Vanderbilt Law Review

Volume 4
Issue 4 *Issue 4 - June 1951*

Article 3

6-1951

The Common Law: An Account of its Reception in the United States

Ford W. Hall

THE COMMON LAW: AN ACCOUNT OF ITS RECEPTION IN THE UNITED STATES

FORD W. HALL*

"The common law of England is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." Story, J., in Van Ness v. Pacard, 2 Pet. 137, 144, 7 L. Ed. 374 (1829).

The story of the extent to which the common law of England has been received and applied in the United States, is one of the most interesting and important chapters in American legal history. However, many courts and writers have shown a tendency simply to say that our colonial forefathers brought the common law of England with them, and there has often been little or no inclination to look further into the question. Nevertheless, the problem of the reception of the common law in America has at various times occupied the attention of many of our most eminent jurists and statesmen, and from the standpoint of the modern law student the matter certainly deserves more consideration than to be passed off with the mere remark that the common law was brought over to America by the colonists. Furthermore, the generality of such a statement is not wholly accurate and is apt to be misleading.

It will not be the purpose to pitch on a philosophical level the discussion of the problems dealt with in this article. Rather, the aim is to describe comprehensively, but as briefly as possible, the process used by law-making authorities in determining the applicable common law which guides the various American state courts. This objective can best be achieved by using the historical approach and relating the significant developments which have taken place from the earliest colonial times up until the present date.

THE AMERICAN COLONIAL CHARTERS

It is apparent that it was contemplated by the British authorities at the beginning of the American colonial period that English law should in the main be transplanted to the American colonies. Every colonial charter granted by the Crown contained a provision authorizing the governing authorities of each plantation to prescribe ordinances, laws, statutes, etc., but invariably the qualification was added: ". . . soe as such Lawes and Ordinances be not contrarie or repugnant to the Lawes and Status of this our Realme of England,"[1] or words of like import. However, at the same time it undoubtedly

*Member of Texas and Louisiana Bars.

1. Charter of Massachusetts Bay—1629, 3 THORPE, AMERICAN CHARTERS CONSTUTIONS, AND ORGANIC LAWS 1853 (1909).

must have been recognized that some allowances would have to be made for the different conditions existing in a new and undeveloped country. Thus, most of the charters expressly provided that the colonial laws should not be contrary to, but should be "agreeable (*as neere as conveniently may bee*) to the Lawes of England. . . ."[2] One can only conjecture as to why the phrase "as near as conveniently may be," was omitted from a few early colonial chartes and included in most of them. An analysis of the dates of the various charters shows that this phrase was included in the charter to Sir Walter Raleigh in 1584,[3] the Second Charter of Virginia in 1609,[4] the Charter of New England in 1620,[5] the Charter of Maryland in 1632,[6] the Charter of Rhode Island and Providence Plantations in 1663,[7] and the Charter for the Province of Pennsylvania in 1681.[8] However, after the Restoration in England in 1660, the Crown and Parliament turned a more and more watchful eye toward the American colonies; thus, not only did the Charter of Massachusetts Bay in 1691 and the Charter of Georgia in 1732 omit this phrase which could be interpreted to give the colonies a certain amount of leeway in carrying out their governmental functions, but also the requirement was made that the laws of said colonies should be transmitted to England for approbation or disallowance.[9]

The foregoing charter provisions were concerned primarily with assuring that statutory law in the colonies should be kept in line with English tradition. It seems clear that it was intended that colonial law should not be repugnant to English unwritten law as well as to acts of Parliament, inasmuch as several charters provided that colonial laws should not be repugnant to English laws *and* statutes;[10] other charters said that colonial laws should not be contrary to ". . . the Laws, Statutes, Government, and Policy of this our Realm of *England*,"[11] while two charters incorporated in their provisions the limitation that colonial ordinances, etc., should not be contrary to English laws and *customs*.[12] Most of the charters were not explicit on the question of whether or not colonial judicial proceedings should follow

2. Grant of the Province of Maine—1639, 3 *id.* at 1628 (italics added).
3. 1 *id.* at 55.
4. 7 *id.* at 3801.
5. 3 *id.* at 1833.
6. 3 *id.* at 1680.
7. 6 *id.* at 3215.
8. 5 *id.* at 3038.
9. Massachusetts Bay: 3 *id.* at 1857; Georgia: 2 *id.* at 772. A similar requirement is found in the Pennsylvania Charter of 1681, 5 *id.* at 3039. The Massachusetts Bay Charter of 1691 also provided that in civil and criminal cases appeals might be taken to England to the King in Council. 3 *id.* at 1881. See generally: SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (1950).
10. Grant of the Province of Maine—1664, 3 THORPE *op. cit. supra* note 1, at 1639.
11. Second Charter of Virginia—1609, 7 *id.* at 3801; The Charter of New England —1620, 3 *id.* at 1833.
12. Charter of Maryland—1632, 3 *id.* at 1680; Charter of Carolina—1663, 5 *id.* at 2746.

the exceedingly technical common-law example in the procedural matters of pleading, issuance of writs, conduct of trial, etc. One explanation for this may be suggested by the commercial nature of several of the companies to which charters were granted and the probability that the draftsmen of the charters were primarily thinking of the companies as business corporations more than as governmental units. However, the Second Charter of Virginia in 1609 did contain a reference to conformity to English adjective law as it gave the Council full power to correct, punish, pardon, govern and rule all the subjects "So always as the said Statutes, Ordinances and *Proceedings* as near as conveniently may be, be agreeable to the Laws, Statutes, Government, and Policy of this our Realm of *England.*"[13]

It is doubtful if these differences in phraseology among the several charters are very significant. No doubt the English authorities contemplated that eventually British laws, customs, policies and system of government should prevail in all the colonies, but it must have been realized that a complete transplanting of British usages could not be accomplished at once because of basic social and economic differences existing between England and the newly-settled wilderness. For example, the table at the beginning of Coke's *Fourth Institute* lists 74 categories of English courts which are dealt with in that volume. Even the fondest adherents to the common-law system as it existed at that time could not have soundly advocated the immediate setting up of such a hierarchy in America.

The Common Law in Colonial Times

To what extent did the colonists in fact receive and apply the English common law? Unfortunately we have available no complete answer to this question; furthermore, it may well be doubted whether a generalized answer should even be attempted in view of the numerous obstacles which are encountered: the first settlements in the original thirteen colonies were made during intervals which extended over a period of more than a century; the various settlements were founded under diverse conditions, for dissimilar purposes, and by people with widely varying backgrounds; geographical conditions affected the rate of social and economic development of the several plantations, and at the outset at least each colony tended to develop along independent lines. These difficulties are further enlarged by the fact that complete records of the jural activities of the various colonies are not available, and historians who have investigated parts of colonial archives which do exist have evidenced some disagreement on the extent of American acceptance of English law during the pre-Revolutionary era. For example,

13. 7 *id.* at 3801. The same provision may be found in the Charter of New England —1620; 3 *id,* at 1833. See also the Charter of Maryland—1632, 3 *id.* at 1680.

it is the view of some writers that the English common law was for the greater part not applied in America until well into the 18th century.[14] On the other hand, one legal scholar asserts that early American colonists followed (although somewhat crudely) the English pattern to a large extent, but says that the imitation was of local custom and local courts in England, such as county courts and recorders' courts in London and various boroughs, rather than the common law as administered by the King's courts at Westminster.[15] This latter stand is based on the premise that although these English local courts were on their way out, they were at the beginning of the 17th century still an important part of law administration in England, and it was with these courts, rather than with the King's common-law courts, that the colonists, most of whom were laymen, must have had their greater previous experience. Naturally, it is argued, the colonists would tend to imitate that with which they were most familiar.

In spite of the foregoing difficulties, it is believed that several generalizations can validly be made concerning law administration during the pre-Revolutionary era; indeed, because of its effect upon subsequent American legal development, the colonial experience cannot be ignored. It should of course be kept in mind that developments in the several colonies occurred by no means at the same time and some characteristics were manifest to a lesser extent in some settlements than in others. Obviously, we cannot all be legal historians and conduct intensive studies of what colonial records are available from the original colonies. If the results of detailed investigations into the past cannot be translated into a form which other students of law can use, there would seem to be little point to making the investigations in the first place. The primary value of the present paper can lie only in giving as complete a picture as possible of the development from the beginning until now of this phase of American law.

Before any conclusions are drawn, certain basic facts must be summarized. Few persons trained in the legal profession were to be found in the various colonies during the 17th century;[16] furthermore, English law

14. See Reinsch, *The English Common Law in the Early American Colonies* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367 (1907); Hilkey, *Legal Development in Colonial Massachusetts* in 37 COLUMBIA STUDIES IN HISTORY, ECONOMICS, AND PUBLIC LAW 68 [224] (1910) (emphasizing the role of the Scriptures in law administration); Morris, *Massachusetts and the Common Law; The Declaration of 1646*, 31 AM. HIST. REV. 443 (1926).

15. See Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COL. L. REV. 416 (1931). *Cf.* Plucknett, Book Review, 3 NEW ENGLAND Q. 157-58 (1930): "As early as 1648 . . . there had been a voluntary reception of a good deal of common law, freely modified to meet local conditions."

16. The authorities are in accord on this proposition. See Goebel, *supra* note 15 at 419-20; MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW 41 (1930); Introductory to WARREN, A HISTORY OF THE AMERICAN BAR 3-18 (1911); Reinsch, *supra* note 14 at 369-70.

books were scarce,[17] and these two circumstances continued to exist until well into the 18th century. Therefore, practically all of the early colonial tribunals which were set up to handle disputes were composed of lay judges untrained in the law.[18] At an early date there seems to have prevailed in every settlement a popular demand for codification of the law. For example, when the "Lauues and Libertyes" of 1647 were published to the inhabitants of Massachusetts Bay, the General Court mentioned its desire to satisfy the people's "longing expectation, and frequent complaints for want of such a volume to be published in print; wherein (upon every occasion) you might readily see the rule which you ought to walke by."[19] This desire on the part of the people for certainty in the law led to the early codification in every colony except Maryland of the legal principles most essential to the settlement of disputes in the social and economic system which existed at the time.[20] Thus, it was the local code to which colonial judges referred as the primary source of law, and because of the scarcity of law reports the common-law decisions of English courts could not have been to any great extent the secondary source of law in the 17th century. These local codes were in many instances manifestations of the demand for law reform which many of the leading colonists insisted upon after having experienced dissatisfaction with the English system of administration of justice. Furthermore, back in England a movement for law reform was also taking place during the 17th century which had reverberations on this side of the Atlantic.[21]

It is probably accurate to say that the southern and middle colonies followed English precepts more closely than did the New England planta-

17. See WARREN *op. cit. supra* note 16, at 7; Kocourek, *Sources of Law in the United States of North America and Their Relation to Each Other,* 18 A.B.A.J. 676, 677 (1932). For the view that the scarcity of law books may be overemphasized in interpreting colonial law, see AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM 43 (1940).

18. It was not until 1712 that the first professional lawyer (Lynde) became Chief Justice of Massachusetts. See Reinsch, *supra* note 14, at 385. The first lawyer to serve as Chief Justice in New Hampshire was Theodore Atkinson, who took office in 1754. *Id.* at 388. On the other hand, William Penn was anxious to secure the services of trained lawyers, and at an earlier date (1701) the first lawyer (Guest) became Chief Justice of Pennsylvania. *Id.* at 399. See also WARREN, *op. cit. supra* note 16, at 8-10; BALDWIN, THE AMERICAN JUDICIARY 189 (1905).

19. Introduction to THE LAWS AND LIBERTIES OF MASSACHUSETTS, 1647 (reprinted by Harvard University Press, 1929).

20. Reinsch, *supra* note 14, at 410. In Maryland events took a somewhat different turn, and there soon developed a controversy between the proprietors and the popular element known as the "country party," with the latter clamoring for the application of English law to Maryland, and the former resisting this demand as an encroachment on the proprietary powers granted by the charter. ALEXANDER, BRITISH STATUTES IN FORCE IN MARYLAND vi (1870).

21. See HOWE, READINGS IN AMERICAN LEGAL HISTORY 78 *et seq.* (1949). For a description during the commonwealth period of the movement for law reform in England, see Robinson, *Anticipations Under the Commonwealth of Changes in the Law,* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 467 (1907).

tions.[22] Part of the explanation for this may lie in the religious background of the northern settlements. Although legal scholars disagree on the extent to which Biblical precepts affected colonial law administration, there is no doubt that particularly in New England religious ideas were significant in affecting the actual working of the legal systems.[23] For example, in Massachusetts Bay the ministers took an active part in numerous early judicial proceedings.[24] In fact, it is hard to draw the line between church and state in Massachusetts Bay and in Plymouth during the earlier part of the 17th century.

In view of the conditions which existed in America during the 17th century and early part of the 18th century, it is readily apparent that the English system of court organization and the substantive and adjective law which it applied, could not have been duplicated *in toto* in the American colonies, and no scholar argues that it was.[25] The differences of opinion by writers on colonial law administration are thus matters of degree and may legitimately be resolved into questions of emphasis. Whether we emphasize the imitation by the colonists of the practices of English local courts or whether we say the early colonial judges were really applying their own common-sense ideas of justice, the fact remains that there was an incomplete acceptance in America of English legal principles, and this indigenous law which developed in America remained as a significant source of law after the Revolution. Of course in the earlier colonial period one of the chief reasons for not applying many phases of the English common-law system was the fact that the frontier economic and social system had not reached the more complicated level which existed in England at the time. Yet, there are a good many instances of conscious deviation from the English prototype.

22. See Reinsch, *supra* note 14, at 367, 371. The assemblies of the Carolinas were the first of the colonies to pass acts declaring the common law of England to be in force. See Reinsch, *id.* at 407-08; N. C. LAWS 1715, c.31, §§6-7, found in 1 TENN. AND N. C. LAWS 20, 22 (Scott, 1821).

23. See AUMANN, *op. cit. supra* note 17, at 58-61; 1 POWELL, REAL PROPERTY § 45 (1949). For a description of the enforcement in colonial Virginia of laws pertaining to religion, see SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA, 239-92 (1930).

24. The Magistrates of the Massachussets Bay Colony were directed to hear cases according to law; where there was no law, they were then to try the case as near to the law of God as possible; and, if no certain rule should be found, the magistrate was to use his best discretion. 1 MASS. COL. REC. 174-175 (Shurtleff ed. 1853). See Aspinwall's preface to the 1655 edition of JOHN COTTON'S ABSTRACT OF THE LAWES OF NEW ENGLAND (1641) in 5 MASS. HIST. SOCIETY COLLECTIONS (Ser. 1) 187 (1816). See also the last paragraph in the introduction to the LAWES AND LIBERTIES OF MASSACHUSETTS (Harvard Univ. Press 1929). The proceedings against John Wheelwright and the trial of Ann Hutchinson are two of the most noted examples of the participation of ministers in the affairs of the colonial General Court. A SHORT STORY OF THE RISE, REIGN AND RUINE OF THE ANTINOMIANS, FAMILISTS, AND LIBERTINES THAT INFECTED THE CHURCHES OF ENGLAND (London 1644); 2 HUTCHINSON, HISTORY OF MASSACHUSETTS BAY 366 *et seq.* (3d ed. 1795).

25. *But cf.* ZANE, THE STORY OF LAW 358 (1927): "As soon as the Colonies reached a stage where there was need of any developed system of law, the whole of the English law was introduced in its system of common law and equity, with exceptions that are not important."

But as the middle of the 18th century approached, more and more English principles and institutions were being applied and set up, as trained lawyers became more abundant, and more English law books were available. After the Restoration a more active exercise of the Crown's veto of colonial legislation and judicial review by the privy council of colonial decisions, helped bring about a greater conformity to the common law.[26]

The basic conclusion is that law administration in America, as it existed around the middle of the 18th century, may aptly be classified as a development of the English common-law system. True, it was not a complete reception of British legal institutions, but fundamentally it was the common-law system which has secured a foothold strong enough to withstand the popular hostility to England and anything English which was being expressed and which reached its greatest outcry during the Revolutionary War and the post-Revolutionary period. It should not be forgotten, however, that the increasing influx of common-law principles by no means obliterated the indigenous systems which had developed during the colonial era and that there existed important differences in law in action on the two sides of the Atlantic.[27]

The Revolutionary War and Post-Revolutionary Period

About the middle of the 18th century the common law of England began to take on a new meaning in America. The same colonists who had insisted that certain English laws were inapplicable to their situation now began to appeal to the common law for protection against Parliament and the Crown. The various settlements were feeling a new kinship one for another and it was acclaimed that all the American plantations, whether considered to be provincial, proprietary or charter colonies, were entitled to the common law of England.[28] However, this clamor for the application of English legal principles to the colonial situation was not based on a love for the technicalities, niceties and fictions of the common-law system, but rather on an appeal to the common law as an embodiment of natural law principles of individual rights and personal liberty.[29] In fact American

26. See generally Smith, *op. cit. supra* note 9.

27. See 1 Powell, *op. cit. supra* note 23, at 101-02. For comparisons of some particular phases of American and English law administration during the colonial period, see generally Morris, *op. cit. supra* note 16, and Scott, *op. cit. supra* note 23.

28. One of the most critical legal problems of the times was the question of the maintenance of the royal prerogative in the American colonies. Components of this issue were the broad questions of what English general law was applicable and to what extent acts of parliament governed the colonies. The problem involves too many ramifications to be dealt with here. See Smith, *op. cit. supra* note 9, at 656. Judicial highlights dealing with the problem of the extension of British law to the American colonies are presented in Goebel, Cases and Materials on the Development of Legal Institutions 243-98 (7th Rev. 1949).

29. In 1 Story, Commentaries on the Constitution § 157 (2d ed. 1851), it is maintained that the common law is "our birthright and inheritance;" nevertheless, in

writers of the Revolutionary period often used the terms "common law" and "Magna Carta" as synonymous terms. Undoubtedly it was this meaning which was attributed to the common law when the Continental Congress on Sept. 4, 1774, declared that "the respective colonies are entitled to the common law of England."[30]

Among the many problems engendered by the severance from the mother country through the historic Declaration of Independence, was that of what law should American judicial tribunals thereafter apply as the rule of decision of specific cases. The substitution of the people for the king as the source of sovereignty made it necessary to exercise some caution in adopting the common law inasmuch as a good many of the old rules would not fit into the political philosophy of the newborn states. After the Declaration of Independence, three primary methods were used by the thirteen American states in dealing with the problem of what English law should be recognized thenceforth. These methods are outlined below.

At an early date following the Declaration of Independence a general convention of representatives from various counties and municipalities in Virginia adopted an ordinance which, among other things, was designed "to enable the present magistrates and officers to continue with administration of justice, and for settling the general mode of proceedings in criminal and other cases till the same can be more amply provided for."[31] This ordinance is an extremely important piece of legislation in American law inasmuch as it contained the following provision which was later to be copied in statutory enactments of many other states:

> "And be it further ordained, that the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations and resolutions of the general convention, shall be the rule of decision, and shall be considered in full force, until the same shall be altered by the legislative power of the colony."[32]

---

the next section the common law is "limited and defined" as (*inter alia*) "the guardian of our political and civil rights. . . . Compare: "I deride with you the ordinary doctrine, that we brought with us from England the common law rights. . . The truth is we brought with us the rights of men, of expatriated men." Letters to Judge Tyler, June 17, 1812, 4 WRITINGS OF THOMAS JEFFERSON 178 (Randolph ed. 1829); see Adams' remarks on the subject in *Novanglus,* 4 WORKS OF JOHN ADAMS 122 (1851).

30. This declaration goes on to say: ". . . and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." See 1 STORY, *op. cit. supra* note 29, at 134 n.2.

31. 9 LAWS OF VIRGINIA 126 (Hening 1821).

32. 9 *id.* at 127. Georgia's reception statute is similar to Virginia's except Georgia made no specific provision as to the force of British statutes. The Georgia revolutionary legislature on Feb. 25, 1784 declared in full force the "common law of England so far as it is not contrary to the constitution, laws and form of government. . . ." See 1 POWELL, *op. cit. supra* note 23, § 54. Rhode Island's method was also similar. In 1766 Rhode Island provided that the laws of England should govern where no local

Thus the Virginia courts were told to continue to look to English common-law decisions for guidance, and were also directed to consider English statutes which had been passed prior to 1607, the date of the first permanent settlement in America made under the auspices of England. The question as to what English statutes were binding on the colonists during the colonial period had been a vexing one and was necessarily akin to the broader political problem of the extent of the power of the Crown and the British Parliament over the American colonies. After the Declaration of Independence the respective states were free to adopt what legislation each thought proper, pending of course the successful outcome of the Revolution. The Virginia solution of adopting English statutes of a general nature passed prior to 1607, necessarily omitted a substantial amount of later British legislation which was well worth having. Evidently this was soon recognized in Virginia because a commission (which included Thomas Jefferson) was appointed to recommend the adoption by the Virginia legislature of specific English statutes. During the legislative session of 1792, the Virginia General Assembly enacted such of the British statutes as were considered "worthy of adoption,"[33] and thenceforth the effect of British statutes in Virginia was more narrowly limited.[34]

A majority of the original thirteen states used another method in determining what law their judicial tribunals should apply, which is illustrated by the following quotation from the New Jersey Constitution of 1776: ". . . the common law of England, as well as so much of the statute law, as have been heretofore practiced in this colony, shall still remain in force, until they shall be altered by a future law. . . ."[35]

Similar approaches to the problem were made by Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina and Pennsylvania.[36] This kind of provision would seem to call for the courts to use

law specifically applied to the particular case. See 1 POWELL, *op. cit. supra* note 23, § 62. The Rhode Island General Assembly also listed specific English statutes which were considered to be in force in that jurisdiction. *Id.* at 208-10. South Carolina was the earliest colony to pass a reception statute. In 1712 South Carolina passed an act listing English statutes in force and declaring the common law of England to be in force. After South Carolina became a state, its constitution specifically continued all prior law. This meant that the specific statutes listed in the act of 1712 and the common law of England formed in the main the backbone of South Carolina's jurisprudence. *Id.* § 63.

33. 1 VA. REV. CODE, c. 40, p. 137 (1819).

34. *Ibid.*; see United Fidelity & Guaranty Co. v. Carter, 161 Va. 381, 170 S.E. 764, 770 (1933).

35. N. J. CONST., Art. XXII (1776).

36. The reception enactments of these states are summarized in 1 POWELL, *op. cit. supra* note 23, §§ 51, 53, 56, 57, 59, 60, 61. Vermont, which became the fourteenth state of the Union, adopted in 1779 the "common law, as it is generally praticed and understood in the New England States . . ." In 1782 Vermont made its enactment more specific by retaining "so much of the common law of England, as is not repugnant to the constitution, or to any act of the legislature of this State," and in addition such English statutes passed before Oct. 1, 1760 as "are not repugnant to the constitution, or some act of the legislature, and are applicable to the circumstances of the State. . . ." *Id.* § 64.

a different method of inquiry in determining the applicable general law than would the Virginia statute. The New Jersey type of enactment would seem to be more restrictive inasmuch as it directs the courts to the common law as previously practiced in the jurisdiction, whereas the Virginia act refers the judges generally to "the common law of England." As will be seen later the differences in wording of the particular reception provisions had little practical effect on subsequent case-law.[37] Neither type of reception provision operated to hamstring the freedom of the courts in deciding cases. In Virginia the courts had the last say-so as to what the common law of England included, and in jurisdictions using the New Jersey method of approach the courts were virtually unfettered in declaring what was the common law of the particular jurisdiction because of the fact that there was no agreement or knowledge in many instances as to what common-law principles and English statutes had actually prevailed during colonial times.[38] In several jurisdictions unofficial lists or collections of British statutes deemed in force, compiled by noted lawyers or judges,[39] helped to resolve the uncertainty as to the effect of English acts of Parliament.[40]

The third method of common-law reception was used only in Connecticut among the thirteen original colonies. No express statutory or constitutional recognition of the whole of the common law is to be found in this state during the Revolutionary and post-Revolutionary period. Thus it was left entirely to the courts to declare the force of the common law, and this has been done in a somewhat selective manner as the Connecticut Supreme Court has asserted that only that portion of the common law which was applicable to the situation in Connecticut should be deemed to be the law of that state.[41] Here we see influences of the thinking of the colonial period hanging over as New Englanders were claiming the benefit of personal liberties deemed to be embodied by the common law, and at the same time were denying that certain other English legal principles bound their courts.

---

37. See *infra* pp. 805-06.

38. "What English statutes are deemed to be in force here, is often a question of difficulty, depending upon the nature of the subject, the difference between the character of our institutions, and our general course of policy, and those of the parent country, and upon fitness and usage." Shaw, C. J., in Going v. Emery, 33 Mass. 107, 115 (16 Pick.) (1854).

39. Maryland: KILTY, ENGLISH STATUTES (1811); ALEXANDER'S BRITISH STATUTES (Coe ed. 1912). Pennsylvania: See the report of the judges of the Pennsylvania Supreme Court as to English statutes in force in that commonwealth, dated in 1808, in 3 Binney 599 (Pa. 1878). Georgia: SCHLEY, ENGLISH STATUTES IN FORCE. (1826). North Carolina: MARTIN, COLLECTION OF STATUTES OF ENGLAND IN FORCE IN NORTH CAROLINA (1792).

40. See *infra* p. 821.

41. See Baldwin v. Walker, 21 Conn. 167, 180 (1851). See also 1 POWELL, *op. cit. supra* note 23, § 52.

THE WESTWARD TRANSMISSION OF THE COMMON LAW

After the Revolution, in order to settle conflicting claims by the various original thirteen states to land west of the Alleghenies, it was finally agreed that control of these western lands should be transferred to the United States. In 1787 the Congress passed an "Ordinance for the government of the territory of the United States northwest of the river Ohio" by which a temporary government was set up headed by a governor and "three judges, any two of whom to form a court, who shall have a common-law jurisdiction. . . ."[42] The governor and judges were directed to "adopt and publish . . . such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district. . . ."[43] "Judicial proceedings according to the course of the common law" were guaranteed to the people of the territory.[44] As soon as there should be 5,000 inhabitants, the Ordinance provided for the setting up of the second stage of government in which a general assembly would represent the people.[45]

It should be noted that the governor and judges were given authority to *adopt* existing statutes of the original states and not to author new legislation. Furthermore, the phrase "judicial proceedings according to the course of the common law" could be susceptible to the interpretation that Congress had thereby extended the common law to the Northwest Territory both in substance and procedurally.[46] However, the governor and the judges of the territory apparently gave the phrase a restricted connotation because in 1795 they felt it necessary to adopt a law declaring what general law should be considered in force in the territory, and the resulting enactment was a copy of the original reception statute passed by Virginia in 1776.[47] The validity of the adoption by the Northwest governing authorities of the Virginia reception statute of 1776 was questioned a good many years later by Salmon P. Chase who was to become Chief Justice of the United States Supreme Court. Chase's grounds of objection were two: (1) since at the time the Virginia statute was adopted by the Northwest authorities, the Virginia statute itself had been repealed, the law adopted was not a law of Virginia and therefore it could not be adopted; (2) Congress, in granting authority to the governor and judges of the territory, intended the adoption of single acts, the subject matter of which when published would be clear

42. 2 THORPE, *op. cit. supra* note 1, at 958.
43. *Ibid.*
44. *Id.* at 960-61.
45. *Id.* at 959-60.
46. See *infra,* note 64. Salmon P. Chase was of the opinion that the quoted phrase extended the common law to the territory. See 1 PEASE, LAWS OF THE NORTWEST TERRITORY, 1788-1800 xvi (1925).
47. 1 PEASE, *op. cit. supra* note 46, at 253.

to the inhabitants of the Northwest Territory, and the act adopting the common law in general was therefore in excess of the powers delegated by Congress.[48] Certain other statutes adopted by the territorial judges were subject to question inasmuch as they would pick only sections or parts of statutes which they wanted and ignore the remainder, or they would rather freely rephrase some statutes. Furthermore, in some instances, the judges would state no source for legislation promulgated which indicates that there was no specific source. They also adopted acts from Kentucky, which of course was not one of the original states.[49]

Despite the infirmities connected with the legislation by the governor and judges of the Northwest Territory, their adoption of the Virginia reception statute set the pattern later to be followed by many western states. For instance, the Indiana territorial legislature in 1807, with small variances, adopted the Virginia reception statute as it had been originally enacted in 1776,[50] and essentially the same statute is in force in Indiana today.[51] Illinois followed with an almost verbatim copy of the original Virginia statute, but later added the qualification that only the common law "so far as the same is applicable" was adopted.[52] The effect of this qualification will be seen presently.

The Ohio legislature also copied the original Virginia reception statute at an early date in its statehood,[53] but repealed it a year later leaving no specific statutory recognition of the force of the common law in that jurisdiction.[54] Despite some early sporadic protests it soon came to be accepted that the act of repealing the Ohio reception statute did not eliminate the common law.[55] As a practical matter the courts needed some body of general law to "supply the defects of a necessarily imperfect legislation,"[56] and it was natural that they should turn to the common law, which was the only system of jurisprudence accessible to any extent. Michigan and Minnesota did not have explicit statutes adopting the common law as the rule of decision, unless it be considered that the Northwest Ordinance or the 1795 Act by the governor and judges of the Northwest Territory extended the common law to those jurisdictions. In both states the courts soon declared that the common law had been inherited and that no express adoption by

48. PHILBRICK, LAWS OF INDIANA TERRITORY, 1801-1809 ci-cii (1930).

49. 1 PEASE, *op. cit. supra* note 46, at xxiv-xxx; 1 BLUME, TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN, 1805-1814, xi-xvii (1935).

50. PHILBRICK, *op. cit. supra* note 48, at 323.

51. IND. STAT. ANN. § 1-101 (Burns 1946).

52. See 1 POWELL, *op. cit. supra,* note 23, § 71.

53. 1 OHIO AND N. W. TY. STAT. 512 (Chase 1833).

54. *Id.* at 528.

55. See HOWE, *op. cit. supra* note 21, at 431-32 and authorities there cited.

56. Ohio v. Lafferty, 1 TAPPAN 113 (Ohio C.P. 1817).

the territorial or state legislatures was essential to affirm the authority of the common law.[57]

When Wisconsin became a state its constitution provided that "such parts of the common law as are now in force in the territory of Wisconsin," should remain in effect.[58] This method of recognizing the common law is somewhat analogous to the New Jersey type of reception provision, which purported to adopt such parts of the common law as were practiced during colonial days in the particular jurisdiction. From the wording of the Wisconsin reception provision, it might be logical to suppose that the Wisconsin state courts should look to the practice of the territorial courts in that jurisdiction to determine if particular common-law rules were actually in force at the beginning of statehood. As a matter of fact the Wisconsin decisions show that the judges have in practice generally looked elsewhere to determine the applicable common law.[59]

To the south, Kentucky borrowed Virginia law as of June 1, 1792.[60] This meant that the original Virginia reception statute of 1776 was considered in force in Kentucky. Tennessee was governed by North Carolina law immediately after its territory was ceded to the United States by North Carolina; this meant that so much of the common law was to be recognized in Tennessee as was not "destructive of, repugnant to, or inconsistent with . . . freedom and independence. . . ."[61] The common law was retained by "continuation in force" clauses in the subsequent Kentucky and Tennessee constitutions.[62]

Further to the south, Congress in 1798 established the Mississippi Territory and provided that the Ordinance of 1787 for the Northwest Territory should extend to the Territory of Mississippi with the exception of the article forbidding slavery.[63] The United States Supreme Court several years later declared that this extended the common law to all the territory, and thereby all other law, Spanish or French, was excluded.[64] "Continuation in force" clauses have kept the common law as the basis of judicial decisions in the state of Mississippi and also in Alabama until 1907 when for the first time an express reception statute was passed by the Alabama legislature.[65]

57. 1 POWELL, *op. cit. supra* note 23, §§ 72, 74. For the background in Michigan with respect to reception of the common law, see 1 BLUME, *op. cit. supra* note 49, at xxxi, xi.
58. WIS. CONST. Art. XIV, § 13 (1848).
59. See the cases discussed in 1 POWELL, *op. cit. supra* note 23, § 73.
60. KY. CONST. Art. VIII, § 6 (1792).
61. N.C. Laws 1778, c. 5, § 2.
62. See 1 POWELL, *op. cit. supra* note 23, § 75.
63. 1 STAT. 549 (1798).
64. Pollard v. Hagan, 3 How. 212, 227, 11 L.Ed. 565 (1845).
65. See POWELL, *op. cit. supra* note 23, § 76.

As American civilization moved to the west coast, the common law moved with it much in the same manner as it had spread to the Northwest, Southwest and Mississippi territories.[66] Most of the midwestern and western states adopted general reception statutes patterned in the main after the original Virginia statute, but often these reception provisions came after it had already been tacitly assumed that the common law was in force. In some instances laws of already established states or territories were extended to a new territory until the local government should have time to set up laws of its own.[67] This meant that the common law as adopted by the previous state or territory was deemed to be in force in the new territory. In cases where the passage of a reception statute came later in the development of a state or territory, it was deemd to be declaratory of existing law.[68]

Some qualification to the foregoing generalization needs to be made in connection with the experience of Florida, Louisiana and the southwestern states of Texas, New Mexico, Arizona and California.[69] In all of these states the civil law was at one time in effect (although often somewhat feebly), and Spanish and French influences are still felt today especially with respect to land grants made prior to the gaining of control by the United States. But generally the problem of the reception of the common law in Florida, Texas, New Mexico, Arizona and California has been no different from that of other states except the retention by some of the named states of concepts derived from the civil law, as for example the community property system in the southwestern states, has required the courts of those states to use a somewhat different technique of interpretation in order to fit the concepts into the general common law system.[70]

Louisiana of course requires special treatment, and even there the common law has had its influence. In 1805 the Territory of Orleans enacted a crime's act which listed a good many common-law crimes and referred the courts to the common law of England for their definition.[71] But the territorial legislature provided for the adoption of a civil code which was patterned after the French Code Napoleon. In spite of this and a Louisiana constitutional injunction against the legislature of Louisiana ever

66. An excellent summary of the various reception provisions in the separate states may be found in 1 POWELL, *op. cit. supra* note 23, §§ 46-94.

67. See *e.g.*, Arkansas: 1 POWELL, *op. cit. supra* note 23, § 80.

68. See the experience of Utah, summarized in 1 POWELL, *op. cit. supra* note 23, § 85.

69. Missouri and Arkansas probably should be added to this list inasmuch as the territory comprising these states was a part of the Louisiana Territory prior to 1804. See generally HOUCK, THE SPANISH REGIME IN MISSOURI (1909).

70. For a specific discussion of this problem in Texas see Hall, *An Account of the Adoption of the Common Law by Texas*, 28 TEX. L. REV. 801, 809, 819 (1950). A general discussion of the reception problem in Florida may be found in Day, *Extent to Which the English Common Law and Statutes Are in Effect*, 3 U. OF FLA. L. REV. 303 (1950).

71. La. Acts 1805, c. 50, p. 416.

adopting a general body of law by reference,[72] the assertion was made in 1937 by a legal scholar that Louisiana had become in fact a common-law state.[73] This somewhat bold statement was immediately contested by several Louisiana law professors,[74] but it cannot be doubted that Louisiana jurisprudence has been substantially affected by Anglo-American law influences, and the differences in interpretation on the force of the common law in Louisiana resolve themselves into questions of degree.

MAJOR ISSUES FACING THE COURTS ON THE RECEPTION PROBLEM

Having traced the principal methods used by the various states in adopting the common law, we turn now to the principal problems which the courts have had to deal with in determining the applicability of the common law. In reading the American decisions handed down during the several decades which followed the Revolutionary War, one cannot help but be impressed by one striking characteristic. The thing that stands out is the extreme amount of latitude which these courts enjoyed in deciding cases. It is true that the courts of some states have generally hewed closer to the line than others in following established common-law principles.[75] Nevertheless, a review of the cases shows that no matter what the wording of the reception statute or constitutional provision of the particular state, the rule developed, which was sooner or later to be repeated in practically every American jurisdiction, that only those principles of the common law were received which were applicable to the local situation.

Most of the cases which refuse to apply English common-law precepts, do it on the basis that such rules are inapplicable because of fundamental differences between England and America in Governmental structure, basic statutory policy, social conditions, economic status, or geographic and climatic conditions.[76] Several theories have been advanced in order to justify the departures from admitted common-law rules. One manner in which it has been done has been to advance the hypothesis that it was the common

72. LA. CONST. Art. IX, § 11 (1812). This provision has been continued and is in the present Louisiana Constitution. LA. CONST. Art. III, § 18.

73. See Ireland, *Louisiana's Legal System Reappraised,* 11 TULANE L. REV. 585, 596 (1937).

74. Daggett, Dainow, Hebert, McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana,* 12 TULANE L. REV. 12 (1937).

75. See the conclusions reached in 1 POWELL, *op. cit. supra* note 23, §§ 48-93 with respect to attitudes adopted by the courts of the various states toward their reception enactments.

76. Sometimes differences have been attributed to local "custom." See Seeley v. Peters, 10 Ill. 104, 130 (1848); GOEBEL, *op. cit. supra* note 28, at 314. Some of the earlier cases dealing with the extent of reception of English law are summarized in Dale, *The Adoption of the Common Law by the American Colonies,* 21 AM. L. REG. (N.S.) 553 (1882). See also Pound, *The Development of American Law and Its Deviation from English Law,* 67 L.Q. REV. 49 (1951).

law we adopted and not English decisions.[77] This theory that there is an abstract common law as distinguished from the decisions themselves is rather difficult for a realist to understand,[78] although it is analogous to Blackstone's view that courts can only discover or declare the law and that their decisions are merely evidence of what the law is rather than the law itself.[79] Another technique has been that of saying that it is a principle of the common law itself that when the reason for the rule no longer exists, the rule also ceases. Thus the judges using this reasoning abandon a common-law principle by purporting to follow the common law. The maxim that when the reason for a rule ceases to exist, the rule also fails has been dignified by a Latin counterpart: *cessante ratione legis cessat et ipsa lex.*[80] Other courts have not felt it necessary to justify on theoretical bases departures from earlier common-law principles, but simply state quite frankly that only that part of the common law has been adopted which is in harmony with the spirit and genius of our institutions.[81]

Several things may account for the numerous instances of failure to follow unwanted English decisions during the first several decades after the Revolutionary War. During the latter part of the 18th century and continuing until well into the 19th century, there was manifest a general hostility to England and all that was English.[82] Pennsylvania, New Jersey and Kentucky legislated against the citation of English decisions in the courts, and New Hampshire had a rule of court against it.[83] A popular statement of the time was: "they would govern us by the common law of England. Common sense is a much safer guide."[84]

Another reason for failure to follow certain English decisions lies in the fact that satisfactory collections of law reports were still not universally available, and the courts in many instances were left with only Blackstone

77. See, *e.g.*, Marks v. Morris, 14 Va. (4 Hen. & Munf.) 463 (1809). In Connecticut, Judge Root in the preface to volume 1 of Root's Reports declared that no resort whatsoever should be had by Connecticut courts to any foreign system of law. 1 Root xiv (Conn. 1789-1793). For an example in Massachusetts of a departure from a common law principle, see the noted case of Commonwealth v. Hunt, 45 Mass. (14 Metc.) 111 (1842).

78. "To talk therefore, about adopting the English common law without adopting the decisions of the English courts is to talk about adopting something which does not exist. . . ." Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6, 14 (1910).

79. 1 BL. COMM. *70-71.

80. See *infra* p. 811.

81. The quotation from Story at the beginning of this article expresses the more usual general approach to the reception problem.

82. See 1 Root, *supra* note 77 at xiv; Pound, *The Place of Judge Story in the Making of American Law*, 48 AM. L. REV. 676 (1914); WARREN, *op. cit. supra* note 16 at 224-25.

83. Pound, *supra* note 82 at 686; see Loyd, *The Courts from the Revolution to the Revision of the Civil Code*, 56 U. OF PA. L. REV. 88, 111-12 (1908).

84. Pound, *supra* note 82 at 686.

and his "complacent view"[85] of feudal real property law and overrefined procedure. Civil-law forces were exerting an influence, and a movement for codification of American law arose and was expounded with some vigor for several decades.[86] At the same time the common law in England was undergoing changes. In light of the foregoing considerations, American judges were faced with the necessity of developing an American common law. Dean Pound sums up the formative period of American law by saying that the legislatures, courts and doctrinal writers had to test the English common law at every point with respect to its applicability in America: thus an American common law was developed in less than three-fourths of a century, and Pound concludes that: "No other judicial and juristic achievement may be found to compare with this."[87]

In the midwestern and western states, differences in geographic and climatic conditions, especially in regard to scarcity of water, have given rise to more frequent deviations from recognized common-law tenets than on the Atlantic seaboard. The fact that the population in these states was scattered more widely was a significant factor in the rejection of the English common-law rule requiring the owner of cattle to fence them in.[88] Also, by the time that many of the western states experienced the formative stages of their law, reports from eastern states and treatises written by American writers were becoming increasingly available. In many instances there had developed conflicts in authority on legal points. This meant that the courts of the newer jurisdictions, which almost universally declared that the common law of England could be found by looking to decisions of courts of the United States, were afforded an even greater latitude in choosing desirable legal formulae. This same technique was available to a lesser extent to courts of the eastern states later on in deciding issues on which there had arisen cleavages of authority in other jurisdictions.

Selective Review of the Cases Involving the Reception Problem

The foregoing generalizations take on greater meaning in the light of specific cases. Therefore, there follows a selective review of some of the cases involving the reception problem with the two primary purposes of (1)

85. Pound, The Formative Era of American Law 9-10 (1938); see Warren, *op. cit. supra* note 16 at 224-25.

86. Pound, *supra* note 82, at 691; Sampson, Discourse on the History of the Law (1823); Walker, Introduction to American Law 58, 60, 648 (1837). For a list of American references on the codification movement, see 2 Hoffman, A Course of Legal Study 691-92 (2d ed. 1836); see also 1 Sprague, Speeches, Arguments and Miscellaneous Speeches of David Dudley Field 219 *et seq.* (1884); Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation,* 17 Tulane L. Rev. 351, 394-405 (1943).

87. Pound, *op. cit. supra* note 85 at 21.

88. Seeley v. Peters, 100 Ill. 130 (1848); Wagner v. Bissell, 3 Iowa 396 (1857); see Prosser, Torts 434 (1941).

illustrating the instances in which the courts have or have not been willing to depart from earlier common-law principles, and (2) showing that this judicial process of selection of "applicable" legal rules is still going on in this country. Except as otherwise indicated, all of the cases next discussed have been decided in the past decade. The reception problem is by no means confined purely to the interest of legal historians.

In a 1949 New Jersey case[89] the respondent had refused to answer certain questions before a grand jury in claiming that she was entitled to a privilege of refusing to answer on the ground, *inter alia,* that the answers might tend to degrade her. The question on appeal was whether or not such a privilege existed according to the common law as adopted in New Jersey. It will be recalled that New Jersey received the common law as practiced in the colony of New Jersey.[90] The court found such a privilege recognized in an English case in 1696, but noted that the privilege fell into disuse during the 18th century, and an English treatise on evidence published in 1769 failed to mention the privilege. Yet, two decisions of the Court of King's Bench in 1802 declared that a witness need not answer any question the object of which was to degrade. No previous New Jersey decisions by a court of last resort were found, and there were conflicting decisions in New Jersey lower courts on the existence of the privilege. The New Jersey Supreme Court asserted that it was not bound by any English case decided since the Revolution, and in view of the status of New Jersey law, the court found itself "free to adopt that rule which appears to be best suited for the ascertainment of truth and the advancement of justice. . . ."[91] The case went on to hold that no privilege against answers that tend to degrade exists in New Jersey, basing the holding partly on the fact that if the New Jersey legislature had intended such a privilege to exist it would have listed it along with the instances in which that body had specifically recognized other types of privileged answers by witnesses. But the opinion adds that even without the aid of the statute, the same result would have been reached.

It will be noted that this New Jersey decision uses a technique which has been usually applied by the courts in those states which adopted that portion of the common law which had been practiced during colonial times in the colony. That is, no attempt is made to discover if in fact the asserted common-law rule was ever applied in colonial litigation.[92] Rather, the court looks to English decisions and treatises, and draws the inference,

89. *In re* Vince, 2 N.J. 443, 67 A.2d 141 (1949).
90. *Supra* p. 799.
91. *In re* Vince, 2 N.J. 443, 445, 67 A.2d 141, 147.
92. For earlier cases using this approach, see Commonwealth v. Churchill, 43 Mass. (2 Metc.) 118, 124 (1840); Williams v. Williams, 8 N.Y. 525, 541 (1853).

which no one can rebut, that such privilege was not a part of the common law received as part of New Jersey law. Another court, having before it the facts of the New Jersey case, might have reached an opposite result by saying that the 1802 English decisions recognizing the privilege were evidence of what the common law must have been 26 years before when it was adopted.[93] Yet, even though the opposite result were reached, a court using this reasoning would still be ignoring the issue of whether such a privilege had been recognized in the courts of New Jersey in colonial times. Thus a state enactment which merely purported to keep in force that part of the common law which had theretofore been practiced in the colony, often has been employed to accept or reject an asserted common-law principle in the absence of proof of historical fact. This practice has been called a "travesty of history,"[94] but it is a matter in which the judiciary has had the final word because it is the courts which make the ultimate decisions on the applicable law in specific cases.

A recent Maryland case illustrates that a court of a jurisdiction having the New Jersey type of reception provision, will prefer not to decide the issue of whether or not a particular common-law doctrine was in effect in the colony before Independence, but instead will invoke alternative grounds where possible. There the court avoided determining the applicability of the English rule that an annuitant has the right to elect to take the principal sum bequeathed for the purpose of purchasing an annuity, by saying that the English rule, even if recognized in American law, would not govern under the facts of the particular case.[95]

One should not be too critical of the courts for not following literally a reception provision directing an inquiry into what the colonial law actually was. In cases where proof of the actual practice in colonial times has been brought to the attention of judges, they have made honest efforts to determine the cases in the light of historical fact.[96] But complete colonial records have not been available, and with the heavy loads which most courts have had to carry few judges have had time to conduct an independent investigation into the colonial practice in every case raising the problem; therefore, the approach has been that the applicable law may be found by looking elsewhere—a method that leaves the courts relatively unfettered in determining the major premise for a particular case. But the results of

93. *Cf.* Holcomb v. Hamilton, 1 Coleman & Caines 67 (N.Y. 1799), cited by POWELL, *op. cit. supra* note 23, at 180, as holding a 1794 English decision to be conclusive evidence of the common law applicable in New York.

94. See GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 330 (1931).

95. Gilbert v. Findlay College, 74 A.2d 36 (Md. App. 1950).

96. See opinion by Cardozo, C.J., in Beers v. Hotchkiss, 256 N.Y. 41, 175 N.E. 506 (1931); see also Matter of Murphy, 294 N.Y. 440, 63 N.E.2d 49 (1945).

this approach have been satisfactory, for if judges had insisted on too close adherence to colonial practices, the emphasis might have been too much on keeping the law as it was, and judge-made law might not have evidenced the capacity for growth which has enabled it to keep reasonably in step with the march of time.

In 1941 the Georgia Supreme Court was confronted with a case involving the reception problem. Because the first English settlement in Georgia was not accomplished until 1733, the settlers had fewer opportunities to develop an indigenous law differing to any extent from the common law. The Revolutionary Legislature in 1784 declared the common law of England to be in full force so far as not inconsistent with the Georgia Constitution, laws and form of government.[97] Thus, there is no specific statutory authority and little early historical basis in Georgia for departing from particular common-law rules on the grounds that these rules are inapplicable to local conditions of society. Yet, in *Hornsby v. Smith*,[98] the Georgia court declared that "common-law rules unsuited to the conditions in this State are not of force here and were not made so by the act of 1784."[99] The question in that case involved the right of a landowner to erect a spite fence which was of no benefit to him, but which was intended to injure an occupier of adjoining land. The court recognized that the English view allowed the landowner to do as he pleased in this situation regardless of motive; but despite an argument to the effect that the court would be usurping the functions of the legislature if it refused to follow this common-law rule, the bald assertion was made that "the common-law rule on this subject is not the law of this State."[100] This case exemplifies the usual attitude that even though the reception statute contains no express qualification receiving only "applicable" common law, the courts have felt free to read an exception into it.

A recent Arkansas decision illustrates the general attitude taken by courts when told to apply the "common law of England." Almost always the view is either explicitly or tacitly expressed that in ascertaining the common law of England resort may be had to cases from other American states as well as to English decisions. In the Arkansas case[101] the court was confronted with the question of whether or not the state could recover certain personal property under the common-law doctrine of *bona vacantia* or vacant goods. The court quoted the Arkansas reception statute, which is a copy of the Virginia act, and then declared that cases from other American jurisdic-

97. 19 COLONIAL RECORDS OF GEORGIA, 1774-1805 (Pt. 2) 290-92 (Candler ed. 1911).
98. 191 Ga. 491, 13 SE.2d 20 (1941).
99. *Id.* at 497, 13 S.E.2d at 23.
100. *Ibid.*
101. State v. Phillips Petroleum Co., 212 Ark. 530, 206 S.W.2d 771 (1947).

tions are persuasive as to what is the common law.[102] It was held that the state had not brought its case within the meaning of the common-law concept of *bona vacantia*, and reliance was placed principally on a case from Illinois. As indicated above the approach by the Arkansas court is typical, and it is defensible. When Virginia first declared the common law of England to be the rule of decision, no doubt it was contemplated that at first at least the courts would look primarily to English written opinions in discovering the applicable law. But when one of the western states has copied the Virginia statute, as Arkansas has done, there is afforded reasonable basis for arguing that the legislature must have intended the adoption of the common law as administered by courts with which they had been familiar—*i.e.*, the courts of sister states from which the early settlers of the state emigrated. This interpretation of the "common law of England" in reception statutes while sacrificing some measure of predictability gives the law an adaptability to everchanging conditions which it might not otherwise have if the courts were restricted to English decisions only.

Sometimes a court will reject an asserted common-law doctrine on the grounds that the state policy as evinced in local legislative enactments is inconsistent. For example, in the 1948 case of *Mattfeld v. Nester*,[103] the Minnesota court rejected an English rule mainly on the basis that it was inconsistent with a legislative policy declared in analogous Minnesota acts. The English cases denied recovery to a husband for the wife's funeral expenses against a wrongdoer culpably responsible for the wife's death. The English view was founded partly on a supposed public policy against setting a money value on human life. The Minnesota court found this policy changed and allowed the husband recovery, using the following language: "Whatever public policy may have been, modern statutes allowing recovery for the money value of human life in actions for wrongful death and in workmen's compensation cases in effect declare as a matter of public policy that there is no valid objection to appraising the money value of a human life."[104] To buttress its position, the court declared that this is an instance where the reason for the rule has ceased to exist, and therefore the rule itself is no longer the law. Another technique might have been used: inasmuch as there was a conflict in authority among American decisions as to whether a wrongdoer was liable to the husband for the expenses of his wife's burial, the court could have declared that the common law prevailing

102. 206 S.W.2d at 774. See also Baker v. State, 215 Ark. 851, 223 S.W.2d 809 (1949). A note on the *Baker* case in 4 ARK. L. REV. 480 (1950) apparently makes the erroneous assumption that the date 1607 in the Virginia-type reception statute was intended to limit the application of English decisions as well as British statutes. See *infra* p. 815.

103. 226 Minn. 106, 32 N.W.2d 291 (1948).

104. 32 N.W.2d at 309.

in Minnesota is the common law as interpreted by courts of the United States as well as those of England, and it could then have proceeded to accept the "better" view.

A recent Wyoming case[105] illustrates the rejection of a common-law rule having its basis in a feudal society differing from present-day conditions. A bailor sued a bailee to recover damages for the loss of leased night club fixtures which had been accidentally destroyed by fire. In the bailment contract the bailee had promised to keep the property in repair and at the end of the lease to yield the property to the bailor in good condition, ordinary wear and tear excepted. Plaintiff argued that defendant was an insurer under the foregoing covenants and relied on the common-law rule with respect to leases of real property to the effect that a covenant to repair leased premises obligated the tenant to rebuild buildings accidentally destroyed by fire, even though there was no negligence on the tenant's part. This rule of interpretation was found to go back in England at least to the 14th century. The Wyoming court referred to the difference in the status of feudal society and present-day mores, but recognized that a majority of American courts had generally adhered to the ancient rule of construction on which plaintiff relied. The Wyoming reception statute is in the main a copy of the Virginia statute with the qualification that the common law of England is the rule of decision so far as the same is "not inapplicable,"[106] and the Wyoming Supreme Court declared that "the common law rule of construction of covenants to 'repair' and 'keep in repair' is not 'applicable to the habits and condition of our society' or 'its circumstances.' "[107] In reaching this result, the court emphasized the modern role of insurance in a commercial world, and further declared it better to apply a common-sense construction—*i.e.*, to follow the meaning of what people usually intend when they use the term "repair."

Another recent holding that certain common-law rules are inapplicable to local conditions involves the situation in Utah where the dry climate and the necessity of irrigating and conserving water were held to be sufficient reasons as to why "the common law of Utah does not read into the prescriptive easement to carry water the same content as the English common law has applied to rights of way over land."[108] Similarly, a rule with respect to the duty of owners of cattle to keep them off the highways, recognized by a federal court in California to be a common-law principle, was held to be inapplicable to present conditions in California inasmuch as

105. Fuchs v. Goe, 62 Wyo. 134, 163 P.2d 783 (1945).

106. WYO. COMP. STAT. ANN. § 16-301 (1945).

107. Fuchs v. Goe, 62 Wyo. 134, 174, 163 P.2d 783, 798.

108. Big Cottonwood Tanner Ditch Co. v. Moyle, 109 Utah 213, 174 P.2d 148, 152 (1946).

the common law was adopted when there was no elaborate system of highways and when motor vehicles were non-existent.[109] Another interesting case from California rejects the common-law rule that when the wife commits a misdemeanor in the presence of the husband a presumption arises that she was acting under the coercion or command of her husband.[110] This presumption was found to go back at least a thousand years; and most of the American jurisdictions had applied it. Yet, the court pointed out that the wife is no longer a marionette in law or in fact generally, and asserted that a "presumption that has lost its reason must be confined to a museum; it has no place in the administration of justice."[111]

Several recent cases deal with the question of the reception of principles which have their origin in American or English jurisprudence since the date of the Revolution. Thus, in a 1947 Nebraska case[112] involving the interpretation of a will the court was confronted with the argument that the doctrine of demonstrative legacies has no place in Nebraska law for the reason that such doctrine was derived from the civil law and was not known to the common law. Hence, the argument proceeded, the Nebraska Legislature did not adopt the doctrine of demonstrative legacies when in 1855 it declared to be the law of Nebraska "So much of the common law of England as is applicable. . . ."[113] New York cases were cited to the effect that a demonstrative legacy was a new type of legacy created about the middle of the 19th century. The court refuted this argument by saying that law changes with the gradual changes of thought on the part of society, and that the common law is applicable only insofar as it is suited to the genius, spirit and objects of its intendments affecting the society of the state. "There is no obligation on the part of this court to adhere strictly tc the common law. . .," the court asserted,[114] and it proceeded to invoke the doctrine of demonstrative legacies. Nowhere does the court explain how the doctrine it applies came to be a part of the common law of Nebraska, except that it may be said to be following the common-law postulate that it is the duty of the court to determine the true intention of the testator, and that the doctrine of demonstrative legacies achieves this result.[115] The cases cited by the court have to do with the situation where previous courts have refused to apply admittedly existing common-law rules,

109. Galeppi Bros. v. Bartlett, 120 F.2d 208 (9th Cir. 1941).
110. People v. Statley, 206 P.2d 76 (Cal. Super. 1949), 3 OKLA. L. REV. 442 (1950).
111. *Id.* at 81.
112. *In re* Lewis' Estate, 148 Neb. 592, 28 N.W.2d 427 (1947).
113. NEB. REV. STAT. § 49-101 (1943).
114. *In re* Lewis' Estate, 148 Neb. 592, 603, 28 N.W.2d 427, 433.
115. But the common-law rule of interpretation that the courts must search for the intent of the writer had its origin around the beginning of the 19th century. See Curtis, *A Better Theory of Legal Interpretation,* 3 VAND. L. REV. 407, 408-09 (1950). This article contains a critical analysis of the oft-repeated "intention" rule.

and not with the situation where it is desired to invoke a rule which was not specifically recognized as a part of the common law at the critical time of reception. Of course, where a common-law rule is rejected, the court is necessarily creating a new rule in its stead; therefore the Nebraska court's approach is not so paradoxical as it might first appear. Thus, whether a court is rejecting an archaic rule as inapplicable or setting forth a principle which has had only recent explicit recognization by the courts, it is in both instances performing a function of allowing the law to grow in order to meet new situations of society intelligently.

A similar problem confronted the Missouri federal court in *Hawkinson v. Johnston*,[116] where counsel for defendant argued that the Missouri reception statute did not adopt the general doctrine of anticipatory breach by repudiation of contracts because that doctrine did not explicitly become a part of English law until 1853 when the familiar case of *Hochster v. De La Tour*[117] was decided. Counsel further argued that the Missouri reception statute,[118] which is essentially a copy of the Virginia statute, requires the courts to apply the common law as it existed in 1607. The correct interpretation of the statute is that the 1607 date was intended to limit the adoption of English statutes only and not to prevent the courts from looking to English decision decided since 1607.[119] At any rate, the court declared that even if an English decision as of 1607 could be found holding that there could be no doctrine of anticipatory repudiation of a contract of lease, this would not bind the court. The decision referred to the fact that previous Missouri cases had recognized the difficulty of accurately defining the common law as of such an early date from the meager precedents, and that Missouri courts had declared that "they were not necessarily 'required to adhere to the decisions of the English common law courts rendered prior to the Revolution, or subsequently.' "[120] The court then pictured the rule of anticipatory repudiation as having gradually crystallized and as such had become part of the common law of Missouri.

In other cases courts have been faced with the argument that there is in absence of precedent at common law, and they have answered with the

116. 122 F.2d 724 (8th Cir. 1941), *cert. denied*, 314 U.S. 694 (1941).
117. 2 El. & Bl. 678, 118 Eng. Rep. 922 (Q.B. 1853).
118. MO. REV. STAT. ANN. § 645 (1946).
119. See, *e.g.*, Baring v. Reeder, 11 Va. (1 Hen. & M.) 154, 161-62 (1806); Chilcott v. Hart, 23 Colo. 40, 45 Pac. 391, 397-398 (1896). *But see* Ray v. Sweeney, 77 Ky. 1, 10 (1878).
120. 122 F.2d at 728. Other examples of the treatment of American courts of a doctrine arising in England since the critical date of reception are the absolute liability cases. The doctrine of *Rylands v. Fletcher* has been rejected by a good many American courts as an anachronistic principle inapplicable to conditions in America. A recent federal case, however, decides that Oregon would follow the rule of absolute liability in allowing recovery for damage caused by escape of stored water. Ure v. United States, 93 F. Supp. 779 (D. Ore. 1950).

proposition that the common law is not an arid and sterile thing and that it is presumed to keep pace with ever-changing needs of society. Thus, it has been recently held that an infant may bring an action in tort for a prenatal injury caused by professional malpractice with resultant consequences of detrimental character.[121] Similarly, a few courts recently have granted children a cause of action for the defendant's wrongfully enticing a parent away from the family home.[122] The Minnesota court in allowing such recovery declared that "The reasons given for the supposed common-law rule denying a right of recovery in cases of this kind have ceased to exist, and, because that is true, the rule, if there ever was one, also has ceased to exist."[123] Another recent example of a court allowing a cause of action in an instance where little or no precedent was available, is the case of *Hitaffer v. Argonne Co.*,[124] where it was held that a wife may bring an action for loss of *consortium* where the injury to the husband resulted from defendant's negligence. The court allowed the action even though it was "not unaware of the unanimity of authority elsewhere denying the wife recovery under these circumstances."[125] Other courts, however, have felt that recognition of a cause of action in situations where no case-law precedent can be found, should come from the legislature rather than the courts.[126]

One should not become too engrossed in the instances of refusal by the American courts to follow earlier common-law decisions, for it is essentially the common-law system that the various American jurisdictions (Louisiana excepted) have adopted. Citations in this paper are mostly to decisions rejecting an asserted common-law principle, but many more cases might be cited in which the courts of the various states have adhered to the common law. For example, at an early date the Mississippi court in declaring the rule in Shelley's case to be a part of the common law of that state, asserted that it would be judicial legislation to hold to the contrary, and stated: "Were it otherwise, the rules of law would be as fluctuating and unsettled as the opinions of the different judges administering them might happen to differ in relation to the existence of sufficient and valid reasons for maintaining and upholding them."[127] Yet, on other occasions the Mississippi court has followed the general trend of American jurisprudence in asserting its prerogative to decide for itself what the common law is and in affirming

121. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

122. Daily v. Parker, 152 F.2d 174 (7th Cir. 1945); Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949); Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947).

123. Miller v. Monsen, 288 Minn. 400, 37 N.W.2d 543, 548 (1949).

124. 183 F.2d 811 (D.C. Cir. 1950), *cert. denied,* 71 Sup. Ct. 80 (1950).

125. *Id.* at 812.

126. Rudley v. Tobias, 190 P.2d 984, 987 (Cal. App. 1948); Garza v. Garza, 209 S.W.2d 1012, 1015-16 (Tex. Civ. App. 1948).

127. Powell v. Brandon, 24 Miss. 343, 363-64 (1852).

the proposition ". . . that it will not adopt such parts of the common law of England as are contrary to conditions within this state. . . ."[128]

Examples may be given of several recent American cases in which the courts adhere to earlier common-law rules even though the judge writing the opinion expresses a personal preference for another rule. Thus, a recent Maryland case denied the corespondent the right to intervene in a divorce action based on grounds of adultery.[129] The court recognized that the corespondent's reputation was often directly affected by the outcome in such an action, but considered itself powerless to allow the intervention in the absence of statutory authorization. Similarly, the Minnesota court held that the words "child" or "children" as used in a statute did not include an illegitimate child, as the statute was interpreted in light of the common law which considered an illegitimate child *filius nullius*.[130] The court considered the common-law principle harsh as it barbarically handicapped and burdened innocent children for the sins of illegitimate parents, but declared that relief from this particular common-law rule must come from the legislature.

ARE BRITISH STATUTES PART OF AMERICAN COMMON LAW?

Briefly, some special attention should be devoted to the problem of determining the extent of recognition which should be given to English statutes. The various American jurisdictions may be divided into two main groups so far as their treatment of English statutory law is concerned. First, twenty states have enacted no specific provision dealing with the question and thus have left it to the courts to determine what acts of Parliament, if any at all, are to be recognized as part of the common law received.[131] Second, most of the remaining states have specifically directed the courts to recognize as in force English statutes of a general nature passed before a specified date, usually 1607 or 1776.[132]

As might be expected, the jurisdictions which have left it to their courts to determine the binding effect of English statutory law, have reached all sorts of results. A few courts have declared that no English statutes were received as part of the common law;[133] some take a middle view by saying

128. City of Jackson v. McFadden, 181 Miss. 1, 14, 177 So. 755, 758 (1937).
129. Lickle v. Boone, 51 A.2d 162 (Md. App. 1947).
130. Jung v. St. Paul Fire Dept. Relief Ass'n, 233 Minn. 402, 27 N.W.2d 151 (1947).
131. These states are: Alabama, Arizona, California, Connecticut, Idaho, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah and Washington. For statutory or constitutional references, see 1 POWELL, *op. cit. supra* note 23, §§ 45-93.
132. See the breakdown of this second category, *infra* notes 147, 148, 149.
133. Mississippi; Boarman v. Catlett, 21 Miss. (13 Sm. & M.) 149 (1849); Martin v. State, 190 Miss. 32, 199 So. 98 (1940); see note, 13 MISS. L.J. 624, 627, n.20 (1941). Nebraska: see Farmers' & Merchants' Ins. Co. v. Jensen, 58 Neb. 522, 530, 78 N.W. 1054, 1056 (1899); Brooks v. Kimball County, 127 Neb. 645, 653, 256 N.W. 501, 504 (1934). Texas: see the authorities cited in Hall, *supra* note 70 at 820-21.

that only those English statutes are recognized which have become so incorporated into the common law so as to become a part and parcel of the system;[134] whereas most of the states in this first category have asserted that the common law of the local jurisdiction is the English customary law as modified by acts of Parliament of a general nature passed prior to the American Revolution. This latter approach thus accepts some, but not all, of English statutory law enacted prior to the Revolution and has left judges relatively free to make a selective application of British legislation. For example, the Oregon court declared in a 1950 case that English statutes of mortmain, so far as they inhibited public corporations from taking real property, were local in character, were intended to remedy a mischief in England, and hence were not applicable to conditions in Oregon.[135] Similarly, the ancient statute of Gloucester, providing treble damages for waste of leased premises, was held to be a harsh rule and not in harmony with conditions in New Mexico.[136]

A recent Nevada case[137] provides the most striking example of the culling process used by American courts in determining applicable English statutory law. In an action to recover on a gambling debt, plaintiff argued that the law of England on gambling at the time of the Declaration of Independence was peculiarly applicable only in England because of the differences in structure of government betweeen British and the American states. It was contended that the variance in governmental structure, together with the Nevada statutes authorizing the licensing of gambling, made no part of the Statute of 9 Anne, c. 14 (1711), in force in Nevada. The Statute of Anne had been passed in England to implement and enforce antigambling policy. The Nevada court admitted that certain parts of the Statute of Anne, such as those sections permitting unlicensed gambling by the royal family "for ready money only," are at hopeless variance with the structure of government in America. But the British act was construed to be severable and in spite of the lenient policy of the Nevada Legislature with respect to gambling, it was held that the first section of the Statute of Anne, which provided that gambling debts may not be collected in an action at law, is a part of the common law in force in Nevada. Thus in this case is seen the express acceptance of part and rejection of another part of the same English statute.

Again it should be pointed out that the foregoing decisions rejecting a part of English law represent somewhat exceptional instances, inasmuch

134. See Crawford v. Chapman, 17 Ohio 449, 453 (1948).
135. *In re* Moore's Estate, 223 P.2d 393, 396 (Ore. 1950).
136. Blake v. Hoover Motor Co., 28 N.M. 371, 212 Pac. 738 (1923).
137. West Indies, Inc. v. First Nat. Bank of Nevada, 214 P.2d 144 (Nev. 1950). See also the earlier case, Esden v. May, 36 Nev. 611, 135 Pac. 1185 (1913).

as there are a good many more cases which accept acts of Parliament as part of American law. Examples of English statutes which have been recognized are the Habeas Corpus Act of 1679,[138] early English statutes dealing with the authority of officials who act as conservators of the peace,[139] the statute of uses,[140] statutes passed in the 17th century providing for forfeiture in common-law courts of various illegally used articles,[141] acts of Parliament limiting early common-law strict liability for the escape of fire,[142] an early (1381) statute on forcible entry making the use of force in obtaining possession of land a criminal offense,[143] and numerous others.[144] In this connection it should also be noted that even though a court rejects an English statute, the same result may be reached as if the statute were considered in force. A good example is the declaration by the Ohio court that the Statute of Charitable Uses is not part of the common law of Ohio; nevertheless, a charitable trust is enforced in Ohio because of the inherent powers of chancery courts over trusts.[145] In summary, it may be said that in determining whether a particular English statute is applicable to the conditions existing in America, the courts have used about the same approach as they have adopted in determining if English common-law doctrines are suited to the situation on this side of the Atlantic. One qualification should be noted to the statement that English statutes of a general nature passed prior to the American Revolution will be recognized. If an act of Parliament was passed only a short while before the Revolution, so as to make it unlikely that its force was ever actually felt in America, the English statute probably will not be recognized.[146]

The jurisdictions which fall into the second main category, that is those whose reception enactments specifically recognize British statutes of a general nature passed before a certain time, may be further classified as follows: (1) those states still having the original Virginia reception statute

138. People v. Den Uyl, 320 Mich. 477, 31 N.W.2d 699 (1948). Compare an earlier Michigan case declaring that Michigan adopted "the English common law, unaffected by statute." Matter of Lamphere, 61 Mich. 105, 108. 27 N.W. 882, 883 (1886).

139. *In re* Sanderson, 289 Mich. 165, 286 N.W. 198 (1939).

140. Horton v. Sledge, 29 Ala. 478, 496 (1856). *Contra:* Thompson v. Thompson, 17 Ohio St. 650, 655 (1867).

141. Moore v. Purse Seine Net, 18 Cal.2d 835, 118 P.2d 1 (1941), *aff'd sub nom.* Hendry Co. v. Moore, 318 U.S. 133, 63 Sup. Ct. 499, 87 L. Ed. 1165 (1943). The United States Supreme Court opinion is an interesting one on the meaning of "a common law remedy" which "the common law is competent to give" as used in § 9 of the Judiciary Act of 1789. The quoted phrases are no longer in the judicial code, however. See 28 U.S.C. § 1333, Reviser's Note (Supp. 1950). On the question of interpretation of the common law in California, see also People v. One 1941 Chevrolet Coupe, 222 P.2d 473 (Cal. App. 1950).

142. McNally v. Colwell, 91 Mich. 527, 532, 52 N.W. 70, 71 (1892).

143. Buchanan v. Crites, 106 Utah 428, 150 P.2d 100, 103 (1944).

144. See generally 1 POWELL, *op. cit. supra* note 23, §§ 45-93; 12 C.J. *Common Law* § 22, n.30 (1917); 15 C.J.S., *Common Law* § 13, n.37 (1939).

145. Urmey's Ex'r v. Wooden, 1 Ohio St. 160, 164 (1853).

146. See Spaulding v. The Chicago & N. Ry., 30 Wis. 110, 117 (1872).

which recognizes English statutes of a general nature passed prior to 1607;[147] (2) one state recognizing British acts of a general nature passed before the time of the Revolution;[148] and (3) those states adopting a reception provision similar to the New Jersey enactment, quoted earlier,[149] which recognizes so much of English statute law as had theretofore been practiced in the particular jurisdiction.[150] An analysis of the cases shows that states recognizing English statutes of a general nature passed prior to 1607 (or 1776) have used about the same technique of accepting or rejecting British statutes as have the courts of those states forming the first main category discussed above. Of course where the legislature has set an outside date limit for the recognition of British statutes, the courts have generally respected it.[151]

Those states using the New Jersey type of provision, recognizing those English statutes which had theretofore been adopted in practice, have had a little different history. The difficulty of knowing the full extent of acceptance of English law in actual colonial practice, as has already been mentioned,[152] helped lead to the adoption of a somewhat *a priori* method by the courts of these states in determining the applicable English law. This is also true with respect to ascertaining applicable English statutes. A very early Pennsylvania case set forth the proposition that all statutes made in Great Britain before the settlement of that colony should have no force in Pennsylvania unless convenient and adapted to circumstances of this country, whereas all statutes passed after the settlement of Pennsylvania should have no force unless the colonies were particularly named.[153] Cardozo said many years later that this was a "common formula, yet subject, we may be sure, to be overridden or enlarged by usage."[154] Thus the rule laid down by the Pennsylvania court constitutes no very definite guide, and one must look to the individual cases decided since the Revolution to see what tech-

147. The states are: Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Missouri and Wyoming. See the statutory references in 1 POWELL, *op. cit. supra* note 23, §§ 70, 71, 75, 80, 91, 92.

148. Florida: FLA. STAT. ANN. § 2.01 (1943).

149. *Supra* p. 799.

150. Delaware, Maryland, New Jersey, New York, Pennsylvania, Rhode Island and South Carolina. See references in 1 POWELL, *op. cit. supra* note 23, §§ 53, 58, 59, 61, 62, 63. Although the wording of their reception provisions varies in small detail from the New Jersey pattern, the following states should be considered in this group: Georgia, Massachusetts, New Hampshire, North Carolina, and Vermont. See references in *id.* §§ 51, 54, 57, 60, 64. Also Maine, Tennessee and the District of Columbia should be included inasmuch as their law was derived from Massachusetts, North Carolina and Maryland respectively. See *id.* §§ 55, 66, 75.

151. Commonwealth v. Kentucky Jockey Club, 238 Ky. 739, 38 S.W.2d 987 (1931); Short v. Stotts, 58 Ind. 29 (1877); Holloway v. Porter, 46 Ind. 62 (1874); Cottrell v. Gerson, 296 Ill. App. 412, 16 N.E.2d 529 (1938).

152. *Supra* p. 799.

153. Morris's Lessee v. Vanderen, 1 Dall. 64, 67 (Pa. 1782).

154. Beers v. Hotchkiss, 256 N.Y. 41, 54, 175 N.E. 506, 511 (1931).

niques the courts have used in determining what English statutory law to recognize.

A good many early Massachusetts cases simply state categorically that certain English statutes were or were not adopted as part of the common law of Massachusetts.[155] These statements may be justified to some extent by the fact that the early state judges had had personal experience with at least part of the practice in the later colonial period. A later Massachusetts case rejects a provincial law specifically made applicable to Boston on the basis that the statute provided for the taking of property without due process.[156] Another decision refused to recognize an English statute passed only a short time before the outbreak of the Revolution because of the probability that it was never actually applied on this side of the Atlantic.[157] However, the Massachusetts court has followed the rule of a statute passed after the Revolution when that statute was found to be merely declaratory of existing law.[158] Other decisions show that the primary inquiry of the courts of states using the New Jersey type of reception provision, is not usually into what was the actual colonial practice, but rather whether the courts consider the particular English act suited to conditions in America.[159] In this respect again the cases use about the same approach as do the courts of the states which have no specific provision as to the effect of English .statutes.

New York, whose original state constitution contained essentially a New Jersey-type reception enactment,[160] has subsequently severely limited the effect of British acts of Parliament. This would have been accomplished to a large extent by the tremendous amount of statutory law which the New York Legislature has passed so as to preempt the field in many instances, but New York's second constitution omitted the provision of its predecessor recognizing such British statutes as had formed the law of colonial New York,[161] and a New York legislative act passed in 1828 attempted to wipe the slate clean by declaring that none of the statutes of Great Britain should

155. Sevey v. Blacklin, 2 Mass. 541 (1807); Commonwealth v. Warren, 6 Mass. 72 (1809); Hastings v. Dickinson, 7 Mass. 153, 154 (1810); Stowers v. Barnard, 32 Mass. (15 Pick.) 221 (1834); Shearer v. Mooers, 36 Mass. (19 Pick.) 308 (1837).

156. Wilkins v. Jewett, 139 Mass. 29, 29 N.E. 214 (1885).

157. Loomis v. Eagle Life & Health Ins. Co., 72 Mass. (6 Gray) 396 (1856).

158. Bull v. Loveland, 27 Mass. (10 Pick.) 9 (1830).

159. *E.g.* Going v. Emery, 33 Mass. (16 Pick.) 107 (1834); Vanuxem and Clark v. Hazlehursts, 4 N.J.L. 192 (1818); State v. Campbell, 1 T.U.P. Charl. 166 (Ga. 1808). Of course a statute passed after the Revolution is held not to have been adopted. Bates v. Hacking, 28 R.I. 523, 68 Atl. 622 (1908) (1 VICT. c. 26, § 22, 1837). A recent Georgia case dealing with the problem of the force of British statutes, looks primarily to earlier Georgia decisions to see if they have previously recognized the acts in question. Davis v. Atlanta Gas Light Co., 61 S.E.2d 510 (Ga. App. 1950).

160. N.Y. CONST., Art. XXXV (1777).

161. N.Y. CONST., Art. VII, § 13 (1821).

be deemed to have had any force in that state since May 1, 1788.[162] However, later New York cases indicate that British statutes may still be pertinent where there is involved an issue of land titles originally granted during colonial times.[163]

Those states which have had unofficial lists of English statutes deemed in force compiled by leading jurists, have generally followed those lists in subsequent cases. Thus, in an 1897 case[164] the Pennsylvania court declared that the omission from the list of statutes previously reported by the judges as being in force in Pennsylvania, raises a presumption of great weight that the particular statute omitted is not part of the law of Pennsylvania. The court stated that in absence of anything to overcome the prima facie correctness of the judges' list, the presumption must prevail. Therefore, a lawyer trying to get a court to recognize an English statute not on the compiled list, faces the task of doing a lot of original research into colonial archives, which may or may not be fruitful; otherwise, he is bound by the unofficially recognized compilation.[165]

A word should be added about the experience of Wisconsin and Iowa with respect to recognition of English statutes. The territorial legislature of both Wisconsin and Iowa declared that "none of the statutes of Great Britain" shall be considered the law of the respective territories.[166] Nevertheless, this territorial act has since become ineffective in Wisconsin inasmuch as a good many later decisions explicitly recognize as in force various British statutes.[167] Therefore, for practical purposes Wisconsin should be placed in the first category as being a state that has left to its courts the task of determining the applicability of English statutes. The Iowa court has adopted a unique approach in interpreting its territorial act. In an 1857 case[168] the Iowa court distinguished "Great Britain" from "England" and declared that Great Britain did not come into existence until 1707 when

162. N.Y. STAT. AT L., p. 72 (1862).

163. Beers v. Hotchkiss, 256 N.Y. 41, 175 N.E. 506 (1931); Bogardus v. Trinity Church, 4 Paige 178 (1833), *aff'd*, 15 Wend. 111 (N.Y. 1835). The federal case of Gorham Mfg. Co. v. Weintraub, 196 Fed. 957 (S.D.N.Y. 1912), rejected a 1773 act of Parliament citing as one reason the fact that subsequent New York constitutions, after the first one, omitted the provision about English statutes.

164. Gardner v. Keihl, 182 Pa. St. 194, 37 Atl. 829 (1897). See also the recent case of Miller v. Michael Morris, Inc., 36 Pa. 113, 63 A.2d 44 (1949), recognizing a statute which was on the 1808 judges' list in 3 Binney 618 (Pa. 1878).

165. Note further the unsuccessful attempts to have courts recognize British statutes not on compilations of English acts deemed in force: Hudson v. Flood, 28 Del. 450, 94 Atl. 760 (1915); Read v. Pennsylvania R.R., 44 N.J.L. 280 (1882); Dashiell v. Attorney-General, 5 Har. & J. 392 (Md. 1822).

166. See references in 1 POWELL, *op. cit. supra* note 23, §§ 73, 90.

167. Coburn v. Harvey, 18 Wis. 147 (1864); Spaulding v. The Chicago & N. Ry., 30 Wis. 110 (1872).

168. O'Ferrall v. Simplot, 4 Iowa 381 (1857). *Cf.* Pierson v. Lane, 60 Iowa 60, 64, 14 N.W. 90, 92 (1882), rejecting the Statute *De Donis* on the grounds that its purposes were foreign to the genius and policy of Iowa institutions.

Scotland was united with England; thus, the territorial act was construed to eliminate only acts of Parliament enacted since 1707. Thus Iowa in actuality falls into the second main category except that its terminal date, after which no English statutes will be recognized, is 1707, instead of 1607 or 1776.

In summary, it is noted from the foregoing discussion that the treatment of the problem of determining the effect of English statutes in America has not been basically different from ascertaining the applicability of English case law. As state legislatures enact more and more local statutory law, the need for recognizing British statutes would appear to be lessened; nevertheless, the fact that a number of recent cases are cited in the several preceding paragraphs demonstrates that the issue of the force of British statutes in America is by no means a dead one.

CONCLUSION

We have dealt with the three primary methods by which the common law of England has been received and applied in this country. The Virginia statute which declared the common law of England to be the rule of decision and which dealt specifically with the force of English statutes, set the pattern for a majority of states to the west, although it was varied by many of them with respect to what English statutes were recognized. A few states inserted a qualifying phrase into the Virginia type of enactment and declared only so much of the common law of England as was "applicable" should be the rule of decision. However, the courts of those states which provided no specific legislative authority to depart from common-law rules unsuited to local conditions, have nevertheless felt free to reject common-law principles considered "inapplicable." Thus the addition of the phrase accepting the common law only so far as the same is "applicable" has had little or no practical effect on the course of decisions dealing with the reception problem.

A minority of states west of the Alleghenies have followed the practice of Connecticut in tacitly accepting the common law as the rule of decision and in leaving it completely to the courts to determine the extent of reception in situations not definitively covered by legislation. Here again the courts of the states which did not pass explicit reception enactments have in numerous instances rejected "inapplicable" common-law principles.

The third method of dealing with the reception problem, which has been called for convenience the New Jersey method, retains so much of the law as was practiced or existed before the jurisdiction became a state. A counterpart for this method is to be found in states other than the original

thirteen colonies in the somewhat similar situation where a newly-formed territory or state specifically recognized as in force the common law as practiced in an earlier jurisdiction. Although this type of reception provision would seem to require the courts to determine what the practice actually was in the earlier jurisdiction, the cases show that courts of these states have generally used the same approach as the courts of states which adopted the common law in a different way.

One of the primary points of concern of counsel and judges in arguing and deciding if a common-law rule should be accepted or rejected as the law of the particular jurisdiction, has been the question of whether or not the court is invading the legislative field when it decides that the asserted common-law principle is not applicable to the local situation.[169] What, then, is the proper province of the judiciary with respect to its application of common-law principles? and when should the rejection of an established rule or the recognition of an interest which has never before been legally protected, be left to the legislature? We say the courts are "bound" by the common law, yet the overwhelming majority of courts have followed a culling process and by one means or another have discarded common-law rules which they have deemed archaic. The cases are by no means unanimous in their views as to when a court would be "legislating" and when it would be keeping within the legitimate scope of the judicial process.[170]

Most of the courts simply make the assertion that an established common-law principle can only be changed by the legislature, when it is felt that the rule should be followed. On the other hand, the same courts, when desiring to avoid the application of other common-law tenets, will say that it is the duty of judges to keep the law abreast of the times. In neither instance do courts ordinarily explain what it is that makes the contemplated action legislative on the one hand, or judicial on the other. It might be said that the courts should make only small or "creeping" changes, while the legislature should gallop or go in reverse if it so desires.[171] The writer has previously suggested that what the courts are doing in this connection

169. This argument that a court is "legislating" when it asserts the power to determine "applicable" common-law rules, dates quite far back in our history. Thus, this problem was an issue while the question of whether or not federal courts had an inherent general common-law jurisdiction was being debated. See argument of Nicholson, 11 ANNALS OF CONG. 805-06 (1802). See generally, HOWE, READINGS IN AMERICAN LEGAL HISTORY 319-419 (1949).

170. Another way of stating the scope of the judicial function is: "Courts may in proper instances apply old rules to newly created conditions, but they cannot create new rules for conditions already regulated." Seibel v. Leach, 233 Wis. 66, 288 N.W. 774, 775 (1939). The same statement is quoted in Stabs v. City of Tower, 229 Minn. 552, 40 N.W.2d 362, 371 (1949). But the quoted test is largely an illusory one, for who can say as to any given case whether the court is applying an old rule to new facts, or is creating a new principle or changing existing law?

171. See WHARTON, COMMENTARIES ON AMERICAN LAW 63, § 30 (1884).

is using the same technique as that adopted in constitutional law cases involving substantive due process questions.[172] In the latter type of case the postulate is that a legislative enactment or administrative determination will be declared invalid when it "passes the bounds of reason and assumes the character of a merely arbitrary fiat."[173] The analogy to the reception problem cases is this: an asserted common-law principle will be followed even though the judge himself from the standpoint of wisdom or policy might personally prefer another rule; but when the common-law rule contended for has become so archaic as to make its application in modern times an arbitrary fiat, it will be declared "inapplicable" to the local situation and rejected. This test of course is in itself nothing more than an abstract postulate, and the ultimate definition is one that must be left to the gradual process of judicial exclusion and inclusion as is the case with so many other legal concepts. Nevertheless, it is submitted that the suggested test is a better way of describing what the courts are doing than is the "court-legislature" dichotomy.

In describing the transplanting of English law in the original American colonies, and tracing its development westward and up to the present time in the United States, we have seen a phase of what has been called the "frontier process." One of the primary factors of this "frontier process" has been the adoption of written constitutions by the United States and all of the states. The earlier constitutions set the pattern for those further west, as each one of them proceeded to drop various pieces of legal equipment that had originated in England but which no longer served legitimate functions in the newer civilization. This process has been described as follows:

> "The junk of the past, the administrative junk that will accumulate in any community, was not particularly venerated, and in making the constitution it was relatively easy to do away with it. In older settled, established communities we put up with obsolete conditions, with laws that cease to fulfill a useful purpose, with institutions that have become cumbersome instead of profitable. We keep on putting up with them, because to change would be an annoyance and a nuisance, and because one can never be quite sure in lopping off a governmental appendix that something else won't be lopped off with it that will leave the system weaker instead of stronger for the operation. But in these new communities, where they started with a great long table and a big white sheet of paper and abundance of ink, with no solicitation as to what they should write or should not, it was easy to cut out institutions of government and to substitute others that they desired and approved. The 13 colonies did this, and then after independence they allowed every new colony to do the same."[174]

---

172. See Hall, *An Account of the Adoption of the Common Law by Texas,* 28 TEX. L. REV. 801, 825-826 (1950).

173. See Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 204, 33 Sup. Ct. 44, 57 L. Ed. 184 (1912).

174. See Paxson, *Influence of Frontier Life on the Development of American Law* in 13 STATE BAR ASSOC. OF WIS. REP. 477, 484 (1921).

The judiciary has played its part in this "frontier process," but its case-by-case role has been less spectacular than those played by constitution makers and legislators. No matter to what school of jurisprudence one adheres, it must be admitted that the sum total of the judiciary's activities in discarding archaic formalisms of the common law has been great. We have seen how from colonial times up to the present day, American jurists have declared that English law bound us only so far as suited or adaptable to our local circumstances. Although we are running out of frontiers in the geographical sense, recent cases involving the reception problem show that the judges in this country are still performing an eminent part in making the law responsive to modern social needs.