

THE RECEPTION OF ENGLISH LAW IN JAMAICA.*

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(1) CONSTITUTIONAL DEVELOPMENT, 1655 — 1728

The recorded history of Jamaica dates from 1492, the year that Columbus landed there and claimed the island in the name of the Spanish Queen from its aboriginal inhabitants, a tribe of Indians known as the Arawaks. These did not long survive the arrival of the first Spanish settlers in the island in 1510 and no trace remains of their existence after 1600.¹ In 1655 Cromwell's troops conquered the island from the relatively small group of Spanish settlers who remained there, most of whom were expelled to neighbouring Spanish colonies.² The efforts of those that remained to defend the island against the British seem to have been quickly abandoned and by 1660, it is said, no Spaniards remained in Jamaica.³

Settlement of the island from Britain immediately received official encouragement and, within months of the conquest, Cromwell issued a proclamation offering attractive terms to Englishmen willing to settle in Jamaica. According to this proclamation, all persons born in the island:-

"shall be and shall be deemed and accounted to be free denizens of England and shall have and enjoy all and every such benefite and privileges, advantages and immunities whatsoever as any the natives or people of England borne in England now have and enjoy in England".⁴

The first governor of the new colony was General Edward D'Oyley, who had been a member of the conquering party of 1655. He was appointed in February 1661 by a commission which directed him to "Settle such

for the Admiralties as may be proper to keep the peace of the Island and ... determine all matters of right and controversy according to Justice and Equity".⁵ Apparently, D'Oyley's appointment and his instructions were only temporary measures,⁶ and in July 1661 Lord Windsor was appointed to succeed D'Oyley and to organise the government of the colony "on a more permanent basis".⁷ Lord Windsor was instructed to "call Assemblies, together, according to the customs of our plantations, to make Lawes and upon eminent necessities to leavy moneyes, provided they [the laws] be not repugnant to any of our laws of England".⁸ The subordinate status of the Assemblies so convened, however, was emphasised by the further instruction that such laws as were passed were to be in force for two years only "and no longer unless they shall be approved and confirmed by us".⁹ The Governor was also enjoined to establish Courts "to determine all matters of Right and Controversy and all causes Civil and Criminal".¹⁰

No precise direction appeared, however, on the question of the substantive content of the laws that were to be administered in these courts and the vague and inconclusive generalities with which the Crown contented itself at the outset were reflected in the uncertainty that prevailed on this issue for another seventy years.¹¹ Windsor's instructions, for example, declared that "no man's freehold life or member" was to suffer damage except in a manner sanctioned "by established laws ... agreeable to the known laws of England".¹² The Council for Foreign Plantations, in an attempt to place the substantive law of the colony on a surer

footing, proposed "that it be declared [by Proclamation] ... that they shall be governed by the laws of England",¹³ a declaration that would undoubtedly have conduced to greater certainty. The proclamation which ultimately appeared in December, 1661, however, was far more equivocal and, as it was to prove, susceptible of myriad interpretations:-

"all children of any of our natural born subjects of England to be born in Jamaica shall, from their respective births, be reputed to be, and shall be, free denizens of England, and shall have the same privileges to all intents and purposes as our free born subjects of England".¹⁴

Although it has been suggested that specific reference to the laws of England was omitted "merely because it was thought unnecessary",¹⁵ the impression that the omission was deliberate lingers, especially when viewed in the light of the Council's earlier proposal.¹⁶ Whatever the reason, "this ambiguous document was treated by the colonists at different times in different ways as the political circumstances seemed best to dictate".¹⁷

In 1664 the colonists themselves, using their recently gained legislative power, attempted to fill in the lacunae in the proclamation by a colonial act entitled "An act declaring the laws of England in force in this island". The act declared all "laws and statutes heretofore made in ... England ... and all liberties, privileges and immunities contained therein" to be of force in Jamaica.¹⁸ This Act, along with some twenty-six others, was dispatched to England by the Governor for confirmation

by the Crown.¹⁹ Nothing more was heard of them until 1776, though they were re-enacted upon expiry every two years by the Jamaican Assembly. In that year the Council for Trade finally examined the laws and sought the Attorney-General's opinion on the question of the extent to which the declaratory act "was necessary and useful to the Island and consistent with His Majesty's interest".²⁰ There is no record of the Attorney's opinion on the point, nor is there any official record of the Act's disallowance, though in a case on appeal from Jamaica to the King-in-Council in 1710 "it appeared that [an Act] for declaring the laws of England to be in force had been disallowed".²¹ In any event, a report of the Lords of the Committee of Trade for plantations in 1678 found that none of the laws transmitted from the plantations since 1660 had received the Royal confirmation.²² As might be expected, "great difference of opinion still prevailed as to whether certain Acts of the British legislature ... extended to Jamaica".²³

Despite these setbacks, it seems clear that the colonists at all times regarded themselves as entitled to the common law and pre-1664 statutes of England as a matter of course.²⁴ Indeed, this stand is hardly surprising when it is recalled that in this early period most of them were people who had grown to adulthood in England. In 1664, for instance, Governor Modyford²⁵ stated, in answer to a Royal enquiry as to the laws in force in the colony, that "right reason which is the common law of England is esteemed and of force amongst us together with Magna Carta and the ancient statutes of England, as far as they are practicable".²⁶ In 1682 a perhaps more disinterested observer declared that all the judges in Jamaica adhered to the laws of England, "except some little variations for ease and benefit of a new settlement",²⁷ and in his "Report on the present state of the government of this island, civil and military", in 1671 the then Governor, Sir Thomas Lynch also indicated reliance on

English common and statute law in Jamaica.²⁸

There appeared, however, to be no clear legal basis for the colonists' firm insistence on their rights as Englishmen to the enjoyment of English law, and the King-in-Council, after an uncertain start, repudiated their claims with equal firmness. In the earliest case on record from Jamaica, the Privy Council ordered the judge of the Jamaican Court of Ordinary to make redress available to a widow who had failed to secure an account from the administrator of her husband's estate, thus affirming the force of the Statute of Distribution (1670) in the island.²⁹ In 1710, however, this encouraging beginning was decisively reversed by the Council in *Orby v. Long*,³⁰ an appeal from the Jamaican Court of Errors. Four years earlier, an action of trespass and ejectment had been brought by one James Allison against Charles Long and his wife in the Supreme Court of Jamaica. Long's wife was the daughter of Sir William Beeston, and Allison was lessee of the premises in question, Sir William's widow being the lessor. The defendants pleaded the general issue and the jury in a special verdict found a 1699 will of Sir William which devised and bequeathed his estate, including the land and messuages in question, to his wife. The jury found further that the four subscribing witnesses had not attested the will in the presence of the testator and that the Statute of Frauds³¹ requiring such attestation was in force in Jamaica. The will being thus ineffective to pass the realty to Sir William's widow, it was therefore held that the plaintiff's action must fail, founding as it did on the existence of a lease granted by a person who was not in law entitled to the fee simple.

The plaintiff pursued a writ of error to the Jamaican Court of Errors, asserting that the Statute of Frauds did not extend to the island and was not of force therein. This submission found no favour with the court which took the opportunity to reaffirm its

conception of the rights of Englishmen to English statutes. The court said that the judgment below would be affirmed because "they took the laws of ... England and all general statutes of that kingdom for the advancement of distributive justice and pro bono publico made and not by express words restrained to the Kingdom of England ... to be of force and to have always been received as such on this island".³² Among such statutes was the Statute of Frauds whereby "the validity and invalidity of wills ... has [always] been adjudged".³³

The appellant plaintiff then prayed, and was given, leave to prosecute his appeal before the King-in-Council from whence it was referred to the Judicial Committee in August, 1710. Four months later the Committee advised that the judgment below be reversed and judgment given for the appellant.³⁴ The narrow ground of the advice was that an act of the Jamaican assembly declaring English law to be of force in the island had been disallowed;³⁵ therefore the provisions of the Statute of Frauds had no effect in the island and the will in question was a valid devise of the realty of Beeston's widow. The appellant was thus in possession under a valid lease and entitled to relief for trespass and ejectment.

This decision immediately caused "great uncertainty and confusion in the administration of the law ... as multitudes of judgments ... were thereby impeached".³⁶ Nevertheless the colonists were not discouraged and it appears that the decision in *Orby v. Long* "had no effect as precedent upon judicial conduct in the island, for the courts continued to regard the Statute of Frauds as in force".³⁷ Their intransigence is well illustrated by the 1774 case of *Doe ex dem, Harris v. Barrett*,³⁸ where the Jamaican Supreme Court again held that the provisions of the Statute of Frauds relating to the attestation of wills were of force in Jamaica. The citation of *Orby v. Long* by counsel for the appellant on the hearing of a writ of error achieved

THE ENGLISH COMMON LAW RULES.

The first known English decision on the point considered the applicability of English law overseas to turn on whether the territory in question was acquired by conquest from a Christian king or from infidels. In *Calvin's Case*⁶¹ it was held that if a king came by conquest to a Christian kingdom, he could alter and change the laws of that kingdom at his pleasure. Until he signified that such was his will, however, the ancient laws of the conquered kingdom would remain in full force. "But if a Christian king should conquer a kingdom of an infidel, and bring them under his subjection, there ipso facto the laws of the infidel are abrogated ...and, in that case, until certain laws be established amongst them, the king...shall judge them and their causes according to natural equity".⁶²

The rules adumbrated in *Calvin's Case* achieved more precise formulation in *Blankard v. Galdy*,⁶³ a case from Jamaica. By certain articles one Blankard, Provost Marshal of Jamaica, had granted a deputation of this office to one Galdy for a yearly rent, and the latter had given the bond for the performance of the agreement. The defendant, when sued on his bond, pleaded the English statute 6 Edward 6, c.16 against the buying and selling of office, and by virtue of which, if applicable, both articles and bond would have been void. The plaintiff's replication averred that this statute did not form part of the law of Jamaica. It was held⁶⁴ that in the case of an uninhabited country newly found by English subjects all the laws in force in England are in force there. However, in the case of a territory conquered by force of arms the laws of England are not in force there until declared so to be by the conqueror. Jamaica, being a conquest, fell into this latter category and therefore the statute 6 Edward 6, c.16 was not in force there, the bond and articles were valid, and judgment would be given for the plaintiff.

Whereas *Calvin's Case* had emphasised the distinction between a conquest from Christians and a conquest from infidels, *Blankard v. Galdy* categorised both as conquests and sought to further distinguish them from settlements, that is, previously uninhabited territories. It was this latter distinction that came to be regarded as definitive:

"Plantations or colonies in different countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country, or where, when already cultivated, they have been either gained by conquest or ceded to us by treaties".⁶⁵

Finally, in 1722, the Privy Council had occasion to make a rather complete statement on the subject. On August 9 of that year it was stated by the Master of the Rolls that it had been determined by the Board on appeal that in the case of a new and uninhabited country discovered by English subjects, such country was to be governed by the laws of England, English law being the birthright of English subjects. After such settlement, however, English statutes would not bind the colonies unless they were particularly named therein. In the case of a conquered country the king might impose such laws as he pleased, but until such imposition the laws of the conquered colony prevailed unless they were contrary to religion, *malum in se*, or silent on particular points, in which cases English law would immediately prevail.⁶⁶

It should be noted that the law received by colonists, whether as of right (in settlements) or by virtue of express extension (in conquests and cessions) was subject to one important limitation: "colonists carry with them only so much of English law as is applicable to their own situation and the condition of an infant colony".⁶⁷ Much learning surrounds⁶⁸ this rather imprecise notion of "applicability to local circumstances" and the comment that "it is a matter which has

defied any definitive test"⁶⁹ seems fair. Especial obscurity has been brought about by the persistent uncertainty on the question of the date as of which such applicability is to be judged; that is, whether it is the date of settlement, the date of the relevant enactment, the time of the events giving rise to the proceedings, or the time of the proceedings themselves. Authority for each of the four approaches is to be found in the law reports.⁷⁰ Happily, as will be argued,⁷¹ the force of English statute law in Jamaica is unaffected by the true view of this particular controversy.

THE POSITION OF JAMAICA.

It is clear that Jamaica originally came under British rule by force of arms⁷² and ought therefore to have been treated as a conquest, with the consequences suggested by the rules already outlined. In *Blankard v. Galdy*, as has been seen,⁷³ the island was so regarded and it was held that "the laws of England do not take place there until declared so by the conqueror or his successors".⁷⁴ In the pre-1728 period, however, the debate between the colonists and the Imperial government did not proceed on the basis of distinction in *Blankard v. Galdy*. The colonists, if they were aware of the distinction, obviously regarded themselves as entitled to the rights of settlers,⁷⁵ while the Imperial government's refusal to accede to their demands up to 1728 did not, as it easily might have, seem to turn on the fact that Jamaica was a conquest, but rather on a fear of losing control over the colonists.⁷⁶ So although Jamaica's position was theoretically clear, it was obfuscated in practice by the demands of the colonists on the one hand and the uncertain approach of the Crown on the other.

This uncertainty was reflected in the post 1728 period in the lack of uniformity in judicial decisions on the question of the position of Jamaica within the framework of the English common law rules. Jamaica's status received its first judicial reconsideration from Lord Mansfield in *R. v. Vaughn*.⁷⁷ The case concerned an alleged

no more than an equality of votes in the Court of Errors for and against allowing the appeal, and so the judgment below stood. No appeal was ever prosecuted before the King-in-Council in this case.³⁹

The uncertain bases of their reception of the English law continued to be a matter of concern to the colonists and they would no doubt have agreed that "it is a great unhappiness that no one can tell what is law and what is not in the Plantations".⁴⁰ The opportunity they sought to ground their entitlement to English law in more secure foundations finally presented itself in 1723, and then only incidentally. For some time the Crown had been trying to persuade the Jamaican Assembly to allocate a permanent revenue to assist in defraying the expenses of the government in Jamaica. It was a struggle which had gone on for some thirty years⁴¹ and it was not until 1723 that the Jamaican Assembly resolved to use the bargaining power which the Crown's anxiety on this question gave them to secure their own privileges. In that year the Assembly passed an Act guaranteeing a perpetual revenue to the Crown. It was clear, however, that this was merely the price which the colonists were prepared to pay and perusal of the Act shows it to be more of "a declaration of rights than a Revenue Act".⁴² The Act declared the laws of Jamaica to be all the known general laws, statutes, customs and usages of England, concerning the life, liberty or property of the subject, which were in force in December 1661. Also adopted were all other statutes made in England since that day either declaratory of such laws or for the better enforcing, regulating or explaining thereof, or for the amendment of the law or for the common advancement of justice or for securing the rights, liberties or properties of the subject. The right to the Habeas Corpus Act and the Bill of Rights was the subject of special mention.⁴³

When sent to England for confirmation the Act placed the Crown in a dilemma. True enough,

it guaranteed the revenue so long sought, but the omnibus declaration of rights was regarded with some alarm. The Attorney-General thought the clause in question to be of a most "extraordinary nature" and felt that it "may be attended with many Inconveniences".⁴⁴ In the result it was too high a price and the Act was disallowed. It would have been preferable, suggested the Attorney, for the colonial assembly to pass an Act specifically enumerating the particular laws of England which could then be subjected to a "distinct consideration as to the fitness of them with regard to the condition and circumstances of the Island".⁴⁵ The vagueness of the objections suggests that the Crown's opposition to the Act was motivated not so much by the legal consequences which it was thought likely to have as from a concern with the practicalities of colonial government. The Jamaican legislators had already shown themselves to be among the most fractious and to allow them as comprehensive a 'Bill of Rights' as they now sought to assume would certainly do nothing to lessen their aggressive assertions of independence.⁴⁶

The colonists did not receive the Attorney-General's suggestion with favour and they viewed the method of separately enacting statutes they desired as a tacit admission that they were not entitled to English statutes as of right.⁴⁷ Undaunted, they pressed on and in 1728 passed another Revenue Act⁴⁸ guaranteeing a permanent revenue of £8000 per annum to the Crown and again tacking a declaratory section to the Act.⁴⁹ The wording of this section, however, differed significantly from that of the 1723 attempt:-

"All the Acts and laws of this Island which determined ... on the 1st day of October 1724 ... shall be declared to be perpetual ... and also all such laws and Statutes of England as have been at any time esteemed, introduced, used, accepted, or received, as laws in this Island shall, and are hereby declared to be

and continue laws of Jamaica for ever".⁵⁰

Finally the colonists' perseverance carried the day. For, though the proposed section 22 was criticised by the Law Officers as being "so loose and uncertain that it will be very difficult to know what laws of England are thereby made laws of Jamaica and what are not",⁵¹ the Crown, needing the revenue and perhaps weary of the struggle, confirmed the Act on May 22, 1729.⁵²

It may be that the Jamaican Assembly thought itself to be achieving the same result that they had sought in 1723 by this roundabout method. The effect of the 1728 Act however, was to make user the criterion for reception of England law⁵³ and to this extent section 22 was of far narrower import than the previous measure. There was also justice in the Law Officers' criticism of the section's vagueness, a vagueness which the Governor⁵⁴ of the island was also constrained to remark just fifteen years later.⁵⁵ His observations were echoed by the Commissioners of Enquiry in 1825⁵⁶ as was his suggestion that the difficulties be resolved by the enactment of an island Act specifying the Acts which, on a "judicious examination" appeared to be "consonant with the circumstances of the island".⁵⁷ The suggestion has never been implemented and the section remains in force to the present day, in substantially the same form.⁵⁸

(2) THE ENGLISH COMMON LAW RULES AND JAMAICA AFTER 1728.

1728 was later regarded as the date when "all the doubts and difficulties were set at rest",⁵⁹ and section 22 was thought to be "the foundation of the present constitution of Jamaica".⁶⁰ The remainder of this essay will be concerned to show that much of the pre-1728 uncertainty persisted nevertheless by reason of judicial vacillation in the later period over Jamaica's position within the framework of the English common law rules governing the applicability of English law to overseas plantations.

attempt by the defendant to bribe the first Lord of the Treasury for the procurement of a patent of the reversion of the office of clerk of the Supreme Court of Jamaica for the lives of the defendant's three sons, or the lives of three other persons to be named by him.⁷⁸ For the defence, it was argued that solicitation to take money for an office in the colonies was no offence, "even if the act itself had been done, and the office had been granted pursuant to the solicitation".⁷⁹ Basing himself on *Blankard v. Galdy*, counsel for the defence submitted that the English statute⁸⁰ which rendered such solicitation illegal did not extend to the colonies; nor was it an offence *malum in se* at common law.⁸¹

It was held that such solicitation was "a misdemeanour and punishable as such".⁸² Lord Mansfield agreed with the Solicitor-General's submission "that the argument does not turn upon the statute 5, 6 Edward 6, c.16 extending or not extending to Jamaica".⁸³ Although his Lordship thus considered the question irrelevant, he would have been prepared to hold that the statutes did not extend to Jamaica for at least one of two reasons. If, on the one hand, Jamaica was to be regarded as a conquest, the old laws would be retained until the conqueror thought fit to alter them. If, on the other hand, it was regarded as a colony, "which it ought to be, the old inhabitants having left the island", then these statutes were "positive regulations of police, not adapted to the circumstances of a new colony".⁸⁴

Five years later the same learned judge developed his view that Jamaica should be treated as a settled colony in *Campbell v. Hall*,⁸⁵ a leading case in a not unrelated context. In that case his Lordship observed that "I have upon former occasions traced the constitution of Jamaica, as far as there are papers and records in the offices, and cannot find that any Spaniard remained upon the island so late as the restoration; if any, there were very few ... and, therefore, all the Spaniards having left

the island or been driven out, Jamaica from the first settling was an English colony, who under the authority of the King planted a vacant island, belonging to him in right of his Crown".⁸⁶

Lord Mansfield's remarks in both cases were obiter in so far as they related to the constitutional status of Jamaica.⁸⁷ Nevertheless, representing as they did the apparently considered view of a very learned judge, they came to be regarded as authoritative. In *Freeman v. Fairlie*⁸⁸ an articulate attempt was made to elucidate the problem in terms of the rationale behind the distinction between settled colonies and conquered and ceded territories. The true general distinction, it was thought, was "between countries in which there are not, and countries in which there are, at the time of their acquisition, any existing civil institutions and laws".⁸⁹ In the former case, it became a "matter of necessity" for the settlers to use the laws to which they were accustomed, there being none extant to which resort could be had. In cessions and conquests, per contra, "there is an established *lex loci* which it might be highly inconvenient all at once to abrogate, and therefore it remained till changed by the deliberative wisdom of the new legislative power". Further, in conquests and cessions there was the problem of new subjects to be governed "ignorant of English laws, and unprepared perhaps in civil and political character to receive them". The distinction, it was conceived, was merely a succinct way of expressing a distinction of greater practical significance; that is, that between the absence and the existence of a *lex loci*.

By this reasoning Jamaica was therefore accorded the status of a settlement, the absence of any civil institutions and laws at the time of the arrival of the first English settlers made resort to a *lex loci* impossible and the resultant vacuum was to be filled by English law. This reasoning commended itself to the Supreme Court of Jamaica some years later in *Jacquet v. Edwards*,⁹⁰ where the question was whether the

English common law rules relating to the liability of innkeepers for the safe-keeping of the goods of guests formed part of the law of Jamaica. It was held, after mature consideration, that they did. The Court found that although there was no doubt that Jamaica originally became British by force of arms, "there was sufficient in its early history to show that by the acts and conduct of the Crown the colonists became entitled to the same rights and privileges as they would have been entitled to had the Colony been a settled one".⁹¹ The island "should therefore, under any circumstances, be treated as a settled colony..."⁹² The law thus received was subject only to the question of applicability to local circumstances and, in the instant case, it was held that the relevant rules were so applicable.

There is thus a considerable body of judicial opinion which treats Jamaica as a settled colony.^{92A} It should be noted, however, that *Blankard v. Galdy* itself is authority to the contrary, as is *Beaumont v. Barrett*⁹³ where Parke, B., thought that "it was a conquered island, and as in other territories obtained by conquest such laws are in force there as the king... may choose to direct". Nor are the views of commentators, both contemporary and modern, uniform. One observer, writing in 1838, asserted that "it seems now determined, that although a country be acquired by conquest, yet if Englishmen emigrate and settle there, and the original inhabitants abandon it, the new settlers are to be governed by the same rules as if they had peopled an uninhabited country".⁹⁴ The position is stated somewhat more guardedly in *Halsbury*⁹⁵ where it is said that "Jamaica seems to be a conquest from Spain in 1655", while the foremost modern authority on the subject, *Roberts-Wray*, is downright contradictory.⁹⁶

The view that Jamaica ought to be treated as a settled colony is an attractive one, the acceptance of which would obviate many of the difficulties involved in trying to determine the precise date at

which English law could be said to have been extended to the colony by the Crown. Nevertheless, that view is not itself free from difficulty. As has been noted,⁹⁷ judicial authority is not unanimous on the point, and the view has been criticised for ignoring the historical reality: "if a British possession was in fact acquired by conquests, circumstances such as those in Jamaica could not alter the fact".⁹⁸ This criticism is, within its own terms, unanswerable, though it might be that it is based on a too literal reading of the rules of reception. The distinction between settled and conquered and ceded colonies is purposive: Conquerors needed no immediate right of recourse to English law, since the pre-existing legal system was usually competent to adjust their legal relationships.⁹⁹ Settlers, on the other hand, usually appropriated uninhabited lands, in which situation the immediate extension of English law was of crucial importance. Looked at in this way, the rules merely describe the nature of the legal response to given factual situations. Jamaica, though actually acquired by force of arms, more closely resembled a settlement than a conquest because of the absence of a *lex loci* and, far from ignoring the historical reality, the view that it should be treated as a settlement merely seeks to give effect to its peculiar historical situation within the context of the rules.

This approach suggests that Jamaica, as a settled colony, received so much of the English law as was applicable to the circumstances of an infant colony at the date of "settlement".¹⁰⁰ It should be noted, however, that the practical consequences of the opposite conclusion, that is, that Jamaica is a conquered colony and therefore the laws of England did not take place there until so declared by the conqueror,¹⁰¹ may not be of much significance: such declaration might well have been made in the proclamation of 1661, which assured the colonists of "the same privileges to all intents and purposes as our free-born subjects of England",¹⁰² a declaration which seems to have

been treated by the colonists as extending English law to the colony.¹⁰³

APPLICABILITY TO LOCAL CIRCUMSTANCES AND 1 GEO. 2, C.2, section 22.

The vexed question of whether particular rules of English law were or are applicable to local circumstances is simplified in Jamaica by the provisions of section 22 of the 1 Geo. 2, C.2. That clause extends only those English Acts "esteemed, introduced, used, accepted or received" before 1728 and it is submitted that the extent of English statute law in force in Jamaica does not depend on whether such law was applicable to local circumstances since this particular criterion was replaced in 1728, at least in so far as English statute law is concerned, by the criterion of user prior to 1728.^{103A} The judicial approach to the section is well illustrated by *Woodgate v. Malabre*,¹⁰⁴ where the principal point for decision was whether the English Acts giving the Courts at Westminster the power to award costs,¹⁰⁵ were in force in Jamaica. After reviewing the early history of the island the Court concluded in this way:

"If therefore it can be shown that the statutes of England relating to costs were acted upon in this island before [1728]...there can be no doubt that we can give costs according to our own discretion. In most of the cases which have come before this Court on this Act (1 Geo. 2, C.2), we have been obliged to infer that the laws of England were acted on in this island previously to its passing from the fact, as far as any evidence could be procured, of their having been acted upon since that period. But in this case we are left in no doubt, nor driven to any presumption; for by the records in the office ... we find that from the earliest period ... costs were always given ... it is clear that the Judges before the 1. Geo. 2 acted on the authority of the

English statutes and consequently they must now be in force here, unless controlled by some subsequent Act of the island".¹⁰⁶

In this instance the Court had no difficulty in holding that the English Acts were in force in Jamaica because of the availability of clear evidence to satisfy the requirements of section 22. The inherent limitation of the strict requirement of evidence of user, however, dictated a different result in *Magnus v. Sullivan*;¹⁰⁷ where the Jamaican Supreme Court held that an English statute will not be deemed to have been "esteemed, introduced, used, accepted or received" where no trace could be discovered of its having been acted on in the island prior to 1728; "*De non apparentibus et de non existentibus eadem est ratio*". It is not, therefore, possible to use section 22 as a general reception clause for all English statutes: it is "merely a statutory confirmation of the operation [of]...laws which had clearly been acted upon and enforced before the passing of that Act".¹⁰⁸

This approach is certainly well within the terms of the statute, but it might be that the practical difficulties of finding evidence of user prior to 1728 might lead to its modification, perhaps in the direction suggested by *R. v. Stephens*.¹⁰⁹ The question in that case was whether the English statutes of forcible entry extended to Jamaica; the only evidence adduced in support of the contention that they did so extend was a local 1773 statute based on the assumption of the force of the English Acts in Jamaica. This, it was urged, raised a presumption that they had been so recognised by the Legislature because they had been "esteemed, introduced, used" etc. in the island before 1728. In support of this submission, the Attorney-General relied on a doctrine "recognised by the English Courts, that where it is necessary to establish the immemorial existence of a right, evidence of this existence, and exercise of that right as far back as living memory extends, will, in the absence of any evidence to the

contrary, afford grounds on which it may be presumed that the right had existed during legal memory".¹¹⁰ The court considered that "the principle upon which that rule of evidence rests is applicable to such questions as the one now before us",¹¹¹ and thus held that the statutes of forcible entry and detainer were in force in Jamaica within the meaning of 1 Geo. 2, C.1, section 22.

Actually, the court's reliance on this presumption was unnecessary, since there is some evidence that these statutes had in fact been in use in the island from the earliest times: Governor Lynch's report of 1671, for instance, clearly indicated as much.¹¹² Because of this, the decision has been criticised, for though "in the result [it]...happily did no violence to historical reality, it is to be questioned whether the application of such a rule of evidence borrowed from the realm of the law of prescription, is not wholly misconceived in the unique context of 1 Geo. 2, C.1".¹¹³ As a criticism of the procedure adopted in the instant case, this may be valid,¹¹⁴ but it is submitted that the approach suggested by *R. v. Stephens* would not be an unreasonable one in a situation where concrete data on the pre-1728 period is obscure or non-existent and it might be that a more flexible approach is desirable in the face of the practical difficulties involved in obtaining direct and positive evidence of user prior to 1728. Such an approach commended itself to a Grenadian court in *Noel v. Noel*,¹¹⁵ holding that the statute of Uses applied to Grenada in 1884: "Support...is also found in section 34 of, and the Third Schedule to, the Conveyancing and Law of Property Ordinance (dated May 26, 1897). The Schedule contains a specimen form of conveyance in which the expression 'to and to the use of' is employed".¹¹⁶

Though, as has been submitted, the criterion of user replaced that of applicability to local circumstances as the test of reception of English statutes by the 1728 Act, it should be noted

that, in at least one instance, the latter criterion seems to have prevailed over the former. In *Attorney-General v. Stewart*¹¹⁷ it was held that the United Kingdom Statute of Mortmain was not applicable to the colony of Grenada because it was "a law wholly English calculated for purposes of local policy"¹¹⁸ and therefore not suitable to the circumstances of an infant colony.¹¹⁹ It was thought further that the Statute was indeed "quite inapplicable to.. any other colony"¹²⁰ and that "in Jamaica, the wealthiest of our West Indian possessions, it has not to this day been thought necessary to guard against any such evil".¹²¹ In 1867 this decision was followed without question by the Jamaican Supreme Court in holding that the English Mortmain legislation was not in operation in the colony.¹²² However, while it is a fact that the Jamaican Assembly had not in terms made any provision barring gifts in Mortmain, there is a 1681 Act of that Legislature which is premised on the assumption that the English Acts were in force in Jamaica.¹²³ This Act purported to exempt certain gifts to "good, pious, charitable or political uses" from the operation of the Statute of Mortmain, from which it may be inferred that gifts in Mortmain were thought bad and contrary to law by the Jamaican legislators.¹²⁴ Though the Act might be thought to provide evidence of the Mortmain legislation having been "esteemed, introduced, accepted, used or accepted" in the island prior to 1728,¹²⁵ it would seem that in this instance the criterion of suitability of local circumstances has been preferred, even in the local courts, to that of user.¹²⁶

The interpretation of the 1728 statute has been considered with reference to its effect on the reception of English statute law in Jamaica, and there is some authority for the view that the local Act concerns itself solely with statute law. In *Jacquet v. Edwards*¹²⁷ it was argued that the words "laws" and "statutes" in section 22 must be construed to mean common law ("laws")

and statute law ("statutes"), since to do otherwise would produce a tautological result.¹²⁸ It was pointed out by the court, however, that the word "laws" appears in the earlier portion of the same section which enacts "that all the Acts and laws of the Island which determined and expired on the 1st day of October 1724...shall be and are hereby received and declared to be perpetual". The court considered that in this part of the section the word "laws" was clearly used synonymously with "Acts" and that, despite the tautology, it might bear that meaning throughout the section.

If this analysis is correct, and it is submitted that it is, then section 22 applies only to English statute law previously used and accepted in the island, and not to the common law.¹²⁹ It is thought that "this construction is consistent with the object and intention of the framers of the Act who wished to preserve for the colonists the benefit of certain English statutes which they had, without legal authority, previously adopted as if laws of the colony".¹³⁰ The common law in force in Jamaica derives its efficacy otherwise than from section 22, that is, according to the general principles of reception.¹³¹ Such law would therefore remain subject to the general common law condition of suitability to local circumstances, a view which derives support from *Jacquet v. Edwards*¹³² itself, where the court held that the only limitation on the extent of the force of the common law rules governing innkeepers' liability in Jamaica was the question of applicability to local circumstances.¹³³

From the above, the following conclusions may be advanced. Jamaica, though originally acquired by force of arms, has come to be regarded as a settled colony, whether because of its peculiar local circumstances or because "the Crown, by its own Acts ... conferred on the early colonists the same rights they would have been entitled to as Englishmen had the colony been settled".¹³⁴ As such, the colonists brought with them so much of the