CHAPTER 2

METHODS OF DEALING WITH BRITISH STATUTES IN AMERICAN JURISDICTIONS

Revolution with the inevitable termination of governmental continuity may solve some problems. It also creates new ones. The break with Great Britain did not automatically give the colonists the common law and English statutes for which they had clamored. When justice ceased to be administered in the King's name, practical problems multiplied involving such mundane matters as the style of a criminal prosecution, the heading on a summons, the method of securing judges, the use of summary justice in the handling of petty crimes, the enforcement of contracts. The colonists faced an interruption in the administration of justice in both criminal and civil proceedings. Some framework for an orderly continuance of the judicial processes of government was apparent to thoughtful and responsible citizens. Laws were needed to deal with the daily mechanics of existence.\(^1\) Rather than devise completely new statutes to deal with all anticipated contingencies, delegates to constitutional conventions and state general assemblies found it expedient to utilize existing and familiar bodies of law\(^2\) and at the same time satisfy

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1. The preambles to two statutes which put into effect the English laws, enacted respectively by Vermont in 1782 and Georgia in 1784, illustrate this awareness of a need for laws:

[Vermont] "Whereas, it is impossible, at once, to provide particular statutes adapted to all cases wherein law may be necessary for the happy government of this people.

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[Georgia] "WHEREAS during the late convulsions in this State several salutary laws were lost, and destroyed, that had from time to time been enacted by the general assembly of the same; ... And whereas it is absolutely necessary for the well governing of every State that laws properly adapted to the circumstances of the inhabitants be at all times in force..."

2. The Vermont statute of 1782 illustrates the legislative recognition of this familiarity. It stated in part:

"And whereas the inhabitants of this State have been habituated to conform their manners to the English laws, and hold their real estate by English tenures.

"Be it enacted, &c that so much of the common law of England, as is not repugnant to the constitution or to any act of the legislature of
popular demand for the use of the common law and English statutes.\(^3\)

Between 1776 and 1784, eleven out of the thirteen original states made, either directly or indirectly, some provision for the use of the common law and British statutes.\(^4\) Out of the total of twenty-eight jurisdictions organized between 1776 and 1836, all but two at one time or another had a comparable provision.\(^5\) While some jurisdictions retained their original provisions unaltered, others did not. Thus the categories listed below relate only to the methods initially employed by the several jurisdictions to handle the status of the acts of Parliament. Methods subsequently used by these same jurisdictions will be dealt with later.

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3. At the outbreak of the American Revolution in 1775, three of the colonies had statutes which dealt directly with the status of English statutes. Rhode Island had a general statute enacted in 1700 which had been followed in 1749 by a statutory declaration that such English statutes as were included in a list were to be "in Force in this Colony." South Carolina in 1712 had re-enacted by reference a long list of English statutes. North Carolina in 1715 had declared a number of groups of English statutes to be in force. Attempts by other jurisdictions during the colonial period to enact similar legislation had been futile, though during the seventeenth century Virginia had from time to time declared particular English statutes to be in effect.

4. Rhode Island did not make such a provision until 1798 while Connecticut waited until 1818. In November 1785, Thomas Jefferson commented "... The American states having on their first establishment adopted the system of British laws..." 9 Papers of Thomas Jefferson 6 (Boyd ed. 1950).

5. The sole exceptions were Michigan and Mississippi territories. Wisconsin Territory, organized in 1836, continued in effect the laws of Michigan. Although the English statutes in toto were never formally put into effect in either Michigan or Mississippi, both territories expressly repealed them, Mississippi in 1807 and Michigan in 1810.
Initial Constitutional And Statutory Provisions For Use Of British Statutes

1. No reference to British statutes but provision that laws here-tofore in force (or in force in prior jurisdiction) to continue
   South Carolina 1778-1872
   Massachusetts 1780 —
   New Hampshire 1784 —
   Territory south of River Ohio-Tennessee 1790-1858
   (North Carolina)
   Kentucky (Virginia) 1792 —
   District of Columbia (Maryland) 1801 —
   Alabama Territory - Alabama (Mississippi) 1817 —
   Connecticut 1818 —
   Maine (Massachusetts) 1819 —

2. Provision that the common law and British statutes were in force (or were to continue in force)
   Delaware 1776 —
   New Jersey 1776-1799
   Pennsylvania 1777 —
   North Carolina 1778-1837
   Georgia 1784 —
   Rhode Island 1798 —

3. Provision that the common law and British statutes as of a particular date were in force
   As of the first emigration
     Maryland 1776 —
   As of April 19, 1775
     New York 1777-1788
   As of October 1, 1760
     Vermont 1782-1797
   As of July 4, 1776
     Florida Territory 1823 —

4. Provision that English statutes enacted prior to 1607 "of a general nature" were the rule of decision
   Virginia 1776-1792
   Northwest Territory - Ohio 1795-1806
   Indiana Territory - Indiana 1807 —
   Missouri Territory - Missouri 1816 —

6. Missouri Territory excluded such portions of the British Statutes as related to crimes.
Arkansas Territory - Arkansas 1819 — 7
Illinois 1819 —
Florida Territory 1822-1823

5. Provision that the common law relative to crimes to be in force
Orleans Territory - Louisiana 1805-1928

Where the state constitution was used to continue the use of the common law and English statutes, two methods were employed. The state constitutions of Connecticut, Massachusetts, New Hampshire, and South Carolina simply continued in effect all laws heretofore in force. The state constitutions of Delaware, Maryland, New Jersey, and New York, however, referred to the continuation of the common law and English statutes.

Where a state or territorial statute was used, two types of statement appeared. Georgia, North Carolina, Pennsylvania, Rhode Island, and Vermont — jurisdictions which did not pass through the territorial period — continued in effect the common law and English statutes then in force or in force as of a particular date. The states of Arkansas and Illinois and the Florida, Indiana, Missouri, and Northwest territories copied the Virginia Ordinance of 1776 which stated that the common law and English statutes enacted prior to 1607 "of a general nature" were the rule of decision. 8

In 1790 Congress, organizing the "territory south of the river Ohio," provided for a continuation of the laws then in force in North Carolina in accordance with the terms of the Deed of Cession under which North Carolina had ceded its western land claims. There was another continuation of the laws in force in 1801 when Congress, accepting cessions from Maryland and Virginia, organized the District of Columbia. In the meantime Kentucky, carved out of Virginia in 1791, provided in its constitution of 1792 for a continuation "of the laws now in force in the state of Virginia." A comparable provision appeared in the Maine constitution of 1819 when that state was separated from Massachusetts.

On six occasions between 1801 and 1836 Congress employed the device first used in 1790 and continued in effect the laws in force within a jurisdiction when organizing a new political entity.

7. Arkansas Territory excluded such portions of the British statutes as related to crimes but repealed this portion of the statute in 1837.
8. Other territories adopting a statute based on the Virginia Ordinance of 1776 included Kansas Territory (1855), Colorado Territory (1861), and Wyoming Territory (1869).
In 1804, dividing the Louisiana Purchase into the Territory of Orleans and the District of Louisiana and providing for the government thereof, the laws then in force — i.e., the laws of Spain — were continued. In 1822 similar provision was made for Florida Territory, also acquired from Spain. In 1817, when Alabama Territory was carved out of Mississippi Territory, the laws in effect were continued, and the same provision appeared in the organic acts for Arkansas, carved out of Missouri Territory in 1819, and Wisconsin, carved out of Michigan Territory in 1836.

The organic act for Mississippi Territory, organized in 1798, made no provision for an existing body of legislation to be in force immediately. In this respect, it was analogous to the 1787 Northwest Ordinance. It may be that in both instances it was felt that the power to "adopt" laws provided a sufficient body of suitable legislation. However the fact that in 1795 the governor and judges of the Northwest Territory declared the common law and English statutes prior to 1607 to be the rule of decision suggests the possibility that the piecemeal adoption of laws from the "original states" had not provided a sufficient framework of statutes. There was a real difference of opinion in the Mississippi Territory as to the status of the English statutes, with one judge contending they were in force and another that they were not. In the case of Michigan Territory, where again no provision was made in the organic act for a body of laws to be in force, it was initially assumed that the statutes of the Indiana Territory were not in force until the Supreme Court decided otherwise in 1806.9 Under this decision, such statutes of the Northwest Territory as had remained in force in Indiana were in force in Michigan Territory, including the Act of 1795. It is at least possible that here, as in the case of Mississippi, it was not felt necessary to provide an immediate framework in the belief "adoption" would be adequate.

Thus with the exception of the Mississippi and Michigan territories, either Congress or the state or territorial legislature or the state constitutional convention provided at an early stage within the life of the jurisdiction for a body of laws to be in force therein. In these provisions, heavy reliance was placed on the use of the common law and English statutes. This was true even in those jurisdictions originally inheriting the civil law, for Orleans Territory introduced the common law relating to crimes in 1805 (while retaining the civil law for other purposes) and

Missouri Territory in 1816 and Florida Territory in 1822 declared the common law and English statutes enacted prior to 1607 to be the rule of decision.

There seems no reason to doubt that when these provisions were placed in state constitutions, acts of Congress, or acts of state and territorial legislatures, they were considered as permanent solutions to the need for a body of laws and also as assurance of the use of such parts of the common law and English statutes as were considered desirable. Two factors, however, caused a reappraisal in some jurisdictions of these early provisions: the realization that there were no objective criteria for determining exactly what portions of the common law and English statutes were in force and a belief that there were sufficient portions of the English statutes (and of the colonial and early state statutes as well) which were not adapted to the government then in force in the several states to warrant a thorough revision or codification of all existing statutes coupled with repeal of all not included within the final revisal. 10

It is true that the state constitutional provisions and state or territorial statutes which dealt directly or indirectly with the status of common law and English statutes imposed a variety of standards for determining what portions of the English statutes were to be considered in effect. The application of these standards, however, was seriously hampered by two factors: the difficulty in obtaining copies of the English statutes themselves and the nature of the criteria so imposed.

The absence of readily available volumes of the statutes of England was remarked upon intermittently throughout the 1776-1836 period. Not only were the volumes themselves relatively inaccessible, but the number involved and the searching which had perforce to be done to locate a particular statute — legal indexing being an art in which the twentieth century has shown marked improvement — constituted a tremendous practical deterrent to their effective use. 11

10. As a factor favoring revision or codification, there was a contemporary belief held by unsophisticated individuals that writing out all the law in one book would enable men to know what the law was, obey it at all times, and hence dispense with the need for lawyers. Concurrently, there was a considerable degree of antagonism toward the legal profession. For a discussion see Warren, History of the American Bar 211 (1911).
11. The 1786 New York act "for revising and digesting the laws of this state," noted in the preamble that "such of the said [English and British] statutes as have been generally supposed to extend to the late
The purely physical facts of unavailability or inaccessibility were significant factors in creating uncertainty on the part of lawyers and judges, not only as to what had been placed in effect but what was the actual substance of the statutes themselves. This was aggravated by the nature of the criteria imposed.

One group of statutes or constitutional provisions continued in effect the laws heretofore in force or practiced under. Immediately, the courts were faced with the problem of whether a particular English statute had been in force or had been practiced under. What did "practiced under" mean? In view of the absence of published reports, if a court set up the standard that a prior decision was the only acceptable evidence of a statute's having

colony and to this state, are contained in a great number of volumes...

"..." 1 Jones & Varick, eds., Laws of the State of New York, 281 (1789).

In 1812 the Pennsylvania legislature authorized the printing of certain English statutes for distribution. Acts of Pennsylvania 1811-1812, 100 (1812).

A report of a committee to the Georgia Senate, dated December 9, 1823, remarked "it being known that there are but few copies of the Statutes of England in the State of Georgia, and those which are in force in this State, being comparatively speaking, but few, and scattered through a heavy and voluminous work, to wit, the Statute Laws of England, up to the year seventeen hundred and seventy-six, so that very few have the opportunity afforded to them of knowing what the said laws are..." Dawson, ed., Compilation of the Laws of the State of Georgia, "Resolutions," 26 (1831). An early reference to the "book problem" is found in the preamble to the Virginia acts of 1661-2, which explained the reasons prompting a review of the laws then in force. 2 Hening ed., Statutes at Large of Virginia 41 at 42-43 (1810). The preamble stated in part:

"This assembly...have also endeavoured in all things (as neere as the capacity and constitution of this country would admitt) to addhere to those excellent and often refined laws of England, to which we profess and acknowledge all due obedience and reverence, And that the laws made by us are intended by us, but as breife memorials of that which the capacity of our courts is utterly unable to collect out of such vast volumes, though sometimes perhaps for the difference of our and their condition varying in small things, but far from the presumption of contradicting any thing therein conteyned..."

Note also the Michigan statute of 1810 which stated:

"...whereas the good people of the territory of Michigan may be ensnared by ignorance of laws adopted and made by the governor and judges of the ancient territory of the United States north-west of the river Ohio, and of laws made by the general assembly of the said territory, and of laws adopted and made by the governor and the judges of the territory of Indiana...which said laws do not exist of record or in manuscript in this country, and are also out of print, as well as intermingled with a multiplicity of laws which do not concern or apply to this country, and therefore may not be expected to be reprinted in a body, and may not be expected to be selected and reprinted in a detached form without much uncertainty, delay and difficulty..."
been practiced under, this would be an untenable situation. Inevitably, the courts were thrown back on more nebulous standards, but the basic question remained to perplex them.

Where the common law and English statutes were specifically continued or said to be in force, the courts still had the problem of selection. True, some provisions stated that no statutes enacted after a particular date were to be in force. This was helpful and definite. However, when the criterion was that those statutes which had been a part of the law of a given state as of a particular date were to be in force, the absence of published reports arose again to plague the judiciary. How establish that a given statute had or had not been a part of the law of the state in question? The standard of "applicable" or "suitable to our condition," while helpful at polar extremes, was not of much assistance in borderline cases. No real problems were provoked by statutes dealing with the aid payable upon making the king's son a knight or marrying his daughter or the head pence due in Northumberland, or, at the other extreme by certain provisions of Magna Carta. Again where it could be shown that an English statute had been superseded by a state statute dealing with the same subject, it could be assumed safely that that English statute was no longer in force. The unresolved issues arose over statutes which dealt with subjects having real relevance to existing governmental, social, and economic patterns but over which the argument could be raised that they were not "suitable." The number of decisions touching on the status of English statutes

14. Statutes made at Westminster, 23 Hen. 6, c. 6 (1444).
15. Illustratively, in the absence of a superseding statute a widow was conceded to be entitled to her marriage inheritance and quarantine as had been provided in Magna Carta. Portions of the Statute of Merton dealing with the right of widows to bequeath the crops of their lands and declaring that a child born before the marriage of its parents was a bastard were also usually held to be in effect, as was the Statute de Anno Bissextili. See Kilty, A Report of All Such English Statutes as Existed at the time of the first emigration of the people of Maryland... 205-207 (1811) where he lists such portions of the early English statutes as he considered to be both applicable and proper to be incorporated. See also Martin, A Collection of the Statutes of England now in Force in North-Carolina, 1-5 (1792), Report of the Judges, 3 Bin. (Pa.) 599-600 (1808), Schley, A Digest of the English Statutes of Force in the State of Georgia 34-82 (1826).
16. See Kilty, note 15 supra, at 139-201.
17. See Glasgow's Lessee v. Smith and Blackwell, 1 Tenn. 144 (1805).
which could not be arbitrarily classified as definitely suitable, not in force, or superseded, illustratively those dealing with apprentices or charitable uses, indicates the inherent difficulty faced by the courts and the lawyers.  

Thus pressure for greater certainty developed. There was an obvious need for a swifter solution to the determination of what English statutes were to be considered in force in terms of the day-to-day conduct of business affairs or the handling of criminal prosecutions than could be achieved through the judicial selection decision-making process alone. Certain choices were available to the legislators. They could leave the situation as it was, continuing to entrust the judiciary with the responsibility for deciding what English statutes fell within the criteria imposed by the particular state. They could enact as state statutes on a piece-meal basis such selected English statutes as seemed desirable. They could authorize the preparation of a list of English statutes considered in force within the jurisdiction which would provide an official, if nonstatutory, guide. Or they could embark on an extensive program of statutory revisal coupled with, upon completion and enactment of the revision, repeal of all English statutes heretofore in force.

Such jurisdictions as were not content to continue reliance upon their original enactments — which had continued in effect laws heretofore in force or had declared that English statutes enacted before 1607 were the rule of decision — utilized two major methods of dealing with the problem of uncertainty: the official nonstatutory list and the revisal-repeal technique.

The idea of preparing a list of English statutes under legislative authorization very possibly derived from those colonial statutes which had declared certain English statutes to be in force within that particular colony. Of the four colonies which had employed this device — South Carolina in 1712, Rhode Island and North Carolina in 1749, and New York in 1767 — the North Carolina and New York colonial legislatures had seen their legislation disallowed by an Order in Council.  

18. See Part III infra.
19. Chancellor Kilty's notes, note 15 supra, at 139-201 indicate something of the extent of this practice in Maryland. See also Willard Hall's report to the Delaware State Senate in 1829 where he remarked inter alia, "We have adopted some English statutes...." Journal of the Senate of the State of Delaware 41 (1829).
20. The Orders in Council were issued in 1754 and 1770 respectively. It is at least possible that the Rhode Island statute escaped disallowance because it was relatively brief. It is also possible that it
It is not beyond possibility that in 1791 some member or members of the North Carolina General Assembly knew of or had called to his attention the fact of the disallowed 1749 statute and that this knowledge spurred the appointment of François-Xavier Martin to prepare a Collection of the Statutes of the Parliament of England in force in the State of North Carolina. Martin's list, in which he included the text of the statutes he considered to be in force, was published in 1792 and approved by the General Assembly in 1804. However, in 1817, the General Assembly authorized the preparation of another list by commissioners appointed by the legislature. The report was simply ordered to be published; it was neither rejected nor adopted. Hence in North Carolina the question of the status of each particular English statute remained to be resolved by the judiciary.

This was also the state of affairs in Pennsylvania, Maryland, and Georgia. Sixteen years after the publication of Martin's Collection, the Pennsylvania General Assembly in 1807 authorized the preparation by the Supreme Court Judges of a list of English statutes considered to be in force in the Commonwealth. Published in the third volume of Binney's Pennsylvania Reports, it did not include the text of the statutes. In 1817, a compilation by Samuel Roberts, based on the Report of the Judges, did include the text. The Report of the Judges was prepared with far greater care and expertise than had been the Martin Collection. However, the report of Chancellor Kilty of Maryland, published in 1811 and dealing with the same subject, was even more extensive. It included not only the text of such statutes as were "found applicable and proper to be incorporated" but also detailed footnotes prepared by

simply went unnoticed as it bore no title and its enactment appeared most unobtrusively in the proceedings of the Assembly for February 1749.

22. "An Act enjoining certain duties on the Judges of the Supreme Court" (April 7, 1807).
23. Roberts, Digest of Select British Statutes, comprising those which, according to the report of the Judges of the Supreme Court, made to the Legislature, appear to be in force, in Pennsylvania; with some others (1817).
24. Kilty, A report of all such English statutes as existed at the time of the first emigration of the people of Maryland, and which by experience have been found applicable to their local and other circumstances; and of such others as have since been made in England or Great-Britain, and have been introduced, used and practised, by the courts of law or equity; and also all such parts of the same as may be proper to be introduced and incorporated into the body of the statute law of the state. ... (1811).
the Chancellor which explained the reasons for his inclusion or exclusion of a particular statute or section of a statute. The existence of the Pennsylvania and Maryland lists may have suggested to the Delaware legislators the desirability of having a list prepared for their state. The preparation of such a list was authorized in 1824, but no record of its compilation has been located. In 1823 William Schley was appointed by the Georgia General Assembly to prepare a list of the English statutes in force in that state. His report was published in 1826 and included the text of the statutes considered to be in effect as well as some footnotes.

During the years which saw lists of English statutes considered to be in force prepared under legislative authorization in North Carolina, Pennsylvania, Maryland, and Georgia, with Delaware authorizing such a list which was not prepared, there were at least two non-authorized lists published. A fragment of a list for North Carolina appeared in 1814 and 1815. A purportedly complete list was included by William Littell in his 1810 compilation of the Kentucky statutes. A list was prepared in Florida under legislative authorization in 1845 but was not published until almost a century later.

When these lists included the text of the English statutes said to be in force in a particular jurisdiction, they gave attorney and judge alike ready access to the language of the statutes, avoiding the need to secure the complete set of the statutes of England. Moreover, the inclusion or exclusion of a statute from a list at the very least represented a reasoned opinion on or suggested the likelihood of a prevailing opinion as to that statute's status. Basically, however, the lists in themselves - absent legislative re-enactment by reference or some other form of positive legislative endorsement - did not resolve the issue of

25. Schley, The Statutes of a General Nature which were " Usually in Force on the Fourteenth Day of May, 1776, and not Repugnant to the Constitution, Laws, and Form of Government since Established in this State" with Explanatory Notes, Connecting References, and Reference to English and American Decisions. ... (1826).


29. This did not take place on any wide basis during the post-Independence period. Mississippi Territory in 1800 did provide by statute
whether a particular statute was or was not to be applied to the particular set of facts in question. Their usefulness in practice as an aid in construction of the general declaration that English statutes as "suitable" were in force depended in large measure upon the competency of and the respect accorded to the list-makers. Some jurisdictions apparently found the general statute supplemented by the list completely adequate. No dissatisfaction was apparent in Georgia. A Pennsylvania decision in 1956 referred respectfully to the list prepared by the judges, although it is of some interest to note the contemporary evidence that this same list was considered as a stop-gap measure until a revisal could be prepared. In Maryland, as late as 1912, a two-volume edition of British Statutes in Force in Maryland was based on Kilty's 1811 Report. On the other hand, North Carolina turned to the revisal-repeal method in 1837, and other than Florida in 1845 no other jurisdiction made any effort to employ the list technique. Instead there was renewed interest in the older revisal-repeal approach, which appealed to lawyers and judges who sought definite answers to the status of particular statutes and also appealed to non-lawyers who felt codification and conciseness would prevent lawsuits and insure justice.

The revisal-repeal method originated with Thomas Jefferson. Writing in 1821 at the age of seventy-seven, Jefferson described his efforts at statutory revision between 1776 and 1779, efforts which were eventually incorporated into the Virginia Revisal of 1792. That "the Statutes of Jeofails" were to be in force therein. Contrarywise, the Northwest and Indiana territories in acts dated 1799 and 1807 respectively specifically declared three English statutes not to be in force and Illinois did likewise in 1819. There was, however, nothing in the 1776-1836 period at all comparable to the 1712 South Carolina statute. The importance attached to this colonial statute by South Carolina compilers should be noted. Grimké, Brevard, and Cooper included the particular statutes included in the list in their compilations, dated respectively 1790, 1814, and 1837.


33. Revised Statutes of North Carolina (1837).

34. It is not clear how much influence Jefferson had on the enactment of the 1776 Virginia Ordinance which declared the common law and
Our delegation [i.e., to the Continental Congress from Virginia] had been renewed for the ensuing year commencing Aug. 11. but the new government was now organized, a meeting of the [Virginia] legislature was to be held in Oct. and I had been elected a member by my county. I knew that our legislation under the regal government had many very vicious points which urgently required reformation, and I thought I could be of more use in forwarding that work. I therefore retired from my seat in Congress on the 2d. of Sep. resigned it, and took my place in the legislature of my state, on the 7th. of October.

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So far we were proceeding in the details of reformation only; selecting points of legislation prominent in character & principle, urgent, and indicative of the strength of the general pulse of reformation. When I left Congress, in 1776. it was in the persuasion that our whole code must be reviewed, adapted to our republican form of government, and, now that we had no negatives of Councils, Governors & Kings to restrain us from doing right, that it should be corrected, in all its parts, with a single eye to reason, & the good of those for whose government it was framed. Early therefore in the session of 76. to which I returned, I moved and presented a bill for the revision of the laws; which was passed on the 24th. of October, and on the 5th. of November Mr. [Edmund] Pendleton, Mr. [George] Wythe, George Mason, Thomas L. Lee and myself were appointed a committee to execute the work. We agreed to meet at Fredericksburg to settle the plan of operation and to distribute the work. We met there accordingly, on the 13th. of January 1777. The first question was whether we should propose to abolish the whole existing system of laws, and prepare a new and complete Institute, or preserve the general system, and only modify it to the present state of things. Mr. Pendleton, contrary to his usual disposition in favor of ancient things, was for the former proposition, in which he was joined by Mr. Lee. To this it was objected that to abrogate our whole system would be a bold measure, and probably far beyond the views of the legislature; that they had been in the practice of revising from time to time the laws of the colony, omitting the expired, the repealed and the obsolete, amending only those retained, and probably meant we should now do the same, only including the British statutes as well as our own: that to compose a new Institute like those of Justinian and Bracton, or that of Blackstone, which was the model proposed by Mr. Pendleton, would be an arduous undertaking, of vast research, of great consideration & judgment; and when reduced to a

English statutes enacted prior to 1607 to be the rule of decision. However, the wording of the title, "An ordinance to enable the present Magistrates and Officers to continue the 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," suggests that the ordinance was considered as a temporary measure. It is clear that if there was any tendency to perpetuate the use of the common law and English statutes prior to 1607 in Virginia, this was nullified by Jefferson's not inconsiderable energies.
text, every word of that text, from the imperfection of human language, and its incompetence to express distinctly every shade of idea, would become a subject of question & chicanery until settled by repeated adjudication; that this would involve us for ages in litigation, and render property uncertain until, like the statutes of old, every word had been tried, and settled by numerous decisions, and by new volumes of reports & commentaries; and that no one of us probably would undertake such a work, which, to be systematical, must be the work of one hand. This last was the opinion of Mr. Wythe, Mr. Mason & myself. When we proceeded to the distribution of the work, Mr. Mason excused himself... Mr. Lee excused himself... The other two gentlemen therefore and myself divided the work among us. The common law and statutes to the 4. James I. (when our separate legislature was established) were assigned to me; the British statutes from that period to the present day to Mr. Wythe, and the Virginia laws to Mr. Pendleton....

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Feb. 6. In the execution of my part I thought it material not to vary the diction of the ancient statutes by modernizing it, nor to give rise to new questions by new expressions. The text of these statutes had been so fully explained and defined by numerous adjudications, as scarcely ever now to produce a question in our courts. I thought it would be useful also, in all new draughts, to reform the style of the later British statutes, and of our own acts of assembly, which from their verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty by saids and aforesaid, by ors and by ands, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves. We were employed in this work from that time to Feb. 1779, when we met at Williamsburg... We had in this work brought so much of the Common law as it was thought necessary to alter, all the British statutes from Magna Charta to the present day, and all the laws of Virginia, from the establishment of our legislature, in the 4th. Jac. I. to the present time, which we thought should be retained, within the compass of 126 bills... Some bills were taken out occasionally, from time to time, and passed; but the main body of the work was not entered on by the legislature until after the general peace, in 1785. when by the unwearied exertions of Mr. Madison... most of the bills were passed by the legislature, with little alteration. 35

Reading Jefferson's account of his efforts to revise the laws of Virginia, with the emphasis on utilizing whatever parts of the common law and English statutes that were suitable to the new political climate, it is difficult to discover any animosity toward what might be termed "usable" portions of the English law. Moreover, it should be noted that he avoided the idea of an

entirely new system of jurisprudence. Rather, he was content to utilize whatever portions of the past seemed desirable and build on them for the future. Obviously, after incorporating into the revision such portions of the English statutes as were suitable, it was logical to provide for the repeal of all outstanding ones, as otherwise the courts would be faced with, in effect, certain English statutes being in force as re-enacted Virginia statutes and also as English statutes declared to be the "rule of decision."

Virginia was the first jurisdiction to initiate a revisal of the statutes coupled with repeal, but it was not the first to complete the project. New York authorized its statutory revision in 1786 and repealed the English statutes upon completion of the revision in 1788. Virginia did not adopt its revisal, coupled with repeal of the English statutes, saving only "all and every writ or writs," until 1792. Patterson of New Jersey commenced his revisal in 1792 and brought it to completion in 1799. Vermont adopted its Revised Laws and repealed all English statutes in 1797. In Mississippi Territory, Judge Harry Toulmin, who had argued that the English statutes were in force in the territory, when appointed to prepare a statutory compilation, incorporated a good number of those same statutes in the compilation which the state legislature adopted in 1807, simultaneously repealing all English statutes then in force. In 1836-1837 North Carolina authorized a revision of the state's statutes and, upon adopting it in 1837, repealed all English statutes then in effect. In 1858 Tennessee adopted a Code which repealed all previous enactments including the English statutes heretofore in force. In 1872 South Carolina did likewise.

A variant of the revisal-repeal approach to the status of acts of Parliament appeared in Ohio, where the English statutes were repealed outright without any indication that a revisal was contemplated. In Michigan, however, although repeal in 1810 preceded the revisal which was spoken of in a preliminary resolution of the governor and judges, the comprehensive Code of 1820 was actually a revisal of such laws as had been in force or were thought necessary for the territory. It is not unlikely that the delay between repeal and the enactment of legislation to take the place of the English statutes and of the statutes of earlier territories which had been repealed was caused in large part by the intervening War of 1812.36

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Looking at the dates on which revisal-repeal was effected, as contrasted with the non-statutory authorized lists, within the 1776-1836 period, four out of the six jurisdictions utilizing revisal-repeal did so before 1800. Out of the four states using the nonstatutory authorized lists, three initially authorized their preparation after 1800. It is possible that the original enthusiasm for the comprehensive revisal-repeal approach diminished when the extent of the necessary work involved in selection and drafting became apparent. At this time, lists appeared a suitable alternative, alike easier to prepare and requiring less overturn of the statutory status quo. When, however, the need for certainty became more obvious, attention may well have shifted back to the revisal-repeal method. But whether the list or the revisal-repeal approach was used, the evidence suggests that on the part of the law-makers and law-users the needs for certainty and accessibility were potent motives. This is not to suggest that antagonism toward English law did not exist, for there is considerable contemporary evidence as to its existence. Its influence, in terms of determining legislative action, is more questionable. It is easy to overestimate the impact of choloric pamphlets and vitriolic letters to newspaper editors. On the other hand, they should not be totally disregarded as evidence of contemporary opinion. They do not, however, to judge from the enactments of state legislatures, appear to have been of significant importance in the legislative process.

Hence when English statutes were repealed — and recall that only two jurisdictions did not accompany repeal with a prior revision which included re-enactment as state statutes of such English statutes as were considered desirable and one of these two did later produce an equivalent to a revisal — this was dictated in large measure by the needs for certainty and

37. New York (1778), Virginia (1792), Vermont (1797), New Jersey (1799), Mississippi Territory (1807), North Carolina (1836-1837).
38. North Carolina (1791, 1817), Pennsylvania (1807), Maryland (1809), Georgia (1823).
39. For an extreme example of anti-English sentiment, see Goodenow, Historical Sketches of the Principles and Maxims of American Jurisprudence in Contrast with the Doctrines of the English Common Law on the Subject of Crimes and Punishments (1819).
40. One factor which may have operated to foster the revisal-repeal approach, with its apparent assurance of certainty, was the depletion of the bar by the American Revolution. While the number of Loyalists who emigrated has never been definitely determined, it is clear that many men of substance and education did leave the United States. It is known, as
accessibility rather than by antagonism for the English law itself.\(^41\) Out of the nine jurisdictions which repealed the British statutes, only one, Ohio, specifically repealed the common law as well, and in later years the effect of this ostensible repeal was largely nullified by judicial decision.\(^42\)

Once revisal and repeal had been effected in such jurisdictions as had elected to utilize this approach, revisors and legislators alike undoubtedly believed that the problem of the English statutes had been resolved on a permanent basis. This was not to be uniformly true. It appeared that the English statutes had imbedded themselves in the interstices of the legal systems of the several United States jurisdictions to a surprising degree. In the retention of the common law, an official loophole had been provided through which the English statutes would penetrate in some, though not in all, jurisdictions. New York, for example, which had repealed the English statutes in 1788, saw Chancellor Walworth in 1833 declaring them to be in force as a part of the common law. There were parallel developments in Alabama, Wisconsin, and Iowa, jurisdictions which had inherited territorial statutes repealing all English statutes. Conversely, however, the state courts of Mississippi and Michigan, out of which had been carved Alabama and Wisconsin, have refused to hold English statutes in force as a part of the common law. New Jersey also has steadily adhered to this refusal.

\(^41\) It is true that in the case of New Jersey there was some dissatisfaction expressed with the "Latin and French terms" contained in the English statutes. See "An additional Supplement to an Act for revising and digesting the Laws of the State," March 19, 1795. In New York "An act for revising the digesting the laws of this state" April 15, 1786, noted the language of the English statutes, that they were "conceived in a style and language improper to appear in the statute books of this state."

\(^42\) See Ohio v. Lafferty, Tappan's Reports 113 (1817). Howe, ed., Readings in American Legal History 426 (1949) reproduced the case and added some useful notes.
The courts of those states whose statutes or constitutions did insure the use of English statutes had to deal with the status of English statutes during the 1776-1836 period with a high degree of frequency. In subsequent decades issues involving their use diminished but still exist. A comparison of the state and territorial reports of United States jurisdictions between 1776 and 1836 with the reports of Canadian provinces during the earlier decades of each, shows that the United States jurisdictions had as high if not a higher dependence on the use of English statutes as a statutory basis for the administration of justice. Some of the provinces — i.e., Ontario, British Columbia, Manitoba, Alberta, and Saskatchewan — and the two territories — Yukon and Northwest — have definite dates as of which general laws in force in England were said to be in force within the particular Canadian jurisdiction. In those provinces without such a cut-off date — Nova Scotia, Prince Edward Island, New Brunswick, Newfoundland — the absorption of general laws enacted by Parliament continued until the Colonial Laws Validity Act of 1867. This statute provided that no subsequent act of Parliament would be considered as extending to any colony or colonies unless such colony or colonies were specifically named therein. This, of course, did not affect prior acts of Parliament. In the case of the African nations, formerly British colonies, where the laws of England as of a certain date had been put into effect, all "statutes of general application" as of that date are considered to be in force but none enacted after that date unless specifically extended. An examination of the reports of these jurisdictions shows a substantial number of English statutes applied by the courts. An additional limitation on the power of Parliament to legislate for the colonies was imposed by the 1931 Statute of Westminster, which provided that some affirmative act of reception by a colonial legislature was necessary to the effectiveness of any act of Parliament within

43. See Part III, infra.

44. | Canadian Jurisdictions         | Date As Of Which Laws Of England Became In Force |
    |                               |                                                    |
    | Ontario                       | 1792                                               |
    | British Columbia              | 1858                                               |
    | Manitoba                      | 1870                                               |
    | Northwest Territories         | 1870                                               |
    | Yukon Territory               | 1870                                               |
    | Alberta                       | 1870                                               |
    | Saskatchewan                  | 1870                                               |


46. See Chapter 1, note 12, supra.
that jurisdiction. There may be much truth in the allegation that the loss of the thirteen North American colonies prepared Great Britain for its Empire and Commonwealth.

Closely allied to the use of English statutes by the newly independent states of the United States was the use of English precedents. The almost total absence of any published reports of decisions, not only for the colonial period but also during the early years of many states and territories, made their employment by the former colonists almost inevitable. The attorney seeking clarification in the application of a statute or point of law instinctively turned to the reasonably available volumes of the English reports. The early volumes of state and territorial reports show the extent to which these English decisions were cited and also show the decrease in their use as local reports became increasingly available.

In three jurisdictions efforts were made to limit the use of English precedents. In 1799 New Jersey prohibited the citation of any English report or treatise made or written after July 4, 1776, a prohibition which was definitely repealed in 1819. In 1808 Henry Clay in Kentucky was able to keep extremists in the legislature from doing more than to ban the citation of English reports dated on or after July 4, 1776. In later years this was altered to permit the reading of such reports but they were not to have "binding authority." The Pennsylvania General Assembly in 1810 prohibited the citation of English precedents, again with the cut-off date of July 4, 1776, a prohibition that was repealed in 1836. It is noteworthy, however, that not one of these three statutes as finally enacted dealt with pre-1776 English precedents.

47. Statute of Westminster, 22 Geo. 5, c. 4 (1931).
48. Insufficient research has been done on law library facilities during the post-Independence period to make very definite conclusions as to the number of books available to lawyers. However, the available data shows the heavy preponderance of English sources. See Hamlin, note 40 supra, at 73, and Warren, note 10 supra, at 325. For a list of law books physically present in the Michigan Territory between 1805 and 1836, see Blume, "Chancery Practice on the American Frontier," 59 Mich. L. Rev. 49 at 89-95 (1960).
49. In this connection, the comment made by St. George Tucker in his 1803 edition of Blackstone's Commentaries is worth noting: "[The Revolution] put an end to the authority of any future decisions or opinion of [English] judges, and sages of the law in the courts of this commonwealth; those decisions and opinions, ... will long continue to be respected in Virginia, as to decision of the wisest and most upright foreign judges; but from the moment that Virginia became an independent commonwealth, neither the laws or the judgment from any other country, or
In 1836 the status of acts of Parliament was handled under the following types of constitutional and statutory provisions:

### Constitutional And Statutory Provisions In Effect In 1836 Which Controlled The Use Of British Statutes

1. **No reference to British statutes but provision that laws heretofore in force (or in force in prior jurisdiction) to continue**
   - South Carolina: 1778-1872
   - Massachusetts: 1780
   - New Hampshire: 1784
   - Territory south or River Ohio - Tennessee: 1790-1858
   - Kentucky (Virginia): 1792
   - District of Columbia (Maryland): 1801
   - Alabama Territory - Alabama (Mississippi): 1817
   - Connecticut: 1818
   - Maine (Massachusetts): 1819

2. **Provision that the common law and British statutes were in force (or were to continue in force)**
   - Delaware: 1776
   - Pennsylvania: 1777
   - North Carolina: 1778-1837
   - Georgia: 1784
   - Rhode Island: 1798

3. **Provision that the common law and British statutes as of a particular date were in force**
   - As of the first emigration
     - Maryland: 1776
   - As of July 4, 1776
     - Florida Territory: 1823

4. **Provision that the common law and English statutes enacted before 1607 "of a general nature" were the rule of decision**
   - Indiana Territory - Indiana: 1807

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its courts, can claim any authority whatsoever in our hearts." 4 Blackstone, Commentaries, 437 (Tucker ed. 1803).

50. In 1828, the original provision which had declared British statutes relative to crimes were not in force was altered to permit the use of those in aid of the common law.
METHODS OF DEALING WITH BRITISH STATUTES

Missouri Territory - Missouri
Arkansas Territory - Arkansas
Illinois

1816 — 51
1819 — 52
1819 —

5. Provision that the common law relative to crimes was to be in force
Orleans Territory - Louisiana
1805 —

6. Continuance of general provision that common law and British statutes were in force supplemented by non-statutory list authorized by the legislature
North Carolina
Pennsylvania
Maryland
Georgia
Florida

1792, 1817
1808, 1817
1811
1826
1845

7. Provision repealing British (or English) statutes upon completion of statutory revision
New York
Virginia
New Jersey
Mississippi
North Carolina
Tennessee
South Carolina

1788
1792
1799
1807
1837
1858
1872

8. Provision repealing English statutes without completion of statutory revision
Ohio
Michigan Territory

1806
1810 53

Within these categories, of course, there were substantial variations. For example, while Orleans Territory had expressly declared the common law relative to crimes to be in force, Missouri had expressly excluded the common law and English statutes relative to crimes when declaring English statutes enacted prior

51. English statutes relative to crimes were specifically said not to be in force.
52. English statutes relative to crimes were specifically said not to be in force between 1819 and 1837, but this part of the general provisions was removed in 1837.
53. The Code of 1820 completed the projected rewriting of the Michigan statutes.
to 1607 to be the "rule of decision." Arkansas originally had the Missouri statute but in 1837 altered it to permit the use of English statutes relating to crimes and misdemeanors in the absence of applicable state statutes. While the earliest Florida statute dealing with English statutes, enacted in 1822, had followed the Virginia Ordinance of 1776 in declaring English statutes prior to 1607 to be the "rule of decision," in 1823 this was changed to a simple declaration that general English statutes down to July 4, 1776, excluding those dealing with crimes and misdemeanors, were "to be in force in this territory," and in 1828 the 1823 statute was altered to permit in the absence of territorial statutes the use of "British statutes respecting crimes and misdemeanors" which were "declaratory of and in aid of the common law...." Moreover, as noted earlier, the consequences of any one particular course of action were not necessarily identical in all jurisdictions employing it.

The following table, grouping the several jurisdictions on the basis of their background — i.e., colonial, territories formed from acquisitions by the national government territories formed from other territories, states created from territories — will show the totality of the constitutional and statutory provisions which governed the use or non-use of the British statutes between 1776 and 1836. For details as to the dates, see the lists dealing with provisions initially used and the provisions in effect in 1836 which appear earlier in this part.

Thus, despite the variations which occurred, the use of English statutes was provided for at an early stage in twenty-six out of the twenty-eight jurisdictions organized between 1776 and 1836, that is, in all but Mississippi and Michigan territories. Eventually, only Ohio failed to make systematic provision for their use, whether in whole or in part, either by direct statutory or constitutional declaration or by a revisal which re-enacted substantial portions thereof as state or territorial statutes. Thus, the potential break with prior legal developments was averted — there was at least as high a continuity in the use of English statutes by the several United States jurisdictions as in the case of the Canadian provinces and territories during the nineteenth century and the emergent African nations of the twentieth century. The extent to which British or English statutes were re-enacted as state or territorial statutes by United States jurisdictions has not been explored. When this is done, it is likely to show the substantial number of these statutes that were incorporated into the body of local statutory law. The table in Part
III shows the English statutes with which the courts dealt between 1776 and 1836. The great variety of these statutes and the number of cases which involved their application is significant. The number of statutes so listed demonstrates with unmistakable clarity how widely the English statutes were relied upon and used in the first six decades of the independence of the United States.
### Constitutional and Statutory Provisions Governing the Use or Non-Use of British Statutes: 1776-1836*

<table>
<thead>
<tr>
<th>Types Of Provisions</th>
<th>Jurisdictions With A Colonial Background</th>
<th>Territories Formed Directly From National Acquisitions</th>
<th>Territories Formed From Other Territories</th>
<th>States Formed From Territories</th>
</tr>
</thead>
<tbody>
<tr>
<td>British statutes in force or continued in force</td>
<td>Maine (Mass.)</td>
<td>Northwest</td>
<td>South of River Ohio</td>
<td>Ohio (Northwest)</td>
</tr>
<tr>
<td>British statutes at a particular date in force</td>
<td>New Hampshire</td>
<td>Mississippi</td>
<td>Delaware</td>
<td>Michigan (Ind.)</td>
</tr>
<tr>
<td>British statutes enacted before a particular date in aid of the common law the rule of decision</td>
<td>Vermont</td>
<td>Louisiana</td>
<td>Kentucky</td>
<td>Illinois</td>
</tr>
<tr>
<td>British statutes continued in force supplemented by authorized non-statutory list</td>
<td>Massachusetts</td>
<td>South Carolina</td>
<td>North Carolina</td>
<td>Missouri (Miss.)</td>
</tr>
<tr>
<td>Selected British statutes re-enacted; all others declared not in force</td>
<td>Rhode Island</td>
<td>Georgia</td>
<td>Florida</td>
<td>Arkansas</td>
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<td></td>
<td>Connecticut</td>
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<td>Indiana (Northwest)</td>
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<td>New York</td>
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<td>Louisiana (Miss.)</td>
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<td>Pennsylvania</td>
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<td>Maryland (Md., Va.)</td>
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<td></td>
<td>Louisiana (Miss.)</td>
</tr>
</tbody>
</table>

*The terms "British" and "English" are used interchangeably.

1. Jurisdictions which had an English colonial background inherited the laws in force during the colonial period which included some portions of the common law and British statutes.

2. Territories formed out of cessions to the national government by Great Britain and the several states, however, with the exceptions of the Territory South of the River Ohio, lacked any background of the common law and British statutes. Territories formed from cessions by France and Spain inherited the Spanish civil law.

3. Territories formed from existing territories inherited the laws of such prior territories.

4. States formed from existing territories inherited the laws in such prior territories.