texts, and the circulation of lawyers and colonial officials. Yet British Asia is still largely absent from the picture.⁴ In this paper I use the example of the 1757 Yorke-Pratt opinion to explore the workings of the eighteenth-century British imperial constitution from the metropolitan perspective, arguing that British Asia belongs firmly within the same frame.

During the summer of 1757 the directors and legal staff of the East India Company (EIC) faced

-
- 2 John Marshall's opinion in *Johnson & Graham's Lessee v. McIntosh* (1823) 21 U.S. 599. Also see E. Kades, “History and Interpretation of the Great Case of Johnson v. M'Intosh,” *Law & History Review* 19 (2001), p. 67; J. Purdy, “Property and Empire: The Law of Imperialism in Johnson v. M'Intosh,” *George Washington Law Review* 75 (2007), pp. 329-371.
- 3 For a few of these works see Mary Bilder, *The Trans-Atlantic Constitution: Colonial Legal Culture and Empire* (Cambridge, MA: Harvard University Press, 2004); Vicki Hsueh, *Hybrid Constitutions* (Durham: Duke University Press, 2010); Daniel Hulsebosch, *Constituting empire: New York and the transformation of constitutionalism in the Atlantic world, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005) and also his “The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence.” *Law and History Review* 21.3 (2003), pp. 439-82. See also Eliga Gould, “Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, Circa 1772,” *The William and Mary Quarterly* 60.3 (2003), pp. 471-510.
- 4 Work linking the legal world of the British Atlantic to that of British Asia is still in its infancy and focused primarily on either the seventeenth century or the period following the Seven Years War. See on the earlier period Philip Stern, “British Asia and British Atlantic: Comparisons and Connections,” *William and Mary Quarterly* 63.4 (October 2006), pp. 693-713. For the later period see Hannah Weiss-Muller, “An Empire of Subjects: Unities and Disunities in the British Empire, c. 1760-1790,” (Ph.D. Dissertation, Princeton University, 2010) and Marshall's excellent *The Making and Unmaking of Empires*.

a potentially serious problem. Nearly a year earlier, an army led by a local Mughal governor had captured the Company's settlement at Calcutta, disrupting the EIC's trade and threatening to overturn the balance of power in the region. A series of coordinated military actions involving Crown troops and Company soldiers had retaken Calcutta by January, and though the EIC in London did not yet know it, had just inflicted a decisive blow against French and Indian forces at Plassey. As English victories mounted in India, the directors and their lawyers worried about how to administer the fruits of conquest. Over the second half of 1757 the directors wrote to Secretary of State William Pitt asking for official government approval and clarification on the distribution of spoils between Crown and Company troops as well as the legal status of Calcutta and its surroundings. Pitt referred these matters to an admiralty lawyer, as well as the Crown attorney general and solicitor general, who provided a series of opinions which were to shape imperial territorial jurisprudence for decades to follow.⁵

The opinions of the lawyers involved, George Hay (an Admiralty lawyer and official), Charles Yorke (the Solicitor General), and Charles Pratt (the Attorney General) hinged on a question central to imperial jurisprudence - who had the legal right to own and govern new colonies? In the first of two opinions the lawyers wrote that all places recaptured in the hostilities should return to their former state. Thus Calcutta should be restored to the Company. However, they believed that all new territorial acquisitions conquered with the help of Crown troops were now “vested in His Majesty by right of conquest.” Some months later Pitt asked for further comment and Yorke and Pratt offered their opinion that “...the property of the soil” (i.e. basic land rights) in those EIC territories acquired by treaty (“Indian grants”) belonged to the Company and that these territories were “...subject only to your Majesty's Royal right of sovereignty over the settlements as English settlements and over the inhabitants as English subjects who carry with them your Majesty's laws wherever they form colonies....” In other words, the EIC had the rights to hold property in India by treaty but these lands would be considered under the dominion and sovereignty of the Crown.

Pratt and Yorke's opinion contained references to pieces of local context, “the Mogul,” “the Nabob of Bengal,” and so forth, but their actual legal conclusions on the nature of royal sovereignty

5 The first of these opinions by Hay, Yorke, and Pratt is dated 16 August 1757 and the second by Yorke and Pratt alone 24 December 1757. For just a few copies in London archives see BL IOR: A/2/7, pp. 99-108, IOR L/L/7/60, BL Add. Ms. 18,464, ff. 1-7; BNA CO/77/19: State Papers Relating to the East Indies, ff.178-80; BNA PRO 30/8/99: Chatham Papers, ff. 236-8. For a list of opinions in the Americas see J.M. Sosin, “The Yorke-Camden Opinion and American Land Speculators,” *Pennsylvania Magazine of History and Biography*, 85 (1961), pp. 38-49.

were far from constrained by India-specific caveats. Indeed, the problems they addressed in the opinion were by no means foreign to other parts of the British imperial world colonial, especially North America. Following the seven years war and the treaty of Paris the Crown faced similar problems of territorial status in the Americas.⁶ The solution of the sitting government in London, embodied in a now-famous 1763 proclamation, established vast swathes of the trans-Appalachian west as subject to royal sovereignty but with property rights ceded to Native Americans under a set of strictures preventing alienation of such land without Crown permission.⁷ Needless to say, many in the American colonies found these strictures confining and problematic. Over the 1760s, a series of American colonial land speculators and investors struggled to find legal confirmation in London for lands they had acquired by treaty or agreement with various Native American groups despite the prohibitions enshrined in the Proclamation of 1763. These pleas largely failed to attract sympathy in the metropole leaving investors eager for any legal reasoning to their advantage. In the early 1770s, likely 1772, a set of American land agents in London latched onto Yorke and Pratt's 1757 opinion as a surefire justification for their western ventures.⁸ These agents transmitted a heavily edited version of the opinion, as seen in George Washington's diary above, to their colleagues in America who eagerly copied and recopied it in order to convince local officials to recognize land bought by investors from Native Americans.

Historians have generally followed the view that this American use of the Yorke-Pratt opinion was “a farfetched rationalization on the part of speculators to legalize their activities.”⁹ While speculators and interested parties did clearly redact the opinion it was also no great secret that it had originated in India. Scholars have speculated on the shadowy ways the original 1757 opinion must have been found and transmitted - yet few seem to realize that it was hardly secret and its origins acknowledged by some of its boosters. By the time Yorke and Pratt's opinion began circulating in America it had been printed twice in London, first in 1767 and then again in 1772.¹⁰ Further, in a 1781

6 The literature on this issue and its backstory is too voluminous to recite. For a recent introduction see Craig Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory* (Cambridge University Press, 2011). For an older study see J.M. Sosin, *Whitehall and the Wilderness* (University of Nebraska Press, 1961).

7 The Proclamation of 7 October 1763 can be found in the Acts of the Privy Council, Colonial Series, IV, pp. 494-6.

8 The story of Yorke and Pratt's opinion once it reached colonial North America has been recounted ably elsewhere, especially by Jack Sosin in his “Yorke-Camden Opinion and American Land Speculators.” See also Stuart Banner, *How the Indians lost their land* (Harvard University Press, 2005).

9 Sosin, “Yorke-Camden opinion,” p. 49.

10 It was printed for the first time in 1767 as part of a series of Parliamentary Papers on the East India Company: *Copy of*

Philadelphia tract by Samuel Wharton, the man responsible for bringing the opinion to America in the first place, its origins were clearly stated.¹¹ Wharton even made explicit analogy between British relations with Indians in India and Indians in America, writing, “This most respectable opinion in favour of the absolute right of Heathen Asiatics to their several territories, applies directly to support the same right, as vested in Heathen Americans.”¹² This kind of cross-imperial analogy and borrowing should not be surprising. India was hardly as radically foreign a place as it might seem from the literature on the early British empire.

Information, people, and laws moved fluidly around the geographic and legal world of the empire. While readers in Boston could catch up on the latest events in Calcutta, those in India likewise read the latest news from the Atlantic world with interest. In 1741, the EIC council at Madras wrote to London justifying their decision in a case before the court of appeals there by referencing a 1729 speech given by the Governor of Maryland.¹³ Likewise, the Madras jailer noted that he had been “advised” that his pay was far below that of his colleagues in the West Indies.¹⁴ Some legal elites even made the transition from India to the Americas. One of these men, the Irishman Joshua Bodley, was the most respected lawyer in 1750s Calcutta, known as far away as London and representing clients including one of the richest Hindu merchants in the city. When he left India his legal acumen and imperial experience earned him a place in America, this time as a powerful land agent in North Carolina. The imperial flow worked in the reverse direction as well. As loyalists fled the American Revolution, many lawyers and officials from America moved to India becoming prominent members of the legal establishment there.¹⁵

His Majesty's Advocate, Attorney, and Solicitor Generals report. August 16, 1757 (London, 1767) [ESTC N27971]. It was then printed again as an appendix in William Bolts' wildly popular *Considerations on India Affairs* (London, 1772). Printed Parliamentary Papers did not usually circulate widely but at least one copy of the 1767 opinion ended up in the hands of the New Yorker Rufus King (1755-1827) which copy is now at the New York Historical Society. Though outside the scope of this essay, it is clear that polemical literature about the EIC did circulate in the American colonies in the early 1770s. The Library Company of Philadelphia had several tracts on Bengal affairs listed in its 1770 catalog and a 1772 response to Bolts' *Considerations* appears in the 1772 catalog of a Boston bookseller.

11 Samuel Wharton, *Plain facts: being an examination into the rights of the Indian nations of America, to their respective countries*, (Philadelphia, 1781). Sosin, in his “Yorke-Camden opinion,” does mention Wharton's pamphlet but notes that it was published some years after the Illinois Company tried in earnest to maintain its land claims (p. 44).

12 *Ibid.*, p. 9.

13 BL IOR H/427: Madras Miscellany, f. 33-34v. (31 January 1741). The Company library at Madras also possessed copies of books printed in Boston.

14 Records of Fort St. George *Consultations*, v.59, p. 111 (20 November 1729).

15 See the example, among others, the lawyer Richard Tilghman who moved to India in the 1770s, also a Mr. Jessup of New York who relocated to India and became the coroner of Calcutta.

While Yorke and Pratt wrote their opinion for the EIC in 1757 in response to events in India , they could hardly have dismissed all thoughts of the British Atlantic and the American colonies as irrelevant. Most legal professionals in the metropole moved back and forth seamlessly between matters relating to domestic Britain, the West Indies, the North American colonies, and India. In doing so, they often applied the lessons and precedents from one sphere to another. Other legal figures of the time, including Dudley Ryder (previously Attorney General, then Chief Justice of King's Bench) and William Murray (later Lord Mansfield) were well versed and influential in imperial jurisprudence, writing countless opinions relating to imperial law, on topics ranging from wastelands in New Hampshire and trade in Georgia to the power of courts in India to make new laws.¹⁶ In fact, Dudley Ryder's letter book as Attorney General is filled with correspondence relating to all parts of the British world, ranging from riots in Oxford, charters for exploring the Northwest passage, New Jersey session laws, new criminal courts for Gibraltar, to the status of Armenians in Calcutta.¹⁷ Even lawyers more noted for their role in American colonial affairs were called upon to give opinions on matters relating to India. In 1763, for instance, Robert Jackson, an attorney for the board of trade and land agent for Connecticut, wrote an opinion on the nature of land tenure in Bengal. Drawing on his knowledge of American legal affairs he cited the Chancery dispute between the Lords Baltimore and the Penn family over the Maryland/Pennsylvania boundary as a key imperial precedent regarding jurisdiction.¹⁸ Charles Yorke himself also belonged to this world of imperial law. He frequently served as counsel for the EIC, providing opinions on everything from Hindu wills to martial law in St. Helena. In doing so he often mentioned imperial precedents from Ireland and the American colonies.¹⁹ Likewise, he was called on time and again to render opinions in other imperial matters. For instance, shortly before giving his opinion with Pratt on lands in India, he consulted on the question of which English statutes applied in Nova Scotia.²⁰

16 For more on the work of the Crown law officers see James Oldham, "The Work of Ryder and Murray as Law Officers of the Crown," in *Legal Record and Historical Reality. Proceedings of the Eighth British Legal History Conference, Cardiff 1987*, ed. Thomas G. Watkin (London, 1989), pp. 157-74. For opinions of these law officers and others see William Forsyth ed. *Cases and Opinions on Constitutional Law* (London: Stevens and Haynes, 1869) one of many printed compilations of prominent opinions on Imperial law.

17 Library of Congress MMC-0818, Dudley Ryder letter book.

18 For his opinion see BL IOR L/L/7/71: Legal Advisors' Papers, 21 November 1763.

19 See BL IOR L/L/7/75: Legal Advisors' Papers, 28 April 1764.

20 Forsyth *Constitutional*, p. 3, opinion of 18 May 1757. Also see an opinion of the same day on courts in Jamaica in George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence* (London, 1814), pp. 136-8; For an opinion relating to New York see Chalmers, pp. 219-221.

The question of property rights and sovereignty in India had plagued the Company in London for decades with a long backstory in Parliamentary debates, charter renewals, and other learned legal opinions.²¹ Yet, Pratt and Yorke made no mention of this prior baggage, instead drawing on a wider set of imperial concerns over land, conquest, and dominion. It seems likely, for example, that Yorke and Pratt would have been knowledgeable of recent metropolitan debates relating to American Indian dominion and property rights. Most strikingly, arguments presented in 1743 before the Privy Council and its appointed commissioners by the representatives of the Mohegan nation seem evident in Pratt and Yorke's thinking.²² In the Mohegan case, lawyers for colonial settlers seeking to validate their land acquisitions argued that they held their land by “lawful Indian grants” as the Mohegans' possessed the original “property of the soil.”²³ Though it is unclear if Pratt or Yorke drew directly from the arguments in that case, they clearly composed their opinion on India in the same legal milieu. Their writing is shot through with language redolent of other Privy Council decisions and borrows from a central set of imperial constitutional principles advanced by that body in the previous decades.²⁴

The Privy Council committee for hearing appeals from the plantations was perhaps the most influential body in forming an imperial legal culture. Judges like Yorke's father, Phillip Yorke (Lord Chancellor Hardwicke) and later Charles Pratt himself (as Lord Chancellor Camden) sat as members of the Council, hearing appeals from all over the British world and constructing an imperial constitution in the process.²⁵ From the late 17th century into the 1720s, litigants from the American colonies had brought a series of cases before metropolitan legal bodies like the Privy Council, forcing judges and legal elites to formulate a series of rules to determine the nature of imperial sovereignty and control

21 For the long history of these debates see Phil Stern, *Company State* (Oxford, 2011). See also a copy of a 1692 opinion on the rights of the Company to its forts as copied sometime between 1743-56 in BL Landsdowne MS 846, f.250. In 1753 the Company wrote to Secretary of State Newcastle that they looked upon their possession of several Indian territories as by grant “not only to the Company but also to the English nation.” See BNA CO/77/19: State Papers relating to the East Indies, p.122 (25 September 1753).

22 For more on the Mohegan case see Craig Yirush, “Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704–1743,” *Law and History Review* 29 (2011), pp. 333-373; Mark Walters, “Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America” *Osgoode Hall Law Journal* 34(4), pp. 785-829.

23 Yirush “Claiming,” p. 363.

24 Notably out of the case of “Anonymous” (1722) 24 Eng. Rep. 646. The exact identity of the case is debatable, see B.H. Macpherson, “The Mystery of Anonymous” *Australian Law Journal* (March 2001), pp. 169-180. Macpherson suggests *Mendez v. Batyn* from Barbados or *Orby v. Long* from Jamaica as the best candidates, pp. 174-5.

25 Bilder, *The Transatlantic Constitution*. See also her more recent “Colonial Constitutionalism and Constitutional Law” in *Transformations in American Legal History: Essays in Honor of Morton J. Horwitz*, Alfred Brophy and Daniel Hamilton eds. (Cambridge, MA: Harvard University Press, 2008).

over foreign lands and peoples.²⁶ According to the Council, all “new and uninhabited countr[ies]” were to be governed by the “laws of England” including all parliamentary statutes up to the date of settlement, though any subsequent parliamentary laws would be unenforceable unless parliament named the colony specifically in the statute. More importantly for India and America, (and more confusingly), in all conquered territories, the King of England could “impose upon them what law he pleases” and if he remained mute, all the previous laws of a country not inherently evil or contrary to “religion” would remain in force - with the caveat that in all cases where local law was silent, the Law of England would be considered applicable.

Time and again, the Privy Council and metropolitan legal elites upheld this constitutional interpretation. Charles Yorke even went so far as to lend these principles the aura of ancient respectability, writing in 1766, “There is not a maxim of the common law more certain than that a conquered people retain their ancient customs till the Conqueror shall declare new laws.”²⁷ These principles, born mostly out of American litigation and experience, are on clear display in Yorke and Pratt's 1757 opinion. When they reasoned that the recaptured territory of Calcutta should not go to the Crown as newly conquered but back to the Company, they echoed the judgment of their predecessors in office who in 1731 opined in similar language about a recaptured territory in what is now Maine - judging it not to be Crown property on recapture.²⁸ However, while the legal ideas at hand might seem clear, this way of framing the issue of legal reception and dominion left ample opportunities for flexibility in almost any dispute and resulted in all manner of definitional jockeying over the nature of “conquered” territory.

It helps to view this set of principles as a legal well to draw from rather than as a finely-crafted policy statement. No Parliament voted these rules up or down, no King or cabinet minister approved them, and no single jurist proposed them. Moreover, no one but judges could determine the “conquered” status of any given place. Much of the scholarship on the American reception of the Yorke-Pratt opinion seems to assume a kind of fixed metropolitan regime of imperial power and intent

26 The Court of King's Bench saw many of these early constitutional cases - the two most important are: *Craw v. Ramsey* (1670) 174 Eng. Rep. 1072 and *Blankard v Galdy* (K.B. 1691) 87 Eng. Rep. 356.

27 Opinion with William De Grey April 14, 1766, quoted in Duncan Macarthur ed. *Documents relating to the constitutional history of Canada 1759-91*, Volume 1 (Ottawa, 1907), pp. 174-8

28 The reasoning laid out in “Anonymous” gained almost immediate traction in Privy Council appeals. See for example the arguments prepared by various doctors of civil law for a case between the Crown and the Massachusetts Bay Colony in 1730-1: Historical Society of Pennsylvania (HSP), George Lee Papers (coll. 361), Box 3, folder 16, p. 313. An extract from the opinion of the law officers of the Crown on this matter was printed later in Forsyth, *Constitutional*, pp. 144-5.

after 1763. This misses some of the complexity and confusion inherent to the British Imperial constitution. As part of his argument that the use of the Yorke-Pratt opinion in America was a kind of ludicrous subterfuge, Sosin writes that it surely could not have been intended to apply to America as, “such a position could hardly have been tenable.”²⁹ While this judgment might hold true in the realm of high politics, we forget at our peril the degree to which imperial law and jurisprudence remained a world unto its own in this period. Lawyers, judges, and other legal elites constructed the legal fabric of empire in such a multifarious way as to belie easy assumptions of what might have been “tenable.”

Metropolitan legal elites, like Yorke and Pratt, often engaged in disputes at the Privy Council with seeming disregard for the political realities on the ground in the colonies. In the case of India, lawyers argued in London about the applicability of Quranic oaths and the extension of English intestacy statutes by reference to Quakers, the Spanish reconquest of Spain, and the Institutes of Justinian without concern for the nuances of life in eighteenth-century Calcutta. Cases from the North American colonies were in some ways no different. The proceedings at the Council in a series of New England cases included detailed references to the history of Rome, Grotius, Pufendorf, and international law with little interest expressed by the judges in local political concerns.³⁰ In fact it seems reasonable to believe that many in the entire Privy Council appeals process operated with only the most general ideas about the differences between the various parts of the expanding British Empire. For example, in 1769, William Samuel Johnson, a prominent Connecticut legal agent, remembered that one lawyer in a matter before the Council placed Philadelphia in either the East or West Indies, perhaps on the coast of Sumatra.³¹ Likewise, over the 1740s, William Lee, the Chief Justice of the court of King's Bench, proclaimed Calcutta outside the dominions of England in one case, and shortly thereafter decided a complicated case in the Privy Council based on English court proceedings in the very same city without batting an eye.

This is not to argue that metropolitan legal elites were wholly ignorant or unconcerned with the

29 Sosin, “The Yorke-Camden Opinion,” p. 47. Banner on the other hand argues that the acceptance of the Pratt-Yorke opinion by speculators and some officials is evidence that many at the time viewed the Proclamation of 1763 as being of dubious legality, p.102.

30 Seen in Chief Justice William Lee's notes taken during the case of *Phillips v. Savage* from Massachusetts, see the William Lee papers at the Beinecke library, Yale University, (Osborn MSS 52) box 16 folder “Colonial” - unpaginated notes. Also see the case between the Crown and the Massachusetts Bay Colony in 1730-1: Historical Society of Pennsylvania (HSP), George Lee Papers (coll. 361), Box 3, folder 16, p. 313.

31 See J. Smith, *Colonial Appeals*, p. 473 n.19 for this incident from Johnson's diaries in the Connecticut Historical Society. Also cited in Macpherson, *Anonymous*, p. 175.

details of an expanding empire, but that their decision-by-decision manner of constructing an imperial constitution helps explain the place of the Yorke-Pratt opinion in colonial America. These legal elites formed an important alternate source of authority for those looking to defy the edicts of secretaries of state, the Board of Trade, and other Crown officials. Regardless of executive proclamations and directives, metropolitan judges and lawyers could continue to hand down decisions based on their own reasoning. In the 1730s and 40s, for example, Lord Chancellor Hardwicke took it upon himself and his fellow Privy Council judges to determine the “conquered” nature of any given territory - regardless of the repercussions for imperial politics. In one 1737 case from Massachusetts he even went so far as to state in the Privy Council chamber that he believed the American colonies not to be conquered countries and thus subject to regulation by Parliament and not the Crown directly.³² Likewise, treaties or executive proclamations, like that of 1763, were far from binding on the legal imagination of metropolitan elites. In a 1759 case from Guadeloupe about sovereignty and land rights on that conquered island Charles Yorke dismissed the treaties at hand as irrelevant writing “As to the articles of capitulation with the inhabitants. I think that question is not affected by them.”³³ More strikingly, in 1766, Yorke, wrote a lengthy opinion with solicitor general William De Grey on the meaning of the 1763 proclamation for territories in what is now Canada.³⁴ They took it upon themselves to clarify what was “intended” by the proclamation, essentially laying out their own plan for how legal administration and dominion should function in the American territories. Thus, while a historical counterfactual, Yorke or Pratt very well could have applied similar reasoning from their 1757 opinion on Calcutta to matters in the Americas post-1763. Thus making the American adoption of the opinion appear much less aberrant and more natural than has been suggested.

In the end, the Yorke-Pratt opinion convinced only some in colonial America that the 1763 Proclamation could not hold legal weight. Some royal officials on the ground dismissed the notion out of hand while others spent years debating the matter. Yet this was not unique to the redacted and out-of-context version of the opinion. In the case of India as well, Pratt and Yorke's ideas saw only limited traction. The Company may have felt assured by the opinion that they owned the “property of the soil”

32 Taken down by Chief Justice William Lee during the case of *Phillips v. Savage* from Massachusetts, see the William Lee papers at the Beinecke library, Yale University, (Osborn MSS 52) box 16 folder “Colonial” - unpaginated notes..

33 Chalmers, p. 359. Opinion of August 13, 1759.

34 April 14, 1766, quoted in Duncan Macarthur ed. *Documents relating to the constitutional history of Canada 1759-91*, Volume 1 (Ottawa, 1907), pp. 174-8

in their territories acquired by treaty, but the nature of these treaties and the system of land tenure in late Mughal India made such a simple conception of property meaningless on the ground. Local judges in India also struggled with the meaning of the opinion. In 1777, the chief justice of the Supreme Court in Calcutta stated that he could not rule on the conquered status of the city and as for Yorke and Pratt's opinion, he declared "I never advanced this doctrine nor assented to it."³⁵ Likewise, members of Parliament fiercely debated Pratt and Yorke's reasoning as the Company's dominions grew richer and more numerous in the 1760s and 70s.³⁶ For instance, in speaking of Calcutta and Bengal, the former governor of British West Florida declared on the floor of Parliament that "I am clear we hold these lands by conquest" while sometime later an opposing member quoted at length from a letter about the Pratt and Yorke opinion to show that it was the Company who validly held dominion over these lands.³⁷

Thus, for many players in the British imperial world, the Yorke-Pratt opinion created a new source of authority to contend with without necessarily dictating a course of events..

Wharton and his fellow American land speculators were able to latch onto Yorke and Pratt's opinion not only because it served their needs but also because it emerged from a common imperial polemic. As such, it should be no surprise that imperial land policy from India, however edited, could inform American land speculators. In neither the Americas or India was the situation of the other part of the empire forefront in the minds of those on the ground. However, they were tied together by a set of metropolitan instruments and principles of imperial jurisprudence. London lawyers, the Privy Council, and other central law courts brought this world together and enabled the kinds of borrowings, like the Yorke-Pratt opinion, which reverberated in both the American and Asian imperial spheres. The British imperial constitution depended on just these kinds of legal borrowings and transmissions.

35 Chief Justice Elijah Impey's opinion in the *Kamal-ul-Din* case (1777), as cited from Justice Hyde's manuscript notebooks and reported in a footnote *In re the goods of Bux Alley Gawney* I Indian Decisions O.S. 64 (11 March 1782).

36 See Huw Bowen, "A Question of Sovereignty? The Bengal Land Revenue Issue 1765-7," *Journal of Imperial and Commonwealth History* 16 (1987-88), pp. 157-76.

37 See George Johnstone's speech 30 March 1772 *Cobbett v.17* p.377 and the mention of the argument over Company dominion a year later in the speech of Hans Stanley 10 June 1773, p. 900.