CHAPTER 4

MIDDLE ATLANTIC STATES

New York

On April 15, 1786, the New York legislature passed "An act for revising and digesting the laws of this state," which stated in part:

WHEREAS by the Constitution of this state it is declared that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the Legislature of the colony of New-York, as together did form the law of the said colony, on the nineteenth day of April in the year of our Lord one thousand seven hundred and seventy-five (except such parts thereof as are by the said Constitution abrogated) shall be and continue the law of this state; subject to such alterations and provisions as the Legislature of this state shall, from time to time, make concerning the same.¹ And whereas such of the said statutes as have been generally supposed to extend to the late colony and to this state, are contained in a great number of volumes, and those statutes as well as the acts of the Legislature of the late colony are conceived in a style and language improper to appear in the statute books of this state; therefore,

¹ Constitution of 1777, Art. 35. See 5 Thorpe, ed., Federal and State Constitutions, Colonial Charters, and other Organic Laws 2623 at 2635 (1909) [hereinafter cited as Thorpe]. The text of this article stated in part:

"And this convention doth further... ordain, determine, and declare that such parts of the common law of England and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on ... [April 19, 1775, i.e., the date of Battle of Lexington] shall be and continue the law of this State subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same...."

It should further be noted that on December 24, 1767, the New York General Assembly passed "An Act to declare the Extension of several Acts of Parliament made since the Establishment of a Legislation in this Colony: and not declared in the said Act to extend to the Plantations," 4 Colonial Laws of New York 953 (1894) which was disallowed by an Order in Council December 9, 1770. For the text of the act, see Part IV infra.
I. Be it enacted ... that Samuel Jones and Richard Varick, Esquires, shall be, and hereby are authorized and appointed to collect, and reduce into proper form, under certain heads or titles of bills, all the said statutes, and lay the same bills before the Legislature of this state, from time to time, as they shall prepare the same; and that they, the said Samuel Jones and Richard Varick, Esquires, also collect and reduce all the public acts of the late colony which yet remain in force, into proper form, under certain heads or titles of bills, and lay the same bills before the Legislature from time to time, as they shall prepare the same; that such of them as shall be approved of by the Legislature may be enacted into laws of this state; to the intent that when the same shall be completed, then, and from thenceforth, none of the statutes of England, or of Great Britain, shall operate, or be considered as laws of this state.

II. And be it further Enacted ... That when all such of the said Statutes so to be collected and reduced into Proper Forms, as shall be enacted as aforesaid; then the said Samuel Jones and Richard Varick, Esquires, shall collect, revise and digest all the Laws of this State then in Force, passed by the Legislature thereof since the Revolution, and prepare the same for the press...; and they hereby are directed to cause to be inserted in the said Work, the Titles of all Acts that shall have been passed by the Legislature of this State, and to distribute each Act into one Chapter, and to subdivide each Act into Sections, and abstract the Substance of each Section on the Margin, and distinguish and note in the Margin, which of the said Acts were temporary, and whether expired, revived or repealed, and when; and to examine and correct the Press; and to make an Index and Table to each Volume of all the principal Matters contained therein, alphabetically digested, with Reference to each Matter in every Act, Section, and Page; and to make References from one Act to another, where the Matter in one Act may have Relation to any principal Matter in another. 4

During the 1787-1788 sessions of the New York Legislature, Jones and Varick submitted a number of bills which provided substitutes for particular English or British statutes then in force. Without a word-for-word comparison of the New York enactments

2. Samuel Jones, 1734-1819, was a New York attorney of whom Chancellor Kent is reported to have said: "... no one equalled him in his accurate knowledge of the technical rules and doctrines of real property, and in familiarity with the skillful and elaborate but now obsolete and mysterious black letter learning of the common law." Jones, Jones Family of Long Island, 109 (1907), cited in 10 Dictionary of American Biography 198 (1933).

3. Richard Varick, 1753-1831, served as recording secretary to George Washington from 1781 to 1783, charged with the responsibility of arranging, classifying, and copying all the correspondence and records of the Continental Army's headquarters. In 1784, he became recorder of New York City. He was Speaker of the New York Assembly in 1787 and 1788 and attorney-general in 1788-1789. In 1789 he became mayor of New York and held the office until 1801 when, as a Federalist, he was swept from office. 19 Dictionary of American Biography 226 (1936).

with the acts of parliament dealing with the same subject, it is impossible to state precisely just which of these enactments constituted re-enactments. However, in subsequent years on at least five occasions, the following English statutes were said to have been re-enacted in 1787-1788: 18 Ed. 1, Quia emptores; 5 the statutes of Marlbridge and Gloucester relating to waste; 6 21 Hen. 8, c. 7, relating to embezzlement; 7 29 Car. 2, c. 3, the Statute of Frauds; 8 and 12 Anne., st. 2, c. 16, relating to usury. 9 Attention is also directed to two other 1787-1788 enactments: "An ACT concerning Uses" 10 and "An ACT concerning Amendments and Jeofails." 11

On February 27, 1788, the Legislature passed "An Act for the Amendments of the Law, and the better Advancement of Justice." Containing 36 sections, it was designed to bring to conclusion the task of statutory re-enactment and revisal. The first thirty-five sections dealt primarily with procedural matters including the granting of bail, with three sections modifying or repealing certain technical real property practices. The final section stated:

And be it further Enacted by the Authority aforesaid, That from and after the first day of May next, none of the Statutes of England, or of Great-Britain, shall operate or be considered as Laws of this State. 12


7. "Servants imbezzling their masters goods to the value of forty shillings, or above..." 21 Hen. 8, c. 7. See People v. Hennessey, 15 Wend. 147 (1836); "An ACT declaring it to be Felony in Servants to embezzle their Master's Goods," February 7, 1788, 2 Jones & Varick 214.


Having declared that no statutes of England or Great Britain were to be in force in New York after May 1, 1788, it was entirely logical for the constitution of 1821 — which superseded the constitution of 1777 — to provide as follows:

Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts or parts thereof as are repugnant to this constitution, are hereby abrogated. 13

Taken at its face value, in conjunction with the Act of February 27, 1788, this would seem to have ended the use of English or British statutes as such in New York. However, the legislature apparently found it necessary to provide additional clarification. "An Act concerning the Revised Statutes," passed December 10, 1828, stated:

3. None of the statutes of England or Great Britain shall be considered as laws of this state; nor shall they be deemed to have any force or effect in this state, since the first of May in the year one thousand seven hundred and eighty-eight.

4. No statutes passed by the government of the late colony of New York, shall be considered as law in this state. 14

Whatever may have been the expectations of the New York legislators in enacting the 1828 statute, it is probable they did not anticipate the doctrine or principle expounded by Chancellor York, 287 (1782) which provided in part:

"WHEREAS the Disturbance which proceeded, and have attended the Present happy Revolution have greatly interrupted the free Course of Justice; and it would be altogether unreasonable, that during this Period the Statute made in the twenty-first Year of the Reign of King James the First, entitled "An Act for the Limitation of Actions, and for avoiding of Suits in Law," ... should operate to the Prejudice of Creditors or Suitors:

"Be it therefore enacted...That no Part of the Time from ...[October 14, 1775] to the Day of the passing of this Act, shall be deemed, computed, pleaded, or adjudged as Part of the respective Periods, limited by the said recited Statute ...for commencing, suing, or prosecuting any of the Writs, Actions, Suits or Plaints, in and by the said Statute... specified and described..." 13

Walworth in Bogardus v. Trinity Church (1833). The corporation of Trinity Church had taken possession of certain land in 1705 as, according to the complainant, tenant in common with complainant's ancestor. Complainant claimed to have, together with his brothers and sister, a right in the land as tenant in common with the corporation. In confirming the right of Trinity Church to perfect title to the premises in question, Chancellor Walworth, noted that when the corporation of Trinity Church took possession of the premises in 1705, two English statutes of limitation were in force in the colony of New York, specifically 32 Hen. 8, c. 2 and 21 Jac. 1, c. 16. He went on to state:

... [These statutes had been] brought hither by our ancestors, who emigrated to this country from England, where these statutes were then in force, and settled in this state as an English colony. It is a natural presumption, and therefore is adopted as a rule of law, that on the settlement of a new territory by a colony from another country, especially where the colonists continue subject to the same government, they carry with them the general laws of the mother country which are applicable to the situation of the colonists in the new territory; which laws thus become the laws of the colony, until they are altered by common consent or by legislative enactment... But there might be a technical difficulty in pleading a statute of the mother country as the statute law of the colony. The common law of the mother country as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, become in fact the common law, rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New-York by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province...  

The logical consequence of the decision in Bogardus v. Trinity Church was that instead of a carefully thought out scheme of replacing with New York statutes such acts of parliament as were considered to be desirable for the state to retain, coupled with a repeal en masse of all English statutes, lawyers and courts were now to be faced with the question of what English statutes could be considered to be in force as a part of the common law of the state at the time it broke away from Great Britain.

15. Bogardus v. Trinity Church, 4 Paige 178, 198-99 (1833), aff'd 15 Wend. 111 (1835).

16. See, for example, DeRuyter v. Trustees of St. Peter's Church, 3 Barb. Ch. 119, 122-23 (1848). See also Lansing v. Stone, 37 Barb. 15, 18 (1862) where the state supreme court, citing Chancellor Kent, remarked "... I think no repealing act of our legislature, not even that passed December 10, 1828... is applicable to English or colonial statutes which were a part of the common law of New York..." Miller v. Miller, 18 Hun 507 (1879) took the same position. Cf., however,
The attitude of the New York courts toward the 1787-1788 re-enactments of the English statutes is illustrated by the following extract from Van Rensselaer v. Hayes (1859):

...Our ancestors, in emigrating to this country, brought with them such parts of the common law and such of the English statutes as were of a general nature and applicable to their situation (1 Kent, 473, and cases cited in note a to the 5th ed.; Bogardus v. Trinity Church, 4 Paige, 178); and when the first Constitution of this State came to be framed, all such parts of the common law of England and of Great Britain and of the acts of the Colonial Legislature as together formed the law of the Colony at the breaking out of the Revolution, were declared to be the law of this State, subject, of course, to alteration by the Legislature. (Art. 35.) The law as to holding lands and of transmitting the title thereto from one subject to another must have been a matter of the first importance in our colonial state; and there can be no doubt that the great body of the English law upon that subject, so far as it regarded the transactions of private individuals, immediately became the law of the Colony, subject to such changes as were introduced by colonial legislation... with the exception of the tenure arising upon royal grants, and such as might be created by the King's immediate grantees under express license from the Crown, I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation [i.e., Statute Quia Emptores, 18 Ed. 1] was always the law of the Colony, and that it was the law of this State, as well before as after the passage of our act concerning tenures, in 1787... The fact that the statute we are considering was reenacted in this State in 1787, has no tendency to show that it had not the force of law prior to that time. Indeed, the contrary inference is nearly irresistible, when it is seen how it came to be reënacted. The compilation of statutes prepared by Jones and Varick, and enacted by the Legislature, embracing the statute of tenures and a great number of other English statutes, was made in pursuance of an act passed in 1786... The persons mentioned were, therefore, authorized to collect and reduce...[the British statutes] into proper form, in order that such of them as were approved might be enacted into laws of this State, to the intent that thereafter none of the statutes of England or Great Britain should be in force here... The Statute of tenures was not, therefore, understood as introducing a new law, but was the putting into a more suitable form certain enactments which it was conceived had the force of law in the Colony, and which the constitution had made a part of the law of the State....


The principle set out by Chancellor Walworth in Bogardus v. Trinity Church (1833) has been, in general, adhered to by the New York courts. As a result, they have been faced with the continuing problem of deciding what English statutes had been incorporated into the practice of the colony of New York so that such English statutes could be considered a part of the common law. The significance of the continuation in force of English statutes and of the common law in the Constitution of 1777, the re-enactment of certain English statutes in 1787 and 1788, the repeal of the English statutes en masse in 1788, and the omission of any mention of English statutes in the Constitution of 1821 was overlooked. It may be that there was some discussion of whether the term "common law" in the 1821 constitution included English statutes; if so, it would explain the apparently superfluous act of 1828 which again stated that English statutes were not in force. In any event, Chancellor Walworth opened a Pandora's box of continuing and perplexing problems for the New York courts. 18


"... the Legislature adopted, among other things, on February 26, 1787 ..., the provisions of the English statute of frauds. This compilation or re-enactment of the English statute of frauds into the statute law of this state was an express recognition and declaration by the Legislature that such statute had theretofore extended to the colony of New York by virtue of the Constitution of 1777 and was a part of its common law.

"The precise question was considered by Mr. Justice Bischoff in the case of Cahill Iron Works v. Pemberton (Com.Pl.) 27 N.Y.S. 927, Id., 30 Abb. N.C. 450, and he there stated:

"'The common law of the state of New York differed from the common law of England in that the statute of frauds, passed during the reign of King Charles II formed a part of the former. The English colonists in this country, prior to the establishment of their independence, are presumed to have carried with them the laws of the country to which they at the time owned their allegiance, except only so far as such laws were inapplicable to their condition and to the form of government subsequently established by them. The laws so transmitted constituted the common law of the colonies... and by the constitutional adoption became the common law of this state...'."

"'There can be no doubt therefore that the common law of the state of New York includes the original English statute of frauds enacted in 1677."
New Jersey

The New Jersey Constitution of 1776 made provision for a continuation of the laws and statutes that had been in force prior to the break with Great Britain. It stated:

...the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter.... 19

No contemporary explanation has been located for the action taken by the New Jersey General Assembly in 1792 when it passed "An ACT for revising and digesting the Laws of this State." The act provided in part:

19. Constitution of 1776, §22. "An ACT for the Limitation of Actions, and for avoiding Suits in Law," passed February 10, 1727-8, provided in part: "... all the Statutes now in Force in that Part of Great-Britain called England, concerning the Limitation of Actions Real and Personal, ... are hereby declared to be in Force in this Province from the Publication hereof, as fully and effectually as if every one of them were herein at Length repeated and enacted, and Law, Usage or Custom to the contrary in anywise notwithstanding."

The dissenting opinion in Lohmann v. Lohmann, 50 N.J. Super. 37, 141 A.2d 84 (1958), aff'd 57 N.J. Super. 347, 154 A.2d 741 (1959) stated in part:

"That the common law of England prevailed in the Colony of New Jersey is not open to question. The settlers of this State brought with them the common law of England and such of its statutes as were of general application. On April 15, 1702 the proprietors of East and West New Jersey made a full and unconditional surrender of the right to self-government to Anne, Queen of England. Anne accepted that surrender and appointed Lord Viscount Cornbury as Governor of the combined provinces. Under the new system of government the citizens of New Jersey claimed the protection of and were subject to the same laws as any other British subject, i.e., the common law of England, and the statutes of England which were of general application. The colonial government could, under its charter, enact laws or ordinances to govern its inhabitants, subject to the approval of the Crown and insofar as those laws did not abrogate the English law. This provision must have been designed to insure the Crown that the laws of England having general application would be uniform throughout the Empire. The colonial power to legislate was limited by charter provision to the enactment of laws which were deemed peculiarly essential to their local conditions. These legislatures were not empowered to change the law of England save by
BE IT ENACTED... That his Excellency William Paterson, Esquire, shall be and he is hereby authorized and appointed to collect and reduce into proper Form, under certain Heads or Titles of Bills, all the Statutes of England or Great-Britain, which, before the Revolution, were practised, and which, by the Constitution, extend to this State; as also all the Publick Acts which have been passed by the Legislature of this State, both before and since the Revolution, which remain in Force; which said Bills, as soon as the Whole shall be completed, the said William Paterson, Esquire, shall lay before the Legislature of this State, to be by them, if approved, enacted into Laws; and the said William Paterson, Esquire, is hereby directed to cause to be inserted in the said Work, the Titles of all Acts that shall have been passed by the Legislature of this State; and to abstract the Substance of each Act on the Margin; and to examine and correct the Press; and to make an Index and Table to the Volume or Volumes, of all the principal Matters contained therein, alphabetically digested, with Reference to each Matter in every Act, Section and Page; and to make References from one Act to another, where the Matter in one Act may have Relation to any principal Matter in another.

2. . . . It shall and may be lawful for the said William Paterson, Esquire, in all Cases, when several Laws relate to the same subject Matter, to reduce them into one Law, and also then to lay before the Legislature such Amendments to any Law or Laws, now in Force, as he may think will promote the Good of this State.20

Clearly, the General Assembly contemplated that Paterson would prepare a complete revision of the statutes, whether of England or of New Jersey, then in force. At that point, Paterson was the Governor of New Jersey, appointed to that office in 1790 upon the death of William Livingston.21 Earlier, he had been the Attorney-General of the state from 1776 to 1783, a member of the Constitutional Convention at Philadelphia, and one of the two first United States Senators from New Jersey. During his brief term of office in the Senate, he had been a member of the Judiciary Committee and participated in drafting the Judiciary Act...
of 1789. He served as Governor from 1790 to 1793, resigning to accept an appointment as Associate Justice of the United States Supreme Court. Despite the burdens, first of the double role of Governor and Chancellor of the State of New Jersey, and then of an Associate Justice at a period when the Supreme Court Justices rode on circuit, Paterson continued his drafting efforts from 1793 to 1798. However, in at least one respect, Paterson did not comply with the expectations of the General Assembly — he presented his bills as they were prepared. Apparently, however, the General Assembly accepted this alteration without demur. In 1793, the Assembly increased the scope of his drafting activity. It passed "A Supplement to the Act, intitled, 'An Act for revising and digesting the Laws of this State'" which provided in part:

...That his late Excellency William Paterson, Esquire, in executing the Duties required of him and by the Act, intitled, "An Act for revising and digesting the Laws of this State," be and he is hereby authorized, according to his Discretion, to modify and later the Criminal Law now in Force in this State, either by the Statutes of England or Great-Britain, or by the Acts of the Legislature of this State; and that the said William Paterson, Esquire, be and he is hereby directed to reduce the said Criminal Law into proper Form, under certain Heads or Titles of Bills, and to lay the same before the Legislature as soon as completed, to be by them, if approved, enacted into Laws.

Lacking access to the drafts of the bills prepared by William Paterson, said to be in existence in 1872, it is impossible to say exactly how many bills he presented to the New Jersey General Assembly. Moreover, without a meticulous word for word examination of the New Jersey statutes between 1793 and 1798, it is impossible to state precisely to what extent he based his bills upon English statutes. However, for the Nineteenth General

23. Elmer, note 21 supra, 89. This statement by Elmer is confirmed by the arrangement of statutes in the 1794-1795 acts; those incorporating English statutes are scattered among those dealing with matters of current importance. Moreover, Elmer's statements receive added credence from the fact that he was the nephew of Jonathan Elmer, who was, with Paterson, one of the two first United States Senators from New Jersey, and may well have had some personal information concerning Paterson.
25. Elmer notes that all of Paterson's drafts were preserved and at the time of writing they were bound together. Elmer, note 21 supra, 90. It is probable that these drafts are among the Paterson manuscripts referred to in the bibliography appearing in Wood, note 21 supra.
Assembly, covering the 1794-1795 period, it is possible to state with some degree of certainty that provisions of one or more specific English statutes were incorporated into the following acts: 26

At the first sitting: 1794

An Act authorizing the Justices of the Supreme Court to appoint Commissioners to take Special Bail, and to administer Oaths and Affirmations in Causes depending in the said Court.
An Act for supporting Idiots and Lunatics, and preserving their Estates.
An Act respecting Amendments and Jeofails
An Act concerning Justices of the Peace, and Courts of General Quarter Sessions.
An Act for the prevention of Frauds and Perjuries.
An Act concerning the Action of Account.
An Act to enable Infants, who are seized or possessed of Estates in Trust, or by Way of Mortgage, to make Conveyances of the same.
An Act for regulating References and determining Controversies by Arbitration.
An Act for the better Regulation of Proceedings upon Writs of Mandamus.
An Act for the more easy Redemption and Foreclosure of Mortgages.

At the second sitting: 1795

An Act to prevent, in certain Cases, the Abatement of Suits and Reversal of Judgements.
An Act concerning Tenures.
An Act concerning Costs.
An Act for the Maintenance of Bastard Children.
An Act concerning Executors and the Administration and Distribution of Intestates Estates.
An Act regulating Proceedings and Trials in Criminal Cases.

26. By one of those fortuitous chances, the particular copy of the Acts of the Nineteenth General Assembly of New Jersey which was used in this study was an original edition of the session laws. In the margin of the separate paragraphs of certain acts are entries, in what may very well be the handwriting of Jonathan Elmer who, with Paterson, was one of the two first United States Senators from New Jersey. These entries indicate the English statutory source of each particular paragraph.
An Act concerning Landlords and Tenants.
An Act concerning Distresses.
An Act for rendering the Proceedings upon Informations in the Nature of a quo warranto, more speedy and effectual.
An Act for the better Regulation of Actions of Replevin.

Possibly some dissatisfaction may have been expressed with Paterson's utilization of the exact phraseology of many of the English statutes. In any event, in "An additional Supplement to an Act for revising and digesting the Laws of the State," passed on March 19, 1795, Paterson was requested to translate the Latin and French terms as near as may be into English, that are contained in the laws that have passed during the present sitting of the legislature, and also in the bills that he may hereafter report; the translation to be inserted in the margin of the said laws and bills.\(^27\)

On the whole, however, the General Assembly cannot have been dissatisfied with the overall scope of Paterson's efforts, for the same act also provided:

... he is hereby authorized, according to his discretion, to collect, alter and modify such of the statutes and laws which he has not reported on, and also to draught and propose for the consideration and approbation of the legislature such bills as to him shall appear conducive to the general interests of this state, and to the completion of the revision of the laws of this state, intended by the act above recited.\(^28\)

While Paterson was preparing the bills which, in essence, provided for the re-enactment of selected English statutes, the New Jersey Supreme Court in State v. Mairs, was faced with the question of whether a particular English statute was in force in New Jersey.\(^29\) The court avoided a direct ruling upon the issue, but the reporter, Richard Coxe, thought the entire matter of sufficient interest to warrant the insertion of a note, which stated in part:

\(^27\). Acts of the Nineteenth General Assembly of New Jersey, 1074 (1795).
\(^28\). Ibid.
\(^29\). State v. Mairs, 1 N.J. Law 335 (1795). Counsel for defendant argued that as prisoners the defendants were entitled to bail, although charged with a capital felony on the ground that the act of Parliament upon which the indictment was founded did not extend to New Jersey. The argument, as reported, stated in part:

"...This Act was passed 22d and 23d. Car. 2 in the year 1670. Two years before this time the Province of New-Jersey possessed within itself a regular legislative government, and of course ceased to be bound
NOTE -- From the peculiar connexion which formerly existed between the colonies now constituting a large part of the United States with Great Britain; from the circumstance that the common law of England was adopted almost universally among us, and that many of the acts of Parliament were recognized as part of our law, questions have frequently arisen, and probably will continue to arise, how far these statutes have any obligatory force among us. Different opinions have been entertained and expressed upon this subject by Judges of equal ability and worth; but upon a question of this kind, so completely anomalous in its nature, the grounds for the decision of which are so scattered, obscure and remote, we cannot be surprised if political feelings have sometimes mingled in the consideration and influence the opinion that has been adopted. . . .

* * * * *

It would seem from a comparison of these opinions that the prevailing idea is, that the statutes of British Parliament, as such, have no force with us; but so far as they have been practised under, they have become a part of our common law, and are authority. Nor is this idea in any degree contradicted by a circumstance which must occur to every lawyer upon reflection, viz., that in examining the particular English statutes a very large proportion of them will be found to have been adopted, much larger indeed than it can be supposed would have been sanctioned, had they been individually submitted to the choice of the people or their representatives. It is to be recollected however that before the revolution it was customary for the gentlemen of the bar, and the Judges to receive their legal education in England, where they were instructed equally in the common and statute law, and insensibly introduced much of the latter into the Provinces.

The idea that none of the British statutes have other force in the United States, than such as is derived from having been adopted by ourselves is sanctioned by an ingenious publication of Judge Wilson of the Supreme Court of the U. S. as early as the year 1774. [3 Wils. Works 203] in which the same idea is very ably supported, and the whole question fully investigated. 30

Paterson continued his drafting efforts throughout 1798. He is said to have presented no bills after the close of that year other than the one which marked the end of his efforts: 31

by the laws of the mother country. It appears . . . that the General Assembly met May 30th 1668, when Carteret was Governor, and passed laws for the government of the Province. From that period therefore the acts of Parliament ceased to have any binding force here. . . .

"Under ordinary circumstances therefore, and with regard to the statutes of the British Parliament, this Court are bound to take notice that they are not applicable here. . . ."


31. This, despite the efforts of the Assembly to lighten the totality of his work as evidenced by the act of January 24, 1799, Acts of the Twenty-third General Assembly of New Jersey, 432 (1799) which no longer obliged Paterson "to insert in the work comprising the said revision, the titles
On June 13, 1799, "An Act relative to Statutes," was passed by the New Jersey General Assembly. The fourth section of the act repealed all English statutes heretofore in effect. It stated:

That from and after the passing of this act, no statute or act of the parliament of England or of Great Britain shall have force or authority within this state, or be considered as a law thereof. 32

In enacting "An Act relative to Statutes," the General Assembly added a section which Paterson had not prepared. The addition provided:

5. And be it enacted, That no adjudication, decision or opinion, made, had or given, in any court of law or equity in Great-Britain, or any cause therein depending, nor any printed or written report or statement thereof, nor any compilation, commentary, digest, lecture, treatise, or other explanation or exposition of the common law, made, had, given, written or composed since the fourth day of July, in the year of our Lord, one thousand seven hundred and seventy-six, in Great-Britain, shall be received or read in any court of law or equity in this state, as law or evidence of the law, or elucidation or explanation thereof, any practice, opinion or sentiment of the said courts of justice, used, entertained or expressed to the contrary hereof notwithstanding. 33

of all the acts that shall have been passed by revision, the titles of all the acts that shall have been passed by the legislature of this state..."

Instead, Paterson was "directed to insert in the said work, only such titles as he shall deem necessary and proper."

33. Ibid. In 1800, however, the General Assembly modified the Act of June 13, 1799, as follows: "... so much of the fifth section of the above act, as prohibits the citing of books of law therein mentioned, made and published in Great-Britain, since the fourth day of July, seventeen hundred and seventy-six, in the courts of this state, shall be ... repealed, and the prohibition therein mentioned, shall be taken and construed only to extend to such books therein mentioned, as shall be made and published in Great-Britain, after the thirteenth day of June, seventeen hundred and ninety-nine — Provided nevertheless, That nothing hereby enacted shall be understood to give to said books, published since the fourth day of July, seventeen hundred and seventy-six, and before the thirteenth day of June, seventeen hundred and ninety-nine, any binding authority upon the courts of judicature within this state." Acts of the Twenty-fifth General Assembly of New Jersey, 28 (1800). However, in 1801, the General Assembly passed "An Act Relative to Foreign Reports," Acts of the Twenty-sixth General Assembly of New Jersey, 127 (1801) which provided:

"Sect. 1. BE IT ENACTED ... That from and after the passing of this act no adjudication, decision, or opinion, made, had, or given, in any court of law or equity in Great-Britain, any cause depending, nor any printed or written report or statement thereof, nor any compilation, commentary, digest, lecture, treatise, or other explanation or exposition of the common law, made, had, given, written, or composed since...
It was not until 1819 that this section of the New Jersey statutes was definitely repealed. 34

The Laws of the State of New Jersey: 1703-1799, edited by William Paterson, was published in 1800 under the authority of the General Assembly. 35 In at least one respect it failed to conform with the instructions given by the Assembly to Paterson in 1795: the translation of "the Latin and French terms" did not appear in the margins "of the said laws and bills." However, Paterson did include an "Explanation of Certain Latin and French Terms Made Use Of In The Preceding Laws." 36

An 1822 comment on Paterson's revision of the New Jersey statutes stated:

This edition [i.e., of the New Jersey statutes] commences with an act Dec. 13, 1703, and ends, Nov. 21, 1799; -- and was completed between the years 1794 and 1799 inclusive; by the late Wm. Paterson, one of the Justices of the Supreme Court of the U. States.

It deserves particular consideration, as containing a complete incorporation of all such of the English Statutes as were supposed to be in force in 1776, with such others or parts of others previously or subsequently enacted, as he deemed fit to introduce. It is supposed, so far as relates to a practical and legislative substitution of English statutes, in connection with antecedent local laws and existing usages and the existing government, to be more complete in its execution than any former or subsequent attempt, besides which the antecedent domestic statutes were thoroughly revised and improved, and many parts of the common

[July 4, 1776] in Great-Britain, or elsewhere, without the present boundaries of the United States of North America, shall be received or read in any court of law or equity in this state, as law, or evidence of the law, or elucidation, or explanation thereof, any practice, opinion or sentiment of the said courts of justice, used, entertained, or expressed, to the contrary notwithstanding.

"2. And be it enacted... That if any practising Counsellor, Solicitor, or Attorney at Law, shall read or offer to read in any court of law or equity in this state, any adjudication, decision, or opinion, contrary to the restrictions contained in this act, then and in such case, he shall be excluded from pleading or acting in any wise as a Counsellor, Solicitor, or Attorney at Law, in any of the courts of this state of one whole year next succeeding, and the judges and justices of the several courts are hereby directed to the strictest observance of this act.

"3. Be it enacted, That the fifth section of the act entitled 'An Act relative to Statutes,' passed... [June 13, 1799], and the Supplement made thereto, passed... [November 20, 1800], shall be and the same are hereby repealed."

35. Laws of the State of New Jersey; Revised and Published, Under the Authority of the Legislature (By William Paterson, 1800).
36. Id. xxii.
The revision by Judge Paterson ends with an act of June 13, 1799, "relative to statutes," in which there is a section declaring that from thence "no statute or act of parliament of England or Great Britain, shall have force or authority within the state of New Jersey, or be considered as the law thereof."

The same provision was re-enacted in the last revised code, by act of May 26, 1820 (Rev. Laws. 726). 37

Writing in 1872, Judge Elmer noted:

"An examination of the statutes Mr. Paterson compiled, to take the place of those English statutes which had been considered in force before the Revolution, will convince any lawyer of the care he took to make them complete, and to preserve, so far as circumstances would allow, the old terms, most of which had undergone judicial examination. 38"

It was this care to preserve the original terms that made it possible for the court in Camden Trust Co. v. Handle, decided in 1942, to comment:

"The statutes of Marlbridge and Gloucester have been incorporated into our statute law. Rev. 1877 p. 1235: R.S. 1937, 2:79-1, 2:79-2, 2:79-3. . . ." 39

Apparently, William Paterson did his work with such meticulous thoroughness that from the time of the act of 1799, repealing all English statutes, no English or British statute was considered as being in force in New Jersey either in its own right or as a part of the common law. However curious this may appear to be, no case has been located which in any way refers to such a statute as being in force. Instead, illustratively, there is an early New Jersey case which carefully differentiated between the effect of a New Jersey re-enactment of the statute of de donis in 1784 and the effect of the repeal of the English statutes in 1799 as well as an emphatic 1882 opinion denying that any English statute was in force as such in New Jersey.

The Supreme Court of New Jersey in 1828 had before it a will dated, May 3, 1799, which was proved on October 5, 1799.

37. 4 Griffith, Annual Law Register 1155 (1822). William Griffith, 1766-1826, a New Jersey lawyer, was the father-in-law of Richard Coxe, the early New Jersey law reporter. He published a number of legal works. "During the years 1820-1824 he published the Annual Law Register, containing a reliable account of the officials, laws, and regulations of each of the then twenty-four United States, and a succinct account of the origin, history and practise of the courts of New Jersey. . . ." 7 Dictionary of American Biography, 625 (1931).

38. Elmer, note 21 supra, 91.

The question was whether the will had created an estate in tail and, if so, whether such an estate would be barred by the Act of June 13, 1799, abolishing all English statutes. The opinion of Associate Justice, Gabriel Ford stated in part:

Ford., J. John Mason by will dated the 3d of May 1799, but not proved till the 5th of October following, devised as follows: "I give and devise the plantation whereon I now live to my son Aaron Mason and his male heirs, lawfully issuing; - and for want of such heirs, I give the same to my son Barnt Mason and his male heirs, lawfully issuing; and for want of such heirs, I give the same to my son John Mason, and his male heirs, lawfully issuing; and for want of such heirs, to return back," &c. On the death of the testator, Aaron, the first named devisee, entered, and died seized without any issue. Barnt Mason, the second devisee then entered and became seized, but died ultimately out of possession, and this action is brought by Lewis Mason, his eldest son.

It is argued that the devise "to Barnt Mason and his male heirs," did not create an estate tail under the statute de donis 13 Ed. 1, because that and all other English statutes had been publicly abolished by law on the 13th June 1799; which date, though after the making of the will, was nevertheless prior to the death of the testator; and from the ambulatory nature of wills they never take effect till death; at which time, in this case, there was in existence no law for upholding this kind of estate; as estates in tail were entirely by force of the statute de donis. Now that it is so, there can be no doubt, in England. But it must be remembered that we had a statute of our own passed in 1784. Pat. 54, sec. 2. That was in existence fifteen years before the abolition of the British statutes, and that remained in force more than twenty years afterwards. This statute adopts the great principle of the statute de donis, and supplies its place, as far as the legislature wished that great principle to remain. Besides acting retrospectively, on estates prior to 1784, it was made to operate prospectively, also, by its very words: "on all such devises which shall hereafter be made in tail of any kind:" thus preserving a future power of making these known estates under the restrictions and limitations in the same act. . These estates could be as well made under our own act as under the statute of Edward; they both rested on the same great principle, that the will of the donor should be observed; and in abolishing the English statute there was no intent to abolish the estates likewise; the principle of them, being very valuable to a certain extent, and to that extent the legislature meant to support them. .

In 1882, the New Jersey Supreme Court in Read v. Pennsylvania R.R. Co., the court stated:

In the course of the discussion the operation of the statutes of 6 Anne, c. 31, and 14 Geo. III., c. 78, was adverted to in reference to their effect upon the question of responsibility in this case.

The act of Anne was incorporated in the compilation made by Judge Paterson, and appears as the last section in the statute for the prevention of waste. Rev., p. 1236, §8.

The act of Geo. III. was never re-enacted in this state, and in view of the fact of its omission from the compilation of statutes just alluded to, it never became a part of the law of this state. 41

Moreover, in 1915, the New Jersey Court of Chancery, considering whether or not the chancellor had the power to issue the writ of habeas corpus, stated:

... Whether the statute of Car. II. was ever in force in New Jersey, colony or state, appears to be doubtful. The supreme court, in State v. Garthwaite, 23 N.J. Law 143, observed (at p. 146) that the Habeas Corpus act of 31 Car. II., 1679, was not enacted in this state until after the Revolution. And the same court, in Paterson v. State, 49 N.J. Law 326, observed (at p. 333) that section 65 of the Criminal Procedure act when first enacted in 1799 seems to have superseded the provisions of section 7 of the Habeas Corpus act of Car. II. as enacted in this state in 1795. It may be, however, that it was in force from the earliest colonial period down to 1795, for the supreme court, in Stille v. Wood, 1 N.J. Law 162, decided that the statutes of Charles and James respecting writs of errors extended here. In State v. Mairs, 1 N.J. Law 335, the supreme court (at p. 337) expressed no opinion upon the question whether the Coventry act of 22 and 23 Car. II., 1670, extended to this state. In Den v. Spachius, 16 N.J. Law 172, the supreme court (at p. 176) seems to recognize the existence of estates-tail in this state by virtue of the statute of 13 Ed. I. (de donis conditionalibus), until that act was repealed by our act of June 13th, 1799. In Den v. DuBois, 16 N.J. Law 285, the supreme court (at p. 295) held that while the statute de donis had never been enacted in this state, it nevertheless was always considered as operative here before and after the Revolution down to June 13th, 1799, when our legislature enacted that no act of parliament should have force or be considered law in this state.

If the statute concerning writs of error and the statute de donis were in force in New Jersey until repealed by the act of 1799, I fail to see why the statute of 31 Car. II. was not also in force. But, if it were, it was doubtless repealed by the passage of our Habeas Corpus act of March 11th, 1795, because our statute, in title and enacting clauses, was practically a re-enactment of the English statute, and, because it legislated upon the whole subject, it appears to have been, under the well-settled rule, a repealer by implication of the earlier English statute, assuming that statute to have obtained here... But if the passage of our Habeas Corpus act of March 11th, 1795, did not, by implication repeal the statute of 31 Car. II., that act was expressly repealed by the act relative to statutes passed June 13th, 1799, supra, which provided that from and after its enactment no statute or act of the parliament of Great Britain should have force or authority within this state or be considered as a law thereof. Pat. Rev. 435 §4 (at p. 436). 42

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42. In re Thompson, 85 N.J. Eq. 221, 246, 96 Atl. 102, 113 (1915).
Although the 1915 Chancery decision did not cite the earlier Read v. Pennsylvania R. R. Co., the court certainly took the same general position. There seems no reason to question the general proposition that only such English or British statutes as have been specifically been re-enacted as New Jersey statutes are in force in New Jersey and that such a situation has prevailed since June 13, 1799.

Pennsylvania

In 1956 the Superior Court of Pennsylvania had before it, in Commonwealth v. O'Brien, the question of whether a grand jury could indict, without special permission of the court, a defendant who was not present at a preliminary hearing because at the time it was held he was in prison in another county of the Commonwealth. In holding that a grand jury could so indict, a decision affirmed by the Supreme Court of Pennsylvania, the court reviewed the English statutes which modified the common law to permit the holding of preliminary hearings. In the course of the opinion, the court stated:

The development of the preliminary hearing can be followed in a series of four English statutes of the 15th and 16th centuries, each of which sets forth the reason for its enactment. . . .

* * * * *

After the signing of the Declaration of Independence the Commonwealth of Pennsylvania finding itself without any adopted or enacted law, passed the Act of January 28, 1777, 1 Sm. L. 429, 46 PS §152 by virtue of which the common law and such of the statute laws of England as had theretofore been in force in the province, with certain enumerated exceptions, were declared to be in force and binding upon the inhabitants of the newly created commonwealth. 44


44. Sections one and two of this statute were, as of January 1, 1962, in force in Pennsylvania as §§ 152, 153, Title 46, Pennsylvania Statutes Annotated. The text follows:

"§ 1. Each and every one of the laws or acts of general assembly, that were in force and binding on the inhabitants of the said province on the 14th day of May last, shall be in force and binding on the inhabitants of this state, from and after the 10th day of February next, as fully and effectually, to all intents and purposes, as if the said laws, and each of them, had been made or enacted by this general assembly...and the common law and such of the statute laws of England, as have heretofore been in force in the said province, except as hereafter excepted.

"§ 2. Provided always, that so much of every law or act of general
Doubt having arisen after a few years as to which English statutes were applicable to the new government and which should be considered as a part of the law of this Commonwealth, the legislature, by the Act of April 7, 1807, directed the judges of the Supreme Court to report to the legislature which of the English statutes were then in force in this Commonwealth. In the report made by the judges found in the appendix of 3 Binney's Report, 616, 620, there were included three of the above acts: the statute of Third Henry VII, Chapter 3 [relating to bail], the statute of First and Second Philip and Mary, Chapter 13 [relating to bail by justices of the peace], and the statute of Second and Third Philip and Mary, Chapter 10 [relating to the examination of suspected felons]. These statutes thus became a part of the law of this Commonwealth, and constitute the basic authority for our preliminary hearings.

The act of 1777, referred to above, continued in effect in Pennsylvania, with certain exceptions, only such English statutes "as have heretofore been in force in the said province...." The criterion of "heretofore been in force" was confirmed in Morris's Lessee v. Vanderen (1782), in which Chief Justice M'Kean, charging the jury, stated in part:

... It is the opinion of the Court, however, that the common law of England has always been in force in Pennsylvania; that all statutes assembly of the province aforesaid, as orders taking or subscribing any oath, affirmation or declaration of allegiance or fidelity to the king of Great Britain, or his successors, or oath of office; and so much of every law or act of general assembly aforesaid, as acknowledges any authority in the heirs or devisees of William Penn, Esq., deceased, the former governor of the said province, or any other person whomsoever as governor; and so much of every law or act of general assembly, as ascertains the number of members of assembly in any county, the time of election and the qualifications of electors; and so much of every law or act of assembly aforesaid, as declares, orders, directs or commands any matter or thing repugnant to, against, or inconsistent with the constitution of this commonwealth, is hereby declared not to be revived, but shall be null and void, and of no force or effect; and so much of the statute laws of England aforesaid relating to felonies, as takes notice of or relates to treason or misprision of treason, or directs the style of the process in any case whatsoever, shall be, and is hereby declared, of no force or effect, anything herein contained to the contrary notwithstanding."

45. The act in question, entitled "AN ACT Enjoining certain duties on the Judges of the Supreme Court," was approved April 7, 1807. It stated in part "...the judges of the Supreme Court are hereby required to examine and report to the next legislature, which of the English statutes are in force in this Commonwealth, and which of those statutes in their opinion ought to be incorporated into the statute laws of this commonwealth." Laws of the Commonwealth of Pennsylvania 1806-1807, 163 (1808).

47. Morris's Lessee v. Vanderen, 1 Dallas 64, 67 (1782).
made in Great Britain, before the settlement of Pennsylvania, have no force here, unless they are convenient and adapted to the circumstances of the country; and that all the statutes made since the settlement of Pennsylvania, have no force here, unless the colonies are particularly named. The spirit of the act of Assembly passed in 1718 supports the opinion of the Court.

The Report of the Judges, dated December 14, 1808, and referred to in Commonwealth v. O'Brien, was a formal attempt to ascertain what English statutes were in force in Pennsylvania. It was inserted in the third volume of Binney's Pennsylvania Reports, with the following footnote:

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48. Cf. Anonymous, 1 Dallas 1 (1754) where the reported case reads: "Adjudged by the Court, that the statute of frauds and perjuries [29 Car. 2, c. 3] does not extend to this province, though made before Mr. Penn's charter: the Governor of New York having exercised a jurisdiction here, before the making of that statute, by virtue of the word territories, in the grant to the Duke of York, of New York and New Jersey."

49. In 1718, the General Assembly enacted "An ACT for the advancement of justice, and more certain administration thereof," in an obvious effort to establish what English statutes should be considered in force in the province. It stated in part:

"... whereas it is a settled point, that as the common law is the birthright of English subjects, so it ought to be their rule in British dominions: But acts of parliament have been adjudged not to extend to these plantations, unless they are particularly named in such acts: Now forasmuch as some persons have been encouraged to transgress certain statutes against capital crimes, and other enormities, because those statutes have not been hitherto fully extended to this province:

"I. Therefore,... Be it enacted, That all inquests and trials of high treason shall be according to the due order and course of the common law, observing the directions of the statute laws of Great-Britain, relating to the trials, proceedings and judgments, in such cases.

* * * * *

"VI. And when any person or persons shall be so as aforesaid convicted or attainted of any of the said [capital] crimes, they shall suffer as the laws of Great-Britain now do, or hereafter shall, direct and require in such cases respectively....

* * * * *

"XI. ...another statute, made in the first year of the reign of King James the first, chap 12, entitled An Act against conjuration, witchcraft, and dealing with evil and wicked spirits, shall be duly put in execution in this province, and of like force and effect, as if the same were here repeated and enacted.

Footnote continued
This important document is here inserted at the request of the judges of the Supreme Court. In many respects it deserves to be placed by the side of judicial decisions, being the result of very great research and deliberation by the judges, and of their united opinion. It may not perhaps be considered as authoritative as judicial precedent; but it approaches so nearly to it, that a safer guide in practice, or a more respectable, not to say decisive authority in argument, cannot be wanted by the profession.

The high regard which Pennsylvania jurists and attorneys have accorded this report is indicated by Gardner v. Kiehl (1897) where the Pennsylvania Supreme Court, faced with the argument that 21 Jac. 1, c. 12, relating to actions against public officials, was controlling, held that the statute was not in force in the Commonwealth and referred to the fact it was not included in the Report of the Judges, stating:

... It is true that this omission is not conclusive against the statute, but it raises a presumption of very great weight. In citing any of the British statutes as ground of judgment it has been considered sufficient to refer to that report as authority for their continuance as part of the law of the state. See Finney v. Crawford, 2 Watts, 294; Kline v. Jacobs, 68 Pa. 58; Savage v. Everman, 70 Pa. 315; Frisbee's Appeal, 88 Pa. 144; Carson v. Cemetery Co., 104 Pa. 575. And though in Warren v. Steer, 118 Pa. 529, by a much to be regretted decision, an act reported

"XXIII. ... every such accessory, and other offenders, as above expressed, shall answer upon their arraignments, and receive such trial, judgment, order and execution, and suffer such forfeitures, pains and penalties, as is used in other cases of felony, and as the statute made in the second and third years of King Edward the Sixth, chap. 24, entituled, An Act for the trial of murders and felonies committed in several counties, does direct in such cases; which statute shall be observed in this province, any law or usage to the contrary notwithstanding.

"XXV. ... the statute made in the fifth year of Queen Elizabeth, chap. 9, entituled, An Act for punishment of such persons as shall procure or commit any wilful perjury, shall be observed in this province, and be duly put in execution."

Alexander James Dallas' footnotes to this statute, reprinted in 1 Laws of Pennsylvania, 129 (1797) make it clear that much of the content of this statute was superseded by subsequent enactments after the revolution. The language of this 1718 statute, however, throws light on some of the language contained in the 1777 Act concerning such portions of the English statutes as were not continued in effect.

50. 3 Bin. (Pa.) 595 (1808).
by the judges was held no longer in force, and parties in ejectment were deprived of a most convenient and much needed remedy, yet it was put on the express ground that the English statute had since the report of the judges been superseded by acts of our own on the same subject. The presumption against a statute by its omission from the report is not of course so strong as the presumption in its favor by its affirmative inclusion, but it is still of very great weight, and it is especially so in the present case, as the judges included the very next and one other section of the same act, showing that the act had passed under their consideration. In the absence of anything in the case to overcome the prima facie correctness of the judges' report the presumption must prevail. 51

The list of the English statutes which the Judges considered to be in force was accompanied by notations as to whether a particular statute should or should not be incorporated "into the statute laws of said commonwealth." The preface to the annotated list stated in part:

The undersigned judges of the Supreme Court of the said commonwealth, respectfully submit their report of the English statutes which are in force in the said commonwealth, and of those the said statutes which in their opinion ought to be incorporated into the statute law of the said commonwealth.

They have taken the liberty, at the same time, of submitting a few preliminary observations, connected with the subject of the report, and tending to explain the principles which have governed them in the execution of the trust which the legislature have been pleased to confide in them.

The subject is divided into two branches. 1st, The ascertaining of such English statutes as are in force in this commonwealth. 2d, The opinion of the judges, which of the statutes so in force are proper to be incorporated into the statute laws of the commonwealth.

In order to accomplish the first part of the subject, it was necessary to begin with the consideration of the present constitution of the commonwealth. It contains nothing particular as to the point in question. There is a general provision, that all laws of this commonwealth, in force at that time, and not inconsistent with the said constitution, and all rights &c., should continue as if the said alterations and amendments had not been made. 52 The question still remained unanswered, what laws were in force. It appeared upon tracing the matter further back that an act was passed on the 28th January 1777, intitled "An act to revise and put in force such and so much of the late laws of the province of Pennsylvania, as is judged necessary to be in force in this commonwealth." In this act it is provided, that the common law, 53 and such of the statutes laws of England as have been heretofore in force in the said province, shall be in force, except as is hereafter excepted. The exception

52. Constitution of 1790, Schedule, Section 1. 5 Thorpe 3092, 3102.
53. For a detailed discussion of the incorporation of certain English statutes into the common law and, as a result, into the common law of Pennsylvania, irrespective of whether or not they had been specifically
relates to the oath of allegiance to the king of Great Britain, the acknowledgment of any authority in the heirs of William Penn the first proprietary, the laws ascertaining the number of members of assembly in any county, the time of election and qualification of electors, the English statutes relating to treason or misprision of treason, and such laws or acts of assembly as declared, ordered, or directed, any thing inconsistent with the then existing constitution of the commonwealth.

Still the point remained open — what English statutes were in force in Pennsylvania? It became necessary therefore to mount up to the first sources of information, the charter granted to William Penn, and the general principles of colonization.

It is provided by the charter, that the laws for regulating and governing of property, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, and likewise as to felonies, within the said province, shall be and continue the same as they shall be for the time being, by the general course of the law in the kingdom of England, until the said laws shall be altered by the said William Penn, his heirs or assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them. Notwithstanding the generality of these expressions, it has always been held, that many of the English laws, relating both to property and to felonies, would have been improper for the state of things in an infant colony; and accordingly they were never practically extended here.

It is the true principles of colonization, that the emigrants from the mother country carry with them such laws as are useful in their new situation, and none other. A multitude of English statutes, relating to the king's prerogative, the rights and privileges of the nobility and clergy, the local commerce and revenue of England, and other subjects unnecessary to enumerate, were improper to be extended to Pennsylvania. In order to execute the duty required of them, it was necessary for the judges to examine the code of English statute law from the beginning to incorporated as statutes into the law of Pennsylvania, see Magill v. Brown, 16 Fed. Cas. 408, (E.D. Pa. 1833), also included in Brightly (Pa.) 346 (1833). See also Carson v. Blazer, 2 Bin. (Pa.) 475 (1810) where the Justice Yeates stated in construing the Act of 1777: "...the uniform idea has ever been, that only such parts of the common law as were applicable to our local situation have been received in this government . . . ." This approach to the adoption of common law under the 1777 statute appears in Guardians of the Poor v. Greene, 5 Bin. (Pa.) 554 (1813) where 43 Eliz., c. 4, relating to charitable uses, was held to be not in force in the Commonwealth on the basis that it had not been included in the Report of the Judges. Cf., Magill v. Brown, supra, where the United States District Court concluded that while the statute itself was not in force, its principles were in effect as a part of the common law. For a later case, see Tollinger Estate, 349 Pa. 393, 397 (1944) where the court stated: "While the statute of 43 Eliz., c. 4 (1601) is not a statute of this Commonwealth, its principles are part of our common law: Fire Insurance Patrol v. Boyd, 120 Pa. 624, 644 . . . ."

54. In this connection, it should be noted that the Charter granted by Charles II to William Penn in 1681 declared that the statute of Quia Emptores, forbidding the subinfeudation of land, was not to be applicable to William Penn, his heirs or assigns.

55. See Morris' Lessee v. Vanderen, note 47 supra.
the time of the settlement of Pennsylvania; and weigh deliberately which of them were proper to be adopted. But this was not all. It was essential that our own statute book should be examined, to see in what cases the English law had been altered, or in what cases it had been expressly extended here. Wherever our own legislature had enacted a law on the same subject on which an English statute was to be found, it has been supposed that the English statute had no force here, even though it contained more extensive provisions than our own act of assembly; because it was reasonable to presume, that our assembly were acquainted with the English statute, and designedly omitted some of its provisions.

Besides these inquiries, it was necessary to ascertain, what had been the decisions of our own courts, respecting the extension of English statutes. This was no easy task, as we have no printed reports prior to our revolution, of cases determined in our courts of justice. Of course these decisions are only to be known by tradition, or manuscript notes in the possession of the gentlemen of the bar, or the judges.

With respect to English statutes enacted since the settlement of Pennsylvania, it had been assumed as a principle, that they do not extend here, unless they have been recognized by our acts of assembly, or adopted by long continued practice in courts of justice. Of the latter description there are very few, and those, it is supposed, were introduced from a sense of their evident utility. As English statutes they had not obligatory force, but from long practice they may be considered as incorporated with the law of our country. 56

Having endeavoured to ascertain the English statutes which were in force, the judges proceeded to the second part of the subject, the consideration of which of these statutes were proper to be incorporated with our own law. They felt that this part of their task, though very honourable, was very arduous, and in executing it, they have thought themselves bound to proceed with great caution. In works which consist in the alteration of long established usages, it is safer to do too little than too much... If further alteration should be necessary, it is always competent to the legislature to make them. It will be found by the report, that in a number of cases, the repeal of English statutes is recommended. In a number of others which appeared doubtful, it was thought best to leave them for further experience.

In perusing the statutes referred to in the report, the legislature will perceive, that in many of them the language is uncouth, and unsuited to our present form of government. In many of them too, they will find here and there a sentence, not properly applicable to any other country than England. There is no other way of curing these defects, than by reenacting the statute in language suitable to our present condition, which might be attended with the additional advantage of simplifying the statute law, by reducing into one, several acts passed on the same subject. This would be a work of labour. Something of the kind had been done in the states of Virginia and New York, but it is believed that several years were employed in the performance. 57

57. Report of the Judges, 3 Bin. (Pa.) 595-98 (1808). The judges could have added Vermont, New Jersey and Mississippi to the list of those jurisdictions which had attempted to re-enact the substance of certain English statutes and then repeal all English statutes en masse.
Despite the importance to Pennsylvania jurists and attorneys of the Report of the Judges, one difficulty was encountered — securing the text of the statutes they had classified. In 1812, the General Assembly had authorized the governor to secure the printing of the Judges' Report, but apparently the authorization was never acted upon. In 1816, the Assembly authorized the secretary of the Commonwealth to subscribe for and purchase 300 copies of a work by Samuel Roberts, entitled as follows: "A 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." Roberts, in his Preface, made it clear that he regarded his "Digest" as only a stop-gap until there could be a reformation of "the English code of statutes" and perhaps a "review of our own statute book." Since, however, the Statutes of Pennsylvania, in force as of January 1, 1962, contain the two sections of the Act of 1777, referred to earlier, and since as recently as 1956, the Pennsylvania Superior Court in a decision affirmed by the Pennsylvania Supreme Court referred both to the Act of 1777 and to the Report of the Judges, it would appear that Robert's hopes, expressed in 1816 for a reformation of the English statutes, had not been fulfilled with unseemly haste. Moreover, no disposition appears in the recorded decisions to consider such English statutes as appear in the Report of the Judges to be other than in force under the authority of the Act of 1777 and the Constitution of 1790.

58. Act of March 10, 1812, entitles "An act authorizing the governor to contract with John Binns, for printing a certain number of copies of such parts of the English statute law as is reported by the judges of the supreme court to be in force within this commonwealth, and to provide for the distribution thereof," Acts of Pennsylvania 1811-1812, 100 (1812).


60. 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, xiv, xv (1817).


62. In 1810 an effort was made to prevent citation of English precedents of a later date than July 4, 1776, approved March 19, 1810. The act stated in part: "... from and after the first day of May next, it shall not be lawful to read or quote in any court in this Commonwealth, any British precedent or adjudication which may have been given or made
Maryland

The Declaration of Rights in the Constitution of Maryland, adopted in 1776, stated:

3. That the inhabitants of Maryland are entitled to the common law of England and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed as the time of their first emigration, and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great-Britain, and have been introduced, used and practised by the courts of law or equity; and also to all acts of assembly in force on the first of June, seventeen hundred and seventy-four...

There was no effort on the part of the new state to break with the past. The provincial assembly had consistently asserted — the proprietor or governor dissenting with equal consistency — subsequent to the fourth day of July in the year one thousand seven hundred and seventy-six, Provided, That nothing herein shall be construed to prohibit the reading of any precedent of maritime law, or of the law of nations," Acts of Pennsylvania 1809-1810, 136 (1810). It was repealed by an act, approved March 30, 1836. Laws of Pennsylvania 1835-36, 224 (1836). See Surrency, "When the common law was unpopular in Pennsylvania," 33 Pa. Bar Ass'n Quart. 291 (1962).

63. 3 Thorpe 1686. The original Maryland charter, granted by Charles I to Caecilius Calvert, Lord Baltimore, in 1632, had provided that Maryland residents were to be secure in "all Privileges, Franchises and Liberties of this our Kingdom of England, freely, quietly, and peaceably to have and possess ... any Statutes, Act, Ordinance, or Provision to the contrary thereof, notwithstanding." Id. at 1677, 1681. In 1638 an act of the Assembly stated: "The Inhabitants of this Province shall have all their rights and liberties according to the great Charter of England." 1 Archives of Maryland, Proceedings and Acts of the General Assembly of Maryland, January 1637-8 — September 1664, 83 (1883). In 1742, the Lower House passed a series of resolutions — which was to be re-passed repeatedly at intervals until 1771 — one of which stated: "Resolved further that this Province hath always hitherto had the common Law and such General Statutes of England as are securitative of the Rights and Liberties of the Subject and such Acts of Assembly as were made in this Province to suit its particular Constitution as the Rule & Standard of its Judicature and Government; such Statutes and Acts of Assembly, being Subject to the like Rules of Common Law, or equitable Construction as are used by the Judges in construing Statutes in England...." 42 Archives of Maryland, op. cit., supra, 1740-1744, 321 (1923); 44 id., 1745, 70 (1925); 44 id., 1746, 258 (1925); 46 id., 1750, 236 (1929); 46 id., 1751, 652 (1929); 50 id., 1754, 598 (1933); 55 id., 1757, 208 (1938); 56 id., 1758, 18 (1939); 58 id., 1762, 73 (1941); 59 id., 1765, 135 (1942); 61 id., 1768, 331 (1944); 63 id., 1771, 81 (1946).
that in general English statutes were in force as statutes in the Province. The state legislature took the position that the English statutes were in force as a source of law, for with the change of sovereign they could no longer be considered as an expression of the sovereign's will. Under the general proposition that English statutes were in force in Maryland as a source of law, the courts continued to be left largely to their own discretion in determining what specific English statutes were or were not in force.

64. See note 63 supra. The attitude of the proprietor was expressed in 1723 in a communication to the Assembly which stated in part: "... [a specific act of the Assembly] seems by implication to introduce English Statutes to operate there, which Statutes have been always held not to extend to the Plantations unless by Express Words Located thither and you are upon all Occasions so to Conduct yourself as not only to admit any such practice to take Place in Maryland but even to discountenance any Doubt concerning the same and when any of the English Statute Laws are found Convenient and well Adapted to your Circumstances you ought specially to Enact then De Novo, or such part of them as you find proper for you; and not by an Act of the Province Introduce in a Lump (as it were) any of the English Statutes and these Sentiments you may instil and make known as you see Cause."

The Lower House appointed a committee which shortly thereafter turned in a report which stated in part: "... we hope that what we have Collected, Will Be Sufficient to evince, that as well the Governours as the People Governed Within this Province since it's first Settlement, or at least ever since we Can find any foot Steps of Assemblys or Judicial Proceedings, deemed the General Statutes of England to have the force of Laws in Maryland... and it would be a great Absurdity to advance that we are intituled to all the Rights and Liberties of British Subjects and that we Can't have the Benefits of the Laws by which those Rights and Liberties are Reserved." 34 Archives of Maryland, Proceedings and Acts of the General Assembly, October 1720 - October 1723, 661-79 (1914).

65. There was in 1662 a controversy concerning the leaving of such decisions to the judiciary. The Lower House had enacted a provision that "in all cases where the Lawe of this Province is silent Justice shall be administered according to the Lawes and Statutes of England if pleaded and produced." To this the Upper House desired "to be sattisfied how the County Courts shall be sattisfyed when the Lawe of England is rightly pleaded and whether all Lawes of England how inconsistent soeuer with a plantacon shall be admitted here." The Lower House answered that "The Courts [were] to judge the right pleadeing and inconsistency according to the best of their Judgemt skill and Cunning." To which the Upper House responded "that by this meanes of leauing all to the Breast of the Courts, all is againe Left to discrecon and soe the Acte unnecessary as it lyes. ..." 1 Archives of Maryland. Proceedings and Acts of the General Assembly of Maryland, January 1637/8 - September 1664, 435-36 (1883). In 1771, Governor Eden urged the Lower House to consider what English statutes were in force in the Province with particular reference to the criminal laws. In his message of October 25, the Governor...
force as decisional (common) law with two exceptions: where there had been a specific prior legislative declaration relative to a particular English statute or where the provincial assembly or legislature had rendered an English statute or group of English

stated in part: "... there is not I apprehend, any precise, invariable Rule established, by which the Extent of the Penal Statutes may be ascertained; and therefore, in what Cases Punishment may be regularly inflicted in this Province according to their Prescripts, is a Question, on which various Sentiments may be expected, and in fact, have often occurred. Should the Position be admitted, that such of the Penal Statutes extend hither, as are suitable to the Circumstances of the Country, still what are, or are not thus suitable, may be, in many instances on a Consideration of Statutes ... a very doubtful Question; and which being determinable by the Courts, seems moreover to admit too great Authority in the Judges, and to give too much Scope for Contrariety in the Decisions which a rigorous or compassionate Disposition may influence; for Men's Qualities, when not controled by fixed and established Provisions, will generally slide into their most deliberate, and best formed Opinions... the Judges have no Authority to reject the Rule enjoined by the Legislature: Such Authority would elevate the judicial Power above it's proper Rank; an Authority the Legislative will hardly ever be so incautious as to confer by Provisions, that such Penal Statutes, and such only shall be carried into Execution, as the Discretion of Judges may adopt; but this seems to be the Result of the Position, or Doctrine, that such Penal Statutes, and such only as suit our Circumstances extend hither ...."


66. The form of oath which the Maryland judges were to take provoked controversy over the status to the accorded the English statutes. In 1727 the Assembly enacted a bill, vetoed by the proprietor, the relevant portions of which provided that the Maryland judges were to proceed "...according to the Directions of the Acts of Assembly of this Province, so far as they provide: And where they are silent, according to the Laws, Statutes, and reasonable Customs of England, agreeable to the Usage and Constitution of this Province...." Archives of Maryland. Proceedings and Acts of the General Assembly, July 1727 - August 1729, 81 (1916).

In 1730 the Assembly made another attempt, also vetoed, which directed the judges to proceed "according to the Directions of the Acts of Assembly of this Province, so far as they provide; and where they are silent, according to the reasonable Customs of England, and the Laws and Statutes thereof, as are or shall hereafter be Enacted, agreeable to the Usage or Constitution of this Province ...." Archives of Maryland. Proceedings and Acts of the General Assembly of Maryland, 151 (1917). Finally, in 1732, the proprietor did not veto the proposed form of oath which directed the judges to proceed "...according to the Laws, Customs, and Directions, of the Acts of Assembly of this Province, so far forth as they provide, and where they are silent, according to the Laws, Statutes, and reasonable Customs of England, as used and practised within this Province...." Id. at 518-19.
statutes obsolete because of its own enactments. 67

Under this general directive, however, it was inevitable
that the issue of whether particular statutes were or were not
in force should be argued frequently before the courts. The
reported decisions show that the judges took their responsibility
seriously, comparing acts of parliament with subsequent provin­
cial or state acts to determine whether or not particular English
statutes were suitable to the present conditions of Maryland or
had been rendered inapplicable because of subsequent provincial
or state enactments. By 1809, however, the legislature felt that
more definite information should be available. In the November
session, the legislature passed the following resolution:

Resolved, That the chancellor and judges of the court of appeals
be and they are hereby requested to inquire, and report to the legis­
lature at the next session, all such English statutes as existed as the
time of the first emigration of the people of this state into the same,
and which by experience have been found applicable to their local and
other circumstances, and of such others as have been since made in
England or Great-Britain, and have been introduced, used and practised,
by the courts of law or equity, and also such parts of the same as may
be proper to be introduced and incorporated into the body of the statute
law of this state. 68

In 1810, Chancellor Kilty presented a report to the Mary­
land legislature, prepared in conformance with the standards set
out in the 1809 resolution. 69 For this work, the legislature voted
"the sum of sixteen hundred dollars." While the legislature did
not formally adopt Kilty's Report, by resolution it instructed the
Governor and Council "to have printed for the use of the State,
one thousand copies of the report made by the Chancellor... of

67. See Dulany, The Right of the Inhabitants of Maryland to the Bene­
fits of the English Laws (1728), reprinted in Sioussat, The English Stat­
utes in Maryland, Series XXI John Hopkins University Studies Nos. 11-12
(1903).

68. Laws of Maryland 1809. Resolutions assented November Session,
1809 (n.d.).

69. The report was entitled "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. Made according to the directions of the legis­
lature, by William Kilty, chancellor of Maryland. To which are prefixed,
an introduction and lists of the statutes which had not been found appli­
cable to the circumstances of the people: with full and complete indexes." It was published in 1811, and although the full title appeared on the title
page, it was usually referred to as Kilty's Report.
the English statutes and those of Great-Britain. . . ." 70

In the introduction to the Report, dated November 12, 1810, Kilty discussed the criteria employed for inclusion or exclusion of particular statutes. In so doing, he recapitulated the background and the rationale underlying and, in effect, summed up the basic principles which led Maryland to consider certain English statutes in force or not in force. He stated in part:

The report thus made, has been grounded on a careful perusal and consideration of the statutes at large, and on an examination, as far as it was practicable, of the records of the former provincial court, and the legislative and executive proceedings of the government before the revolution, for which I have to acknowledge the assistance of the officers having respectively the custody of these documents.

With respect to the criminal statutes (which before the making of the penitentiary law of the last session, were considered of the most importance,) the records have afforded the most conclusive evidence as to the usage and practice under them.

In civil cases, it has been, from the nature of the proceedings, and the want of indexes pointing to the different subjects, more difficult to ascertain the grounds upon which my selections have been made; and although the record books have been frequently resorted to with success, I have had to consider, also, the nature of the subjects, and the law authorities thereon, and to refer to the usage and practice generally known in proof of the extention of many of the statutes.

The knowledge of what was the practice, must for want of books of reports necessarily depend in some degree on information, or what may be called tradition, which, when it could be obtained, I have availed myself of; and I have been furnished by the clerk of the court of appeals, with some cases which have not been yet reported.

I think it proper also to mention, that among the papers which were put into my hands, of the late John Ducket, Esq. who had projected some report on the English statutes, I found a copy of a letter from Samuel Chase, Esq. at present one of the judges of the supreme court of the United States, to the late judge Tilghman, in answer to some enquiries made by him on the subject, of which I have been informed several copies were distributed. The following part of that letter is here inserted: "It is a general principle, that the first settlers of Maryland brought with them all English statutes made before the charter, and in force at that time, which were applicable to the local and other circumstances of the province, and the courts of justice always decided the applicability of any statute, and of consequence its extention. I have understood that the judges under the old government laid it down as a general rule, that all statutes for the administration of justice, whether made before or since the charter, so far as they were applicable, should be adopted by them."

Several statutes, (to the number of forty) during both periods, are then particularly mentioned therein, as having extended, together with all the statutes relative to distresses for rent, and all the statutes respecting

70. Laws of Maryland 1810. Resolutions assented to November Session, 1810 (n.d.).
ejectments — as 4 Geo. 2, ch. 28 — 11 Geo. 2, ch. 19 — with the observation, that other statutes had been received in our courts upon the general principles which had been suggested — which observation is verified by their being nearly two hundred statutes which are considered proper to be incorporated, and upwards of three hundred not proper to be incorporated, that had extended.

* * * * *

It appears from an examination of the proceedings of the government, that the question as to the application and extension of the English statutes, was taken up at the first session of Assembly of which we have any record, and continued in various ways to be agitated, to a period so late as the year 1771. The views of the proprietors, and their adherents, having been to discourage the extension of those statutes, in order that their power of assenting to laws might become more important, and the country party having been unwilling that such statutes should be particularly enumerated, so as to limit the courts in their power of judging of the consistency of them with the good of the province: a power which was essential to the proper discharge of their duties; and which had been expressly given by several acts of Assembly.

There are three distinct modes by which the English statutes may have been in force in the province.
1. By the express declaration of the parliament.
2. By declarations contained in the provincial acts of Assembly.
3. By having been introduced and practised by the courts of law and equity, which is the most important in judging of those that are to be retained under the provision in the declaration of rights.

In the late case of "Whittington and Polk," in the general court, the following was a part of the opinion given: "None of the English statutes which passed anterior to the first emigration of the inhabitants of Maryland have been adopted by the constitution of Maryland, and incorporated with the laws, but such as have been found by experience applicable to our local and other circumstances; and it does not appear to the court, there can be any other safe criterion by which the applicability of such statutes to our local and other circumstances can be ascertained and established, but that of having been used and practised under in this state."

In the application of this criterion to the several statutes as passed in review, it must however be observed, that many statutes relating to rights and rules of property have been tacitly and without contest acquiesced in, and that many have been used and practised under without the sanction of any express decision of the courts. Several of the criminal statutes which would otherwise have remained in force, are stated as improper to be incorporated on account of the act of the last session, commonly called the penitentiary act. . . .

71. Kilty, A Report v-vii (1811). For the full title, see note 69 supra.
Kilty divided the body of the Report into three parts with these titles:

- English Statutes existing at the time of the first emigration of the people of this State, which have not been found, by experience, applicable to their circumstances. 72
- Statutes and Parts of Statutes Found Applicable, but not proper to be incorporated. 73
- Statutes and Parts of Statutes Which Have Been Found Applicable and are proper to be Introduced and Incorporated Into the Body of the Statute Law of the State. 74

For each category, a list of the statutes was provided and for the two latter – statutes found applicable but not proper to be incorporated and statutes found applicable and proper to be incorporated – Kilty provided an explanation, referring to acts of the Maryland legislature before and after the Revolution and to cases decided in the state courts.

Despite the lack of formal adoption of Kilty's Report by the legislature as the basis for determining the status of particular English statutes in Maryland, the courts – when faced with the necessity of determining whether or not a particular statute was in force as a source of law – were quite willing to consult it. The following extract from the opinion in Dashiell v. The Attorney General (1822) is illustrative:

The next and principal question is, whether the statute 43 Eliza­beth [relating to charitable uses] is in force in this state? which we think depends entirely on the construction to be given to the third section of the bill of rights, and the evidence furnished by Chancellor Kilty's Report of the Statutes. The third section of the bill of rights is in these words: "The inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration, and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great Britain, and have been introduced, used, and practised by the courts of law or equity."...

The inhabitants of the state are declared to be entitled to the common law, without any restrictive words being used, and thus the common law is adopted in mass, so far at least as it is not inconsistent with the principles of that instrument, and the nature of our political institutions.

They are declared to be entitled to the benefit of such of the English statutes as existed at the time of their first emigration, and which, by experience had, at the time of the declaration of rights, been found to be applicable to their local and other circumstances, and also to the

72. Id. at 9.
73. Id. at 139.
74. Id. at 203.
benefit of such other British statutes, made after the emigration, as had been introduced, used, and practised by the courts of law or equity — a distinction being made between the statutes which existed before the emigration, and those which were afterwards passed, and between both and the common law. We do not think that this section of the bill of rights is to be expounded according to the rule of construction applicable to declaratory laws, but that it must be understood as adopting the different classes of the statutes to which it relates sub modo only, and rejecting all others; and as laying down rules by which to ascertain what statutes were so adopted — a different rule applying to each class. In relation to those which existed at the time of the emigration, their having been found by experience to be applicable to our local and other circumstances, being the rule for the government of courts of justice in determining which are in force; and their having been introduced, used, and practised by the courts of law or equity, the rule in relation to those passed since the emigration. As to the latter class, it does not seem to be denied that none are in force but such as had, at the time of the declaration of rights, been introduced, used, and practised by the courts of law or equity; and if that rule was intended to be restrictive, it is difficult to ascribe to the convention a different intention in relation to the other, nor can a different intention be raised by the argument that our ancestors brought with them all the laws of the mother country at the time of their emigration. For if it had been intended that all the statutes, then existing, should be and continue in force, which might by courts be deemed applicable to our local and other circumstances, it was exceedingly idle to declare such of them to be in force as had by experience been found applicable. And why was a different language adopted in relation to them from that which was used in relation to the common law? for they were equally brought with them by our ancestors.

The circumstances of a different provision being made shows that the convention entertained different views with respect to them.

It could not have been intended as a mere declaratory provision for the purpose only of removing doubts that existed at the time, for if there were any statutes about the extension of which no doubts were entertained, it must have been those which, by experience, had been found applicable, and there was no necessity for declaring the inhabitants of the state to be entitled to their benefit, unless it was the intention to prohibit the use of all such as had not by experience been found applicable.

This view of the third section of the bill of rights raises the question, Which of the statutes existing at the time of the first emigration had by experience been found applicable? The only evidence to be found on that subject is furnished by Kilty's Report of the Statutes, in which the 43 of Elizabeth is classed among those which are said not to have been found applicable. That book was compiled, printed, and distributed, under the sanction of the state, for the use of its officers, and is a safe guide in exploring an otherwise very dubious path.

It is therefore our opinion, that the statute 43 Elizabeth, is not in force in this state...

75. Dashiell v. Attorney General, 5 H. & J. (Md.) 392, 401-03 (1822).
This opinion as to the status of British statutes in Maryland — as laid down in the Declaration of Rights in 1776 and illustrated by Kilty's Report and subsequent cases — continued as the official posture of the state in 1962. The analogous provision of the state's Declaration of Rights, adopted in 1851 and in force in 1962 provided:

... the inhabitants of Maryland are entitled to the common law of England, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed on the fourth day of July, seventeen hundred and seventy-six, and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used, and practised by the courts of law or equity .... 76

Maryland thus continued the practice employed during the early statehood period: the courts were left to determine what particular English or British statutes were in force as decisional (common) law under the constitutionally imposed criteria of applicability and usage.

Delaware

The Delaware Constitution of 1776, Article 25, provided:

The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this state, shall remain in force unless they shall be altered by a future law of the Legislature, such parts only excepted as are repugnant to the rights and privileges contained in this Constitution and the declaration of rights, &c., agreed to by this convention. 77

This article, however, was not incorporated into the Constitution of 1792. Article VIII of the state's second constitution provided in part:

76. Constitution of 1851, Declaration of Rights, Art. 3. See 3 Thorpe at 1713. Constitution of 1867, with amendments of January 1, 1957, Art. 5. For two recent Maryland cases relative to particular English statutes see Hitchcock v. State, 213 Md. 273, 131 A.2d 714 (1956) and Kelly v. Scott, 215 Md. 530, 137 A.2d 704 (1957). Hitchcock v. State held that 34 and 35 Hen. 8, c. 8, relating to natural healers, was not in force in Maryland. Kelly v. Scott, held that the statute 17 Edw. 2, c. 10 De Praerogativa Regis, relative to lunatics, was in force.

77. 1 Laws of Delaware, 1700-1797, Appendix, 89.
Sect. 10. All the laws of this state, existing at the time of making this constitution, and not inconsistent with it, shall remain in force, unless they shall be altered by future laws; and all actions and prosecutions now pending, shall proceed as if this constitution had not been made.

* * * * *

Sect. 12. The Legislature shall, as soon as conveniently may be, provide by law, for ascertaining what statutes, and parts of statutes, shall continue to be in force within this state; for reducing them, and all acts of the General Assembly, into such order, and publishing them in such manner, that thereby the knowledge of them may be generally diffused. . . . 78

Thus the Constitution of 1792 continued in force all statutes originally British that had been continued in force by the Constitution of 1776 — that is, "so much of the statute law" as had been "adopted in practice" — except any which had been repealed prior to 1792. The statutes that had been "adopted in practice" were not specified, and it is only by examining colonial records that those British statutes which were made state statutes by the Constitution of 1776 may be identified.

On January 31, 1824, the Delaware General Assembly passed a resolution which stated in part:

...to complete a digest of the laws of this State, it is expedient that the statutes, coming properly under the following general titles, to wit; . . . should be revised, and that the principles contained in these statutes should be embraced by a general act relative to each title.

RESOLVED, That Nicholas Ridgely, Esquire, and Willard Hall, Esquire, be appointed to carry into effect the foregoing resolution. . . .

RESOLVED, that the said Nicholas Ridgely, esquire, and Willard Hall, esquire, be requested to make report to the General Assembly, at their session in January next; and that they, at the same time report what English statutes are in force in this state, to the end that the same may be included in the revised code; also that they be requested to make such explanatory notes of adjudged cases, to accompany a digest, as may shew the construction that has been given to any statute therein to be included; and further that if they shall consider that any statutes should be repealed, that they shall report the same, with their reasons. 79

This Resolution may have been an attempt to fulfil the mandate of Article VIII, Section 12 of the Constitution of 1792. The need for identifying and specifying what English statutes had become state statutes was obvious. Nevertheless, the Revised Laws of 1829 does not mention that part of the 1824 Resolution

78. Laws of the State of Delaware, 28 (1829).
79. 6 Laws of the State of Delaware, 681 (1826).
which directed the commissioners to "report what English statutes are in force in this state." 80

This omission becomes understandable upon examination of a report made by Willard Hall to the Delaware Senate in 1829, in which he stated:

With a view to report to the General Assembly the English statutes in force in this state pursuant to the resolution of February 3, 1828, I have examined this subject. To aid me in this examination, I have taken the report of the judges of the supreme court of Pennsylvania in the appendix to the 3rd vol. of Binney's report 595-626, and I have considered the statutes therein mentioned. We have adopted some English statutes not contained in this report; because these statutes have been supplied in Pennsylvania by their own acts of Assembly, and have not been supplied in this State. There are several statutes contained in this report, which, I apprehend, were never adopted in this state; for I do not see how they could be applied. But generally I presume, that from the similarity of our condition with that of Pennsylvania under the proprietary government and the general similarity of our laws, great reliance may be placed on this report. The advice of the judges of the supreme court of Pennsylvania is, that many of these statutes should be incorporated with their laws. To this course in this state, there are I think great objections. It would swell the volumes of our laws. Many of the statutes would be unintelligible; for they concern matters which are obsolete; we know nothing of the things by the names. With regard to some of the statutes, it is enough to say they are in force; such as the statute "de donis" which creates the estate tail. We know the effect of the language can never come in question; so of the statutes concerning fines and common recovery. Generally the provisions should be supplied by our own acts and the statutes excluded from our system. Besides, our practice, altho' founded on the statute, frequently varies from it. Our provisions ought to conform to our practice, for this is adapted to our convenience. In the bills which have been presented for the consideration of the General Assembly, many of these statutes have been supplied or rendered unnecessary.81

80. The editor of Laws of the State of Delaware (1829), Willard Hall, stated in the Preface: "...the General Assembly directed their attention to the state of the Acts of Assembly. These had become intricate. The law in force was to be gathered from a mass, a great part of which was obsolete or had been repealed or altered. On many subjects, it required great diligence and care to search out the law, and skill to distinguish what was in force from what had been annulled, varied or supplied. It was seen, that every year would increase this evil."

81. Journal of the Senate of the State of Delaware 41 [1828] – (1829) Emphasis supplied. In Sobolewski v. German, 32 Del. (2 W. W. Harr.) 540 (1924) the Delaware Superior Court stated: "... We know of no compilation of the English Statutes which are in force in Delaware, although the Legislature on January 31, 1824, requested Chancellor Ridgely and Judge Hall to prepare such a list... and the report of Judge Hall to the Legislature of 1829 indicates that it had been prepared (House Journal 1829, p. 53) ...."
Due to the absence of reports of cases decided in the colonial and early state periods, and the lack of an authoritative list of British statutes in force as state statutes after 1776, the courts of Delaware have been forced in many cases to engage in extensive research to determine whether a particular British statute enacted before 1776 should be applied. That the problem has been a continuing one is shown by an extract from a 1924 opinion where the court stated:

The English acts, just referred to, having been enacted after the settlement and colonization of this state, the question of their application to our jurisprudence becomes material. The Delaware Constitution of September 20, 1776, adopted upon our separation from England and organization into an independent state government, provides by Article 25: "The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this state, shall remain in force, unless they shall be altered by a future law of the Legislature; such parts only excepted as are repugnant to the rights and privileges contained in this Constitution and the declaration of rights, * * * agreed to by this convention."

The object of this clause was to secure to the people in their transition from a colonial to an independent political state, a jurisprudence already complete and adequate immediately to define and to protect their rights of person and property without awaiting the slow growth of a new system to be thereafter matured by legislation and judicial precedent. Clawson v. Primrose, 4 Del. Ch. 643, 652. It created no new common law nor re-created any old common law, but continued an existing common law with such statutes as had been adopted in practice . . . .

The court held that there was no evidence that the particular English statutes under consideration had been "adopted in Delaware," noting that while it knew of no compilation of English statutes in force in Delaware, it was aware of the list for Pennsylvania found in 3 Binney (Pennsylvania) 595.

82. The first volume of Harrington's Delaware reports was not published until 1837. In addition to post-Revolutionary cases contained in the printed reports, there is a group of early Delaware cases decided in several of the Delaware courts, reprinted from manuscript notebooks maintained by attorneys. Delaware Cases: 1792-1830, Daniel J. Boorstin, editor, 3 vols., 1943. Some of the cases in these volumes touching upon the status of British statutes include Burton's Lessee v. Vaughan, 1 Del. Cases 268 (1800), State v. Stansborough, 1 Del. Cases 129 (1797), Bassett's and Clayton's Lessee v. Ellsberry, 2 Del. Cases 99 (1798), Burton v. McCullen, 2 Del. Cases 21, 338 (1793), Evans v. Boggs, 1 Del. Cases 349 (1794). See also, Starr and v. Fisher and Shockley, 1 Del. Cases 611 (1818) relative to the common law.

83. See Clawson v. Primrose, 4 Del. Ch. 643 (1873).

Thus, the 1776 constitutional provision continued to be operative with the Delaware courts charged with the responsibility of determining what portions of the common law or of English statutes had been "adopted in practice" but with the authority for any change in what had been "adopted in practice" vested in the legislature.

District of Columbia

"An Act concerning the District of Columbia," enacted by Congress in 1801, provided:

... the laws of the state of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said state to the United States, and by them accepted for the permanent seat of government; and that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States, and by them accepted as aforesaid. 85

As discussed earlier in connection with the status of British statutes in Maryland, the Maryland legislature had taken the general position that the British statutes were in force in that jurisdiction as a source of law from which, as a generalization, the courts were free to draw in determining what particular statutes were or were not in force. 85 In contrast to this, Virginia had repealed all of its British statutes — other than those re-enacted as Virginia statutes — in 1792, although it had preserved as a source of law those statutes pertaining to the writs. 86

There was, apparently, enough confusion over what were the precise laws in force in the District of Columbia to cause Congress, by an act approved April 29, 1816, to direct the preparation of a code of jurisprudence for the district. 87 The code was prepared but no action thereon was taken by Congress. It is, however, of some interest, for it attempted to re-enact all the British, Virginia, and Maryland statutes which Judge Cranch, its compiler, considered suitable, 88 and it further contained the

85. 2 Stat. 103. Alexandria County was retroceded to Virginia in 1846. 9 Stat. 35.
86. See supra, p. 96 and infra, pp. 123-25.
88. Code of Laws for the District of Columbia (1819). The Preface, signed by W. Cranch as one of the Circuit Court judges, stated in part: "In preparing a substitute for the existing statute law, it was
draft of an act to specifically repeal all British, English, Virginia, and Maryland statutes. 89

necessary, if possible, to ascertain what the law was. This was not an easy task. By the act of Congress of the 27th of February, 1801, the laws of Virginia, as they then existed, were to remain in force in that part of the District which was ceded by Virginia, and the laws of Maryland in that part which was ceded by Maryland. The laws thus adopted consisted of so much of the common law of England as was applicable to the situation of this country; of the bills of rights, constitutions, and statutes of Virginia and Maryland, modified by the constitution and laws of the United States; and also (in regard to that part of the District ceded by the State of Maryland) of such of the English statutes as existed at the time of the first emigration to Maryland, 'and which, by experience, had been found applicable to their local and other circumstances, and of such others as had been since made in England or Great Britain, and had been introduced, used, and practised by the courts of law or equity' of that state.

"To ascertain, therefore, what was the existing statute law, it was necessary to know what statutes of England, enacted before the first emigration to Maryland, had, by experience, been found applicable to the local and other circumstances of the country, and what statutes, since made in England or Great Britain, had been introduced, used, and practised by the courts of law or equity in that state; and also what statutes of England or Great Britain had been expressly re-enacted by the state of Virginia.

"From these three systems of statutes to select such as were most important and best adapted to the circumstances of the District, to supply such defects as were discovered, and to combine the whole into one code, required more deliberation, and occupied more time, than was anticipated."

89. "AN ACT Respecting the statutes of England, Great Britain, the commonwealth of Virginia, and the state of Maryland." Code of Laws for the District of Columbia 25 (1819).

"SECT. 1. Be it enacted, &c. That no statute of England or of Great Britain, as such, no statute of the commonwealth of Virginia, as such, and no statute of the state of Maryland, as such, (except such statutes of Virginia and Maryland respectively, as have been enacted since the first day of January, seventeen hundred and eighty-nine, and prior to the twenty-seventh day of February, eighteen hundred and one, and were expressly enacted in relation to such parts of the District of Columbia, respectively, as were at the time of the enacting of such statutes under their respective jurisdictions) shall be of any force or validity within the said District of Columbia, but the same, so far as they were in force in the said District, are hereby repealed; and the first section of the act of Congress passed on the twenty-seventh day of February, eighteen hundred and one, entitled, "An Act concerning the District of Columbia," so far as the said section operated to give validity to the said statutes, within the said District, is also hereby repealed.

"SECT. 2. And it is hereby declared that the inhabitants of the said District, being citizens of the United States are entitled to the benefit of the common law of England, except so far as the same shall have
Insofar as the area ceded by Maryland was concerned, the British statutes in force at the time of the Act of 1801 were generally considered as remaining in force. The provision in this act, which so provided, was commented upon in 1819 by Justice William Johnson, speaking for the Supreme Court in Bank of Columbia v. Okely. He stated:

The laws of the State of Maryland derive their force, in this district, under the first section of the act of Congress of the 27th of February, 1801. But we cannot admit, that the section which gives effect to those laws amounts to a re-enactment of them, so as to sustain them, under the powers of exclusive legislation, given to Congress over this district. The words of the act are, "The laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that State to the United States." These words could only give to those laws that force which they previously had in this tract of territory under the laws of Maryland; and if this law [i.e., the statute under consideration by the Supreme Court] was unconstitutional in that State, it was void there, and must be so here. . . .

Twelve years after the decision in Bank of Columbia v. Okely, Chief Justice John Marshall, speaking for the Supreme Court in Cathcart v. Robinson, stated unequivocally: "The statute of Elizabeth [i.e., 27 Eliz., c. 4, An Act against Covinous and fraudulent Conveyances] is in force in this district . . . ." Marshall then went on to discuss the construction of the statute; he did not discuss how it came to be in force in the District of

been or may hereafter be repealed by the statutes in force in the said District . . . ."

90. One editorial comment in 1929 noted that "the laws of Great Britain and the early laws of the State of Maryland still in force in the District . . . have been found pertinent by the courts of the District on no less than 127 reported occasions . . . ." District of Columbia Code, ix (1951 ed.).


92. Cathcart v. Robinson, 5 Pet. (30 U.S.) 264, 280 (1831). In commenting on the construction to be given to the statute of 27 Eliz., c. 4 (relating to fraudulent conveyances), Marshall stated: "The rule, which has been uniformly observed by this court in construing statutes, is to adopt the construction made by the courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British statutes which are adopted in any of these states. By adopting them they become our own as entirely as if they had been enacted by the legislature of the state. The received construction in England at the time they are admitted to operate in this country, indeed to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however we may respect subsequent decisions, and certainly they are entitled to great respect, we do not admit their absolute authority. . . ."
Columbia, apparently taking this for granted. Justice Henry Baldwin dissented "as to the construction of 27 Elizabeth. On the other points he agreed with the court." 93

In 1838 Justice Smith Thompson, in Kendall v. United States discussed the power of the District Court of the District of Columbia to issue a writ of mandamus. He referred to the operation of the Act of 1801, stating in part:

The first section [of the Act of 1801] declares, that the laws of the state of Maryland, as they now exist, shall be, and continue in force in that part of the district which was ceded by that state to the United States; which is the part lying on this side the Potomac, where the court was sitting when the mandamus was issued. It was admitted on the argument, that at the date of this act, the common law of England was in force in Maryland, and of course it remained and continued in force in this part of the district; and that the power to issue a mandamus in a proper case is a branch of the common law, cannot be doubted, and has been fully recognized as in practical operation in that state...

* * * * *

... There can be no doubt, but that in the state of Maryland a writ of mandamus might be issued to an executive officer, commanding him to perform a ministerial act required of him by law; and if it would lie in that state, there can be no good reason why it should not lie in this district, in analogous cases.... 94

In "An Act To establish a code of law for the District of Columbia," enacted in 1901, Congress provided:

Section 1. The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code. 95

An analysis of the status of British statutes in the District of Columbia appears in a 1940 District Court decision, Burdick v. Burdick where the court stated in part:

I am of the opinion that the meaning of the expression "all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one" is ascertainable from an examination of the Maryland Declaration of Rights of 1776. That declaration, in Sec. 3, provided that the inhabitants of Maryland were entitled to "the benefit

of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their circumstances," and also to "the benefit * * * of such others as have been since made in England, or Great Britain, and have been introduced, used and practised by the courts of law or equity." Of course, no British statutes were "in force" in Maryland in 1801 nor had any been in force, legally or literally speaking, since 1783, the date of the treaty establishing the independence of the Colonies, or probably since 1776 when the Colonies declared their independence, but by the Maryland Declaration of Rights of 1776 the Maryland inhabitants were entitled to the benefit of English statutes found applicable to their circumstances and introduced, used and practiced by their courts. This was a simple verbal expedient for the retention of the statutory law as it was unless and until amended by the Legislature of Maryland. It would be unrealistic to assume as contended by defendants, that any act of British Parliament enacted between 1776 and 1801 had any force and effect in Maryland or that Congress in enacting the D.C. Code of 1901 intended any such assumption. Based on the foregoing, it is my opinion that this provision in the D.C. Code, 1901, was intended by the Congress to mean those British statutes to the benefit of which the Maryland inhabitants were entitled under the Maryland Declaration of Rights of 1776 which were still recognized as being in force in Maryland in 1801 as part of the laws of Maryland under which Declaration of Rights, and that this provision did not intend to incorporate in the District of Columbia law, either as amending the common law or otherwise, British statutes enacted between 1776 and 1801. . . .

A 1956 Circuit Court of Appeals decision, Manoukian v. Tomasian, was faced with the specific question of the status under the Act of 1901 of Sections 19-104 and 19-105 of the District of Columbia Code, such sections having been derived from the British Statute of 25 Geo. II, Ch. 6, §§1, 7 (relating to gifts to the attestor of a will). After quoting the relevant provision from the Act of 1901 and the Maryland Declaration of Rights of 1776, the court went on to state:

... The Declaration of Rights drew no distinction between British statutes which were expressly made applicable to the colonies by Parliament, and those which were not. The statute of George II thus must be given the same force as — and no more than — any other British statute received here by July 4, 1776 . . . .

British statutes antedating the Declaration of Independence have almost universally been regarded as having the effect of judicial precedent, rather than legislative enactment. "The common law of the mother country as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, becomes in fact the common law rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New York, by common consent,

because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province." Bogardus v. Trinity Church, N.Y. Ch. 1833, 4 Paige 178, 198, affirmed N.Y.Ct. of Errs. 1835, 15 Wend. 111. Such statutes are for many purposes considered part of our common law... to be applied by American courts like the common law, rather than like enactments of our own legislatures. In substance, they have been received here as "part of our judicial heritage,"... and should be interpreted and applied as such.

... And not only changed conditions but simply the peculiar circumstances of a particular case may justify departure from a rule of the common law to reach a sensible result...

Thus, whether we approach this case as one requiring construction of a statute or as one calling for application of common law principles, we think the result should be the same — a result based on reason and justice. We recognize that the old British statutes that have been received in the District of Columbia must be considered well established rules of law, not to be varied without good reason. Nor do we lightly undertake the task of excepting a particular case from the general rule of a statute — old or new. But here we think the course to be taken is plain: to exclude this case from the literal wording of Sections 19-104 and 19-105 [derived from 25 Geo. II, c. 6, §§1, 7 relating to gifts to the attestor of a will]. 97

The precise treatment District of Columbia courts in the future will accord British statutes may be in some doubt after this decision in Manoukian v. Tomasian. However, within the period 1801 to 1836, there can be no doubt that the district courts were prepared to consider what the status of particular British statutes had been in Maryland on February 27, 1801, and be guided accordingly.