CHAPTER 6

JURISDICTIONS CARVED FROM NORTHWEST TERRITORY

Territory North-West of the River Ohio — Ohio

The definitive Treaty of Peace between Great Britain and the United States, concluded at Paris, September 3, 1783, and ratified by Congress, January 13, 1784, recognized the claims of the several states to the area west of the Appalachians which lay east of the Mississippi, north of Spanish Florida, and south of the Great Lakes. These claims were ceded to the United States at various times, with cessions to the lands north of the Ohio River completed by September 13, 1786.[1]

The delegates to the Continental Congress were keenly aware that one of the major factors in causing the Revolution against Great Britain had been the desire to utilize or speculate in these western lands, frustrated as it was by the British colonial policy of keeping these same lands as a source of furs for the Canadian based fur trade. Men and women from the seaboard were moving across the Appalachians even before the Treaty of Peace had been officially signed, and the sporadic forays of British-oriented Indians showed no signs of discouraging the westward movement. Colonists, fresh from success in a fight for freedom from colonialism, found themselves a colonial power faced with the task of governing their own colonies.

A plan for the "temporary government" of the "western territory" was adopted by the Continental Congress in April 1784,[2] but it never came into effect. It was not until July 13, 1787, that the delegates adopted "An Ordinance for the Government of the Territory of the United States north-west of the river Ohio," usually referred to as the Northwest Ordinance.[3]

The Ordinance set out a plan or scheme for governing the area, but it did not envisage that the territories to be carved from it were to remain indefinitely in a dependent position. On

1. States having claims to parts of the western area north of the Ohio River ceded their interests to the United States on the following dates:
   New York . . . . . March 1, 1781
   Virginia . . . . . March 1, 1784
   Massachusetts . . . April 19, 1785
   Connecticut . . . . . September 13, 1786
2. Journals of the Continental Congress, XXVI, 275
3. See 2 Carter ed., Territorial Papers of the United States 39-50

the contrary, the territorial status was viewed as a prelude to statehood and equality with the original states. In the interim period, however, certain guarantees were considered necessary. Among these are three provisions which have particular relevance in determining the extent to which the acts of the English or British parliament were to be considered in force within the area.

> . . . There shall also be appointed a court to consist of three judges any two of whom to form a court, who shall have a common law jurisdiction. . . .
>
> The governor and judges or a majority of them shall adopt and publish in the district such laws of the original states criminal and civil as may be necessary and best suited to the circumstances of the district. . . .
>
> * * * * *
>
> ARTICLE THE SECOND. The Inhabitants of the said territory shall always be entitled to the benefits of . . . judicial proceedings according to the course of the common law. . . . [4]

In 1795 the Governor and Judges of the Territory, acting in their legislative capacity, adopted the following statute, based on a Virginia act of 1776, which stated:

> The common law of England, all statutes or acts of the British 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) and also the several laws in force in this Territory, shall be the rule of decision. . . .[5]

In 1799 the General Assembly of the Territory, in acts dated November 15 and December 2, specifically repealed so much of the act of 1795 as referred to three particular English statutes

---

(1934) for the text as it appeared in the original Journals of the Continental Congress. See also 1 Stat. 51, footnote (a).

4. The Northwest Ordinance, see 2 Carter ed. supra note 3, at 42, made the following provision for the enactment of legislation:

> "The governor, and judges or a majority of them shall adopt and publish in the district such laws of the original states criminal and civil as may be necessary and best suited to the circumstances of the district and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit."

5. Illinois State Bar Association, Pease ed., Laws of the Northwest Territory, 1788-1800, 253 (1925). See also 1 Blume ed., Transactions of the Supreme Court of the Territory of Michigan 1805-1814, xxxii-xxxiii (1935). It should be recalled that while the Virginia statute of 1776 was "adopted" in the Northwest Territory in 1795, the Virginia General Assembly had repealed it in 1792.

— i.e., 37 Hen. 8, c. 9 (relating to usury); 13 Eliz., c. 8 (relating to usury); 43 Eliz., c. 6 (relating to the prevention of unnecessary suits at law).[6]

Indiana Territory was carved out of the Northwest Territory in 1800. The area included within the original territory was thereby reduced to the present state of Ohio and the eastern half of the lower peninsula of Michigan. In 1802 Ohio was admitted as a state and all of Michigan became part of Indiana Territory.[7] The first state constitution of Ohio provided:

> Sec. 4. Laws and parts of laws now in force in this Territory, not inconsistent with this constitution, shall continue and remain in full effect until repealed by the legislature, except so much of the act entitled "An act regulating the admission and practice of attorneys and counsellors at law," and of the act made amendatory thereto, as related to the term of time which the applicant shall have studied law, his residence within the Territory, and the term of time which he shall have practised as an attorney at law, before he can be admitted to the degree of counsellor at law.[8]

In 1805, the General Assembly repealed the Act of 1795 but passed the following statute:

> . . . the common law of England, all statutes or acts of the British 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, and also the several laws in force in this state, shall be the rule of decision and shall be considered as of full force, until repealed by the general assembly of this state.[9]

However, on January 2, 1806, the General Assembly proceeded to repeal so much of the 1805 act ". . . as declared the common law of England and the statutes or acts of the British Parliament made in aid of the common law, prior to the fourth year of the reign of King James the First, to be in force as the rule of decision in this state. . . ."[10]

Commenting on this statute, the state supreme court in 1848 stated:

> It is claimed that this statute [i.e., 32 Hen. 8, c. 34] relating to the

6. Illinois State Bar Association, Pease ed. 353, 401.

7. "An Act to enable the people of the eastern division of the territory northwest of the river Ohio to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States, and for other purposes," 2 Stat. 173.

8. Constitution of 1802, Schedule, Sec. 4. See 5 Thorpe ed., Federal and State Constitutions, Colonial Charters, and Other Organic Laws 2901 at 2912 (1909) [hereinafter cited as Thorpe].

9. Acts of the State of Ohio 248 (1805).

10. Acts of the State of Ohio 38 (1806).

rights of reversioners against lessees has become incorporated into the law of Ohio, not as a statute law, or by virtue of legislative jurisdiction, but as a part of the common law, which has been adopted as a body or system of law into the American code generally. That it is a part of the system, being in aid of the common law and not repugnant to our institutions, which is as operative in this State as in the English Courts.

It is not known to any of us that this precise question was ever before presented for the consideration of this Court.

In 1793 [sic] a statute was adopted from Virginia, declaring "that the common law of England and all statutes made in aid of the common law prior to the fourth year of James 1st which were of a general nature, should be a rule of decision until repealed, within the territory." 1 Chase, 190.

By the 2d section of the act passed Feb. 22, 1805, the above law was repealed, and by the first section of the same act it was re-enacted. (1 Chase, 512.) And again it was repealed January 2, 1806. (Chap. 122, 1 Chase, 528.) Since that date we can discover no legislation upon the subject. The adoption of the law from Virginia and the two enactments of 1805 and 1806 by implication, necessarily show that the British statutes never had any force in Ohio save that derived from their adoption by the Legislature. In all cases where the British statutes contravene or change the common law and are not so incorporated into it as to have become part and parcel of the system, it is supposed they have no force within this State independent of Legislative enactments adopting them.[11]

Indiana Territory — Indiana

"An Act to divide the territory of the United States northwest of the Ohio into two separate governments," approved May 7, 1800,[12] carved Indiana Territory out of the Northwest Territory. The organic act made no specific provision for continuing in force the laws of the prior territory, but in practice — despite some articulate dissent — the statutes of the Northwest Territory were considered as remaining in force until repealed or altered.[13]

11. Crawford v. Chapman, 17 O.S. 585, 590 (1885) where the court remarked: "During part of our territorial period and a portion of time under the state government, but not since 1806, English statutes not inapplicable to our circumstances and conditions, enacted prior to 4 James I., were in force in Ohio, but statute 29 Car. II. [c. 7] [relating to the observance of Sunday] was not among the English statutes which have been in force with us at any time. . . ."

12. 2 Stat. 58.

13. Letter, John Marshall, Secretary of State, to John Adams, President, August 26, 1800: "The opinion that the laws of the old territory do not operate in the new, whether well or ill founded. . . ." 7 Carter ed., Territorial Papers of the United States 18 (1934). See Illinois State Bar Association, Philbrick ed., Laws of Indiana Territory, 1801-1809, cii (1930). See also Laws Adopted by the Governor and Judges of the Indiana Territory at their First Sessions, held at Saint Vincennes, January 12th, 1800

Among the statutes so continued in effect was the act adopted in 1795 by the Governor and Judges of the Northwest Territory which had declared that the common law and certain English statutes enacted before 1607 should be the "rule of decision."[14] In 1799, the General Assembly of the Northwest Territory had specifically repealed so much of the Act of 1795 as referred to three particular English statutes.[15] Thus at the date of organization of Indiana Territory, the bulk of the English statutes enacted before 1607 "of a general nature, not local to that kingdom," were the "rule of decision" in the Northwest Territory and hence continued to occupy the same status in the newer territory.

For about two and a half years, between 1801 and 1803, another group of English statutes was in force in Indiana Territory. On January 22, 1801, the Governor and Judges of Indiana Territory adopted from the Kentucky and Virginia codes an act which placed in force "the several acts of parliament commonly called the statutes of jeofails, which were in force and use in England on the seventh day of February, one thousand seven hundred and fifty-two . . . .[16] This act, however, was repealed on September 26, 1803.[17]

(1802), reproduced in full in Illinois Bar Association, Philbrick ed., op. cit. 1 ff. The first law adopted is entitled "A Law supplemental to a law to regulate county levies. . ." A resolution was adopted repealing a specific portion of a law of the Northwest Territory regulating the admission and practice of attorneys. "An Act repealing certain laws and acts and parts of certain laws and acts. . ." specifically described the laws of the Northwest Territory which were no longer to be in force in Indiana Territory.

14. The first stage of government in the Indiana Territory, as in the Northwest Territory, placed in the Governor and judges the power to "adopt" such laws of the original states as they considered suitable. The statute adopted in 1795 for the Northwest Territory, originally a Virginia enactment of 1776, provided: "The common law of England, all statutes or acts of the British 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) and also the several law in force in this Territory, shall be the rule of decision. . . ." Illinois State Bar Association, Pease ed., Laws of the Northwest Territory, 1788-1800, 253 (1925). See also 1 Blume ed., Transactions of the Supreme Court of the Territory of Michigan 1805-1814, xxxii-xxxiii (1935).

15. Illinois State Bar Association, Pease ed., Laws of the Northwest Territory, 1788-1800, 353, 401 (1925). The specific acts so declared to be not in force were the following: 37 Hen. 8, c. 9 (relating to usury), 13 Eliz., c. 8 (relating to usury), and 43 Eliz., c. 6 (relating to perjury and the prevention of unnecessary suits at law).

16. Illinois State Bar Association, Philbrick ed., note 13 supra, at 7.

17. Id. at 64.

In 1807, the Territorial Legislature adopted a revision of the laws of Indiana Territory, specifically providing that these laws ". . . so revised, altered and amended shall with the Laws passed at this Session of the Legislature, be the only statute Laws in force in this territory."[18] Contained in this 1807 revision was the following act:

> The Common Law of England, all statutes or acts of the British Parliament, made in aid of the Common Law, prior to the fourth year of the reign of King James the first (excepting the second section of the sixth Chapter of forty-third Elizabeth [relating to the prevention of unnecessary suits at law], the 8th Chapter, thirteenth, Elizabeth [relating to usury], and 9th Chapter, thirty-seventh, Henry eight [relating to usury],) and which are of a general nature, not local to that kingdom; and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered, as of full force. . . .[19]

Indiana was admitted as a state by Congressional resolution, approved December 11, 1816.[20] The first constitution of Indiana provided:

> All laws and parts of laws now in force in this Territory, not inconsistent with this Constitution, shall continue and remain in full force and effect until they expire or be repealed. [21]

This provision was clarified by the General Assembly in "An Act declaring what Laws shall be in force," approved January 2, 1818, which stated:

> . . . the common law of England, all statutes or acts of the British parliament made in aid of the common law, prior to the fourth year of the reign of King James the first, excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter, thirteenth Elizabeth, and ninth chapter, thirty-seventh Henry eight, and which are of a general nature, not local to that kingdom, and not inconsistent with the laws of this state; and also, the several laws in force in this state shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority. [22]

The Revised Statutes of the State of Indiana (1838) declared this act to be in force.[23] The Statutes of Indiana, in force in 1962, contain a similar statute which provides:

18. Id. at 608.

19. Id. at 323. Note that these were the same statutes which the Northwest Territory had declared in 1799 were not in force. See note 15 supra.

20. 3 Stat. 399.

21. Constitution of 1816, Article 12 § 4. See 2 Thorpe 1057 at 1072 (1909).

22. Revised Laws of Indiana 256 (1824).

23. Revised Statutes of the State of Indiana 398 (1838).

The law governing this state is declared to be:

First. The Constitution of the United States and of this state.

Second. All statutes of the general assembly of the state in force, and not inconsistent with such constitutions.

Third. All statutes of the United States in force, and relating to subjects over which congress has power to legislate for the states, and not inconsistent with the Constitution of the United States.

Fourth. The common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth), and which are of the general nature, not local to that kingdom, and not inconsistent with the first, second and third specifications of this section.[24]

There are no published decisions during the territorial period. The published reports of the Indiana supreme court during the first decades of statehood make it clear that the common law[25] and English statutes enacted prior to 1607 were considered as

---

24. Annotated Indiana Statutes § 1-101 (1933) (1946 Replacement Volume).

25. See Fuller v. State, 1 Ind. 63 (1820); Platt and Another v. Eads, 1 Ind. 81 (1820). During the territorial period, provoked by the phrase in the Northwest Ordinance (in force in Indiana Territory by virtue of the Organic Act) which gave to the three federally-appointed judges "a common law jurisdiction," certain irritated residents of Indiana prepared a Memorial to Congress, which stated in part as follows:

"Your memorialists beg leave further to suggest the propriety and necessity of defining, with more precision, the duties of the judges appointed by virtue of the ordinance for the government of the Territory. The ordinance says there shall be a court to consist of three judges, who shall have a common law jurisdiction. . . it would be desirable that Congress would define the jurisdiction of the superior court. We presume that it is a sound rule for the construction of a constitution or a law, that it must be construed from the face of it, and not travel to the history of other times and other Governments in search of the meaning of our ordinance, or any act of Congress. We beg leave to suggest the propriety of pointing out, by law, what common law the ordinance refers to, whether the common law of England, or France, or of the Territory over which the ordinance is the constitution. If it should be determined that, by the expression of the ordinance, a common law jurisdiction should be located on the common law of England, it is essential to define to what extent of that common law the judges shall take cognizance; whether the whole extent of the feudal and gothic customs of England; whether the customs, or unwritten law shall be taken with the statute law, and that to form the common law to govern the judges; or whether the unwritten and statute law is to be taken in contradistinction to the laws, customs, and rules of chancery; or whether it includes that law which is common to all . . . ." Annals of Cong., 13th Cong. 3d Sess., cols. 400-401 (1814); 20 Indiana Historical Collections, Ewbank & Riker, eds., Laws of Indiana Territory 1809-1816, 809-810 (1934).

being in force.[26] This pattern has been continued, subject to statutory modifications or replacements.

Illinois Territory — Illinois

Illinois Territory was carved out of Indiana Territory by "An Act for dividing the Indiana Territory into two separate governments," approved February 3, 1809.[27] The organic act made

26. See Fite v. Doe, 1 Ind. 127 (1821); Hanna v. Pegg, 1 Ind. 181 (1822); Meek v. Ruffner, 2 Ind. 23 (1826). See also State ex rel. Bingham, Attorney-General v. Home Brewing Co., 182 Ind. 75, 105 N.E. 909 (1914), where the court stated:

"The common law of this State as it has always existed here by legislative adoption is the common law of England and English statutes of a general nature and not local to that kingdom, in aid thereof, as it was prior to the fourth year of the reign of James I (1607), with certain named exceptions and when not inconsistent with our State or Federal Constitutions, or statutes. It was first so adopted from Virginia by the governor and judges of the Northwest Territory and has since been so declared by subsequent legislative bodies of the state. . . But this provision of our law has not had the effect of making English statutes, passed subsequent to 1607, a part of the body of our law. Holloway v. Porter (1874), 46 Ind. 62. The law and practice of informations in the nature of quo warranto were not as comprehensive under the common law of that time as that embodied in our statutes on the subject as they are now and have been at least as far back as 1843. . . When the ancient writ of quo warranto was supplanted in English practice by informations in the nature of quo warranto, these informations were filed and exhibited by, and in the name of, the Attorney-General. . . Gradually the practice developed of allowing the master of the crown office. . . to exhibit information in the nature of quo warranto on the relation of private individuals to enforce certain of their rights in offices, franchises and the like. . . The vexatious and irresponsible character of this litigation led to the enactment of statutes 4 and 5, William and Mary, chapter 18, which required the private individual to enter into a recognizance in the sum of twenty pounds and obtain leave of the court before he could require the master of the crown office to file such an information on his relation. As this statute was enacted long after 1607 it is no part of the common law of Indiana. Thereafter, the practice in filing such informations on private relation was covered by the statute 9 Anne, chapter 20, enacted 1711. This statute is no part of the common law of Indiana, although it may doubtless have suggested our statute, and the information statutes of other states; but our statute goes further and covers the entire field embracing those public causes which the common law entrusted to the Attorney-General as well as the suits of a private interest which the statute of 9 Anne covered. That part of the law of England concerning informations in the nature of quo warranto which prevailed at the date of the settlement of Virginia does not contain any discoverable act of parliament, certainly not the statutes of William and Mary, or of Queen Anne. . . ."

27. 2 Stat. 514.

no provision for continuing in force the laws of the prior territory, but in 1812 the Illinois territorial legislature provided:

> . . . all the laws passed by the Legislature of the Indiana Territory which were in force on [3-1-1809] . . . in that Territory, that are of a general nature and not local to Indiana Territory and which are unrepealed by the laws passed by the Governor and Judges of the Illinois Territory are hereby declared to be in full force and effect in this Territory, and shall so remain until altered or repealed by the Legislature of this Territory. [28]

It will be recalled that the 1807 revision of the Indiana territorial laws had included the following act:

> The Common Law of England, all statutes or acts of the British Parliament, made in aid of the Common Law, prior to the fourth year of the reign of King James the first, (excepting the second section of the sixth Chapter of forty-third Elizabeth, the 8th Chapter, thirteenth, Elizabeth, and 9th Chapter, thirty-seventh, Henry eight,) and which are of a general nature, not local to that kingdom; and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered, as of full force. . . . [29]

Illinois was admitted as a state by Congressional resolution, approved December 3, 1818.[30] The first Illinois constitution of 1818 did not continue in force the laws then in effect. However, at the first session of the General Assembly of the state, efforts were made to supply this omission by the passage of "An Act declaring what laws are in force in this state," approved February 4, 1819, which provided in part:

> . . . the common law of England, all statutes or acts of the British Parliament made in aid of the common law prior to the fourth year of the reign of King James the I, excepting the second section of the sixth chapter of XLIII. Elizabeth [relating to the prevention of unnecessary suits at law]; the eighth chapter XIII. Elizabeth [relating to usury], and ninth chapter XXXVII. Henry VIII [relating to usury]; and which are of a general nature and not local to that Kingdom, shall be the rule of decision, and shall be considered as of full force, until repealed by legislative authority.[31]

---

28. "AN ACT Declaring what laws shall be in force," December 13, 1812. Illinois State Historical Library, Philbrick ed., Pope's Digest 34 (1938).

29. "An Act declaring what Laws shall be in force," September 17, 1807. Illinois State Bar Association, Philbrick ed., Laws of Indiana Territory, 1801-1809, 323 (1930).

30. "RESOLUTION declaring the admission of the state of Illinois into the Union," 3 Stat. 536.

31. Laws of Illinois, 1819, 1 (1819).

In 1845, this provision was changed to read:

> . . . the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.[32]

Under these provisions, the English statutes, falling within the specified categories, have been considered in force in Illinois, as illustrated by Plumleigh v. Cook, decided in 1852, where the opinion stated in part:

> It is insisted that an action of debt will not lie against a sheriff, for an escape on a writ of capias ad satisfaciendum. At common law the only remedy was by action on the case. But the statutes of Westminster 2, ch. 11, 13 Ed. 1, and 1 Rich. 2, ch. 12, gave an additional remedy by action of debt. And those statutes being in aid of the common law, are in full force in this State. Our statute not only adopts the common law of England, but also all statutes in aid thereof, passed prior to 4 James 1, (except the 2d sec. of the 6th ch. 43 Eliz., the 8th ch. 13 Eliz., and 9th ch. 37 Henry 8,) which are of a general nature and not local to that kingdom. Rev. St. ch. 62, § 1. Under a similar provision in Indiana, the British statutes giving the remedy by action of debt for an escape, were held to be in force in that State. Gwinn v. Hubbard, 3 Blackf. 14. Similar decisions were made in Shewel v. Fell, 3 Yeates, 17, and Steere v. Field, 2 Mason, 486. . . .[33]

Michigan Territory

(Wisconsin, Iowa, Minnesota, and Dakota Territories)

The Territory of Michigan was carved out of Indiana Territory by "An Act to divide the Indiana Territory into two separate governments," approved January 11, 1805.[34] No specific provision was made for continuing in force the laws of Indiana Territory. The available evidence indicates that prior to September 1806, the Governor and Judges "acted on the assumption that the laws

32. Revised Statutes of the State of Illinois, 1844-5, Ch. LXII, 337 (1845). Changes made in 1845 are indicated by underlining in the text. This statute is currently in effect. Illinois Revised Statutes, Ch. 28 § 1.

33. Plumleigh v. Cook, 13 Ill. 669 (1852). See also Shedd v. Patterson, 312 Ill. 371, 144 N.E. 5 (1924) where the statute of 4 Ed. 3, c. 7 (relating to the survival of actions) was held to be in force in Illinois.

34. 2 Stat. 309.

of Indiana Territory were not in force," but that in that month the three judges composing the territorial supreme court "held for the first time that the laws of Indiana Territory were in force in Michigan." [35]

When Indiana was carved out of the Northwest Territory, it was generally assumed that the laws of the older territory continued in force in the newly organized one. Such of these statutes as were not repealed by the legislative authority of Indiana, consisting of the governor and judges, remained in force in Michigan Territory. However, in Michigan they were referred to as the laws of Indiana and not of the Northwest Territory.

Among the statutes thus inherited by Michigan from the Northwest Territory was the statute of 1795, which declared the common law of England and certain English statutes to be in force in the Northwest Territory. This became in due course a law of Indiana Territory and as such continued in force in Michigan. The effect of this law was to continue in force in Michigan all English statutes of a general nature made in aid of the common law prior to 1607.[36]

On October 17, 1808,[37] Judge Augustus Brevoort Woodward laid before the governor and judges thirteen resolutions, the tenth of which stated:

WHEREAS, The variety of government and laws through which it has been the fate of this country successively to pass has had a tendency to introduce complexity, confusion, and distraction, therefore,

Resolved, That it is expedient to revise all the laws which have successively been in force in this Territory, and re-enact such of them as may be found necessary and suitable to its present circumstances, and that after such revision fully made, it will be expedient to provide that the continue [sic.; i.e. coutume], or common law of France, the ordinances of the government of France, the common law of England, or such parts thereof as have been found inexpedient, acts of the British parliament, the laws of the late Territory of the United States northwest of the river Ohio, and laws of the Territory of Indiana, excepting so far as it will be found desirable to re-enact them under the authority of this government, ought to cease to have operation.[38]

---

35. 1 Blume ed., Transactions of the Supreme Court of the Territory of Michigan 1805-1814, xxxvi-xxxvii (1935).

36. Id. at xxxviii.

37. Although the original manuscript bears a date of "Dec. 31, 1806" in a handwriting other than that of Judge Woodward, the internal evidence of the resolutions themselves indicates clearly that it is in error. Moreover, Hull himself stated that he had presented them to the legislature on October 17, 1808. 12 Michigan Pioneer Collections 466 (1887). See also 1 Blume ed., note 35 supra. at xxxix, n. 129.

38. 12 Michigan Pioneer Collections 464-5 (1887).

Reporting on this proposal, Governor Hull stated on December 23, 1808:

> The 10th resolution recommends a revision of the laws, and a compression of them into one code, at as early a period as possible, and is desirable to effect this object. The various governments, which it has been the fortune of the people, who inhabit this country, to be under, and the different laws to which they have been subjected, have created perplexities and embarrassments which it is desirable to remove. . . .[39]

Judge Woodward left the territory on October 18, 1808. He was gone for some months and in his absence forty-five acts, signed by the governor alone, were passed.[40] These statutes, known as the "Witherell Code" were in force for less than two years. Their importance arises from the fact they were intended to constitute a complete revision of the laws previously adopted in Michigan and to supersede the statutes of the older territories. Their enactment was coupled with "AN ACT repealing certain acts therein mentioned," signed by Hull on February 24, 1809, which repealed twenty specifically listed acts of the governor and judges of Michigan and then went on to state:

> And be it enacted, That all acts or laws adopted and published by the governor and judges, or by the legislative authority of the Northwestern Territory, or the Indiana Territory, shall, from and after the passing of this act, cease to have any force or operation within this Territory. . . .[41]

When Woodward returned to the territory, he was highly displeased at the enactment of the "Witherell Code." Eventually he was able to secure the repeal of the several statutes, on the ground that since they had been signed by the governor alone they were invalid.

Among the acts so repealed was the provision which declared the laws of the earlier territories to have no effect in Michigan, but the "Witherell Code" itself did not touch on the status of the common law or the English statutes. Woodward, however, saw to it that the statute which repealed the forty-five acts signed by the governor also repealed the Acts of Parliament and the coutume de Paris hitherto in force in the territory.

While Woodward himself may have intended to emulate Virginia in a codification of existing law, including the English statutes, coupled with a repeal of all existing law not so codified, this in

39. Id. at 466-7.
40. See 4 Laws of the Territory of Michigan 21-91 (1884).
41. Id. at 82-4.

fact was not done. Instead, Michigan reversed the order of every other jurisdiction which had repealed the English statutes in the course of codification. It was only after the legislatures of Virginia, New York, New Jersey, and Mississippi had codified or rewritten existing legislation and enacted as local statutes such English statutes as they wished to retain, that the English statutes were repealed. Michigan repealed first and then failed to follow through promptly on the re-enactment. The result was a serious gap in the territory's statute law which was not repaired until the completion of the Code of 1820.[42]

"AN ACT to repeal all acts of the Parliament of England, and of the Parliament of Great Britain, within the Territory of Michigan, and for other purposes," signed by Hull as governor and Woodward and Griffin as judges on September 16, 1810, stated in part:

> "Whereas the good people of the territory of Michigan, may be ensnared by ignorance of acts of the parliament of England, and acts of the parliament of Great Britain, which are not published among the laws of the territory, and it has been thought advisable by the governor and the judges of the territory of Michigan, hereafter specifically to enact such of the said acts as shall appear worthy of adoption,
>
> Be it therefore enacted. . . That no act of the parliament of England, and no act of the parliament of Great Britain, shall have any force within the territory of Michigan:. . . .
>
> Section 2. And whereas, the good people of the territory of Michigan, may be ensnared by ignorance of the laws of other governments under which this territory has heretofore been, that is to say, of the Coutume de Paris, or common law of France, the laws, acts, ordinances, arrests and decrees of the ancient kings of France, and the laws, acts, ordinances, arrests and decrees of the governors or other authority of the province of Canada and the province of Louisiana, under the ancient French crown, and of the governors, parliaments, or other authorities of the province of Canada particularly, under the British crown, which laws, acts, ordinances, arrests and decrees, do not exist of record, nor in manuscript or print in this country, and have never been formally repealed or annulled,
>
> Be it therefore enacted. . . That the Coutume de Paris, or ancient French common law, existing in this country, the laws, acts, ordinances, arrests and decrees of the governors or other authorities of the province of Canada, and the province of Louisiana, under the ancient French crown, and of the governors, parliaments or other authorities of the province of Canada generally, and of the province of Upper Canada particularly, under the British Crown, are hereby formally annulled, and the same shall be of no force within the territory of Michigan:. . . .

---

42. See Blume, "Legislation on the American Frontier," 60 Michigan Law Review 317 at 348-66 (1962). Pending a detailed analysis of the Code of 1820, it is impossible to state the extent to which it enacted British statutes as Michigan laws.

Section 3. And whereas, the good people of the territory of Michigan may be ensnared by ignorance of laws adopted and made by the governor and judges of the ancient territory of the United States north-west of the river Ohio, and of laws made by the general assembly of the said territory, and of laws adopted and made by the governor and the judges of the territory of Indiana, under all of which respective governments, this territory has heretofore been, and which said laws do not exist of record or in manuscript in this country, and are also out of print, as well as intermingled with a multiplicity of laws which do not concern or apply to this country, and therefore may not be expected to be reprinted in a body, and may not be expected to be selected and reprinted in a detached form without much uncertainty, delay and difficulty, and it has been thought advisable by the governor and the judges of the territory of Michigan, heretofore specially to re-enact such of the said laws as appeared worthy of adoption, and hereafter also to re-enact such of the said laws as shall appear worthy of adoption.

Be it therefore enacted. . . That the laws adopted and made by the governor and the judges of the territory of the United States north-west of the river Ohio, and the laws made by the general assembly of the said territory, and the laws adopted and made by the governor and judges of the territory of Indiana, shall be of no force within the territory of Michigan:. . . . [43]

This statute did not repudiate the common law of England or declare that it was not in force within the territory. In Chene v. Campau (1828) [44] the pivotal question was whether the particular cause of action died with the person or survived to the decedent's administrator. An opinion in the handwriting of Solomon Sibley, one of the three judges of the territorial supreme court, expressed the view that the common law rule had been modified by the statute of 4 Ed. 3, and hence in England since that time the maxim actio personalis moritur cum persona did not apply. The opinion went on to state that the common law in force in Michigan Territory was the common law in force in England at the time of the American Revolution. Sibley relied on the Ordinance of 1787, guaranteeing the inhabitants the "benefits. . . of judicial proceedings according to the course of the common law," as placing the common law in effect in Michigan Territory. He went on to declare that the statute of 4 Ed. 3 (relating to the survival of actions) was in force in the territory as a part of the common law in force at the time of the emigration from England to the colonies, stating in part:

The question then as applying to the present case, is, was the maxim of the Com. Law that Actio personalis moritur cum persona in force at

43. 1 Laws of the Territory of Michigan 900-02.

44. 1 Blume ed., Transactions of the Supreme Court of the Territory of Michigan 1825-1836, 82 (1940).

that period of time [at the time of the Declaration of Independence] in extensio or so far as to embrace the present action — would the Com. Law as acted on, at that day have warranted the admr to support the present action? — I apprehend It will not be contended but that the action might have been well maintained in England at that time and also at this time, But it is contended that the action in that Country was given by a statute, and that the operation of that statute was Local and confined to England — It is admitted that the statute altered the Com Law in that Country, and that the law continues there to this day so altered. —

The statute alluded to was past in the 4 year of Edwd the first, a period anterior to the colonizing of the present United States by Great Britain — How then, I would ask could it be brought into the Colonies, consistent with the doctrine that the Com— Law, in force in the mother Country, at the time of the emigration, is alone brought out and only so much thereof as is applicable to their convenience or necessities? —

Could they take with them any principle, as Law, which had ceased to be Law— I contend not— They could take nothing with them but the law of the land— They were compelled to draw from the Com. Law, as they found it settled at the time they used it— And I do not Consider it material, in what way the principles of the C. Law have been settled, whether by usages, custom, statute or Judicial decisions of Courts— In whatever mode a change has been accomplished, is in my view, so long as the change has been acquiesced in, a part of the Com. Law in a modified and improved state— Such alteration and improvement having been made in the maxim relied on, at the time the Com— Law was brought to bear on the rights and persons of this Territory as to take the Case out of the influence or operation of the maxim, I think the present case is not nor ought to be affected by it— [45]

No further cases dealing with English statutes appear in Transactions of the Supreme Court of the Territory of Michigan 1805-1836. A number of early Michigan state cases refer to the common law as being in force in the state,[46] but the earliest case located which deals with the status of English statutes was decided in 1861. In Trask v. Green the court referred to the act of 1810 as "expressly repealing all acts of the British parliament. . . ." [47] Perhaps the most widely known of the earlier Michigan cases dealing with this subject is In the Matter of Lamphere, decided in 1886, where the court stated:

. . . The relations of this commonwealth to the common law are not altogether conformed to the holdings of some other states. In many of the states, statutes of parliament passed before or during the early days

45. Id. at 305, 311-12.

46. E.g., Stout v. Keyes, 2 Doug. 184 (1845).

47. Trask v. Green, 9 Mich. 358, 365 (1861). See also Crane v. Reeder, 21 Mich. 24 (1870); Newark M.E. Church First Soc. v. Clark, 41 Mich. 730, 741, 3 N.W. 207 (1879); In the Matter of Lamphere, 61 Mich. 105, 108, 27 N.W. 882 (1886).

of the American colonies, as well as old colonial statutes and usages, have been construed and applied by the courts. But Michigan was never a common law colony, and while we have recognized the common law as adopted into our jurisprudence, it is the English common law, unaffected by statute.[48]

However, in 1939, the decision by Justice Potter in In re Sanderson seems to reflect the line of reasoning advanced by Judge Solomon Sibley eleven decades earlier. He stated in part:

> The common law was brought to this country by the English colonists who settled at Jamestown in 1607. What was brought was not only the common customary law of England, but the law as modified by English statutes of general operation up to that time, subject to some modifications not here important. . . .
>
> The ordinances of 1787, for the government of the territory northwest of the Ohio river, provided the inhabitants of the territory should always be entitled to judicial proceedings according to the course of the common law. Swan v. Williams, 2 Mich. 247. The common law, including the English statutes of general application, made the law of the Northwest Territory by the ordinance of 1787, continued to be the law of Michigan during the territorial period. . . .[49]

Despite these isolated references to English statutes in aid of the common law having been kept in force in Michigan, it seems impossible to avoid the conclusion that as a practical matter the act of 1810 was effective in preventing the use of English statutes by the Michigan courts.

The impact of the act, however, was not limited to the area included within the present state of Michigan. At its farthest extent, between 1834 and 1836, the Territory of Michigan extended westward to the Missouri and White Earth rivers, including all of the present states of Wisconsin, Minnesota, and Iowa and parts of North and South Dakota.[50]

When Congress carved out Wisconsin Territory in 1836, the organic act provided in part:

> . . . The existing laws of the Territory of Michigan shall be extended over said Territory [of Wisconsin], so far as the same shall not be incompatible with the provisions of this act, subject nevertheless, to be altered, modified, or repealed, by the Governor and Legislative Assembly of the said Territory of Wisconsin. . . .[51]

---

48. In the Matter of Lamphere, supra note 47.

49. In re Sanderson, 289 Mich. 165, 174-175, 286 N.W. 198 (1939). See also People v. Den Uyl, 320 Mich. 477, 486, 31 N.W. 2d 699 (1948) where the court stated that ". . . the principles of the habeas corpus act [31 Car. 2, c. 2 (1679)] have become a part of our common law. . . ."

50. 4 Stat. 701.

51. 5 Stat. 10.

Thus the act of 1810, providing that no English or British statute was to be in force in the Territory of Michigan, continued in effect in the newly organized territory.

However, in an act effective July 4, 1839, the Wisconsin territorial legislature repealed all the acts of the Territory of Michigan in force in the Wisconsin Territory on July 4, 1836. The legislature then went on to provide:

> None of the statutes of Great Britain shall be considered as law of this territory; nor shall they be deemed to have had any force or effect in this territory since the fourth day of July, 1816.[52]

In spite of the explicit language of this statute, in 1870 the state supreme court held that the statute 6 Anne, c. 31, §6 (relating to actions upon the accidental escape of fire) was in force in Wisconsin "as part of the common law of this state."[53]

Iowa Territory was carved out of Wisconsin Territory in 1838.[54] The organic act continued in force the laws then in force in Wisconsin subject to legislative modification or repeal. In 1840, Iowa repealed all the laws of Michigan and Wisconsin then in force, and, like Wisconsin, declared that "none of the statutes of Great Britain shall be considered as law of this territory."[55] However, the state supreme court in 1857, in O'Ferrall v. Simplot, held that as the statute in question specified statutes of Great

---

52. "An ACT to repeal the act herein mentioned," Statutes of the Territory of Wisconsin 1838-1839, 404-407 (1839).

53. Kellogg v. Chicago and Northwestern Ry. Co., 26 Wis. 223, 272 (1870). See also Spaulding v. Chicago and Northwestern Ry. Co., 30 Wis. 110, 116-118 (1872) where the same statute was held to be in force. Note the recent decision in In Re Budd's Estate, 11 Wis. 2d 248, 105 N.W.2d 358 (1960) where the court stated:

"The common law in this state is defined in Coburn v. Harvey, 1864, 18 Wis. 156, 162:

"'* * *When our territorial legislature and the framers of our constitution recognized the existence here of the common law, they must be held to have had reference to that law as it existed, modified and amended by English statutes passed prior to the [American] revolution.'

"In Menne v. City of Fond Du Lac, 1956, 273, Wis. 341, 345, 77 N.W. 2d 703, 705, this court stated:

"'The common law in effect at the time of the adoption of our state constitution is difficult of definition. We do not think it is confined to English statutes and the decisions of English courts * * * the term "common law" is broad enough to embrace customs and usages and legal maxims and principles in vogue at that time.'"

54. 5 Stat. 235.

55. "An Act to repeal the acts therein mentioned." Effective July 30, 1840. Laws of the Territory of Iowa 20, 21 (1840).

Britain, it did not apply to the English statutes, and hence the Statute of Merton, 20 Hen. 3, was in force in the state. [56]

---

56. O'Ferrall v. Simplot, 4 Iowa 381, 400-402 (1857). In Gardner v. Cole, 21 Iowa 205, 209-210 (1866), statutes of 13 Eliz., c. 4, relating to fraudulent conveyances, were held to be in force as "part of the unwritten law," i.e., statutes prior to 1607. See also McClure v. Dee, 115 Iowa 546, 549, 88 N.W. 1093 (1902) where the court stated that 3 & 4 Wm. & M., ch. 14 was "a part of the common law of this country. . . ."

In O'Ferrall v. Simplot, the court stated:

". . . the ordinance of 1787, for the government of the Northwest Territory, made it [i.e., the common law] the law of that country; and that was extended over Wisconsin, and then the laws of Wisconsin, over Iowa. And although the statutes of Michigan and Wisconsin were repealed in 1840, the ordinance of 1787 was not affected, but remained in full vigor as before. . . .

* * * *

". . . By the original common law, the doweress could not recover damages for the detention of her dower. This was remedied by the statute of Merton, 20 Hen. III, A.D. 1236. . . .

"It becomes, in some measure important, then to inquire what effect, if any, the statute of Merton has in this State. . . It is urged that this ancient statute can have no effect here, because of the enactment of the sixth section of the act of July 30, 1840 (Special Session, 1840, chap. 20, p. 20), which is, that 'none of the statutes of Great Britain shall be considered as law of this territory.' The enactment of this chapter, containing a repeal of the laws of Michigan and Wisconsin, as well as the above declaration in reference to the statutes of Great Britain, was then, and has ever since been considered of very doubtful wisdom, and of no less doubtful effect. It seemed to be taking a step in the dark. That act did not receive the approval of the governor of the territory . . . The lawyer can readily perceive that there was much reason for hesitation. The statutes of England, from time to time, modified and meliorated the common law to a considerable extent. . . In this view of them, these statutes were as much required by the people of America, as by those of the mother country. Many of them of a general character, and an enabling or remedial nature, have been adopted by the different states (even by the new western ones), either by express statute provision, or by re-enactment, or by judicial construction; the latter sometimes declaring them adopted, and sometimes considering them as become the common law of the state. . . And these remarks will justify us in saying, that we are not disposed to give the above named section, relating to the statutes of Great Britain, any greater effect than is necessary.

"Then the question is, whether the declaration of that section extends to the statutes of England. Great Britain is not the same with England, although it includes it. The greater part, if not all of those beneficial acts, which have been adopted into the laws of the American States, were enacted before the union with Scotland. The periods at which the English statutes have been held to cease operating upon American law have been different in different states.

"Some have stopped at the fourth of James I, which was about the period of the first emigration to this country; some have fixed the

Minnesota Territory was organized in 1849.[57] The organic act provided that ". . . the laws in force in the Territory of Wisconsin at the date of the admission of the State of Wisconsin [i.e., 1848] shall continue to be valid and operative therein. . . ." Thus the 1839 Wisconsin statute became part of the Minnesota laws, but despite this the Minnesota court in 1877, in Dutcher v. Culver, held that neither the 1810 Michigan statute nor the 1839 Wisconsin statute was "entitled to be considered as extending to such statutes as were amendatory of the common law."[58] Therefore, the court held 2 Wm. & M., c. 5 (relating to distraint for rent) to be in force in the state.

In its two years of greatest territorial extent, Michigan Territory had extended to the White Earth River, thus including parts of the area later organized as Dakota Territory. No case or statute has been located, however, either for Dakota Territory or for the states of North or South Dakota, which shows any inclination to consider English or British statutes in force.

---

epoch of our revolution; and some, if we mistake not, that of the revolution of 1688. The above act of 1840 may reasonably be considered as having prescribed the event of the union of the crown of England with that of Scotland, which was nearly contemporaneous with that of the English revolution, that having taken place in the year 1707. This is more reasonable than to regard that declaration as to the statutes of Great Britain, as synonymous with a like declaration in relation to the statutes of England, which would receive support from neither history, language, nor the principles of interpretation. We conclude, therefore, that the statute of Merton is not deprived of any effect by the foregoing declaration of the act of 1840. . . ."

57. 9 Stat. 403.

58. Dutcher v. Culver, 24 Minn. 584, 619-20 (1877).