CHAPTER 5

THE SOUTHERN STATES

Virginia

In May 1776 the Virginia Assembly passed "An ordinance to enable the present Magistrates and officers to continue the administration of justice, and for settling the general mode of proceedings in criminal and other cases till the same can be more amply provided for," which provided:

VI AND be it further ordained, That the common law of England, all statutes or acts of Parliament made in aid of the common law prior to the fourth year of King James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with several ordinances, declarations, and resolutions of the General Convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the Legislative power of this colony. 1

This Ordinance was complemented by a statute approved in December 16, 1776, entitled "An act for establishing a Court of Admiralty," which stated in part:

The said court shall have cognizance of all causes heretofore of admiralty jurisdiction in this country, and shall be governed in their proceedings and decisions by the regulations of the continental congress, acts of general assembly, English statutes prior to the fourth year of the reign of king James the first, and the laws of Oleron, the Rhodian and Imperial laws, so far as the same have been heretofore observed in the English courts of admiralty, save only in the instances hereafter provided for. 2

Both the Ordinance and the statute relative to the Admiralty Court reflected the overall attitude which prevailed in Virginia throughout the colonial period. English statutes enacted after the fourth year of James the first — i.e., the date on which the

1. 9 Hening ed., Statutes at Large of Virginia 127 (1821) [hereinafter cited as Henning ed.]. See also A Collection of all such Public Acts of the General Assembly and Ordinances of the Conventions of Virginia, 37 (1785), known as the "Chancellors' Revisal."
2. 9 Hening ed. 202. See 1 Papers of Thomas Jefferson 645 (Boyd ed. 1950) [hereinafter cited as Boyd ed.]. Jefferson prepared the original draft of the bill and reported it himself on December 4, 1776.
Virginia General Assembly was first constituted — were not in force, unless declared to be in force by the Virginia Assembly or declared by Parliament to extend to the plantations in general or to Virginia in particular. English statutes "of a general nature, not local to that kingdom," enacted prior to 1607 were "in full force," but only to the extent they were consistent with colonial statutes and were considered suited to the conditions of the colony. Such English statutes — i.e., those enacted prior to 1607 — could be applied as rules of decision, but until a court had decided that a particular one should be so applied, it was uncertain just what statutes or parts of statutes were actually in force.

Writing in 1781 and 1782, Jefferson in his "Notes on the State of Virginia" stated:

3. This was consistent with the English position. See Ch. 1 supra.

4. Only one such statute which specifically mentioned the colonies is referred to in any cases which have been located. Rogers Adm'r of Rogers v. Spalden, Jefferson 58 (1738) and Harrison v. Halley, 2 Va. Colonial Decisions 80 (1739) both refer to 5 Geo. 2, c. 7 (1732) [16 S. L. 272] "For the more easy recovery of debts in his Majesty's plantations and colonies in America."

It should be noted that there are almost no official court records available prior to the Revolutionary period. The sole exception is the County Court Record of Accomack-Northampton, 1632-1640, American Legal Records.

Jefferson's Reports, 1730-1740, 1768-1772, contains the following Preface, illustrative of the paucity of reported decisions:

"When I was at the bar of the General Court, there were in the possession of John Randolph, Attorney General, three volumes of MS. Reports of cases determined in that court; the one taken by his father, Sir John Randolph, a second by Mr. Barradall, and a third by Hopkins. These were the most eminent of the counsel at that bar, and give us the measure of its talent at that day. All, I believe, had studied law at the Temple in England, and had taken the degree of Barrister there. The volumes comprehended decisions of the General Court, from 1730 to 1740, as well on cases of English law, as on those peculiar to our own country. The former were of little value, because the Judges of that court, consisting of the King's Privy Counsellors only, chosen from among the gentlemen of the country, for their wealth and standing, without any regard to legal knowledge, their decisions could never be quoted, either as adding to, or detracting from, the weight of those of the English courts, on the same points. Whereas, on our peculiar laws, their judgments, whether formed on correct principles of law, or not, were of conclusive authority. As precedents, they established authoritatively the construction of our own enactments, and gave them the shape and meaning, under which our property has been ever transmitted, and is regulated and held to this day. These decisions, therefore, were worthy of preservation. With this impression, I undertook to extract from those volumes every case of domestic character. They constitute the earlier part of this volume."
A description of the laws.

The general assembly was constituted ... by letters-patent of March the 9th, 1607, in the fourth year of the reign of James the first. The laws of England seem to have been adopted by consent of the settlers, which might easily enough be done whilst they were few and living all together. Of such adoption, however, we have no other proof than their practice till the year 1661, when they were expressly adopted by an act of the assembly, except so far as "a difference of condition" rendered them inapplicable. Under this adoption, the rule, in our courts of judicature was, that the common law of England, and the general statutes previous to the fourth of James, were in force here; but that no subsequent statutes were, unless we were named in them, said the judges and other partisans of the crown, but named or not named, said those who reflected freely. It will be unnecessary to attempt a description of the laws of England, as that may be found in English publications. To those which were established here, by the adoption of the legislature, have been since added a number of acts of assembly passed during the monarchy, and ordinances of convention and acts of assembly enacted since the establishment of the republic....

Upon the change of sovereignty, English statutes as such could not continue in effect. They might, however, become state statutes through re-enactment by reference. They might also, of course, be rewritten or altered and enacted as state statutes. The Ordinance of 1776, quoted above, re-enacted by reference all English statutes prior to 1606 that were "made in aid of the common law ... of a general nature, not local to that kingdom," to the extent that they were consistent "with the several ordinances, declarations, and resolutions of the general convention." English statutes after 1606, incorporated by reference or otherwise into colonial statutes in force in 1776, were also made state statutes by the same ordinance.

"During the subsequent period, which may be called that of Wythe, Pendleton, the Randolphs, Peyton and John, sons of Sir John, Mason &c. until 1768, an interval of twenty-eight years, no Reports, I think, were ever taken. At the latter date, I began to commit to writing some leading cases of the day, confining myself still to those arising under our peculiar laws, and I continued to do so until the year 1772, when the Revolution dissolved our courts of justice, and called those attached to them to far other occupations. These cases I have added to the former series.

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TH: JEFFERSON"


6. For illustrations of the adoption or incorporation of English statutes into the laws of colonial Virginia between 1632 and 1754, see 1
The Virginia Assembly had passed the ordinance continuing in effect the common law and certain English statutes in May 1776. In October 1776 they passed "An act for the REVISION of the LAWS," which provided in part:

Section I. WHEREAS on the late change which hath of necessity been introduced into the form of government in this country, it is become also necessary to make corresponding changes in the laws heretofore in force, many of which are inapplicable to the powers of government as now organised, others are founded on principles heterogeneous to the republican spirit, others which, long before such change, had been oppressive to the people, could yet never be repealed while the regal power continued, and others, having taken their origin while our ancestors remained in Britain, are not so well adapted to our present circumstances of time and place, and it is also necessary to introduce certain other laws, which, though proved by the experience of other states to be friendly to liberty and the rights of mankind, we have not heretofore been permitted to adopt; and

Hening ed., note 1 supra, 167, 172, 193, 217, 331, 336, 351, 472, 552 (1809); 3 id. 171, 178, 360 (1812); 4 id. 164 (1814); 6 id. 339 (1819). See comment by F. S. Philbrick to the effect "... that some of the Assembly's early 'Acts' assumed that English statutes could be made law in Virginia merely by publishing them there." 7 American Legal Records, County Court Records of Accomack-Northampton, Virginia, 1632-1640, viii (1954). At "A Grand Assembly holden at James Citty the 21st of February, 1631-2" the three following acts were adopted. 1 id. 153, 167, 172.

**ACT XXX**

"The statutes for artificers and workemen are thought fitt to be published in this colony. (1 Jacobi c. 6.)"

**ACT XXXI.**

"And the lawes of England agaynst drunkards are thought fitt, to be published and dulie put in execution, that is to say, for every offence to pay five shillings to the hands of the church wardens, and further as is conteyned in the statutes of the 4th of kinge James and the 5th chapter."

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**ACT XLIII.**

"The statutes and lawes of England agaynst forestallers, and engrossers, to be made known and executed in this colony."

As a collateral illustration of the practical utilization of the laws of England, note the following from the "Extracts of the Minutes of the Proceedings of the Governor and Council of Virginia," 1640, 1 id. 551, 552. "Robert Sweet to do penance in church according to the laws of England, for getting a negroe woman with child and the woman whipt."
whereas a work of such magnitude, labor, and difficulty, may not be ef­fected during the short and busy term of a session of Assembly:

Sect. II. BE it therefore enacted . . . that a committee, to consist of five persons, shall be appointed by joint ballot of both Houses (three of whom to be a quorum) who shall have full power and authority to revise, alter, amend, repeal, or introduce all or any of the said laws, to form the same into bills, and report them to the next meeting of the General Assembly.

* * * * *

Sect. V. PROVIDED, that such bills so to be prepared and reported by the Committee of Revisors shall be of no force or authority until they shall have gone through their several readings in both Houses of Assembly, and been passed by them in such manner and form as if the same had been originally introduced without the direction of this act. 7

On November 5, 1776, the Assembly "RESOLVED, that Thomas Jefferson, Edmund Pendleton, George Wythe, George Mason, and Thomas Ludwell Lee, Esquires, be appointed a committee to revise the laws of this commonwealth."8 Then in December the Assembly passed "An act for establishing a Court of Admiralty," with its direct reference to the English statutes prior to 1607 and to "the laws of Oleron, the Rhodian and Imperial laws...."9 The committee of revisors, headed by Thomas Jefferson, met at Fredericksburg on January 13, 1777.10 In the plan of operation eventually decided upon, Jefferson was responsible for those bills — out of the 126 prepared by the committee — which were based on the common law and English statutes prior to 1607.11

On June 18, 1779, a letter was laid before the House of Delegates, signed by Jefferson and Wythe, which stated in part:

7. 9 Hening ed. 175. See also Report of the Committee of Revisors 3 (1784).
8. Id.
9. See supra note 2.
10. 2 Boyd ed. 305–15 (1950). Writing in 1826, to S. H. Smith, James Madison commented on Jefferson’s share in the revisal: "The revised Code, in which he had a masterly share, exacted perhaps the most severe of his public labours. It consisted of 126 Bills comprizing and recasting the whole Statutory Code British and Colonial then admitted to be in force or proper to be adopted, and some of the most important articles of the unwritten law, with original laws on particular subjects; the whole adapted to the Independent and Republican form of Government. The work tho' not enacted in the mass as was contemplated has been a mine of Legislative wealth; and a Model also of Statutory Composition, containing not a single superfluous word, and preferring always words and phrases of a meaning fixed as much as possible by oracular treaties or solemn adjudications." Madison Papers, Library of Congress, quoted in Boyd ed. at 313.
11. Id. at 315–16. See also id. at 658 for "Jefferson's Notes of English Statutes" classified as to those which were doubtful whether or
The committee appointed in pursuance of an act of General Assembly passed in 1776, intituled "An act for the revision of the laws," have according to the requisitions of the said act gone through that work, and prepared 126 bills, the titles of which are stated in the inclosed catalogue. Some of these bills have been presented to the House of Delegates in the course of the present session two or three of them delivered to members of that House at their request to be presented, the rest are in the two bundles which accompany this; these we take the liberty through you of presenting to the General Assembly. 12

While ultimately more than a third of the 126 bills were enacted by the Assembly, the "revisal was never put into effect as a unit." In fact, it was not until October 1785 that the "proposed revisal as a whole was brought forward for consideration. . . ." 13

In the meantime, however, on June 16, 1783, the General Assembly had directed the Judges of the High Court of Chancery to collect the acts of the General Assembly subsequent to 1769, currently in force. 14 Delays were encountered, 15 and it was not until 1785 that the Chancellors completed "A Collection of All Such Public Acts of the General Assembly and Ordinances of the Conventions of Virginia, Passed since the year of 1768, as are now in force. . . ." Essentially this work, known as the Chancellors' Revisal of 1785, was a compilation or collection. It did not purport to replace the existing laws, a purpose to which, in some substantial measure, the Committee of Revisors appointed under the 1776 act felt itself to be committed. 16

not they should be retained and those which he had omitted but which were "necessary to be taken up." See also "Autobiography," 1 Ford ed., note 5 supra, at 59-61.

12. Report of the Committee of Revisors, 3 (1784), See also 2 Boyd ed. 307.


14. The Resolution of 1783, 9 Hening ed. 176, stated:

"Resolved, That it be an instruction to the executive to cause the several acts of the General Assembly subsequent in date to the revisal in the year 1769, and the ordinances of Convention which are now in force to be collected into one code with a proper index, and marginal notes, to be revised and examined by any two judges of the high court of Chancery: that copies of this code be printed in sufficient numbers for the use of the two houses of Assembly, the several executive boards, the superior courts of justice and the county and corporation courts, that they be covered with paste board: And that the executive be empowered to defray the expense of this collection and of printing the same out of any money in the treasury. Provided nevertheless, That the whole expence attending the same do not exceed the sum of seven hundred and fifty pounds."


One hundred and twenty-six bills were contained in the 1779 Report of the Revisors. Three are of particular importance as regards the status of English statutes in Virginia: Numbers 92, 102, and 126. They were all submitted to the Assembly for action in 1785, but none passed.

Number 92, "A Bill Constituting the Court of Admiralty," provided in part:

... the Court of Admiralty, to consist of three Judges ... shall have jurisdiction in all maritime causes ... and shall be governed in their proceedings and decisions by the regulations of the Congress of the United States of America, by the acts of General Assembly, by the laws of Oleron, and the Rhodian and Imperial laws, so far as they have been heretofore observed in the English Courts of Admiralty, and by the laws of nature and nations....

Thus, was removed the phrase in the 1776 act which directed the admiralty courts to use as a source of law "English statutes prior to the fourth year of the reign of king James the first" while the phrase "the laws of nature and nations" was added.

Number 102, "A Bill for Regulating Proceedings in Courts of Common Law," stated in part:

Be it enacted ... that all writs, given by the twenty-fourth chapter of the statutes, made in the thirteenth year of the reign of King Edward, the first of England [relating to the issuing of writs in consimili casu], and heretofore in use, shall continue to be used, in the same manner as if that statute were hereby re-enacted....

Bill 126, entitled "A Bill for Repealing Certain Acts of Parliament and of General Assembly" provided in part:

Be it enacted ... that all acts of the Parliament of England, made before the fourth year of the reign of King James the first of England, except such of them as shall be by this General Assembly enacted, in express words, to be in force, shall be, and are repealed, so far as they concern any persons or things in, or belonging to this commonwealth. And it is declared, that every act, either of the said Parliament of England, made in or after the said fourth year of the reign of the said King James, or of the Parliament of Great-Britain, made since the union of the two kingdoms of England and Scotland, so far as any such act concerned or was intended to concern any persons or things in or belonging to this commonwealth, was and is void, and never had any force, further than such act shall have been particularly enacted or allowed by some act of General Assembly to be in force....

17. Id. at 572.
19. Report of the Committee of Revisors 90 (1784). See also 2 Boyd ed. 656. See also id. 658 for "Jefferson's Notes of English Statutes."
Neither bill 102 nor bill 126 was enacted. James Madison—who in Jefferson's absence was shepherding the bills through the Assembly—felt it undesirable to press for the passage of the bill repealing the English statutes since the complementary bills for enacting as state statutes such English statutes as were considered desirable to be so incorporated had not been enacted. In December 1786 Madison proposed that a new Committee of Revisors be appointed to salvage as much as possible of the earlier committee's work. Although appointed, it accomplished nothing.

On November 18, 1789, the General Assembly appointed another committee of revisors, and then on November 25, they

20. 2 Boyd ed. 657 note. See also id. at 323.
21. 12 Hening ed. 409 (1823). See also 2 Boyd ed. 323. The act itself, entitled "An act for completing the revision of the laws," passed on January 2, 1787, stated in part:
"I. FOR completing the revision of the laws, Be it enacted
... That a committee ... shall be appointed ... who shall take into consideration such of the bills contained in the revisal of the laws prepared and reported by the committee appointed for that purpose, in the year ... [1776] as have not been enacted into laws; shall examine what alterations therein may be rendered necessary, by a change of circumstances or otherwise, and shall make report thereupon to the next meeting of the general assembly, as the said committee shall judge proper.
"II. And be it enacted, That the said committee shall also take into consideration, all acts of assembly passed since the revisal aforesaid was prepared, and shall have full power and authority to revise, alter, amend, repeal or introduce, all or any of the said laws, to form the same into bills, and report them to the general assembly...." 22
22. 2 Boyd ed. 323-324.
23. "An act concerning a new edition of the Laws of this Common-wealth...." 13 Hening ed. 8 (1823) which stated in part:
"Sect. 1 WHEREAS the great number of the laws of this Commonwealth, dispersed as they are through many different volumes, renders it often questionable, which of them are in force; copies of those laws are procured with difficulty, and only at high prices; and so many of them have been repealed, wholly or in part, were temporary and have expired; were occasional, and have had their effect; were private or local, or have been re-enacted in substance, in the laws, taken from the report of the revisors, appointed in the year of our Lord one thousand seven hundred and seventy-six, that scarce a third of them concern the public at large.

"Be it enacted by the General Assembly, That James Mercer, Henry Tazewell, Joseph Prentis, Saint George Tucker, Edmund Randolph, James Innes, John Taylor and John Marshall, Esquires, be appointed, whose duty it shall be, first, to report to the next session of the General Assembly, what English statutes, if any there be, are suited to this Commonwealth, and shall not have been enacted in the form of Virginia laws; secondly, What laws or parts of laws, which are of a general concern, shall remain in force at the close of the present session of
repealed that part of the 1776 ordinance which had continued in force certain acts of parliament. A year later, realizing that although the revisal had been authorized, it had not been prepared, on December 23, 1790, the General Assembly appointed a new committee of revisors. The question of the status of the Assembly; thirdly, What laws on the same subject, ought from their multiplicity to be reduced into single acts; and fourthly, What laws or parts of laws are either unfit to be continued in force, or unnecessary to be published in any code of the laws; fifthly, To prepare and report as aforesaid, marginal notes and a full index to all the laws of the Commonwealth; sixthly, To note in due order of time and report as aforesaid, the titles of all those laws, which may be proper to be omitted, in a general compilation of the laws; and seventhly, To instruct the clerk of the House of Delegates, as far as it may be in their power, how to obtain for the use of his office, copies of those laws, the rolls whereof are lost."

24. "An act repealing a part of the ordinance by which certain English Statutes were declared to be in force within this Commonwealth," 13 Hening ed. 23 (1823), which stated:

"Sect. 1. WHEREAS by an ordinance of convention, intituled "An ordinance to enable the present magistrates and officers to continue the administration of justice, and for settling the general mode of proceedings in criminal and other cases, till the same can be more amply provided for" it is among other things enacted, that "all statutes or acts of Parliament made in aid of the common law, prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that kingdom, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony;" and whereas the good people of this Commonwealth may be ensnared by an ignorance of acts of Parliament, which have never been published in any collection of the laws; and it has been thought adviseable by the General Assembly during their present session, specially to enact such of the said statutes as to them appeared worthy of adoption, and did not already make a part of the public code of the laws of Virginia.

"Be it enacted by the General Assembly, That so much of the above recited ordinance, as relates to any statute or act of Parliament, shall be and is hereby repealed; and that no such statute or act shall have any force or authority within this Commonwealth.

"Sect. 2. But all rights arising under any such statute or act, and all crimes and offences committed against the same, at any time before the commencement of this act, shall remain in the same condition in all respects, as if this act had never been made. This act shall commence in force on the first day of January, in the year one thousand seven hundred and ninety-one."

25. For some of the difficulties encountered in preparing a definitive edition of the statutes at large of Virginia from 1618 onward, see 1 Hening ed., Preface, iii-xxii, especially x-xi.

26. "An act to amend an act, intituled 'An act concerning a new edition of the laws of this Commonwealth, reforming certain rules of legal construction, and providing for the due publication of the laws and
English statutes, however, remained. In 1791 the General Assembly re-instituted them, declaring that they were to continue in effect "until the revisors shall make report of their proceedings, and the General Assembly shall have acted thereon." 27

resolutions of each session," 13 Hening ed. 130, which stated in part:

"Sect. 1. WHEREAS an act passed at the last session of the General Assembly, intituled "An act concerning a new edition of the laws of this Commonwealth, reforming certain rules of legal construction, and providing for the due publication of the laws and resolutions of each session," so far as it relates to the new edition of the laws, has not been carried into effect, and it is thought expedient, that the same should be revised and amended: Be it therefore enacted... That six gentlemen be appointed, whose duty it shall be, First, To prepare bills upon the subject of such British statutes, if any there be, which are suited to this Commonwealth, and have not been enacted in the form of Virginia laws: Secondly, To report what laws or part of laws, which are of a general concern, shall remain in force at the close of the next session of the General Assembly: Thirdly, To prepare bills upon the subject of such laws, as from their multiplicity ought to be reduced into single acts: Fourthly, To report what laws or parts of laws are either unfit to be continued in force, or unnecessary to be published in any code of the laws: Fifthly, To note in due order of time and report the titles of all bills which may be proper to be omitted in a general compilation of the laws: Sixthly, To instruct the clerk of the house of delegates, as far as it may be in their power, how to obtain for the use of his office, copies of those laws, the rolls whereof are lost.

* * * *

"Sect. 4. And be it further enacted, That the following gentlemen, viz. Edmund Pendleton, Henry Tazewell, St. George Tucker, Joseph Prentis, Arthur Lee, and William Nelson, jun. shall, and they are hereby appointed to carry into execution the duties above ascertained..."

27. "An act to amend and explain the act, intituled, 'An act to amend the act, intituled, An act concerning a new edition of the Laws, of this Commonwealth, reforming certain rules of legal construction, and providing for the due publication of the Laws and Resolutions of each Session,'" 13 Hening ed. 259, which stated in part:

"Sect. 1. WHEREAS by the third section of the act passed at the last session of Assembly, intituled, "An act to amend an act, intituled, an act concerning a new edition of the laws of this Commonwealth, reforming certain rules of legal construction, and providing for the due publication of the laws and resolutions of each session," It is enacted, that the said revisors shall make report of their proceedings to the next session of the General Assembly, and that an act passed at the last session, intituled, "An act repealing part of an ordinance by which certain English statutes were declared to be in force within this Commonwealth," shall be, and the same is hereby continued until the General Assembly shall have acted thereon. And whereas doubts have arisen, whether by continuing the last recited act, the said ordinance was not
In 1792 the long-anticipated revisal of the Virginia laws was finally effected. It is important not only because of its treatment of the English statutes, directly and indirectly, but also because it was the second in a series of attempts to provide for a compilation of the laws in force within a state, including such English statutes as were considered as being in force. Though Virginia had attempted to provide for its overall revisal of the laws in 1776, New York, while commencing its revisal later, finished in 1788, four years before Virginia. Each of these two states— to be joined within the decade by New Jersey—apparently proceeded on the theory that insofar as English statutes were in force within its jurisdiction, such statutes should be re-enacted as statutes of the enacting state and all not so re-enacted be declared to be no longer in force.

As a part of the general Revisal of the laws, the General Assembly enacted in December 1792 two statutes, one of minor, the other of major importance. The first, passed on December 12, entitled "An Act reducing into one, the several Acts concerning the Establishment, Jurisdiction, and Powers of the District Courts," provided for the transfer of "cases in which the Court of Admiralty heretofore had jurisdiction by Law, and which are not taken away by the Constitution of the United States...to the District Courts to be proceeded on as the Law requires in the said Court of Admiralty."29

The second, enacted on December 27, 1792, follows:

An Act repealing under certain Restrictions, all Statutes or Acts of the Parliament of Great-Britain, heretofore in Force within this Commonwealth.

repealed, and for removing such doubts, as well as to declare and explain the law thereon, Be it enacted, That so much of the said act as repeals a part of the ordinance by which certain English statutes were declared to be in force within this commonwealth, shall be deemed, taken, and considered to have been suspended, until the revisors shall make report of their proceedings, and the General Assembly shall have acted thereon.

"Sect. 2. And be it further enacted, That the said recited ordinance, so far as the same relates to the said statutes, shall continue to be in force."

28. See supra pp. 69-72.
29. A Collection of all such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as are now in force, 80 (1792). See also 13 Hening ed. 427, 432, (1823). The theoretical question might be raised as to whether this had impliedly left in force the English statutes prior to 1607 under the authority of the Act of 1776 relating to the Court of Admiralty.
WHEREAS by an ordinance of convention, passed in the month of May, in...[1776], intituled, "An ordinance to enable the present magistrates and officers to continue the administration of justice, and for settling the general mode of proceedings in criminal and other cases, "till the same can be more amply provided for," it is among other things ordained, "That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations and resolutions of the general convention, shall be the rule of decision, and shall be considered in full force, until the same shall be altered by the legislative power of this colony."

II. AND whereas the good people of this commonwealth may be ensnared by an ignorance of acts of parliament, which have never been published in any collection of the laws, and it hath been thought advisable by the General Assembly, during their present session, specially to enact such of the said statutes as to them appear worthy of adoption, and do not already make a part of the public code of the laws of Virginia.

III. BE it therefore enacted by the General Assembly, That so much of the above recited ordinance as relates to any statute or act of parliament, shall be, and is hereby repealed; and that no such statute or act of parliament shall have any force or authority within this commonwealth.

* * * * *

V. SAVING moreover to this commonwealth, and to all and every person and persons, bodies politic and corporate, and each and every of them, the right and benefit of all and every writ and writs, remedial and judicial, which might have been legally obtained from or sued out of any court or jurisdiction of this commonwealth, or the office of the clerk of any such court or jurisdiction, before the commencement of this act, in like manner, with the like proceedings thereupon to be had, as fully and amply, to all intents, constructions and purposes, as if this act had never been made; any thing herein contained, to the contrary, or seeming to the contrary, notwithstanding. 30

This act which repealed the Ordinance of 1776 is noteworthy for two reasons in addition to the unequivocal statement that no English "statute or act of parliament shall have any force or authority within this commonwealth." In the first place, it stated that the Assembly had already enacted such of the English statutes as had appeared to them "worthy of adoption" which were not already "a part of the public code of the laws of Virginia." To this extent, the 1792 act paralleled the action of the New York legislature and anticipated that of New Jersey. Secondly, the unique and distinguishing feature of the Virginia statute was

30. A Collection of all such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as are now in force, 302 (1792). See also 1 Shepherd, ed., Statutes at Large of Virginia (N.S.) 199 (1835).
in the provision which saved "the right and benefit of all and every writ and writs, remedial and judicial which might have been legally obtained . . . before the commencement of this act, in like manner, with the like proceedings thereupon to be had, as fully and amply . . . as if this act had never been made."

Thus the thrust of this 1792 act reflects the thinking of Thomas Jefferson embodied in his drafts of bills 102 and 126 submitted to the General Assembly in the Report of the Revisors prepared in 1779. The English statutes were discarded; the important ones already had been incorporated as Virginia statutes into the laws of the state. The remedial and judicial writs, however, and the rights and benefits arising thereunder, had been retained.

This, however, is not the only impact Jefferson had upon the laws of Virginia. Hening's edition of the Statutes at Large, covering the period through the 1792 session of the General Assembly, contains footnotes showing the source of the sections of the particular bills. In a number of these sources appear the notation "Rev. Bills of 1779," referring to the 1779 Report of the Revisors. The 1819 Revised Code of the Laws of Virginia contains marginal references which show whenever a particular section of any Virginia statute had its source in an English statute. As it was known that Jefferson was responsible for the preparation of those bills in the Revisors' Report of 1779 which were based on the English statutes and the common law, whenever an act is noted in Hening as originating in the "Rev. Bills of 1779" and also is noted in the 1819 edition of the Virginia Statutes as having been derived from one or more English statutes, it is reasonable to assume that this particular act was prepared by Jefferson. Moreover, such an act will also reflect Jefferson's decision that such English statute, when rewritten, was proper to be incorporated into the laws of Virginia.

The Revised Code of the Laws of Virginia, published in 1819 under the authority of the General Assembly, contained the following provision:

All acts and parts of acts, of a general nature, which shall not be published in the code aforesaid, pursuant to the directions of this act,

31. See e.g., 12 Hening ed. 160, 166, 185, 334.
32. 1 Revised Code of the Laws of Virginia iv (1819) [hereinafter referred to as Revised Code].
33. For a table, setting out the extent to which the subject matter of English statutes was covered by the Revised Code of 1819, see Blume & Brown, "Territorial Courts and Laws: Unifying Factors in the Development of American Legal Institutions — Part II. Influences Tending To
either entire or by their titles, shall be, and the same are hereby
repealed...34

following table is based on the more extensive one noted above.

<table>
<thead>
<tr>
<th>Title of Act</th>
<th>Hening ed., Statutes at Large Reference</th>
<th>Revised Code of 1819 Reference</th>
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<tbody>
<tr>
<td>&quot;An Act to prevent Frauds and Perjuries&quot;</td>
<td>12:160</td>
<td>1:372</td>
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<tr>
<td>&quot;An Act providing that wrongful Alienations of Lands shall be void so far as they be wrongful&quot;</td>
<td>12:166</td>
<td>1:368</td>
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<tr>
<td>&quot;An Act declaring that none shall be condemned without Trial, and that Justice shall not be sold or deferred&quot;</td>
<td>12:186</td>
<td>1:595</td>
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<td>&quot;An Act forbidding and punishing Affrays&quot;</td>
<td>12:334</td>
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<tr>
<td>&quot;An Act against Conspirators&quot;</td>
<td>12:334</td>
<td>1:553</td>
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<tr>
<td>&quot;An Act providing that Actions popular prosecuted by Collusion, shall be no bar to those which may be pursued with good Faith&quot;</td>
<td>12:354</td>
<td>1:615</td>
</tr>
<tr>
<td>&quot;An Act for the Suppression and Punishment of Riots, Routs, and unlawful Assemblies&quot;</td>
<td>12:331</td>
<td>1:556</td>
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<tr>
<td>&quot;An Act prescribing a Method of protesting Inland Bills of Exchange, and allowing Assignees of Obligations to bring Actions thereupon in their own Names&quot;</td>
<td>12:350</td>
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<tr>
<td>&quot;An Act against conveying or taking pretensed Titles&quot;</td>
<td>12:335</td>
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<td>&quot;An Act against Usury&quot;</td>
<td>12:337</td>
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<tr>
<td>&quot;An Act allowing a Bill of Exceptions to be Sealed&quot;</td>
<td>13:10</td>
<td>1:523</td>
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</table>

However, the Revised Code contained the sixth section of the Ordinance of 1776 and the 1792 legislation repealing "under certain restrictions, all Statutes or Acts of the Parliament of Great Britain, heretofore in force within this Commonwealth." Thus the cluster of English statutes dealing with remedial and judicial writs was continued in force by the General Assembly.

The effect of the 1792 act in continuing the use of the writs reached the Virginia Court of Appeals in 1825. Dykes & Co. v. Woodhouse's Adm'r dealt with the question of whether an administrator de bonis non could "maintain an action of debt, or scire facias, upon a judgment obtained by an executor for a debt due by the testator." The opinion stated in part:

... The statute of Westm. 2, Cap. 19, authorised creditors to sue the ordinary; and the same statute, Cap. 45, authorised a scire facias against him. But neither of these statutes authorised the ordinary or administrator to sue for the debts due to the intestate; and at common law, neither could sue for such debts. It was not until the 31 Ed. 3, Cap. 11... that any authority was given to an administrator, to sue for debts....

* * * * *

It is said, that the scire facias in personal actions was given by the statute of Westm. 2, Cap. 45, and did not exist at common law. Bac. Abr. Scire Facias, C. 1. Lord Holt, in Withers v. Harris, 2 Salk, 600, doubted whether this was true as a general proposition, but submitted to the weight of authority. I think any one who will examine the statute at large, will agree with Lord Holt. It will be found that the statute gives only a scire facias after the year and the day, instead of a new action, which was necessary at the common law, and a scire facias against the ordinary; and these are the only cases expressly provided for. No scire facias is given to an executor, and of course, not to an administrator; for an administrator could not then sue at all, in right of his intestate. If the great variety of scire facias's, in use in England, sprang out of this statute, it must have been upon a most uncommonly liberal construction. It is, however, immaterial from what source this process was derived, whether from the common law or statute. It came to us upon the settlement of the colony, and has been preserved by the exception in our act repealing the British statutes.

In 1827 Commonwealth v. Winstone raised the question of the status of an English statute which had been declared to be in force in Virginia during the colonial period by the General Assembly. The statute under consideration, 8 Hen. 6, c. 12 (relating to the examination of court records) was held not to be in

35. Id. at 135.
36. Id. at 136.
force, not because it had been repealed in 1792 but because the Revised Code of 1819 had repealed all acts not included therein and the particular colonial statute had not been included. The opinion stated in part:

At the common law, an error committed by the Court, not in a point of judgment, but such as might be called a misprision of the Court, could be amended; but, no misprision of the clerk was amendable after the term... By the 14th Edw. 3, chap. 6 (which was the first act of amendment) it is enacted, that by the misprision of clerks in every place wheresoever it be, no process shall be annulled or discontinued, by mistaking in writing one letter or one syllable too much or too little, &c. but shall be hastily amended in due form....

The most important English statute on this subject, is 8th Hen. 6, chap. 12, by which Judges had power to examine records, and in affirmation of judgments, to amend all that to them, in their discretion, should seem to be the misprision of the clerk.

In 1753, 6 Stat. at Large, 339, it was enacted that all the English acts of jeofail and amendment, shall be in full force in this Dominion also. Under the statute of 8th Hen. 6, many decisions have taken place in England, drawing the line of distinction between misprisions of the clerk, and errors in judgment...

[The court then held that the facts showed that there had been a clerical error.]

* * * * *

But, it is said, that the English statutes were not in force here, when this case arose; and that is very true. I consider, however, that by the statute of 1753, they were incorporated into our laws, as much as if they had been repeated verbatim; and they were not repealed by the subsequent declaration, that British statutes (as such) should no longer be in force here; but that they were repealed by the clause in the revisal of 1819, declaring that all laws, not included in that revisal, should be repealed.... 38

This had been the Virginia position. The Code of Virginia, in effect on January 1, 1962, contained the following provision:

The right and benefit of all writs, remedial and judicial, given by any statute or act of Parliament, made in aid of the common law prior to the fourth year of the reign of James the first, of a general nature, not local to England, shall still be saved, so far as the same may consist, with the Bill of Rights and Constitution of this State and the Acts of Assembly. 39

38. Commonwealth v. Winstone, 26 Va. (5 Randolph) 546, 547-50 (1827). See also Cathcart v. Robinson, 30 U.S. (5 Pet.) 264, 279-80 (1831) where Chief Justice John Marshall, in dealing with the construction of British statutes by the Virginia courts threw out as dictum: "... By adopting them [i.e. British statutes] they became our own as entirely as if they had been enacted by the legislature of the state...."

The first state organized west of the Alleghenies, Kentucky, was admitted to the Union in 1791, having been "formed" out of Virginia. Its initial constitution, adopted in 1792, provided in part:

All laws now in force in the State of Virginia, not inconsistent with this constitution, which are of a general nature, and not local to the eastern part of that State, shall be in force in this State, until they shall be altered or repealed by the legislature.

The Constitution of 1799 was somewhat more specific. It stated:

All laws which, on the first day of June, one thousand seven hundred and ninety-two, were in force in the State of Virginia, and which are of a general nature, and not local to that State, and not repugnant to this constitution, nor to the laws which have been enacted by the legislature of this commonwealth, shall be in force within this State, until they shall be altered or repealed by the general assembly.

Substantially the same provision was in force as of January 1, 1962. Thus from the date of its organization as a separate state, Kentucky continued its existence with the same laws it had possessed when a part of Virginia. Among those laws so continued in force was the Ordinance of 1776, in which the Virginia General Assembly had stated:

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

This ordinance was in force in Virginia on June 1, 1792, as it
was not repealed until November of that year. Hence, "the common law of England, all statutes or acts of parliament made in aid of the common-law prior to ... [1607]" became the "rule of decision" for Kentucky. There was, however, one important exception. The language of the Constitution continued in effect the laws of Virginia. As a consequence, whenever the Virginia General Assembly had enacted a statute which superseded or replaced an English statute, the Virginia statute and not its English predecessor or counterpart was in force in Kentucky.

On December 7, 1793, the Kentucky General Assembly passed an act entitled, "An Act for the revision of the Laws of this Commonwealth." Its purpose was explained as follows:

WHEREAS, on the separation of this state from that of Virginia, the Convention declared all the laws then in force in that state and not of local nature, in force also in this state, in consequence of which there are multiplied laws on the same subject; And it is necessary and proper, that a revision should be made of all the British Statutes and acts of the Assembly now in force in this state, and a selection of such as ought to continue in force, and that the different acts on the same subject should be brought into one point of view.

That the revision contemplated was designed to encompass all the statutes then in force, not being merely limited to the British statutes, is reinforced by a re-enactment of the act of 1793 in 1795, when a list of the duties of the revisors was added to the original language. The Act of December 17, 1795, stated in part:

Sec. I. Be it enacted...That two persons shall be appointed by joint ballot of both houses, whose duty it shall be, first, to prepare bills upon the subject of such British Statutes, if any there be which are suited to this commonwealth, and have not been enacted in the forms of acts of assembly.

Secondly, to report what laws or parts of laws which are of a general concern shall remain in force at the close of the next session of the General Assembly, after they have compleated the work; thirdly, to prepare bills upon the subject of such laws as from their multiplicity

45. A Collection of all such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as are now in force, 302 (1792). See also 1 Shepherd ed., Statutes at Large of Virginia (N.S.) 199 (1835).
ought to be reduced into single acts. And, Fourthly, to report what laws or parts of laws are either unfit to be continued in force or unnecessary to be published in any code of laws... Provided, that such bills so to be prepared and reported by the said revisors, shall be of no force, until they shall have been passed in such manner and form as if the same had been originally introduced without the direction of this act.

Under this act, the revisors submitted their first revisions to the General Assembly in 1796 and continued to present bills yearly through 1798. During these years, the General Assembly passed a series of acts, each dealing with a particular subject reducing to one the existing laws governing that subject matter. 48

The last of these bills to "reduce into one the several acts concerning..." was enacted in 1798. In 1799 the state adopted its second constitution which continued in effect in Kentucky the laws in force in Virginia on June 1, 1792. Then in 1802, the General Assembly enacted two provisions, one on December 20, and the other on December 22, which repealed certain English statutes or categories of English statutes. The first of these statutes provided as follows:

... whereas a mode of prosecuting and punishing offences has been provided by act of assembly, differing in some cases, from that which had before been provided by the common law, or by the English statutes: Be it enacted, That in such cases, the provisions of the common law, or of the English Statutes, shall be, and the same is hereby repealed. 49

The second statute stated in part:

And be it further enacted, That the statutes of the 39th of Elizabeth chapter the 15th [denying benefit of clergy to certain offenders], the 5th and 6th of Edward the 6th chapters the 9th and 10th [denying benefit of clergy to certain offenders], the 8th of Elizabeth chapter the 4th [denying benefit of clergy to certain felons], the 5th of Elizabeth chapter 14 [relating to forgeries], the 5th Henry the 4th Chapter the 4th [relating to the "multiplication of gold or silver"], the 37th of Henry 8th chapter 6th [relating to the burning of frames], the 43d of Elizabeth chapter 7th

48. The subjects covered by the acts "to reduce into one the several acts..." included the following: county courts and justices of the peace, proceedings in civil cases, courts of quarter-sessions, limitations of acts, ferries, proceedings in chancery courts, executions and insolvent debtors, land boundaries, descents, conveyances, "examination and trial of Criminals, Grand and Petit Juries, Venires....", wills and intestates' estates together with executors and administrators, "a Permanent Revenue," "Assignment of Bonds and other writings," authenticating foreign deeds and other records, bills of exchange.

49. "An Act to amend an act entitled 'an act directing the mode of revising the Criminal Common Law, and providing for the appointment of Revisors, and for other purposes, ['"] Acts of Kentucky 1802, 146, 148 (1803).
[relating to misdemeanors], ... all English statutes and laws relating to
witchcraft, to false and pretended prophecies, and to religious doctrines
and observances; any statute which imposes a penalty for exercising a
trade without having served an apprenticeship; all laws and statutes which
provide for the punishment of offences for which other punishments are
provided by act of assembly, together with all laws, statutes and acts or
parts thereof, which come within the purview of this act, shall be, and
the same are hereby repealed. 50

That the 1802 legislation "repealed" certain acts of Parlia-
ment suggests widespread acceptance of the fact that English
statutes were in force in the state. Anti-British feeling, how-
ever, was responsible for the proposal to the legislature, made
in 1807, that all acts of Parliament and the common law be re-
pealed and that no English precedent be hereafter cited in a
Kentucky court. The proposal as originally laid before the state
Senate stated:

Resolved, Therefore, that no report of cases or decisions had in
the courts of England, ought to form precedents by which the courts in
this commonwealth ought in any manner to be bound.

Resolved, That the common law of England, and all acts of parlia-
ment of Great Britain made in aid thereof, so far as the same has been
in force in this state, be repealed.

Resolved, That the laws regulating judicial proceedings in this
commonwealth need amendment. 51

Henry Clay was instrumental in causing the resolution as origi-
ally drafted to be modified to apply only to English precedents
handed down after July 4, 1776. 52

50. "An Act in addition to an act, entitled 'an act to amend the act,
titled an act to amend the Penal Laws of this Commonwealth,'" Acts
of Kentucky 1802, 107, 118 (1803).

51. Senate Journal 1807-1808, 6 (1808). There is considerable ev-
idence of the existence of pronounced anti-British feeling among the
senators, but to judge from the Journal, it was provoked by overt acts
of the English rather than by their legal system as such. This appears
to have been a convenient scapegoat. See id. at 6, 7, 8, 20, 61. See
also Senate Journal, 1808-1809, 21 (1809).

52. "An act prohibiting the reading of certain reports in this common-
wealth," February 12, 1808, Acts of Kentucky 1807-8, 23 (1808). The
act itself stated: "Be it enacted ... That all reports and books containing
adjudged cases in the kingdom of Great Britain, which decisions have
taken place since the 4th day of July, 1776, shall not be read nor con-
sidered as authority in any of the courts of this commonwealth; any
usage or custom to the contrary notwithstanding." Bullock & Johnson,
ed., General Statutes of Kentucky, 610 (1873) show the following variant:
"The decisions of the Courts of Great Britain, rendered since ... [July
4, 1776], shall not be binding authority in the courts of Kentucky, but
This ban on the use of post-Independence precedents, however, had no effect on the status of such pre-1607 English statutes as had been continued in force under the Virginia Ordinance of 1776 and the Kentucky constitutions of 1792 and 1799. In 1810, William Littell completed his two-volume compilation of *The Statute Law of Kentucky*. The second volume contained a Preface in which Littell explained the criteria he had applied in determining whether or not particular English statutes were in force in Kentucky. In the Appendix he listed "all the acts of parliament and of Virginia, of a general nature, remaining in force in the state of Kentucky..." Then in 1822 came a Digest of the Statute Law of Kentucky which placed "the English... Statutes yet in force..." under the several topic headings.

Although Littell's compilation cannot be classed as an official publication, it was widely cited in Kentucky decisions, and hence becomes of considerable importance. In his Preface he stated in part:

An examination of the English statute-book, for a period of nearly six hundred years, must be admitted to be a laborious task, even if it was all in one language: but this labor is rendered irksome and disgusting, by the variety of uncouth languages in which these statutes were written. It is true that the largest part of them were, about three hundred years ago, translated into the English of that day; but it is equally true, that many of them have never yet been translated. Of those which still remain in the Norman language, I have discovered none which I consider in force here, and only two in the Latin; these I have published without attempting any translation; understanding it to be an admitted rule, that a translation of a law has no authority, unless made by one appointed by the government for that purpose.

Those who are well acquainted with the English statute-book, will probably wonder why I have rejected so many acts of parliament; and those unacquainted with it, will equally wonder why I have retained so many. It is not to be expected, on a subject like this, that any thing I could say, would satisfy either the one or the other. I will, however, give a brief account of my views as to some.

With the strongest wishes to believe that the common law, and most of the statute law of England on the subject of fines, was in force in this may be read in court and have such weight as the judges may think proper to give them." The Kentucky Revised Statutes (1953), §447.040 state: "The decisions of the courts of Great Britain rendered since July 4, 1776, shall not be of binding authority in the courts of Kentucky ..."). For an account of the part played by Henry Clay see 1 Mallory ed., *Life and Speeches of Henry Clay*, 29 (1843).

54. 2 id. 493-584.
country, I was, on a thorough examination, compelled to decide that none of it was in force.

My reason for excluding all the acts respecting bankruptcy, was, that I did not think any of our judges authorised to issue a commission of bankruptcy.

Some statutory provisions for the punishment of offences have become obsolete, from the great change which has taken place in the value of money. A fine of four pence, for an atrocious fraud, was once an adequate punishment: it would now be a burlesque on vindicative justice.

Those who may be disposed to think that too many acts have been retained, are respectfully reminded, that when Mr. Bradford's first volume was published [i.e., Bradford ed., Laws of Kentucky, 2 vols. 1799, 1807], it was very generally believed to contain all the statute law in force in this country. This delusion was then almost universal; and not more than five years ago, two highly respected circuit judges told me that they did not consider a single act of parliament to be in force in this state.

These facts I considered as sufficient evidence, that on a subject so remote from popular view, public opinion, however general, was at any time a most delusive guide. I of course made no further inquiries respecting it; but employed myself in comparing the statute-books of Kentucky, Virginia, and England, together — rejecting what the constitution of Virginia bade me reject, and retaining what that had retained. Wherever I found that Virginia had, previous to the year 1792, adopted an act of parliament, and no similar one was to be found in our code, I have taken the Virginia instead of the English act.

I have never consulted my inclination in either excluding or retaining an act: conscious at all times, that whether it was in force or not, did not depend on my volition, or any opinion I might entertain of its merit or demerit, but upon the constitutions of Kentucky and Virginia. If it shall be found that some of the laws which I have published as being in force, contradict the adjudications of all the courts in the state, I cannot help it. A judicial decision, that no law exists on a particular subject, does not repeal a law actually existing....

* * * * *

I respectfully recommend the careful perusal of the appendix, to those who apprehend danger from that part of the English law remaining in force here. I am inclined to think that they will cease to consider it as oppressive or immoral in its tendency.

The Acts of Parliament which Littell considered to be in force in the state were listed in his Appendix under the following headings: 56

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56. Although Littell's headings have been used, they have been re-arranged in alphabetical order and his method of statute citation has been altered to conform to contemporary usage.
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<td>27 Edw. 3, c. 10 (1353)</td>
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<td>1 Rich. 2, c. 9 (1377)</td>
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<td>6 Rich. 2, c. 6 (1382)</td>
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<td>8 Rich. 2, c. 3 (1385)</td>
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*Littell stated with respect to this statute: "There is no doubt but that all the provisions of this act have been superseded by the acts of assembly, but it has been retained from a consideration of the great importance of thoroughly understanding the adjudications which have been had on it." 2 Littell 496.
5 Hen. 4, c. 10 (1403)  
18 Hen. 6, c. 14 (1439)  
32 Hen. 8, c. 9 (1540)  
2 & 3 Edw. 6, c. 15 (1548)  
5 & 6 Edw. 6, c. 23 (1552)  
5 Eliz., c. 21 (1562)  
8 Eliz., c. 3 (1565)  
23 Eliz., c. 8 (1581)  
27 Eliz., c. 6 (1585)  
35 Eliz., c. 8 (1593)  
1 & 2 Jac., c. 18 (1604)  
3 Jac., c. 21 (1605)  

Escheators  
18 Hen. 6, c. 7 (1439)  
23 Hen. 6, c. 17 (1444)  
1 Hen. 8, c. 9 (1509)  
2 & 3 Edw. 6, c. 8 (1548)  

Executors  
13 Edw. 1 (Westminster 2), Stat. 1, c. 18 (1285)  
13 Edw. 1, c. 45 (1285)  

Fraudulent Administration  
43 Eliz., c. 8 (1601)  

Fraudulent Conveyances  
27 Eliz., c. 4 (1585)  

Interest  
20 Hen. 3, c. 5 (1235)  

Land Measure  
[Stat. Incerti Temporis]  
"Measures for Land"  

Leap Year  
21 Hen. 3 (1236)  

Leases and Leasehold Estates  
21 Hen. 8, c. 15 (1529)  

Marriage and Pre-Contracts  
32 Hen. 8, c. 28 (1540)  
32 Hen. 8, c. 34 (1540)  

Proceedings in Actions Real  
6 Edw. 1 (Gloucester), c. 1 (1278)  
6 Edw. 1, c. 2 (1278)  
13 Edw. 1 (Westminster 2), Stat. 1, c. 4 (1285)  
13 Edw. 1, c. 7 (1285)  
13 Edw. 1, c. 23 (1285)  
20 Edw. 1 (Statute de Defensione Juris) (1292)  
9 Rich. 2, c. 3 (1385)  
13 Rich. 2, c. 17 (1389)  
21 Hen. 8, c. 3 (1529)  

Rents, Distress, etc.  
51 Hen. 3, Stat. 4 (1266)  
52 Hen. 3, c. 1 (1267)  
52 Hen. 3, c. 3 (1267)  
52 Hen. 3, c. 4 (1267)  
32 Hen. 8, c. 38 (1540)  

Sheriffs  
13 Edw. 1, c. 39 (1285)  
2 Edw. 3, c. 5 (1328)  

Weights and Measures  
[Stat. Incerti Temporis]  
"Measures"  
2 Hen. 6, c. 11 (1423)  
9 Hen. 6, c. 8 (1430)  
1 Rich. 3, c. 13 (1483)  
11 Hen. 7, c. 5 (1496)  
23 Hen. 8, c. 4 (1531)
In 1839, the Kentucky Court of Appeals had before it the question of whether the English mortmain acts were in force in Kentucky. The court in Lathrop v. The Commercial Bank of Scioto held that they were not but in the opinion discussed the status in Kentucky of British statutes in general, stating in part:

By an ordinance of 1776, Virginia adopted "the common-law of England, and all statutes or acts of parliament made in aid of the common-law, prior to the fourth year of King James I, and which were of a general nature, and not local to that kingdom."

And the eighth section of the sixth article of the constitution of Kentucky adopted, with certain qualifications, "all laws which, on the 1st of June, 1792, were in force in the state of Virginia."

Unless the British mortmain acts were in force in Virginia on the 1st of June, 1792, they have never been in operation in Kentucky. Virginia, had never, prior to June, 1792, specially enacted any mortmain statute, and therefore, if the mortmain acts of England, prior to the fourth James I, were all "local to that kingdom" no part of them was ever in force in either Virginia or Kentucky.

Without further amplification, the foregoing considerations are sufficient, in our judgment, to authorize the conclusion that the mortmain acts of England were altogether local, and that none of them were ever applicable, or considered applicable, to Virginia. . . .

And if those statutes were not applicable to Virginia in 1776, they were not adopted by the ordinance of that year, which embraced only such statutes as were "of a general nature, and not local" to England.

It is, therefore, our opinion that none of the mortmain acts of England are, or ever have been, in force in Kentucky. 57

The Kentucky courts have continued to take the position that such English statutes as were in force in Virginia on June 1, 1792, have continued to be in force in Kentucky until "altered or repealed by the General Assembly."

57. Lathrop v. The Commercial Bank of Scioto, 38 Ky. 76, 81-85, 8 Dana 114, 121-127 (1839). In accord Coleman v. O'Leary's Ex'r, 114 Ky. 388, 406-409, 70 S.W. 1068 (1902). See also Nider v. Commonwealth, 140 Ky. 684, 686, 131 S.W. 1024 (1910) where the court stated:

"... If this was an offense at common law, then it would also be an offense in this State, even if we had no statute on that subject, as the common law of England and all acts of parliament made in aid thereof have since the organization of this State been a part of the body not only of the criminal but the civil law, except where it has been abrogated or superseded by statute, or is repugnant to the spirit of our laws or the public policy of the State. . . ."

"That the crime we are considering was an offense at common law is shown by an act of parliament passed in the reign of Queen Elizabeth. . . ."

"That this parliamentary statute is a part of the common law in force in this State, except to the extent that it has been modified by
North Carolina

In 1817, the General Assembly of North Carolina appointed a commission to revise and consolidate its public acts, and "to enumerate and specify those statutes and parts of statutes of Great-Britain which are in force within this State." The commissioners, after an account of the operation of British statutes in the colony and the state, listed the British statutes in force in 1817. Their report, a lengthy one, stated in part:

In order to meet the enquiry, what [British] statutes were in force before 1778, it became necessary to consider, in the first place which of them began to operate with the first settlement of the country by emigrants from Great-Britain.

This event took place in 1665, the date of the charter of Charles the Second; and the colonists brought with them from the mother country, all such statutes then in force as were applicable to their situation, to the country, and their new way of life. Their infant settlements required a legislation of a new character more simple, clear and determinate, than could be obtained by indiscriminate adoption of the English statutes; a very large proportion of which were suitable to England alone, and could not without evident absurdity be extended to Carolina. Of this description, were the laws relative to the King's prerogative, the rights of the nobility and clergy, the trade and revenue of England, and even many of those

section 1155 of the Kentucky Statutes, is apparent from a consideration of the section of the Constitution and the cases before mentioned. It was passed in aid of the common law, that is to supply a deficiency or an omission in that law and prior to the reign of King James the First, who succeeded Elizabeth on the throne of England, and it is not repugnant to the spirit of our laws or our public policy."

The same position was taken by the Kentucky courts in Campbell v. W.M. Ritter Lumber Co., 140 Ky. 312, 131 S.W. 20 (1910). Decisions referring to the common law alone include Commonwealth v. Donoghue, 250 Ky. 343, 63 S.W. 2d 3 (1933) and Ruby Lumber Co. v. K.V. Johnson Co., 299 Ky. 811, 187 S.W. 2d 449 (1945).


59. 1 Laws of the State of North Carolina iv–vi (1821). The two-volume work was entitled: Laws of the State of North-Carolina including The Titles Of Such Statutes And Parts Of Statutes Of Great Britain as are in force in said state.

60. In arranging the statutes, the commissioners placed the list of British statutes immediately after the Treaty of Peace with Great Britain and before the earliest North Carolina provincial statutes of 1715, under the following title: "Statutes and Parts of Statutes of Great Britain, Reported As Being In Force In This State, By The Commissioners Appointed Under The Act of 1817, Entitled, 'An Act For The Revision Of The Acts Of The General Assembly.' The statutes so listed are arranged in chronological order, with the year and reign appearing in the first column, the 'Title of the Statutes, and Remarks' in the second column, and in the third column the 'Book & page of Ruffhead's edit.'"
sanguinary penal laws, whose policy, questionable even in a rich, commercial and populous country, must be ill adapted to the condition of a few agriculturalists, inhabiting a wilderness.

The next object of enquiry was, what statutes were extended to the colony after the date of the charter, either by the terms of the statutes themselves, and adopted here, or were enforced by legislative acts of the Proprietary, Regal or State Governments.

The charter of the lords proprietors invested them with the power of enacting laws with the assent of the freemen; but what was the course of proprietary legislation for the first fifty years after the settlement of the colony, there are no accessible means of ascertaining. In 1715, the date of the first acts which are extant, the legislature avow that it is often disputed how far the laws of England are in force in the colony; and to put an end to the doubts upon the subject, they deduce from the words of the charter, what perhaps would have more clearly resulted from the general principles of colonization, that the laws of England are the laws of the colony, so far as they are "compatible with our way of living and trade." But they go further, and adopt many statutes by general description, passed both before and after the settlement of the colony, which would not otherwise have been in force, either in consequence of any general principle, or as the necessary construction of the charter.61

61. "An Act for the more effectual observing of the Queen's Peace, and establishing a good and lasting Foundation of Government in North Carolina..." (1715) Iredell ed., Laws of North Carolina 17 (1791), provided in part:

"...it appearing by the Charter, that the powers therein granted of making Laws, are limited with this Expression, viz. 'Provided, Such Laws be consonant with Reason, and as near as may be, agreeable to the Laws and Customs of our Kingdom of England.' From thence it is manifest, That the Laws of England are the Laws of this Government, as far as they are compatible with our Way of Living and Trade.

"VI. Be it therefore enacted... That the Common Law is, and shall be, in Force, in this Government, except such Part in the Practice, in the Issuing and Return of Writs, and Proceedings in the Court of Westminster; which for Want of several Officers cannot be put in Execution; which ought to be supplied by Rules of the General Court of this Government, being first approved of by the Governor and council, which shall be good in Law, from Time to Time, till it shall be altered by Act of Assembly.

"VII. AND be it further enacted... That all Statute Laws of England, made for maintaining the Queen's Royal Prerogative, and the Security of her Royal Person, and Succession of the Crown, and all such Laws made for the Establishment of the Church, and the Laws made for the Indulgence to Protestant Dissenters, and all Laws providing for the Privileges of the People, and Security of Trade; as also, all Statute Laws made for Limitation of Actions, and preventing Immorality and Fraud, and confirming Inheritances and Titles of Land, are and shall be in Force here, although this Province, or the Plantations in general, are not therein named..."

It should be noted that this 1715 act did not speak of laws in force at the time of the establishment of the colony nor of those which were suitable to the condition of the colony. It did reject certain portions of
Some of these were abrogated by the revolution, others became merged in the declaration of rights, which secured the privileges of the people in a more enlarged and effectual manner; and the residue have been superseded by laws, providing for the same subjects. There is one statute, however, passed after the date of the charter, which was adopted in 1715, under the designation of those which provided for the privileges of the people, which still retains its authority to a certain degree. The statute adverted to is the 31st Charles II, chapter 2nd, commonly called the habeas corpus act. Although the immunity of the subject from unjust imprisonment is proclaimed by magna-charta and the petition of right, 3 Car. I. c. 1, and that of the citizen is still more strongly fortified by the declaration of rights, yet, with the exception of the habeas corpus act, there is neither statute nor act of Assembly which prescribes and enforces the method of obtaining the writ, and regulates the details of redress.

Some other statutes passed posterior to the charter, are also now in force in this state, either because they were enforced in 1715, or at some later period, and are not incompatible with the constitution, and have not been repealed or otherwise provided for; or because they were originally made to extend to the state, and have been practically adopted. Of the former description, are the statutes for the amendment of the law; of the latter, are the 5th George II, c. 71, "An act for the more easy recovery of debts in his Majesty's plantations and colonies in America," of which the fourth section is in force; and the 12th George III, ch. 20. "An act for the more effectual proceeding against persons standing mute on their arraignment for felony or piracy." 62

the common law which could not "be put in Execution." Moreover, it clearly stated that it was not necessary that either "this Province, or the Plantations in general" be named in a British statute in order for that statute to be in force in North Carolina. Instead, it established particular categories of British statutes and declared them to be in force.

In 1749 the General Assembly again addressed itself to the question of what British statutes should be in force in the Province. On October 16, 1749, it enacted a statute entitled: "An Act to put in Force in this Province, the several Statutes of the Kingdom of England, or South-Britain, therein particularly mentioned." Laws of North Carolina, 1749, Ch. I. The act was subsequently disapproved by an Order In Council, April 8, 1754. Such disapproval was consistent with the general attitude of the British Crown toward colonial efforts to re-enact English statutes or to declare English laws in force. See Russell, Review of American Colonial Legislation by the King in Council (1915).

The text of the 1749 act stated in part:

"I. Whereas many of the Statute Laws of the Kingdom of England, or South-Britain, by Reason of the different Way of Agriculture, and the different Productions of the Earth of this Province, from that of England are altogether Useless, and many others, which otherwise are very apt and good, either by reason of their Limitation to particular Places, or because in themselves they are only Executive by such nominal Officers are not in, nor suitable for the Constitution of this Government, are thereby become impracticable here.

"II. Be it therefore Enacted... That the several Statutes, and
The Commissioners are apprehensive that a detailed exposition of the reasons for inserting or omitting each particular statute, might be deemed tedious or unprofitable, but so far as the whole subject is susceptible of a general analysis, the result of the whole is, that when any British statute, passed between the years 1225, the earliest of the British statutes, and 1665, the date of the second charter of Charles II, to the proprietors of Carolina...both inclusive, is not contained in the list, the reasons are either,

1. Because it was unsuited to the condition of the colonies.

the several Paragraphs or Sections of the several Statutes of the Kingdom of England intituled as followeth, and made and Enacted in such Years of the Reigns of the Kings and Queens of England as before the Titles of the several Statutes, as in this Act set down, are, and are hereby to be in as full Force, Power, and Virtue, as if the same had been specially Enacted and made for this Province, or as if the same had been made and Enacted there in, by any General Assembly thereof: That is to say:

"Magna Charta"

" 9 Henry III. Chap. 1. An Act for confirmation of Liberties.  
[For the list of the British statutes contained in this act, see Part IV infra.]

* * * * *

"VI. And be it further Enacted...That all and every Part of the Common Law of England, where the same is not altered by the above enumerated Acts, or inconsistent with the particular Constitutions, Customs, and Laws of this Province, excepting so much thereof as hath Relation to the ancient Tenures...and also excepting that Part of the Common Law which relates to Matters of Ecclesiastical, which are inconsistent with, or repugnant to, the Settlement of the Church, of England in this Province, by the Acts of Assembly thereof; be, and is hereby made and declared to be in as full Force and Virtue within this Province, as the same is, or ought to be, within the said Kingdom of England: ....

* * * * *

"XI. And be it further Enacted...That all the Statute Laws of the Kingdom of England, which are not enumerated and made of Force in this Province by this Act (such only excepted which relate to, or concern his Majesty's Customs, and the Acts of Trade and Navigation,) are hereby declared not adapted, or applicable to, the Circumstances of this Province.

"XII. Provided nevertheless, ...That because few of the Statute Laws of the Kingdom of England, made since the Eleventh Year of the Reign of his present Majesty King George the Second, have been transmitted to this Province; It is hereby Enacted, That all Statute Laws made within the Kingdom of England since the said Eleventh Year of the Reign of his said Majesty King George the Second, shall be deemed, construed, and taken, to have such and the same Relation and Force in this Province...as the same might, could, or ought to have had, if this Act had never been made."
2. The same objects have been provided for, by the legislature of
the Proprietary, Regal or State Government.
3. It has been annull’d by the change from the Proprietary to the
Regal Government, which took place in 1728, or by that from the Regal
to the Independent Sovereignty established in 1776.63

When any British statute, passed since 1665, is inserted in the list,
the reasons are either,
1. It has been enforced by some legislative act; or,
2. It has been extended by its terms to the colonies and adopted in
practice.

Since, as noted by Judge Henderson in State v. Antonio64
decided in 1825, the "report was not either sanctioned by law
or disapproved; it was simply ordered to be published," the
question of what British statutes were in force remained unre­solved. In the case referred to, the following opinions were
delivered:

Hall, Judge. — The privilege extending to aliens the right to a jury
de medietate linguae was granted by stat. 28 Ed. 3. ch. 13. re-enacted
by the 8th Hen. 6. ch. 29. it is contended that these statutes are in
force in this state, and that that privilege has been improperly withheld
from the prisoner in this case. It is said that the act of 1715, New
Rev. ch. 5. enforces those statutes. That act declares, that all statute
laws of England, provided for the privileges of the people, limitations of
actions, preventing vexatious law-suits, immorality and fraud, confirming
inheritances and titles to land, shall be in force. It is farther argued,
that the act of 1778, New Rev. ch. 133. embraces them. That act de­
clares, that all such statutes and such parts of the common law as were
in force and use as are not destructive of or repugnant to the freedom

63. In 1778, the General Assembly of the State of North Carolina
passed "An Act to enforce such Parts of the Statute and Common Laws
as have been heretofore in Force and Use here, and the Acts of Assem­
bly made and passed when this Territory was under the Government of
the Late Proprietors and the Crown of Great-Britain...." Laws of
North Carolina, 353 (Iredell, 1791). The act stated in part:

"I. WHEREAS Doubts may arise, upon the Revolution in Govern­
ment, whether any and what Laws continue in Force here: For Pre­
vention of which,

"II. BE it enacted... That all such Statutes and such Parts of
the Common Law, as were heretofore in Force and Use within this Ter­
ritory, and all the Acts of the late General Assemblies thereof, or so
much of the said Statutes, Common Law, and Acts of Assembly, as are
not destructive of, repugnant to, or inconsistent with the Freedom and
Independence of this State, and the Form of Government therein estab­
lished, and which have not been otherwise provided for, in the Whole or
in Part, not abrogated, repealed, expired, or become obsolete, are here­
by declared to be in full Force within this State...."

64. State v. Antonio, 11 N. Car. (4 Hawks) 201 (1825).
and independence of this state, &c. and which have not been provided for, in whole or in part, &c. are declared to be in full force.

If those British statutes were in force before the revolution, I do not think the latter act of assembly excluded them; but I do not think they were in force by the first recited act. That act, so far as relates to this question, enforces such as provided for the privileges of the people; the statutes in question provides for the privilege of aliens. I admit, however, that many statutes of Great-Britain had become the law of this state before the time of passing that act. When the state was first settled as a colony of Great Britain, the colonists brought with them, as their birthright, the laws of the mother country, namely, such parts of the common law, and statutes that were incorporated with it, as were suitable to their situation at the time of their migration; such as the statute 4 Ed. 3 ch. 7. de bonis asportatis in vita testatoris, the statute of uses, and the statutes of Eliz. against fraudulent conveyances to defraud creditors, &c. And if the statutes we are now considering were suitable and proper for the government and well being of the colonists at that time, and were not afterwards repugnant to or inconsistent with the freedom and independence of the state and form of government therein established, I admit they are in force at this time. But it seems to me that those statutes were in their nature local; they were founded more in commercial policy than in general principles calculated to answer alone the ends of justice and reach the objects of criminal law....

In the infancy of the settlement of this country, the habits of the colonists were agricultural; their trade and commerce were altogether in the hands of the mother country; a quite different policy prevailed from that which dictated the statutes of Ed. 3. and Hen. 6.; and the question which we have now to decide is, not whether such a law extending the privilege to aliens would be suitable to our present situation, as it seems many of the states have thought it would be, but whether it was suitable to our situation as an infant colony at that time; for if that was not the case, and on that account it was not adopted at that time, it is not the law at this day, for it has never been enforced by any positive law.

I therefore think, as the reasons which induced the parliament in England to enact those statutes, were not good reasons why they should be enforced by the colonists, as not being applicable to their then situation, the Court below gave a correct judgment in refusing the prisoner the jury he prayed for.

Henderson, Judge. — I concur in the opinion given by Judge Hall, and for the reasons given by him. The policy which induced the parliament of England to pass the statutes of Edward, was to encourage foreign merchants, and possible artists, to come and trade with and reside among them. This policy is not only declared in the act itself, but in the act of Henry 6. complaining of the construction given to an act of Henry 5. respecting the qualification of jurors. In the colonial system, the policy was certainly inverted. Foreign merchants were prohibited from trading with us; and artists were certainly not encouraged, for it was the policy of the mother country to supply the colonists with manufacturers of her own production, and to keep the colonists engaged in the cultivation of the earth, to grow the raw materials for the manufactures of the mother country.... Our ancestors, therefore, did not bring with the statute of Edward. This law, I think, was territorial, and confined to England; it
was unsuited to the situation of the colonists. If it was not brought with our ancestors, there is no act either of the colonial government, the mother country, or of our present government, which imposes it. The last act upon the subject enforces such acts of the British government as had been in force and use here, and were compatible with our form of government. If, therefore, it had not been in force before, that act did not enforce it. I am at a loss to declare the meaning of the words *in use*, as used in that act; I am now, and heretofore have been, much perplexed to ascertain its meaning; but I am satisfied that it produces no such effect, as enforcing the act in question. I would mention, also, the various acts of our legislature on the subject of the qualification and appointment of jurors, as affording some evidence, although, I admit, not conclusive, that the law of *Edward* was not considered as being in force. I do not mean to say, that had the act of *Edward* been in force, that these provisions would repeal it, for I think that they might be made to stand together; but only as affording some evidence that the law was not in use, and sufficiently strong to repel the evidence of its being in use, arising from its having been used by Judge Williams once or perhaps twice at Wilmington; if such partial and solitary instances of its being in use would satisfy that word in the act of 1778.

I place no reliance on the report of the gentlemen on the subject, who lately revised our statutes. That report was not either sanctioned by law or disapproved; it was simply ordered to be published. . . This subject was brought before the legislature by the report, and it was simply ordered that it should be published, without expressing any opinion thereon. It was saying, that it must depend on its own merits, we will neither give it our sanction or disapproval.

I, therefore, concur with Judge Hall, that there should be judgment for the state.

Taylor, Chief Justice. — It is difficult, perhaps impossible, to arrive at exact demonstration on a subject that involves the question whether an ancient British statute, passed nearly five hundred years ago, is now in force in this state. There are no certain guides to direct us in an inquiry of this sort; for the darkness that hangs over the early legislation and judicial history of this state, the dearth even of traditional knowledge, has left us little to resort to but general principles and reasoning, and no confidence that more can be done that grouping together the strongest probabilities . . .

In order to ascertain whether the prisoner has been legally convicted, I shall consider two questions; 1st, whether the statute of 28 Ed. 3. allowing to aliens a trial *de medietate linguae*, forms a portion of that statute law of Great Britain, which the first settlers of this state brought with them from the mother country; 2dly, if it does, then, whether it has been repealed, or superseded by any legislative act of our own.

It seems to be agreed by the writers on the subject, that colonists who settle a new and uninhabited country, carry with them the laws of the parent country as their birth-right, so far as such laws are applicable to their situation, and the condition of an infant colony; or in the language of an early act of assembly, the laws of England were, at first migration of our ancestors, the laws of this province, "so far as
they were compatible with our way of living and trade." (1715, sec. 1.)

At the legislative session of 1836-1837, the North Carolina General Assembly once again revised the state statutes. In a Preface to the Revised Statutes of 1837, the legislative history of the state was set out with an account of the treatment of the British statutes. In this Preface, reference was made to a collection of English statutes published in 1792 and approved by the General Assembly in 1804, which had been prepared by François-Xavier Martin, a French émigré who later distinguished himself as a jurist in Louisiana.

... in obedience to a resolution of the General Assembly of the preceding year [i.e., 1791], [he] published a "Collection of the statutes of the Parliament of England in force in the State of North Carolina," of which work it may only be remarked that it was utterly unworthy of the talents and industry of the distinguished compiler, omitting many important statutes, always in force, and inserting many others, which never were, and never could have been in force, either in the Province or in the State of North Carolina.

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65. For an extract from the 1715 act referred to, see note 61 supra.
66. Revised Statutes of North Carolina (1837).
67. Martin, A Collection of the Statutes of the Parliament of England in force in the State of North Carolina (1792). In the Preface to the Collection, Martin stated in part:

"I began at Magna Charta... From thence to the seventeenth year of Charles the Second, the time at which the people of this country first legislated for themselves, I have inserted every statute unrepealed by subsequent acts, or which did not appear so glaringly repugnant to our system of government as to warrant its suppression. From the seventeenth of Charles, I have published such statutes as have been expressly enforced by act of Assembly, as those commonly called the statutes of jeofails, and the 5 Geo. 2, c. 7, which was intended by Parliament to operate in the British colonies of North-America, has ever been taken notice of by our courts of judicature, and was, I believe, for many years the only authority under which they issued writs of fieri facias against real estates.

"All the statutes relating to the benefit of clergy have been preserved. They are a key that opens the way to the knowledge of a part of our criminal jurisprudence, which ought to be clearly known and understood.

"Since the abolition of tenures in fee-tail, the statutes respecting fines and recoveries may be said to have become obsolete. Those, nevertheless, with a few others, relative to that species of tenure, I have thought it improper to reject, as a great deal of property in this state is still secured under them; and in a few instances, an obsolete statute has been retained, having been deemed necessary for the illustration of others...."

69. 12 Dictionary of American Biography 335 (1928).
70. Revised Statutes of North Carolina xii (1837).
The Preface to the Revised Statutes of 1837, however, did not mention an earlier and unofficial listing of the British statutes appearing in 1814 and 1815 in the Carolina Law Repository. Although fragmentary, it serves to indicate the need on the part of North Carolina attorneys to know what statutes of England were considered to be in force in the state. 71

In the course of the General Assembly's statutory revision of 1836-1837, they enacted two complementary statutes. The first, "An Act Declaring What Parts of the Common Law Shall Be In Force In This State" declared:

... all such parts of the common law, as were heretofore in force and use within this State, or so much of the said common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in the whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this state.

The second, "An Act Concerning The Revised Statutes" provided in part:

... all the statutes of England or Great Britain heretofore in use in this State, are hereby declared to be repealed and of no force and effect from and after the first day of January next. . . . 72

The General Statutes of North Carolina, in force January 1, 1962, provide:

All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State. 73

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71. "An Abridgment of the Statute Law of Great-Britain, Now in Force in North-Carolina," Carolina Law Repository (1814) 549-555; 4 North Carolina Reports, Part II, 294-303. While the Abridgment may have been completed by its compiler, only the titles from "Accessary" through "Felons and Felony" were printed.

72. Revised Statutes of North Carolina 52-53 (1837). The Journals of the Senate and House of Commons of the General Assembly of the State of North Carolina 1836-1837 (1837) furnish no explanation for the repeal of the British statutes, although they provide full information concerning the enactment of the bill by both branches of the General Assembly.

73. General Statutes of North Carolina §4-1. State v. Mitchell, 202 N.C. 439, 444, 163 S.E. 581 (1932) construed §4-1 as follows: "It is generally conceded that so much of the common law as is in
South Carolina

In 1694, South Carolina made the first attempt by any legislative body in North America to deal with the status of English statutes. "AN ACT to put in force the several Acts of the Kingdom of England therein particularly mentioned" was ratified on June 20, 1694. Unfortunately, no text of this act has been located. It was confirmed by "A Declaration and Repealing Act," ratified March 10, 1696, and was not repealed until 1712 when a more comprehensive statute was enacted. This Act of 1712 remained in force throughout the colonial period and was not repealed until 1872.

The Act of 1712 stated in part:

WHEREAS, many of the statute laws of the Kingdom of England or South Britain, by reason of the different way of agriculture and the differing productions of the earth of this Province from that of England, are altogether useless, and many others, (which otherwise are very apt and good) either by reason of their limitation to particular places, or because in themselves they are only executive by such nominal officers as are not in nor suitable for the Constitution of this Government, are thereby become impracticable here.

I. Be it enacted ... That the several statutes, and the several paragraphs and sections, or number of the paragraphs of the several statutes of the Kingdom of England, entituled as followeth, and made and enacted in such years of the reigns of the Kings and Queens of England, as before the titles of the several statutes is in this Act set down, and as the same are distinguished and divided into paragraphs and sections or numbers, by Joseph Keble of Gray's Inn, Esq., in his Statutes at Large, from Magna Charta ... to the fifteenth day of November, 1709, ... are and are hereby to be in as full force, power and virtue as if the same had been specially enacted and made for this Province, or as if the same had been made and enacted therein by any General Assembly thereof, (that is to say,)

[Here follows a list, identified by regnal year, title, and page reference to the proper volume of the Statutes at Large, of 168 separate items, referring to the specific chapters in the several statutes.]

force by virtue of this provision is subject to legislative control and may therefore be modified or repealed. But there are parts of the common law which are not subject to modification or repeal by the Legislature because they are imbedded in the Constitution."

74. 2 Cooper ed., Statutes at Large of South Carolina 81 (1837); Trott ed., Laws of the Province of South-Carolina 37 (1837).
75. 2 Cooper ed. 81 (1837). Cooper stated: "The original Act not now to be found."
76. 2 Cooper ed. 135 (1837); Trott ed. 65.
77. "An ACT to put in Force in this Province the several Statutes of the Kingdom of ENGLAND or SOUTH-BRITAIN, therein particularly mentioned," 2 Cooper ed. 401 (1837); Trott ed. 236.
78. Revised Statutes of the State of South Carolina 778 (1873).
V. And be it further enacted... That all and every part of the Common Law of England, where the same is not altered by the above enumerated Acts, or inconsistent with the particular constitutions, customs and laws of this Province, excepting so much thereof as hath relation to the ancient tenures which are taken away by Act of Parliament made in the twelfth year of the reign of King Charles the Second, chapter 24th [relating to tenures in capite]... whereby it is enacted that all tenures by the common law, whether held of the King or any other person or persons, are turned into free and common soccage, and which statute, as to that part of it which doth enact that all tenures be turned into free and common soccage, is hereby enacted and declared to be of as full force in this Province as if particularly enumerated by this Act; and also excepting that part of the common law which relates to matters ecclesiastical, which are inconsistent with or repugnant to the settlement of the Church of England in this Province, by the several Acts of Assembly thereof, be and is hereby made and declared to be in as full force and virtue within this Province, as the same is or ought to be within the said Kingdom of England....

X. And be it further enacted... That all the statute laws of the Kingdom of England which are not enumerated and made of force in this Province by this Act (such only excepted which relate to or concern Her Majesty's customs, and the Acts of Trade and Navigation,) are hereby declared impracticable in this Province.

XI. Provided nevertheless,... That because few or none of the statute laws of the Kingdom of England, made since the eighth year of her present Majesty's reign, have been transmitted to this Province, all statute laws made within the Kingdom of Great Britain since the eighth year of the reign of her present Majesty, shall be deemed, construed and taken to have such and the same relation to and force in this Province, and on all her Majesty's subjects inhabiting and dwelling in the same, as the same might, could, or ought to have had, if this Act had never been made.

Two additional acts relating to particular British statutes were passed during the colonial period, one in 1737 and the other in 1743. They were, however, quite different in the methods employed. The statute enacted in 1737 re-enacted part of an act of Edward VI (relating to the buying and selling of offices) and parts of two acts of George II (relating, inter alia, to forgery).

79. 3 Cooper ed. 468 (1838). The complete title of the act read:

"AN ACT for putting in force in this Province part of An Act of the Parliament of England, made in the fifth and sixth years of the reign of King Edward the sixth, against buying and selling of Offices, and also part of an Act of the Parliament of Great Britain made in the second year of the reign of our present most gracious sovereign Lord King George the second, entituled 'An Act for the more effectual preventing and further punishment of Forgery, Perjury and subordination of Perjury,
horse stealing) "to be in full force in this Province, to all intents and purposes whatsoever."\(^80\)

Thus, at the end of the colonial period, in 1776, South Carolina had specifically incorporated into her laws, via the acts of 1712 and 1743, particular statutes of England, with the statement that they were "...be to in as full force, power and virtue as if the same had been specially enacted and made for this Province, or as if the same had been made and enacted therein by any General Assembly thereof. . . ."

The South Carolina Constitution of 1778 continued in effect the laws then in force stating:

XXXIV. That the resolutions of the late congress of this State, and all laws now of force here, (and not hereby altered,) shall so continue until altered or repealed by the legislature of this State. . . . \(^81\)

The Constitution of 1790 provided:

All laws of force in this State at the passing of this constitution shall so continue, until altered or repealed by the legislature. . . . \(^82\)

In 1809, an edition of the Public Laws of South Carolina, edited by John Faucheraud Grimké, was published. The Preface stated in part:

and to make it Felony to steal Bonds, Notes or other securitics for payment of money,' and also part of one other Act of the Parliament of Great Britain, made in the seventh year of the reign of his said present Majesty, entituled 'An Act for the more effectual preventing the forgign and the acceptance of Bills of Exchange, or the numbers or principal sums of accountable receipts for notes, bills or other securitics for payment of money or warrants or orders for payment of money or delivery of goods, and for the more effectual putting in execution the said several acts in this Province.'" \(^80\)

80. 3 Cooper ed. 603 (1838). The Act of 1743, entitled "AN ACT to prevent Stealing of Horses and Neat Cattle. . . ." stated in part:

"I. And be it enacted. . . That an Act of Parliament made in the first year of the reign of King Edward the Sixth, entituled an Act for the Repeal of certain statutes concerning treason and felonys, &c. in so far as the same relates to the felonious stealing of horses, geldings or mares — and also another Act of Parliament, made in the second and third years of the reign of the said King, entituled a Bill for horse and horse stealers, are, and are hereby declared, immediately from and after the passing of this Act, to be in full force in this Province, to all intents and purposes whatsoever."

81. Constitution of South Carolina, 1778, Article XXXIV. See 1 Cooper ed. 137, 144 (1836); 6 Thorpe 3248 at 3255.

82. Constitution of South Carolina, 1790, Article VII. See 1 Cooper ed. 184, 190; Thorpe 3258, 3264.
I have given at large all such acts, parts and sections of acts of assembly, as are of a public nature; and have inserted all the British Statutes which were made of force in 1712; a very few excepted, and which, the change of our political situation renders no longer of any force or efficacy. Their titles, however, are mentioned.

... I compiled therefore several other British Statutes (in Appendix No. 1) which are declared to be of force by some act of Assembly, either expressly or virtually; also such as have been determined in the courts of law to have an operation here, and likewise some which may by parity of reason, implication, or construction or the uniform practice of our courts be deemed and adjudged to be of force. Perhaps I may lay this down as a general rule, that all those British Statutes which are stiled "vetera statuta" & "statuta incerti temporis" are of force in this State; but undoubtedly it must be left to the courts of justice ultimately to determine, whether many of the said statutes are not obsolete or totally inapplicable to our present independent government. Besides these statutes contained in No. 2, of which there are a considerable number, I have inserted in No. 2, all the statutes relative to the retailers of spiritous liquors, and in No. 3, those which declare the parliamentary privileges of the members of the houses of Assembly. . . .

In 1814, Joseph Brevard published An Alphabetical Digest of the Public Statute Law of South Carolina. He first classified the statutes of the state according to subject matter and then arranged them in chronological order under the separate headings. Among these statutes, he included the particular English statutes which had been declared to be in force, thus equating them with those enacted directly with the General Assembly.

The South Carolina General Assembly authorized the governor in December 1834 to employ "som fit and competent person, to compile under his direction the Statute Law of this State . . ."
Thomas Cooper was authorized to prepare the compilation, the first volume of which was published in 1836. In his Preface, Cooper stated in part:

The legislative records of South-Carolina commence in 1682: from that time to the present, no plan sanctioned by public authority has been formed and executed to collect, revise or digest our written Laws... Of these laws, enacted during a period of more than 150 years, many have been repealed, many have become obsolete, others have been at various times altered and modified, many have been passed without a due reference to former enactments, many British Statutes have been adopted by formal and direct reference, others have been made of force indirectly and as a class of statutory provisions; until the Statute Law of South-Carolina has become a confused mass of legislation... Revisal, condensation, amalgamation, and something in the form of an intelligible digest, have become absolutely necessary...

It is manifest, that before any step of this kind can be taken for the future, it is necessary to have under our view the whole ground occupied by past legislation... I have endeavored to supply this want by collecting in a chronological series the whole mass of our public legislation... This objective Cooper adhered to, presenting in order of their enactment the several acts of the colonial and state legislative bodies. While giving the text of such of the English statutes as were put in force by the acts of 1712 and 1743, he did not present them under subject headings: in effect, they were as notes to the text of the original enactments. However, he did add certain other British statutes which had been considered as being in force under court decisions or by implication of other colonial or state legislation.

"Resolved, That His Excellency the Governor be authorized and requested to employ some fit and competent person, to compile under his direction the Statute Law of this State, with a digested index thereto: that he be requested to communicate at the next Session of the Legislature the progress of this work, and the compensation he may deem just and equitable should be paid to the person thus employed: and that the Governor be further authorized to pay from time to time such sum or sums as upon inspection of the work he may deem equivalent to the labor actually bestowed on the same by the person thus employed."

87. When completed, Cooper's edition of the South Carolina statutes consisted of 6 volumes, covering the period from 1682 to 1838, published between 1836 and 1839. The Preface in the first volume contains a useful account of the evolution of the South Carolina statutes. Cooper himself was fully responsible only for the first four volumes, but his name appears as editor on the title page of the first five.

88. 1 Cooper ed. iii (1836).

89. 2 Cooper ed. 549 set out an "Appendix To The English Statutes Made Of Force," which listed certain British statutes "with the reason for their insertion, at the head of each Act." The following will serve as illustrations:
One hundred and sixty years after the act of 1712 which had placed specific English statutes in force in South Carolina, the General Assembly in 1872 repealed this colonial statute. At the same time, it specifically retained the common law.

Georgia

In May 1823, the Georgia Senate referred to the Joint Committee on the Judiciary of the Georgia General Assembly a resolution which instructed the committee "to inquire into the expediency of appointing some fit and proper person to compile and

The following Act of 33 Edward 1, A.D. 1305, "As to Challenges of Jurors," is inserted under the authority of the State v. Barrontine, 2 Nott and McCord's Reports, p. 552.


He that challengeth a Jury or Juror for the King, shall shew his Cause

[25 Ed. 3. st. 2 (1350)]

(Inserted on the authority of the second section of A. A. 1712)

In what place Bastardy pleaded against him that is born out of the Realm shall be tried

[34 & 35 H. 8. c. 5 (1542-3)]

(Inserted as confirmatory of the common law relating to Pledges of Prosecution.)

None shall sue a Subpoena until he find Surety to satisfy the Defendant his Damages, if he do not verify his Bill

(The following sections of 4 & 5 W. & M. ch. 24, 1692, are adopted by Judges Grimke and Brevard. They are explanatory of the statutes relating to executors, and relating to Benefit of Clergy.)

An Act for Reviving, Continuing and Explaining several Laws therein mentioned, which are expired and near expiring

90. Revised Statutes of the State of South Carolina, 778 (1873).

91. Id. at 767. This provision of the Act of 1872, declaring the continuation in effect of the "Common Law of England," appeared in the Revised Statutes of 1873, Ch. CXLVII, §10 and in the General Statutes of 1882, §2738. It did not appear in the Revised Statutes of 1893 or in the Code of Laws of 1902. The question was raised in 1919 whether or not the common law of England had remained in force in the state, but the
digest the statutes of England that are of force in the State of Georgia." The committee reported to the Senate on December 9, 1823, stating:

... they have taken the same into consideration, and are of opinion that the subject-matter embodied in the said resolution, is one well worthy the serious attention of the Legislature: That the Legislature of Georgia, in the year seventeen hundred and eighty-four, by law, adopted, as the law of this State the common law of England and such of the statute laws thereof as were usually of force in the State of Georgia, and binding on the inhabitants thereof ... and although a considerable length of time has elapsed since the adoption of the said laws, yet the Legislature has devised no means to facilitate to her citizens the knowledge of the said laws, which it is acknowledged are in force and binding upon them; and it being known that there are but few copies of the Statutes of England in the State of Georgia, and those which are in force in this State, being comparatively speaking, but few, and scattered throughout a heavy and voluminous work, to wit, the Statute Laws of England, up to the year seventeen hundred and seventy-six, so that very few have the opportunity afforded to them of knowing what the said laws are; and it being not only compatible with but indispensably necessary to, the liberty and interest of a free people, that the laws by which they are governed

state supreme court in State v. Charleston Bridge Co., 113 S. C. 116, 125, 101 S.E. 657 (1919) stated that "... the common law is as much the law of this country as of England."


"WHEREAS during the late convulsions in this State several salutary laws were lost, and destroyed, that had from time to time been enacted by the general assembly of the same; and among others, an act reviving and putting in force such as so much of the laws of the province of Georgia as were adjudged necessary to be in force in this State; And whereas the said laws are for the most part suited to the circumstances of the people; And whereas it is absolutely necessary for the well governing of every State that laws properly adapted to the circumstances of the inhabitants be at all times in force: Therefore be it enacted ... That all and singular the several acts, clauses, and parts of acts that were in force, and binding on the inhabitants of the said province, on the fourteenth day of May in the year of our Lord one thousand seven hundred and seventy-six, so far as they are not contrary to the constitution, laws and form of government now established in this State, shall be, and are hereby declared to be in full force, virtue and effect, and binding on the inhabitants of this State immediately from and after the passing of this Act, as fully and effectually to all intents and purposes as if the said acts and each of them, had been made and enacted by this general assembly, until the same shall be repealed, amended or otherwise altered by the legislature. And also the common laws of England, and such of the statute laws as were usually in force in the said province, except as before excepted."
should be promulgated and known; and inasmuch as the statute laws of
England that are of force in Georgia cannot be published conveniently,
unless they are digested and arranged by some fit and proper person,
whose duty and whose interest it will be to compile the same; and in
order to effect this desirable object,

The Committee respectfully recommend the following resolution:

Resolved ... That it is expedient that some fit and proper person
should be appointed by the Legislature, at its present session, to compile
and digest the statute laws of England that are now of force in the State
of Georgia, and whose duty it shall be within two year, to report the
same to his excellency the Governor, who after the same has been ex­
amined by a committee of three learned in the law, to be appointed by
him for that purpose, shall approve or disapprove the same, and who
for their services shall be paid by the Governor, out of the contingent
fund; and when the said work shall be performed and approved, that his
excellency the Governor be, and he is hereby authorized to subscribe
for two thousand copies, in conveniently bound volumes. . . .

William Schley was appointed to prepare the compilation at
the same session of the General Assembly. 94 His report took
the form of a volume entitled "A Digest of the English Statutes
in Force in the State of Georgia," printed at Philadelphia in 1826. 95
A resolution of the Georgia House of Representatives, approved
on December 22, 1826, directed the governor to forward copies
of Schley's Digest to the proper officials in the several counties
of the state. 96

In the preface to his Digest, Schley stated in part:

In prosecuting the task assigned me by the General Assembly, I
found some difficulty in determining which of the English statutes were

93. Dawson ed., Compilation of the Laws of the State of Georgia,
"Resolutions," 26 (1831).
94. Id. at 37.
95. The full title of Schley's report was as follows: "All the Stat­
utes of a General Nature which were 'Usually in Force on the Fourteenth
Day of May, 1776, and not Repugnant to the Constitution, Laws, and Form
of Government since Established in this State' with Explanatory Notes,
Connecting References, and Reference to English and American Decisions,
and the Acts of the General Assembly of Georgia: and AN APPENDIX,
Containing Several Statutes which the Compiler believes to be in Force;
and which are Recommended by the Committee of Revision to the Legis­
lature, as Containing Principles Worthy of Being Incorporated in our
Laws — also the Petition of Right — The bill of Rights — and the Charter
of Georgia: Compiled by the Appointment, and under the Authority of the
General Assembly." [Hereinafter cited as Schley.]
96. Dawson ed. 81. No record appears of a formal acceptance of
the Digest by the General Assembly, although a Resolution originating
in the House of Representatives, approved December 15, 1824, authorized
the governor to advance to Schley "one-half of the amount subscribed for
the State to enable him to defray the expense of printing and binding the
said work. . . ." Id. at 47.
in force in this state, because the rules laid down by the writers on the subject, and by the adopting act of 1784... could not be applied with any degree of certainty for want of necessary evidence to establish the facts upon which these rules might operate...

Schley concluded that the following rule provided him with the most satisfactory guide:

"That the colonists of America brought with them from England as their birthright all those laws of the mother country, which were capable of being so transferred, up to the period of the settlement of Georgia, therefore all the English statutes of a general nature must be considered to have been in force anterior to the revolution. After the settlement (as internal though restricted legislation was permitted to the colonies) the laws of the mother country extended to them only when they were expressly named; though when those laws were merely modifications of previous general laws, the utility of these modifications may have recommended their adoption to the colonial courts. These are our guides to ascertain what laws were in force here before the revolution, and they continue in force, so far as they are not repugnant to the constitution, laws, and form of government since established."

Despite the use of this as a general rule, Schley found that its application presented some difficulties. He went on in his preface:

"...the application of this rule, plain and simple as it may seem, was a task requiring considerable labor and investigation; for many statutes, although general in their nature, were, from the subject matter or the mode of enforcing them — the habits and manners of the colonists — their local situation, or the forms of judicial proceedings established here, totally inapplicable. It became necessary therefore to establish a line between such statutes as could not at any time have been suited to the situation of the people, and such as might reasonably be supposed to have been adapted to their wants, and their use; and then to compare these last with the constitution, laws, and form of government since established, and select such as were not repugnant to them.

* * * *

Those statutes which are considered to be of force in the state of Georgia, compose the body of the following work... Some of the statutes here reported of force, were passed after the settlement of Georgia; but they were adopted in practice long before the fourteenth May, 1776, and have been in constant use ever since, and are therefore a part of our law, such as the 11 Geo. II, ch. 19 [relating to the payment of rents], 24 Geo. II, ch. 55 [relating to warrants to apprehend those beyond the court's jurisdiction], 25 Geo. II, ch. 6 [relating to wills and codicils].

There are also a few of these statutes, which at first view would seem to have little or no application here; but they form a part of that system of English law in regard to real property which in principle is adopted by us, and ought therefore properly to have a place in this work; although, perhaps, they may never be called into practical operation; such
for instance are the statutes of 6 Edw. I, ch. 7 [according writ of entry to dower lands to heirs], 13 Edw. I, sta. 1, ch. 3, 4 [according writ of entry to wife in dower lands], 11 Hen. VII, ch. 20 [relating to alienation of lands by a widow], and a few others. But they are necessary to be known, as they are alterations of the common law. 97

How extensively Schley's Digest was used by lawyers throughout Georgia, it is impossible to state. However, the general attitude of the Georgia courts toward the British statutes indicates that it probably was relied upon heavily.

In 1848, Justice Lumpkin, speaking for the Georgia Supreme Court in Flint River Steamboat Company v. Foster, classified the several categories of laws which were in force in Georgia. He included in his list "the Common Law of England, and such of the Statute Laws as were usually in force before the revolution...." 98

As recently as 1950, the Georgia Court of Appeals held that the statute of 4 Edw. 3, c. 7 (relating to survival of actions) was in force in Georgia by virtue of the act of 1784. 99

Thus the Georgia courts have taken and continued to take the position that the statutes of England, in force in the province in 1776, were continued in force under the Act of 1784, insofar as compatible with the constitution, laws, and form of government of the state.

97. Schley xviii-xxix.
98. Flint River Steamboat Co. v. Foster, 5 Ga. 194, 204-205 (1848). See also Tucker v. Adams, 14 Ga. 548, 569 (1854). Judge Lumpkin's classification, giving the relative importance of the several types of law in Georgia, was incorporated into the state constitutions of 1865 and 1868. In his opinion, Judge Lumpkin stated:
"The laws of Georgia may be thus graduated, with reference to their obligation or authority. 1st, The Constitution of the United States. 2d, Treaties entered into by the Federal Government before, or since, the adoption of the Constitution. 3d, Laws of the United States, made in pursuance of the Constitution. 4th, The Constitution of the State. 5th, The Statutes of the State. 6th, Provincial Acts that were in force, and binding on the 14th day of May, 1776, so far as they are not contrary to the Constitution, laws and form of government of the State. 7th, The Common Law of England, and such of the Statute Laws as were usually in force before the revolution, with the foregoing limitation. It is the peculiar province of the Courts to ascertain and declare when any two of these several species of law conflict with each other; and then it follows, as a matter of course, that the less must yield to the greater. "And on this point there is no dearth of precedents...."
99. Davis v. Atlanta Gas Light Co., 82 Ga. App. 460, 463, 61 S.E. 2d 510 (1950). See also Grimmett v. Barnwell, 184 Ga. 461, 464, 192 S.E. 191 (1937), where the court remarked: "The common and statute law of England, of force in this State on May 14, 1776, remains of force, so far as it is not incompatible with the Federal or the State constitution or has not been modified by statute...."