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THE ADOPTION OF THE COMMON LAW BY THE AMERICAN COLONIES.

THE most casual student of the jurisprudence of the several states comprising the Federal Union will observe that our whole system is predicated upon a body of laws not found in any books published on this side of the Atlantic; and a consideration of our colonial history points to the quarter in which this basis of our laws is to be found.

In *State v. Campbell*, T. U. P. Charlton (Ga.) 166, we find the following remark: "When the American Colonies were first settled by our ancestors it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither as a birthright and inheritance so much of the common law as was applicable to their local situation, and change of circumstances." This is in accordance with what was said in 2 P. Wms. 75, where the following memorandum is found, "9th August 1722, it was said by the Master of the Rolls to have been determined by the Lords of the Privy Council upon an appeal to the King in council from the foreign plantations, 1st, that if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go they carry their laws with them, and, therefore, such new-found country is to be governed by the laws of England, though after such country is inhabited by the English, Acts of Parliament made in England

without naming the foreign plantations will not bind them." 1 Blackst. 107, recognises the same principle, but falls into the curious error of treating the American plantations as a conquered nation, having pre-existing laws of its own, and that, therefore, the common law has no allowance or authority there, being subject to the control of Parliament, though not bound by any Acts of Parliament unless particularly named. Chancellor KENT, 1 Com. 472, says, "The common law so far as it is applicable to our situation and government has been recognised and adopted as one entire system by the Constitutions of Massachusetts, New York, New Jersey and Maryland. It has been assumed by the courts of justice or declared by statute, with the like modifications, as the law of the land, in every state. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also the established doctrine that English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law constitute a part of the common law of this country."

Though these are correct statements of the general principle, the subject is of sufficient importance to merit a more extended discussion of the cases which have arisen in the application of the principle.

I. In the first place, it is to be noticed that the whole body of the common law, existing in England at the date of the settlement of the colonies, was not transplanted, but only so much as was applicable to the colonists in their new relations and conditions. Much of the common law related to matters which were purely local, which existed under the English political organization, or was based upon the triple relation of king, lords and commons, or those peculiar social conditions, habits and customs which have no counterpart in the New World. Such portions of the common law, not being applicable to the new conditions of the colonists, were never recognised as part of their jurisprudence.

But notwithstanding these exceptions, which are always admitted when a good reason is shown for so doing, the presumption in every case is, that the common law is the same in this country, as it was in the country of its origin, and the inapplicability of any particular portion of it must be shown before such portion will be excised from the whole body.

In *Wilford v. Grant*, Kirby's Rep. (Conn.) 114 (this is the ear-

liest volume of American reports), we have the following statement, "The common law of England we are to pay great deference to, as being a general system of improved reason, and a source from whence our principles of jurisprudence have been mostly drawn. The rules, however, which have not been made our own by adoption we are to examine, and so far vary from them as they may appear contrary to reason or unadapted to our local circumstances."

In *Powell v. Brandon*, 24 Miss. 343, the question was, whether the rule in *Shelley's Case* was a part of the law of Mississippi. In their opinion, the court showed no hesitation in declaring that it, as well as the whole body of the common law, was an integral part of their system saying, "The argument has been frequently urged by those who assign a feudal origin to the rule that inasmuch as the feudal system has been abolished the reason for the rule has ceased, and, therefore, the rule itself should be abrogated. However cogent this argument may be when addressed to the legislature, yet courts of justice cannot so far recognise its policy as to make it the basis of their decisions. Whenever a principle of the common law has been once clearly and unquestionably recognised and established, the courts of this country must enforce it, until it be repealed by the legislature, as long as there is a subject-matter for the principle to operate upon, and although the reason in the opinion of the court which induced its original establishment may have ceased to exist. This we conceive to be the established doctrine of the courts of this country in every state where the principles of the common law prevail. Were it otherwise the rules of law would be as fluctuating and unsettled as the opinions of the different judges administering them might happen to differ in relation to the existence of sufficient and valid reasons for maintaining and upholding them." In *Commonwealth v. Churchill*, 2 Metc. 123, all well-recognised maxims of the common law were declared to be a part of the law of Massachusetts, the court saying, "It is conceded to be a maxim of the common law applicable to the construction of statutes that the simple repeal of the repealing law not substituting other provisions in place of those repealed, revive the pre-existing law. As a maxim of the common law it was in force here, when the constitution of the Commonwealth was adopted. By that constitution it was declared that all the laws which have heretofore been adopted, used and approved in the colony, province or state of Massachusetts Bay, and usually practised on in the court of law, shall still

remain and be in full force until altered or repealed by the legislature. This constitution has been construed as adopting the great body of the common law with those statutes made before the emigration of our ancestors which were made in amendment of the common law, so far as these rules and principles were applicable to our condition and form of government." In *Penny v. Little*, 3 Scam. 301, Judge STEPHEN A. DOUGLASS recognised the landlord's common-law right of distress as part of the law of Illinois, in a case where the right to distrain was not expressly given in the lease. His words are worthy of quotation. "The common law is a beautiful system, containing the wisdom and experience of ages. Like the people it ruled and protected, it was simple and crude in its infancy and became enlarged, improved and polished as the nation advanced in civilization, virtue and intelligence. Adapting itself to the condition and circumstance of the people, and relying upon them for its administration, it necessarily improved as the condition of the people was elevated. Is it to be presumed then that our legislature, in adopting the common law of England, and the British statutes in its aid, prior to the Fourth of James I., intended to exclude all the improvements in the common law since that period? If we are to be restricted to the common law as it was enacted at 4 James I., rejecting all modifications and improvements which have since been made by practice and statutes, we will find that system entirely inapplicable to our present condition, for the simple reason that it is more than two hundred years old. The reason why 4 James I. was adopted instead of the Declaration of Independence was because that was the period of the establishment of the first colonial government, and with it the common law of England as it then existed. From that period we must look to American legislation and the reports of American courts for improvements and modifications in the common law."

Goodwin v. Thompson, 2 Greene (Iowa) 329, was an action to recover damages from the defendant for aiding and abetting the marriage of the plaintiff's minor daughter, a girl of the age of fourteen years. It appearing that there was no force, fraud or imposition used upon the girl, and that the marriage was her own voluntary act, it was held that the action could not be maintained, because, by the common law which was in force in Iowa, a female of the age of twelve years could give her consent to a marriage

contract, and the later English statutes requiring the consent of parents did not extend to this country.

Stout v. Keyes, 2 Doug. 184, was an action on the case by the purchaser of a defeasible estate for the malicious cutting of timber upon it by the defendant. It was admitted that such an action could be maintained at common law, but it was contended for the defendant that the common law was not in force in Michigan. Upon this question the court said "This is a somewhat startling proposition to be seriously urged at this time, when this court as well as the Circuit Courts have been adjudicating common-law actions upon common-law rules and principles since their organization under the state government, and also the territorial courts had done so previously, from the organization of the territorial government under the Act of Congress in 1787." To the same effect is *Barlow v. Lambert*, 28 Ala. 704, where the court said: "In *Cawood's Case*, 2 Stewart 360, this court held that under the second article of the ordinance of 1787, which was afterwards made the fundamental law of this territory, the common law of England so far as applicable was made a rule of action for our government, both in civil and criminal cases. By a series of decisions running through our entire judicial history, the above doctrine has been firmly established, and it must now be admitted that the common law qualified as above is part of the law of this state."

The *lex mercatoria* so far as incorporated into English law is recognised by the American courts. If it were otherwise the law relative to negotiable paper and the days of grace given for its payment would be thrown into indescribable confusion. This very question of whether days of grace are to be allowed was raised and fairly met in *Cook v. Renick*, 19 Ill. 598, where it was said, "The allowance of days of grace is a part of the *lex mercatoria*, and the real question to be considered is, whether that is a part of the common law and adopted with it, when the common law was adopted in this state. The law merchant first originated in customs among commercial men, who by common consent adopted such rules and regulations as they found the wants and necessities of commerce required, and as commerce was extended, it spread itself over the kingdom till it became as universal as any principle of the common law. At first the courts did not take judicial notice of it, but required proof to show what it was, when they would recognise and enforce it. Soon after, however, it began to insinuate itself into

the common law, by the courts taking judicial notice of it, till its fibres became so intimately interwoven with the body of the common law itself that no one could draw the line of demarcation between the two, and the common law ever improving and adapting itself to the requirements of commerce and the wants of the subject, finally by progressive judicial decisions, the law merchant, or at least that portion of it which was of universal application throughout the realm, was recognised by the courts without proof of its existence, and from that time forth became absorbed by and really constituted a part of the common law. The law-merchant then being a part of the common law of England and being of a general nature, and not local to that kingdom, is comprehended in that clause of our statute which adopts the common law." In *Piatt v. Eads*; 1 Blackf. 82, a similar conclusion was reached.

The criminal law of England is the basis of the criminal law of this country. In *Fuller v. State*, 1 Blackf. 66, it was held that an indictment for murder could be maintained in Indiana at common law, as well as upon their statute, and therefore that the fact of the indictment concluding *contra formam legis* instead of *contra formam statuti* was immaterial. In the same case the accused having been convicted endeavored to obtain "the benefit of clergy." But this claim was disposed of by the court in the following opinion: "The benefit of clergy never was properly a common-law privilege. It originated with that of sanctuary in the gloomy times of popery. It was the offspring of that absurd and superstitious veneration for a privileged order in society, which unfortunately existed in those ages of darkness when the persons of clergymen were considered sacred, and churchyards were viewed as consecrated ground. The statutes of England on the subject are local to that kingdom. They were not made in and of the common law, and are certainly not adopted as the laws of our country." This subject early came under the attention of the Pennsylvania courts, and in *Shewell v. Fell*, 3 Yeates 17, we find SHIPPEN, C. J., saying, "The common law and such of the statute laws of England as were enacted before the settlement of the late province, applicable to our local situation, have been adopted here both before and since the Revolution. They form part of our code, under certain modifications sanctioned by the judicial authority. The English decisions, however, do not universally comport with our circumstances. It is the province of the court to judge in what cases the rules of the

English common law should be relaxed. Should juries assume this power, the necessary consequence would be, that the utmost uncertainty must ensue from the fluctuating opinions of different sets of jurors in different countries."

A clearer comprehension of this branch of the subject, however, may be obtained by the consideration of the cases in which certain portions of the common law have been declared inapplicable to our conditions of society or general circumstances. In *Boyer v. Sweet*, 3 Scam. 120, book entries for goods sold and delivered, made by the plaintiff who kept no clerk, were admitted in evidence to charge the defendant, the court saying, "On the argument it was urged by the counsel for the defendant that, inasmuch as we have adopted the common law of England, we have adopted, likewise, all its uses, and that resort must be had to the decisions of the British courts to ascertain what is the rule in any given case wherein the legislature has not provided one. It is true, we have, like most other states in the union, adopted the common law by legislative act, but it must be understood only in cases where that law is applicable to the habits and conditions of our society, and in harmony with the genius, spirit and objects of our institutions. Generally, too, the decisions of these courts furnish strong evidence of what the common law is, but it is equally true, that they have made many innovations upon its original principles, and refining upon the adjudications of one another, many of them have become much modified or wholly changed. The courts of the several states have also taken advantage of its pliant nature, in which consists one of its greatest excellencies, and adapted it to the ever varying exigencies of the country and to the ever changing condition of society. Some rules of the common law suited to a highly refined and luxurious people, where every description of business is reduced to a system, and minute division of labor exists, may be very ill adapted to a community differently situated. There are some great leading principles, some fundamental rules which are never departed from, being founded in the common reason of every man, and which no change of his condition can alter." The same conclusion was reached in *Poultney v. Ross*, 1 Dall. 238. In *Lindsley v. Coats*, 1 Ohio 243, the question was whether a good title to land could be obtained by simple livery of seisin as at common law, without any deed or written muniment of title, and the court said, "It has been repeatedly deter-

mined by the courts of this state that they will adopt the principles of the common law as the rules of decision, so far only as these principles are adapted to our circumstances, state of society and form of government. In no instance have the ancient common-law modes of conveyance, as such, been adopted in this state, and long anterior to the settlement of this country they had given way to the comparatively modern mode of assurance by deeds of lease and release." Upon the subject of what are to be considered as navigable rivers, the English rule that only those were to be regarded as such in which the tide ebbed and flowed, was early disregarded in the Pennsylvania cases, as inapplicable to the great tideless streams which traverse vast extents of our territory: *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. 71. In *Morgan v. King*, 30 Barb. 9, there is a learned discussion of the same subject, the court holding that the Racket river was navigable, saying, "The principles of the common law, as its theory assumes, and its history proves, are not exclusively applicable or suited to our country or condition of society; but on the contrary, by reason of its property of expansibility and flexibility, their application to many is practicable. The adoption of the common law, in the most general terms by the government of any country, would not necessarily require or admit of an unqualified application of all its rules without regard to local circumstances, however well settled and generally received these rules might be. Its rules are modified upon its own principles, and not in violation of them. When it is said that we have in this country adopted the common law of England, it is not meant that we have adopted any mere formal rules or any written code, or the mere verbiage in which the common law is expressed. It is aptly termed the unwritten law of England, and we have adopted it as a constantly improving science, as an art or a system of legal logic, rather than as a code of rules. In short, in adopting the common law, we have adopted its fundamental principles and modes of reasoning, and the substance of its rules as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed." So, also, on the wide prairies of the West, the reason of the English rule that every owner of cattle is bound to keep them fenced in upon his own premises, was deemed to have ceased. The rule was, therefore, abandoned, and the doctrine enunciated, that if one desired to protect his crops from tres-

passing cattle, he must separate his field from the prairie where the cattle grazed at large. In *Wagner v. Bissell*, 3 Iowa 396, the court, after admitting that at common law the principle was well settled, said, "We are then led to inquire whether independent of any statutory provision, this rule is applicable to our condition and circumstances as a people, and if it is, then whether it has or has not been changed by legislative action. Unlike many of the states we have no statute declaring in express terms the common law to be in force in this state. That it is, however, has been frequently decided by this court, and does not, perhaps, admit of controversy. But while this is true, it must be understood, that it is adopted only so far as it is applicable to us as a people, and may be of a general nature." The reason of the inapplicability of the English rule is thus stated in *Seeley v. Peters*, 5 Gilman 150, "Admitting that at common law the owner of a close was not bound to fence against the adjoining close except by force of prescription, yet, in adopting the common law it must be understood only in cases where that law is applicable to the habits and condition of our society, and in harmony with the genius, spirit and objects of our institutions. However well the rule of the common law may be suited to a densely populated country like England, it is surely but ill-adapted to a new country like ours. The wide prairies and scarcity of timber are a sufficient reason for the non-existence of this rule. He who desires to protect his crops must fence them in himself." In *Norris v. Harris*, 15 Cal. 226, it was argued that, though the common law was incorporated into the common law of the original colonies, it was not part of the law of the western states. Mr. Justice FIELD (now of the Supreme Court of the United States), conclusively sets at rest this doubt in his opinion, saying, "There is no doubt that the common law is the basis of the laws of those states which were originally colonies of England, or carved out of such colonies. It was imported by the colonists and established so far as it was applicable to their institutions and circumstances, and was claimed by the Congress of the United Colonies in 1774 as a branch of those indubitable rights and liberties to which the respective colonies were entitled. In all the states thus having a common origin formed from colonies which constituted a part of the same empire, and which recognised the common law as the source of their jurisprudence, it must be presumed that such common law exists. A similar presumption

must prevail as to the existence of the common law in those states which have been established in territory acquired since the Revolution, where such territory was not at the time of its acquisition occupied by an organized and civilized community, where, in fact, the population of the new state upon the establishment of government was formed by emigration from the original states. As in British colonies established in uncultivated regions by emigration from the parent country, the subjects are considered as carrying with them the common law so far as it is applicable to their new situation. So, when American citizens emigrate into territory which is unoccupied by civilized man, and commence the formation of a new government, they are equally considered as carrying with them so much of the same common law in its modified and improved condition under the influence of modern civilization and republican principles, as is suited to their new condition and wants. But no such presumption can apply to states in which a government already existed at the time of their accession to the country, as Florida, Louisiana and Texas. They had already laws of their own, which remained in force until, by the proper authority, they were abrogated and new laws were promulgated. With them there is no more presumption of the existence of the common law than of any other law."

But though the jurisprudence of England, as administered through common-law forms, has been incorporated into the body of the American law without much dispute, the remedies enforced in the ecclesiastical courts were not so willingly accepted as within the jurisdiction of our purely secular courts, in a country where matters ecclesiastical are left entirely to church judicatories independent of the state. If, however, all these matters which in England at the time of the settlement of the American colonies were solely cognisable in the courts ecclesiastical, are not within the jurisdiction of our courts, many most flagrant civil injuries would be without a remedy. For in England, many matters purely civil in their nature are within the exclusive jurisdiction of the ecclesiastical courts. For example, all cases arising out of the contract of marriage, in consequence of the old view that this relation was of a purely religious character, were only cognisable in courts presided over by ecclesiastics. In America, where the contract of marriage is purely a civil contract, and where no ecclesiastical courts exist to take cognisance of such cases, breaches

of marital rights would be remediless if the ordinary civil courts had not jurisdiction of such causes. In many of the states, statutory enactments incorporating *in extenso* the main provisions of the English law, and designating the proper courts for the exercise of this jurisdiction, have removed all difficulty and confusion from the subject. But apart from these statutes, it has been decided that our civil courts have jurisdiction of cases in which rights of person or property are involved, which in England are solely within the jurisdiction of the ecclesiastical courts. In *Short v. Stotts*, 58 Ind. 29, there is a very interesting discussion of the struggle which took place in England between the courts of common law and the ecclesiastical courts for jurisdiction over cases arising out of the contract of marriage. The action was one for damages for breach of promise to marry. The defendant denied that the courts of common law in Indiana could take cognisance of such an action. His position, as stated in the opinion of the court, is as follows: "The only law governing this state is: 1. The Constitution of the United States and of this state; 2. All statutes of the General Assembly of the state in force and not inconsistent with such constitutions; 3. 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 U. S.; 4. 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 I., which are of a general nature and not local to that kingdom, * * * that as the sources of our law are as above stated, and as neither the common law of England nor any statute made in aid thereof prior to the period mentioned (1607), authorized such action, it follows we have no law which authorizes the action, * * * that prior to the year 1607, the contract for marriage was one exclusively of ecclesiastical and not of common-law jurisdiction, and that prior to that time, no action had been maintained in a common-law court for the breach of such contract." The court, in a very carefully considered opinion, sustain their jurisdiction over this action upon the ground that though prior to 1607 no case can be found in English common-law courts where the action was maintained, yet that by the principles of the common law which existed long anterior to 1607, an action for the breach of a contract for marriage will lie. In *Crump v. Morgan*, 3 Ired. Eq. 91, there is a very elaborate and learned discussion of the question

whether a court of equity, without statutory authority, could declare void the marriage of a female lunatic, which had been procured in order that the husband might obtain possession of her large estate. The decisions of English ecclesiastical courts having been cited in support of the jurisdiction, it was argued that they had no force in American civil courts. The court unhesitatingly disposed of the objection to the jurisdiction, saying: "It is said that these are the adjudications of ecclesiastical courts and are founded not in the common law, but in the canon and civil laws, and therefore not entitled to respect here. But it is an entire mistake to say that the canon and civil laws, as administered in the ecclesiastical courts of England, are not part of the common law. Blackstone, following Lord HALE, classes them among the unwritten laws of England, and as parts of the common law which by custom are adopted and used in peculiar jurisdictions. They were brought here by our ancestors as parts of the common law and have been adopted and used here in all cases to which they were applicable, and whenever there has been a tribunal exercising a jurisdiction to call for their use. They govern testamentary cases and matrimonial cases. Probate and re-probate of will stand upon the same grounds here as in England, unless so far as statutes may have altered it:" *Wightman v. Wightman*, 4 Johns. Ch. 343, repeated the same doctrine, and held further that where by statute jurisdiction is given to any particular court over matters either matrimonial or testamentary, the English law is still to be consulted as a guide in matters relating to the general subject, for which particular provision is not made in the statute. To the same effect is *Williamson v. Williamson*, 1 Johns. Ch. 489, where upon a libel for divorce for adultery, the question was whether the facts having been proved, the granting of a final decree dissolving the marriage was within the sound discretion of the court. The same learned judge said: "The statute says that after the truth of the adultery charged has been ascertained, 'it shall be lawful for the court to decree a dissolution of the marriage.' This language may and ought to be understood as leaving to the court the exercise of that sound discretion which the nature of the case and the principles of equity might require. The general rules of the English jurisprudence on this subject must be considered as applicable under the regulations of the statute to this newly-created branch of equity jurisdiction." This doctrine is still more strikingly ex-

emplified in *LeBarron v. LeBarron*, 35 Vt. 365, where in a proceeding for divorce by the wife for the alleged impotence of the husband, the petitioner asked for a physical examination of the respondent by medical experts. The application was resisted upon the ground that the statutes relating to divorce contained no provision for such an examination, but the court granted the application, POLAND, C. J., saying: "To enable us to determine this question, it becomes necessary to examine into the real source and extent of the jurisdiction of the court over this subject. The legal power to annul marriages has been recognised as existing in England from a very early period, but its administration, instead of being committed to the common-law courts, was exercised by their spiritual or ecclesiastical courts. Under the administration of these courts for a long period of time, the principles and practice governing this head of their jurisdiction ripened into a settled course and body of jurisprudence, like that of the courts of chancery and admiralty, and constituted with these systems a part of the general law of the realm, and in the broad and enlarged use of the term, a part of the common law of the land. This country having been settled by colonies from England under the general authority of the government, and remaining for many years a part of its dominion, became and remained subject and entitled to the general laws of the government, and they became equally the laws of this country, except so far as they were inapplicable to the new relation and condition of things. This we understand to be well settled, both by judicial decision and the authority of eminent law writers. But if this were not so, the adoption of the common law of England by the legislature of the state was an adoption of the whole body of the law of that country, aside from their parliamentary legislation, and included those principles of law administered by the courts of chancery and admiralty, and the ecclesiastical courts (so far as the same were applicable to our local situation and circumstances and not repugnant to our constitution and laws), as well as that portion of their laws administered by the ordinary and common tribunals. As the jurisdiction in cases matrimonial in England was exclusively committed to the spiritual courts, and had never been exercised by the ordinary law courts, the same could not be exercised by the courts of law in this country until it was vested in them by the law-making power. As we have never had any ecclesiastical

courts in this country who could execute this branch of the law, it was in abeyance until some tribunal was properly clothed with jurisdiction over it or vested in the legislature. It was probably on this ground that the legislatures of the states proceeded in granting divorces as many of them did in former times. When the legislature establish a tribunal to exercise this jurisdiction or invest it in any of the already established courts, such tribunal becomes entitled, and it is their duty to exercise it according to the general principles of the common law of the subject and the practice of the English courts so far as they are suited to our condition and the general spirit of our laws." The order for physical examination was granted. Similar orders upon similar grounds were granted in *Newell v. Newell*, 9 Paige 25, and in *Devanbagh v. Devanbagh*, 5 Id. 554.

It must be noticed, however, that in the federal courts a different rule has been adopted relating to criminal offences from that adopted in the state courts. In such matters the jurisdiction rests entirely upon the Constitution of the United States and Acts of Congress. This was early declared in *The United States v. Worral*, 2 Dall. 384, where Justice CHASE said: "It is attempted, however, to supply the silence of the Constitution and statutes of the Union by resorting to the common law for a definition and punishment of the offence which has been committed. But in my opinion the United States, as a federal government, have no common law, and consequently no indictment can be maintained in their courts for offences merely at the common law. If, indeed, the United States can be supposed for a moment to have a common law, it must, I presume, be that of England, and yet it is impossible to trace when or how the system was adopted or introduced. With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers as by the judges and lawyers of England, that they brought hither, as a birthright and inheritance, so much of the common law as was applicable to their local situation and change of circumstances. But each colony judged for itself what parts of the common law were applicable to its new condition, and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others. Hence, he who shall travel through the different states will soon discover that the whole of the common law of England

has been nowhere introduced; that some states have rejected what others have adopted, and that there is, in short, a great and essential diversity in the subjects to which the common law is applied as well as in the extent of its application." This conclusion that there is no federal common law in criminal cases has been followed in numerous cases to be found in the federal reports, the proper consideration of which would require a separate article.

Another important question is, how far are British statutes, passed before the settlement of this country, to be recognised as part of our common law. This subject was most carefully considered by the judges of the Supreme Court of Pennsylvania in 1807, whose report is found in the appendix to 3 Binney. Of this report Mr. Binney says: "In many respects it deserves to be placed by the side of judicial decisions, being the result of very great research and deliberation by the judges, and of their united opinion. It may not, perhaps, be considered as authoritative as judicial precedent, but it approaches so nearly to it that a safer guide in practice or a more respectable, not to say decisive, authority in argument cannot be wanted by the profession." In this report this general principle was stated, that such English statutes passed before the settlement of the colony as were applicable to the emigrants in their new situation were in force, but such statutes as related to the king's prerogative, the rights and privileges of the nobility and clergy, the local commerce and revenue of England, and other subjects unnecessary to enumerate, were improper to be extended to Pennsylvania. With respect to statutes enacted since the settlement of Pennsylvania, it was assumed as a principle that they do not extend here, unless they have been recognised by an Act of Assembly, or adopted by long continued practice in courts of justice. Of the latter description, there are very few, and those, it is supposed, were introduced from a sense of their evident utility. As English statutes they had no obligatory force, but from long practice they may be considered as incorporated with the law of our country. A similar report was prepared in Maryland by Chancellor KILBY in 1794. In Massachusetts the question was raised in *Sackett v. Sackett*, 8 Pick. 309, whether the Statute of Gloucester, 6 Edw. I., c. 5, giving an action of waste against tenants for life was in force in that state, or to be considered part of the common law of the land. PARKER, C. J., said: "Our ancestors came to this country, bringing with them, as all agree, the

rights and privileges of Englishmen and the common law of that country, so far as it should be found applicable to their new state and condition. They brought with them also a charter containing power to make such new laws as their exigencies might require. They could live under the old law or make new ones. Whenever they legislated upon any subject their own law regulated them; when they did not legislate, the law they brought with them was the rule of conduct. Then the question is, whether the law by which they would be governed in relation to waste committed by tenants was the ancient common law as it stood before the Statute of Marlebridge, or as modified by that statute, or the law which was in force in England at the time of their emigration, and for centuries before, and we think it very clear that it was the latter, it would seem exceedingly strange that their coming over to this country should operate as a repeal of either of these ancient statutes, so as to reinstate the law as it existed in the time of Henry III., which had been abrogated three or four centuries and was found inconvenient in the reign of that prince." The same doctrine was declared in *Bruce v. Wood*, 1 Metc. 542, where the court said, the Statute of 32 Henry VIII., c. 28, which gives the wife and her heirs a right of entry after the decease of her husband, having been passed before the emigration of our ancestors, must be taken to be a modification and amendment of the common law in force here. But all British statutes which are in conflict with our Constitution and laws, or with the general spirit of our institutions, are unhesitatingly disregarded by the American courts whenever any right is claimed dependent upon them. Such was the Statute of 9 George I., commonly known as the "Black Act," for the suppression of poaching. In *State v. Campbell*, T. U. P. Charlton 666, the Supreme Court of Georgia said: "That statute never could have been in force, because it, as is discoverable from the preamble and the context, is founded upon a tender solicitude for the amusement and property of the aristocracy of England. It was made to protect from the violation or profanation of the people the forest of his majesty or the park of the peer. How then could it apply to a country which was but one extended forest, in which the liberty of killing a deer or cutting down a tree was as unrestrained as the natural rights of the deer to rove or the tree to grow. In this view of the statute there was nothing left for its provisions to operate upon in this.

state. It was therefore a local statute, fit only for the internal polity of England."

It has been argued in some of the western states that whatever recognition may be given to British statutes in the states which have grown out of the original colonies, no place should be given to them in the virgin jurisprudence of the west. But this contention met with proper reprobation in *Hamilton v. Kneeland*, 1 Nevada 40, the court saying: "The rule of the common law that a condition cannot be reserved to any but the grantor and his heirs, I think has never been recognised as the law in this country, and it was completely overturned in England by the Statute 32 Henry VIII., c. 34, and in adopting the common law of England in this country it seems to be the established doctrine that it is adopted as amended or altered by English statutes in force at the time of the emigration of our colonial ancestors. But counsel argue that this doctrine embraces only the original states. The authorities recognise no such limitation, and upon principle there ought to be none. When the common law of England, consisting in part of statutes, as we have shown, has been adopted in the United States, why may not Americans, like the adventurous emigrants of other nationalities, carry with them the common law of their country into the territories acquired since the Revolution?"

The territorial legislature of Iowa, by the Act of 1840, provided that none of the statutes of Great Britain should be in force as part of the law of the territory, but in *O'Farrall v. Simplot*, 4 Iowa 381, this was interpreted so as only to apply to statutes of the United Kingdom, passed since the union with Scotland at the accession of James I. This period coincides very nearly with the date fixed by the constitutions and codes of many of the states, at which the country is reckoned to have been settled, and when the common law was transplanted from British to American soil. Nearly all the states which were formed out of what was formerly known as the Northwest Territory have fixed upon 4 James I., A. D. 1607, the year of the founding of Jamestown. The selection was natural, in view of the former intimate relations existing between Virginia and the Northwest Territory. Of course, the original colonies each take the date of their own settlement. But in *Coburn v. Harvey*, 18 Wis. 147, the year of our independence is taken as the date. This exceptional doctrine is justified upon the following grounds, stated in the opinion of the court: "The

Revolution, in the case of the western states, should be taken as the time of the emigration of our ancestors from whence the statutes work. Chancellor KENT states that it is the established doctrine that English statutes passed before the emigration of our ancestors in amendment of the law constituted a part of the common law of this country. The phrase 'emigration of our ancestors' is too indefinite to establish any fixed time which excluded subsequent English statutes from being considered a part of the common law of some at least of the colonies. For our ancestors did not all emigrate, nor were the colonies all established at any one time. And the reason given for adopting the common law with all the statutes amending it prior to a certain time, and excluding statutes passed afterwards unless expressly adopted, precludes the idea of fixing the same time for all the colonies. It is very obvious that in applying the general principle each colony would fix the beginning of its colonial existence as the dividing line between those English statutes which were and those which were not a part of its common law, and we have come to the conclusion that in applying the general rule to a state which like this had no political existence before the Revolution, it must, in harmony with the reasoning of these cases, be held that when our territorial legislature and the framers of our Constitution recognised 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 Revolution. As before shown, there was no one time applicable to all the colonies, and there is no reason to assume that we should adopt the commencement of one colony rather than another as the time applicable to us. The Revolution itself is the dividing line which the reasoning of these cases would suggest for us."

A judicial discussion of this question, however, has become unnecessary in most of the states organized since the Revolution, by the statutory provision before mentioned, fixing the year 1607 as the date. The jurisprudence of some of the western states can never be properly understood by one unmindful of their early settlement by non-English speaking nations. Therefore over a great portion of the Northwestern Territory, as well as the trans-Mississippi territories, the French or Spanish laws prevailed. Upon, however, the acquisition of these various territories, by statutory enactment, the former law was abolished and the common law substituted.

This is admitted in *Lyman v. Bennett*, 8 Mich. 18, where the court said: "It is undoubtedly true that at one time the Custom of Paris was in force here. It was expressly abrogated by the territorial legislature in 1810, and probably applied to very few cases then, if to any. Practically the common law has prevailed here in ordinary matters since our government took possession, and the country has grown up under it. How or by what particular means it originated would open an inquiry more curious than useful. A custom which is as old as the American settlements, and has been universally recognised by every department of government, has made it the law of the land if not made so otherwise. Our statutes, without this substratum, would not only fail to provide for the great mass of affairs, but would lack the means of safe construction. We are of opinion that questions of property not clearly excepted from it must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs." And in *Reaume v. Chambers*, 22 Mo. 36, it was said: "Prior to 1816 the Spanish law was the law of Missouri, then the common law was introduced by statute. After the introduction of the common law, the Spanish law no longer had any existence here. It has only been regarded in the interpretation of contracts which had been made before its abrogation, and on the adjustment of rights which had accrued prior to the introduction of the common law, just as we would look at this day to the laws of Spain in interpreting a contract which had been made in that kingdom." It must be always borne in mind, however, that the law of Louisiana is an exception to the general rule, and that the civil law introduced by the early settlers still remains the basis of the jurisprudence of that state.

The various courts of this country are constantly called upon to settle controversies whose determination is dependent upon the law of sister states. In such cases either party is at liberty to produce evidence of the law of another state upon any given subject by the oral testimony or deposition of those skilled in the profession; but in the absence of such testimony, it is important to notice that the presumption is that the common law exists in a sister state in the condition it was at the settlement of that state: *Thurston v. Percival*, 1 Pick. 415; *Brown v. Pratt*, 3 Jones, N. C. Eq. 202; *Inge v. Murphy*, 10 Ala. 885; *High's Appeal*, 2 Doug. 515; *Shepherd v. Nabors*, 6 Ala. 631; *Crouch v. Hall*, 15 Ill. 263.

It may be worth while to notice that this statement of the law differs from that sometimes made, that, in the absence of proof, the law of sister states will be presumed to be the same as the law of the forum. This is not so, because the common law of the forum may have been altered by statute, and there is no presumption that other states have passed statutes similar to those passed by the legislature of the state in which the action is brought. The true presumption is, that in the absence of proof to the contrary, the common law exists unaltered in a sister state.

But though the common law has been incorporated into the general system of our laws, it is within the power of the legislature to alter or amend it at their discretion. A contention to the contrary was disposed of in *Noonan v. State*, 1 Smedes & Marshall 562. "That the common law, like the common atmosphere around every living being, is gladly received by all framers of government, is certainly very true, but that it was adopted to remain perpetual, unaltered and unalterable, and not to be tempered to our habits, wants and customs, we conceive was never designed by the wisdom of those who established our fundamental law." The following quotation from the opinion of the court in *Marks v. Norris*, 4 Hen. & Munf. 465, may not be out of place as a concluding paragraph. "While I have not less respect for English judges and English opinions than other gentlemen, yet I have too much regard for myself, and the national character of my country, to rely upon English books further than for information merely, but not as authority; it was the common law we adopted and not English decisions, and we should take the standard of that law, namely, that we should live honestly, should hurt nobody, and should render to every one his due, for our judicial guide."

The following extracts from the codes of several of the states have an immediate bearing upon the subject under discussion:

Arkansas: Rev. Stat. 1874, sect. 772. "The common law of England, so far as the same is applicable and of a general nature, and all statutes of the British Parliament, in aid of or to supply the defects of the common law, made prior to the fourth year of James I., that are applicable to our form of government, of a general nature, and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the General Assembly of this state."

California : Act of April 13th 1850, Gen. Laws, p. 599. "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the state of California, shall be the rule of decision in all the courts of this state."

Illinois : Rev. Stat. 1874, ch 28, sect. 1. "That 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 or to supply the defects of the common law prior to the fourth year of James I., excepting the second section of the sixth chapter of 43 Elizabeth, the eighth chapter of 13 Elizabeth, and the ninth chapter of 37 Henry VIII., 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."

Indiana : Act of 31st May 1852, is in the same words as the Illinois act, *supra*.

Kansas : Rev. Stat. 1868, ch. 119, sect. 3. "The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people shall remain in force in aid of the general statutes of the state."

Missouri : Rev. Stat. 1870, ch. 86, sect. 1. "The common law of England and all statutes and Acts of Parliament made prior to the fourth year of the reign of James I., and which are of a general nature not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any law, custom or usage to the contrary notwithstanding."

Nebraska : Rev. Stat. 1873, sect. 1. "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, the constitution of this state or with any law passed or to be passed by the legislature thereof is adopted and declared to be the law within this state."

North Carolina : Code 1855, ch. 22. "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