

CHAPTER 7

JURISDICTIONS CARVED FROM TERRITORY SOUTH OF THE RIVER OHIO

Territory South of the River Ohio – Tennessee

In 1790 the State of North Carolina ceded to the United States the area referred to as "a certain district of western territory." Known initially as "the Territory of the United States, south of the river Ohio," it had substantially the same boundaries as the present state of Tennessee.

The North Carolina Deed of Cession provided:

. . . the territory so ceded shall be laid out and formed into a State or States containing a suitable extent of territory; the Inhabitants of which shall enjoy all the privileges, benefits and advantages set forth in the Ordinance of the late Congress for the Government of the Western territory of the United States. . . .¹ Eighthly, That the laws in force and use in the State of North Carolina at the time of passing this act shall be and continue in full force within the territory hereby ceded, until the same shall be repealed, or otherwise altered by the Legislative authority or the said territory. . . .²

This stipulation, among the others set out in the Deed of Cession, was accepted by Congress³ and incorporated by reference in "An Act for the Government of the Territory of the United States, south of the river Ohio," approved May 26, 1790.⁴

Thus from the moment of its organization, "the territory . . . south of the river Ohio" was provided with a complete body of

1. For the text of the Northwest Ordinance as it appeared in the original journals of the Continental Congress, see 2 Carter ed., Territorial Papers of the United States 39-50 (1934) [hereinafter cited as Carter]. See also 1 Stat. 51, footnote (a). Among the "privileges, benefits and advantages" conferred by the Northwest Ordinance, re-enacted by reference in "An Act for the Government of the Territory of the United States, south of the river Ohio," 1 Stat. 123, were the following:

"There shall also be appointed a court to consist of three judges . . . who shall have a common law jurisdiction. . . .

"The inhabitants of the said territory shall always be entitled to the benefits . . . of judicial proceedings according to the course of the common law."

2. Deed of Cession, February 24, 1709, 4 Carter 11-12.

3. An Act to Accept the North Carolina Cession, April 2, 1709, 1 Stat. 106.

4. 1 Stat. 123.

statute law.⁵ This included not only the statutes enacted by the Province and State of North Carolina but also the British statutes which had been declared to be in force in North Carolina by virtue of the acts of 1715 and 1778.

In 1715 the General Assembly of the Province of North Carolina enacted a statute entitled "An Act for the more effectual observing of the Queen's Peace, and establishing a good and lasting Foundation of Government. . . ." which provided in part:

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 of vexatious Law Suits, and for 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. . . .⁶

In 1778 the General Assembly of the State of North Carolina enacted a statute entitled "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 Assembly made and passed when this Territory was under the Government of the Late Proprietors and the Crown of Great Britain. . . ." which stated in part:

I. WHEREAS Doubts may arise, upon the Revolution in Government, whether any and what Laws continue in Force here: For Prevention 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 Territory, and all the Acts of the late General Assemblies thereof, or so much of the said Statutes, Common Laws, and Acts of Assembly, as are

5. Not only was the territory fortunate in having a ready-made pattern of legislation, but the actual problems of administration "were few, because the entire basis of local government had already been established under North Carolina jurisdiction. It is also significant that the relations between the Governor and his superiors and associates were in general without serious incident; the course of government appears to have run with relative smoothness." 4 Carter iv.

6. Iredell ed., Laws of North Carolina 17 (1791).

not destructive of, repugnant to, or inconsistent with the Freedom and Independence of this State, and the Form of Government therein established, and which have not been otherwise provided for, in the Whole or in Part, not abrogated, repealed expired, or become obsolete, are hereby declared to be in full Force within this State. . . .⁷

The first constitution of the state of Tennessee, February 6, 1796, provided that:

All laws and ordinances now in force and use in this territory, not inconsistent with this constitution, shall continue to be in force and use in this state, until they shall expire, be altered, or repealed by the legislature.⁸

A similar provision appeared in 1834 constitution.⁹

In 1805 the Tennessee Supreme Court was faced with the question of the status in the state of the North Carolina acts of 1715 and 1778. In Glasgow's Lessee v. Smith & Blackwell, Overton, J., stated:

That part of the act of 1715, which refers to royalty, and its privileges is not in force, being incompatible with the present form of government, and the act of 1778. The same observation will apply to the statutes made for the benefit of an established church. The remainder of the act is obscure, and does not permit any specific and definite train of ideas, in relation to what English statutes, by that act, are enforced. The construction of this act when standing alone must have depended very much upon usage and the decisions of the superior courts. Information on this subject is wanting. It becomes then necessary to look carefully into the act of 1778. The preamble of the act is in these words "whereas doubts may arise upon the revolution in government, whether any and what laws continued in force here." Sec. 2. enacts "that all such statutes and such parts of the common law, as were heretofore in force and use, within this territory and all the acts of the late general assembly 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 established, and which laws not been otherwise provided for, in the whole, or in part, not abrogated, repealed, expired, or become obsolete, are hereby declared to be in full force within this state."

With respect to what part of the statutes of England, to use the language of this act, "were heretofore in force, and use," no satisfactory opinion can be given; but the alternative of this sentence is susceptible

7. Id. at 353.

8. Constitution of Tennessee, Art. X, Sec. 2 (1796). See 6 Thorpe ed., Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3414 at 3421 (1909) [hereinafter cited as Thorpe].

9. Constitution of Tennessee, Art. XI, Sec. 1 (1834). See Thorpe 3426 at 3439.

of specification, the expressions are, "or so much of the said statutes, &c as are not destructive of, repugnant to, or inconsistent with the freedom and independence of this state and the form of government." In other words all the statutes of England, contemplated in this act are in force which are not inconsistent with the principles, and the form of government. The statutes contemplated by the act, were those which passed previously to the fourth year of Jac. 1st. when the charter to the colony of Virginia was granted, which included, what was afterwards called North-Carolina.¹⁰

In 1809 John Haywood, formerly a judge in the superior courts of North Carolina, published A Revisal of all the Public Acts of the State of North Carolina and of Tennessee now in force in the State of Tennessee. He included the North Carolina act of 1778.¹¹

In 1836 Caruthers and Nicholson prepared a compilation of Tennessee statutes.¹² They included sections six and seven of the North Carolina act of 1715 and section two of the North Carolina act of 1778. To the latter act, a note was appended which quoted the second paragraph extracted from Glasgow's Lessee v. Smith, as set out above.

Under these statutes, it was held by the Tennessee Supreme Court in State v. Miller (1883) that the statutes which the acts of 1715 and 1778 placed in force were

. . . those passed before the fourth year of James I., 1607, when the charter of the Colony was granted. See N. & C., 438; 1 Tenn., 154. Under these provisions many English statutes were held by the courts in force as statutes in Tennessee, a list of which will be found in a note by Judge Cooper to the case of Glasgow v. Smith & Blackwell, Overton Rep., 168-9. Among these we may mention the statute of limitations of 21 James I., except so far as changed by the act of 1715, ch. 27. See App. N. & C., 770. So the law stood at the time of the enactment of the Code [of 1858]. 13

10. Glasgow's Lessee v. Smith & Blackwell, 1 Overton (Tenn.) 144, 153-54 (1805). See also Shute v. Harder, 9 Tenn. 1 (1818); Sappington & Hickman v. Philips' Ex'rs, 9 Tenn. 105, 106-107 (1826); Green et al v. Allen et al., 24 Tenn. 170, 205 (1844); Harding v. St. Louis Life Ins. Co., 2 Cooper's Tenn. Ch. 465, 467 (1875); State v. Miller, 79 Tenn. 620, 624-25 (1883); Smith v. North Memphis Savings Bank, 115 Tenn. 12, 17-19, 89 S.W. 393 (1905); Moss v. State, 131 Tenn. 94, 103-106, 173 S.W. 859 (1914).

11. Haywood ed., A Revisal of all the Public Acts of the State of North Carolina and of the State of Tennessee now in force in the State of Tennessee (1809).

12. Caruthers & Nicholson, eds., A Compilation of the Statutes of Tennessee, of a general and permanent nature, from the commencement of the government to the present time, with reference to judicial decisions, in notes. . . (1836)

13. State v. Miller, 79 Tenn. 620, 625 (1883). See also Box v. Lanier,

The Code of 1858 repealed all previous enactments and enacted a new body of statute law with the result that no statutes not included within the Code were considered to be in force. The opinion in State v. Miller went on to state:

For these reasons we have no doubt of the proposition, that no English statute as such is in force in our State since the Code.¹⁴

Mississippi Territory — Mississippi

The Mississippi Territory, as organized by Congress in 1798, included the land between the western boundary of Georgia and the eastern bank of the Mississippi, north of the 31st latitude and south of a line drawn from the mouth of the Yazoo River to the Chattahoochee River.¹⁵ It was not until 1804 that the boundaries of the territory were extended northward to the southern boundary of Tennessee,¹⁶ and it was 1812 before the arguments with Spain were sufficiently resolved to permit annexation to Mississippi Territory of the narrow strip along the Gulf of Mexico east of Louisiana and west of Florida.¹⁷

The area initially included within the territory had been claimed by Georgia throughout the colonial period under grants from the British Crown. Spain, fighting against Great Britain during the American Revolution, conquered it in 1781 and did not formally cede the land north of the 31st latitude to the United States until 1795. The English however, had relinquished their claims in the Anglo-Spanish Treaty of 1783, though Georgia refused to abandon hers until 1802.¹⁸

The organic act, "An Act for an amicable settlement of limits

112 Tenn. 393, 79 S.W. 1042 (1904); *Smith v. North Memphis Savings Bank*, 115 Tenn. 12, 89 S.W. 393 (1905); *Moss v. State*, 131 Tenn. 94, 173 S.W. 859 (1914).

14. *State v. Miller*, 79 Tenn. 620, 627 (1883).

15. "An Act for an amicable settlement of limits with the state of Georgia, and authorizing the establishment of a government in the Mississippi territory," 1 Stat. 549.

16. "An Act supplementary to the act intituled 'An act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the state of Tennessee,'" 2 Stat. 303.

17. "An Act to enlarge the boundaries of the Mississippi territory," 2 Stat. 734.

18. "An Act To ratify and confirm certain articles of agreement and Cession entered into on the 24th day of April, 1802, between the Commissioners of the State of Georgia on the one part, and the Commissioners of the United States on the other part," *Laws of Georgia 1800-1810*, 48 (1812).

with the state of Georgia, and authorizing the establishment of a government in the Mississippi territory," provided:

And be it further enacted, That from and after the establishment of the said government, the people of the aforesaid Territory shall be entitled to and enjoy all and singular the rights, privileges, and advantages granted to the people of the territory of the United States northwest of the river Ohio in and by the aforesaid ordinance of the thirteenth day of July in the year one thousand seven hundred and eighty-seven, in as full and ample a manner as the same are possessed and enjoyed by the people of the said last-mentioned Territory. ¹⁹

Unlike the organic act which in 1790 had established the territory south of the river Ohio, no specific provision was made for the laws which were to be in force. However, under the re-enactment by reference of the Northwest Ordinance, the Governor and Judges of Mississippi Territory were given the same power to adopt laws of the original states as was granted under both the Northwest Ordinance and the organic act for the territory south of the Ohio River.

In 1849, the Mississippi Supreme Court in Boarman v. Catlett commented on this re-enactment by reference of the Northwest Ordinance, stating in part:

. . . When the Mississippi territory was organized, the ordinance secured the inhabitants in the enjoyment of judicial proceedings, according to the course of the common law. Toulmin, Dig. 473; Laws U.S. Vol. 1, 475. This, together with the provision in the [Mississippi] constitution of 1817, schedule §5, has been considered to exclude all English statutes, and to adopt only the common law, and the statutes of our own government, for the determination of the rights of the citizen. . . .²⁰

An early reference in territorial legislation to English statutes appeared in an act of October 30, 1800, when Governor Winthrop Sargent²¹ and Judges Seth Lewis and P. Bryan Bruin enacted the following:

19. 1 Stat. 549.

20. Boarman v. Catlett et al., 21 Miss. (13 Smedes and Marshall) 149, 152 (1849). See also "An Act for the punishment of crimes and misdemeanors," § 45, February 10, 1807, Toulmin ed., Statutes of Mississippi Territory, Revised and Digested. . . , 324 (1807), originally enacted January 30, 1802 (Acts of 1802, Act 13, §32) which provided that ". . . every other felony, misdemeanor or offence whatsoever not provided for by this act, shall be punished as heretofore by the common law."

21. Winthrop Sargent, 1753-1820, had served as secretary of the Northwest Territory until his appointment as the first governor of the Mississippi Territory. Jefferson refused to re-appoint him in 1801. For the papers relating to the difficulties he encountered in Mississippi, see 5 Carter. See also 16 Dictionary of American Biography 368 (1935).

And be it further enacted, That all the statutes of England and Great Britain for amendment of the Law, commonly called the Statutes of Jeofails, which are received and enforced in the state of North Carolina, as the Laws of the said state, be, and the same are hereby Adopted and declared to be in force in this Territory.²²

This statute is of considerable interest as a controversy arose in the territory as to whether the English statutes extended to Mississippi. The supporters of the proposition that they had been extended followed one of two theories: either the statutes had come by way of Georgia, lying dormant during the period of Spanish occupancy or they had come by way of Florida during the years when Great Britain had held the area. Those who took the position that the English statutes had come by way of Florida pointed to the fact that in 1765 the boundary of West Florida had been extended northward by Great Britain to 32° 39' at the mouth of the junction of the Yazoo River with the Mississippi. It was argued that this action had, at least constructively, placed the British statutes in force within this portion of Mississippi.²³

22. "A Law to alter, and amend a Law heretofore passed in this Territory, entitled 'A Law fixing the place where the Supreme Courts for this Territory shall be held, the number of Sessions and the time of holding them,' and for other purposes," §25, October 30, 1800. Historical Records Survey, Sargent's Code 1799-1800 [135] at [145] (1939).

23. 8 American State Papers, 1 Public Lands 57 (1834). See also Cox, *West Florida Controversy 1798-1813*, 12 (1918). For a general account, see Johnson, *British West Florida 1763-1783* (1943). Both theories are open to considerable scepticism. Although Georgia's original grants provided the basis for her claims to land west of the Mississippi, the technical question arose whether Great Britain had ever legally moved the boundary of British West Florida northward to the junction of the Yazoo River with the Mississippi. If the commission of 1764 to Governor George Johnston of British West Florida did not effectuate the Order in Council which had so extended British West Florida, it could be argued that no act of the British Crown had interfered with Georgia's claim. Thus the Spanish conquest of the area in 1781 could be considered as non-destructive of the inherent continuity of the laws in force in Georgia. However, there is no indication that either the common law or English statutes, let alone Georgia statutes, were actually administered by Georgia within the area, although Georgia did attempt to exercise nominal sovereignty within the area by a series of legislative acts commencing in 1785 and culminating in the formal cession of the area claimed to the United States in 1802. Moreover, no comment has been located in any of the early cases taking the position that the common law came to Mississippi by way of Georgia.

The supporters of Florida as a source for English statutes in Mississippi, on the other hand, had to recognize the fact that even if British West Florida had included the area within the Mississippi Territory, Great Britain had ceded all of British West Florida to Spain in

On the general question of whether or not the English statutes were in force in Mississippi, two of the United States territorial judges were in complete disagreement. Thomas Rodney, judge in the western part of the territory from 1803 until his death in 1811, believed they were not.²⁴ Harry Toulmin, judge in the eastern part in and around Mobile from 1804 until the end of the territorial period, believed they were. That he held this view is of more than academic interest, as he was commissioned by the General Assembly to prepare a digest of the territorial law.²⁵ The evidence indicates that Toulmin interpreted his instructions somewhat liberally: that is, he not only wrote, rather than compiled, a number of the provisions in the Digest but he also incorporated into it the text of a number of English statutes which he considered would be useful to have in effect in the territory.²⁶

1783. Despite this, Harry Toulmin, one of the United States territorial judges, advanced the proposition that "the common law of England, as it stood previously to the settlement of Florida, makes a part of the law of the Mississippi Territory." Toulmin to Cowles Mead, Washington, January 19, 1807, Series A, 7 Mississippi Archives, M.T.A. Cited and quoted in Hamilton ed., *Anglo-American Law on the Frontier: Thomas Rodney and His Territorial Cases* 127 (1953). R. J. Walker, editor of the first volume of the Mississippi reports, mentioned the possibility of a question arising concerning the transfer of laws from British West Florida or from Georgia but did not explore the issue. 1 Miss. (Walker) 52.

24. Rodney to T. Gammel, October 2, 1805, 44 Penn. Mag. 188 (1920), cited in Hamilton ed., note 23 supra.

25. Toulmin ed., note 20 supra.

26. Hamilton ed., note 23 supra, states as follows:

"... The word 'wrote' is used advisedly rather than 'compiled,' because there is a substantial foundation for the belief that Toulmin composed many passages in his digest. In addition to incorporating the public acts still in force, he wrote to the acting governor:

"I have likewise, Sir, ventured a step beyond this, knowing that many of our legal provisions and mode of proceedings are founded not in the common law, but on the Statutes of England — reflecting that in the establishment of a colony in this country under the auspices of the British Government, the settlers must have brought with them the laws of the parent state — which a subsequent temporary occupation of the country by the Spaniards, occasioned by an ignorance of the acknowledged boundaries, would not be considered as abrogating. I have felt inclined to adopt [the view that] the statute as well as the common law of England, as it stood previously to the settlement of Florida, makes a part of the law of the Mississippi Territory.

"Knowing full well that this opinion ran counter to prevailing view in the territory, Toulmin said he had restrained himself and limited his use of English statutes, not incorporating into the digest many that he felt would be useful" Toulmin to Cowles Mead, Washington, Jan. 19, 1807, in Mississippi Archives, M.T.A., Ser. A, Vol. 7. "

The Digest prepared by Toulmin was "received and established as the law of the said territory" by the General Assembly in 1807,²⁷ but the legislators took pains to add to the act of acceptance the following provision:

. . . That the said Digest and acts of the present session shall, when printed, be entitled "The Statutes of the Mississippi territory, revised and digested by the authority of the General Assembly:" and that from and after the first day of October next, all the laws of the Governor and Judges, all the acts of the General Assembly of the Mississippi territory, and all statutes of England and Great-Britain, not contained in the said volume of statutes, shall cease to have any force or validity in this territory. . . .²⁸

When Mississippi became a state in 1817, its first constitution contained the specific provision that all the laws then in force in the Territory were to continue in force.²⁹ A similar provision appeared in the state constitution of 1832.³⁰ As pointed out in the extract quoted above from Boarman v. Catlett, the Mississippi Supreme Court on at least this one occasion construed the constitutional provision as excluding all English statutes, stating unequivocally ". . . no English statute has any intrinsic validity here."³¹

The general denial of validity to any English statute not incorporated into Toulmin's Digest and thus re-enacted as a statute of Mississippi was made by the Mississippi High Court of Errors and Appeals in 1856. The opinion stated in part:

27. "An Act to adopt the Digest of the Laws of the Mississippi Territory, prepared agreeably to a resolution passed at the last Session of the General Assembly, and for other purposes therein mentioned. Whereas in consequence of a resolution of the General Assembly of this territory, passed at the last session, the Governor of this territory did accordingly employ HARRY TOULMIN, Esquire, one of the Judges of the same, to compile a Digest of the Statutes now in force; and whereas the said Digest has been laid before the present General Assembly, and has been examined and amended: . . . Be it enacted. . . That the said Digest, containing the acts hereinafter mentioned, is received and established as the law of the said territory, viz:— . . ." Toulmin ed., note 20 supra, at 19.

28. Toulmin ed., note 20 supra, at 23. See also, "An act for the Punishment of Crimes and Misdemeanors," February 6, 1807, § 55, id. at 328. which provided ". . . all laws, customs or usages relating to, or in any manner respecting the benefit of clergy, are hereby abrogated and made null to all intents and purposes."

29. Constitution of 1817, Schedule, § 5. See 4 Thorpe 2032 at 2046.

30. Constitution of 1832, Schedule, § 4. See 4 Thorpe 2049 at 2063.

31. Boarman v. Catlett et al., 21 Miss. (13 Smedes and Marshall) 149, 152 (1849).

When this statute was passed [i.e., the Act of June 13, 1822 relating to conveyances], neither the statute of Westminster 2d, 13 Edward I., called the statute "de donis conditionalibus," nor the Statute of Wills, 32 Hen. VIII., was in force within this commonwealth. As early as the year 1807, all the statutes of England and Great Britain not re-enacted, were, by express enactment of the legislature, excluded from operation within the territory. Hutch. Dig. 65. ³²

Alabama Territory — Alabama

The Territory of Alabama, carved out of Mississippi Territory, was organized under "An Act to establish a separate Territorial Government for the eastern part of the Mississippi Territory," approved March 3, 1817.³³ Section 2 of the act provided:

And be it further enacted, That all laws which may be in force, in said Territory, within the boundaries above described, at the time this act shall go into effect, shall continue to exist, and be in force, until otherwise provided by law. . . .³⁴

Among the laws so continued in effect in Alabama Territory was the 1807 Mississippi territorial statute declaring that ". . . all statutes of England and Great-Britain, not contained in the said volume of statutes, shall cease to have any force or validity in this territory. . . ." Also continued in effect was another Mississippi statute, initially enacted in 1802 but amended in 1807, which provided in part:

. . . every other felony, misdemeanor or offence whatsoever not provided for by this act, shall be punished as heretofore by the common law.³⁵

The first constitution of Alabama, adopted in 1819, continued in force the laws of Alabama Territory.³⁶ Thus, in theory, no

32. *Jordan v. Roach et al.*, 32 Miss. 482, 616 (1856), cited with approval as to this particular point in *Middlesex Banking Co. v. Field*, 84 Miss. 646, 665, 37 So. 139, 146 (1904). See *Ingraham et al. v. Regan*, 23 Miss. 213, 226-27 (1851) re the construction to be placed by Mississippi courts on English statutes re-enacted by the state. However, see also *Lumber Co. v. Harrison County*, 89 Miss. 448, 42 So. 290 (1906) where the opinion held that while the English statutes of Marlbridge and Gloucester had no force as statutes in Mississippi, the principle announced by them relative to waste committed by a tenant was a part of the law of the state.

33. 3 Stat. 371.

34. Toulmin ed., *supra*, note 20, 19.

35. "An Act for the punishment of crimes and misdemeanors, § 45, February 10, 1807, Toulmin ed., 324, originally enacted January 30, 1802, Acts of 1802, Act 13, § 32.

36. Constitution of 1819, Schedule, § 5. See 1 Thorpe 96, 113.

English or British statutes have ever been in force in the state.

In 1830, the Supreme Court of Alabama faced the question in a criminal case of whether the common law was in force in the state where the offence in question was not covered specifically by a state statute. State v. Cawood held that it was in force, referring both to the Northwest Ordinance and to the Mississippi acts of 1802 and 1807. ³⁷

37. State v. Cawood et al, 2 Ala. 360, 361-62 (1830) stated in part:

"It was conceded in argument, that a conspiracy was punishable at common law, but that we had not adopted it as an offence in our code of criminal jurisprudence. The objection we think is not sustainable; yet for its novelty, it merits consideration. By the 2d article of the ordinance of 1787, 'for the government of the Territory of the United States, North West of the Ohio,' which was afterwards made the fundamental law of the Mississippi Territory, it is provided that 'the inhabitants of the said Territory shall always be entitled to . . . judicial proceedings according to the course of the common law.' This provision was doubtless made with reference to the common law of England, and hence that law need not have been declared to be in force here by express enactment; but if express legislation were necessary, the part of the ordinance referred to, may be considered as having that effect. We cannot yield our acquiescence to the proposition, that the common law of England was abrogated by our secession from that country, although aware that this doctrine is sustained by some respectable names. We are willing to admit, that as the common law of England, it no longer obtains, yet as the law of the different members of the union, in which it once obtained, it still maintains validity without the aid of legislative enactment, so far as compatible with the genius of our institutions.

"I take it then as most obvious, that Congress designed to make the common law of England, so far as applicable, the rule of action, both in civil and criminal proceedings in the Mississippi Territory. This idea, in regard to crime, is strengthened by the 45th section of the 'act for the punishment of crimes and misdemeanours,' originally passed in June, 1802, but re-enacted with amendments in 1807. After the enumeration of many offences, among which conspiracy is not included, the section referred to, declares 'that every other felony, misdemeanour or offence whatsoever, not provided for by this, or some other act of the General Assembly, shall be punished as heretofore by the common law.' This act was enacted upon the hypothesis, that the common law was in force here; or it would have specifically mentioned the offences which were understood to be punishable.

"This being all the written law upon the subject, existing anterior to the adoption of our constitution, the 5th section of the schedule of the that instrument, declares that 'all laws and parts of laws, now in force in the Alabama Territory, which are not repugnant to the provisions of this constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the legislature thereof.' By this section it is clear, that all laws whether unwritten or statute, if consistent with the constitution, are continued in force."

State v. Cawood had involved a conspiracy to commit an unlawful act, and under the Mississippi statutes continued in force it was logical to hold the common law applicable. However, in 1851 the state supreme court went somewhat further. In Carter and Wife v. Balfour's Adm'r, it addressed itself to the question of whether the statute of 43 Elizabeth relative to charitable bequests was in force in the state and stated in part:

... it is not necessary to inquire whether the statute of 43d Elizabeth is in force in this state. It appears that that statute was passed in the year 1601. and the first settlement of Virginia, (that being the first settlement in any part of the United States,) was in 1607. And the doctrine appears to be settled that English statutes passed before the emigration of our ancestors to America. and which were applicable to our situation and not inconsistent with our institutions and government, constitute a part of the common law, and are in force (unless repealed) in all the States of the Union. — 38

Carter v. Balfour was cited with approval by the state supreme court in Nelson v. McCrary et al. (1877),³⁹ a case involving 13 Edw. 1, c. 18 (relating to alternative methods of execution).

In 1907 the Legislature adopted a Political Code for the state which contained the following provision:

The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decision, and shall continue in

38. Carter and Wife v. Balfour's Adm'r, 19 Ala. 814, 829 (1851). Emphasis added, See also Clark & Co. v. Goddard, 39 Ala. 164, 169-170, 84 Am. Dec. 777 (1863) which held that 5 Eliz. 4, relating to apprentices, despite its enactment prior to the "emigration of our ancestors to America. . . cannot possibly be regarded as of force in this country. . . [as it] is incompatible with the genius and spirit of our institutions. . . ."

39. Nelson v. McCrary et al., 60 Ala. 301, 309-310 (1877). The opinion stated in part:

"... The principle is well settled, that English statutes passed before the emigration of our ancestors, so far as consistent with our institutions and government, unless repealed, constitute a part of the common law prevailing in the states of a common origin. — Carter v. Balfour, 19 Ala. 814; Horton v. Sledge, 29 Ala. 478. If it were a matter of practical importance, there would be no room for doubt, that this statute was of force during the five years of organized government elapsing before it was in substance re-enacted by the act of 1807, Clay's Dig. 199, § 1. . . ."

Horton v. Sledge, referred to in the Nelson v. McCrary opinion, 29 Ala. 478, 496 (1856), held that the English statute of uses, 27 Hen. 8, constituted "... 'a part of the common law' of Alabama and [was] in force unless repealed. . . ." Besides, the opinion noted "... our own statute is strikingly similar, and perhaps in effect the same, with the English statute. . . ."

force, except as from time to time it may be altered or repealed by the legislature. ⁴⁰

In the 1941 annotated edition of the Alabama code the following annotation appears for the above-quoted section:

Old English statutes are part of our common law. The statutes passed in England before the emigration of our ancestors, which are in amendment of the law, and applicable to our situation, constitute a part of our common law. *Carter v. Balfour*, 19 Ala. 814; *Clark v. Goddard*, 39 Ala. 164, 84 Am. Dec. 777; *Nelson v. McCrary*, 60 Ala. 301. ⁴¹

40. The Code of Alabama, Political Code, ch. I, § 12 (1907).

41. The Code of Alabama, tit. 1, § 3 (1940).