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It is an interesting study to trace the development of law in the colonies of England which developed into the United States. That the colonists carried with them the rights of Englishmen, when they crossed the Atlantic, is one of the axioms of our constitutional history. What portion of the law of the mother country they carried with them has been somewhat disputed. The charter granted to Cecilius Calvert, Second Lord Baltimore, gave the settlers especial privileges, among them the right to preserve their English citizenship and to possess lands and other property in England, as though still resident there. They were also "frequently and peaceably to have and possess" "all privileges, franchises and liberties of this our kingdom of England," and to be permitted to use and enjoy them," in the same manner as those still in England. The laws and ordinances of the Province must be "agreeable to the laws, Statutes, customs and rights" of England.

The colonists themselves stated their understanding of the place of English Law in Maryland in the "Act for Rule of Judicature," passed in 1646. The words of the Act have the true ring, and we can feel sure that justice will be done by people who decree thus. "Right and just in all civil causes shall be determined according to the law or most General usage of the Province since its plantacon or former presid'ts of the same or the like nature to be determined by the Judge. And in defect of such Law usage or president, then right and just shall be determined according to equity and good conscience, not neglecting, so far as the Judge or Judges shall be informed thereof, and shall find no inconvenience in the application to this Province the rules by which right and just useth and ought to be determined in England in the same or the like cases. And all crimes and offenses shall be judged and determined according to the law of the Province, or in defect of certain Law, then they may be determined according to the best discretion of the Judge or Judges judging, as neer as conveniently may be to the laudable law or usage of England in the same or the like offenses. Provided that no person be adjudged of life member or freehold without law certain of the Province." (Md. Archives Assembly I, p. 147.)

The people of Maryland still claim in their State Constitution that they "are entitled to the common law of England, and

the trial by jury according to the course of that law, and to the benefit of such English Statues as existed on the Fourth day of July, 1776; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity." (Const. of 1867. Declaration of Rts. Art. 5.) The Constitutions adopted in 1851 and in 1864 contain the same provision, but the original Constitution of 1776 words it somewhat differently, claiming: "That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of the law, and to the benefit of such English Statutes as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, or Great Britain, and have been introduced, used and practiced by the courts of law or equity. (Dec. of Rts. Art. 3.)

It will be noted that the "common law is adopted in mass, so far at least, as it is not inconsistent with the principles" of the Constitution and the "nature of our political institutions." (Dashiell v. Atty. Gen., 5 H. and J. 401. This is the cause in which it was decided that the Statutes of Charitable Uses was not in force in Maryland.)

In regard to Statutes of England, the old Constitution made two classes which were to be in force: Those which "existed at the time" of the "first emigration, and which, by experience, have been found applicable," and those made later and "introduced, used and practiced by the Courts of Law and Equity." These classes were merged into one by the Constitution of 1851, as we have seen, but they were held to be quite different previous to that time. The Court of Appeals in 1822 held that the Bill of Rights "must be understood as adopting the different classes of the Statutes to which it relates *sub modo* only, and rejecting all others; and as laying down rules by which to ascertain what Statutes were so adopted—a different rule applying to each case. * * * As to the latter class, * * * none are in force but such as had, at the time of the Declaration of Rights, been introduced, used and practiced by the courts." A "different language" was "adopted in relation to them from that which was used in relation to the common law." The provision was not a "mere declaratory" one, but the framers declared the "inhabitants of the State to be entitled" to the benefit of certain classes of Statutes, with "the intention to prohibit the use of all such as had not by experience been found applicable." (Dashiell v. Atty. Gen., 5 H. and J. 402.)

It will be seen that the State thus claims for the Courts of Provincial Maryland a final decision as to the applicability of English Statutes. This position should be compared with Blackstone's well-known words on the colonies. To him there were "many and very great restrictions" to the propositions that "all the English laws then in being, which are the birthright of every subject, are immediately * * * in force in an uninhabited country," "discovered and planted by English subjects." "Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, * * * the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions are neither necessary nor convenient for them, and, therefore, are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council; the whole of their Constitution being also liable to be new modeled and reformed by the general superintending power of the Legislature in the mother country." (Commentaries I, 108.) This description would have been accepted by the early Marylanders, even though Blackstone himself might have been doubtful of its application to the Province. Blackstone regarded most of the American colonies as conquered countries, whither the common law and English Statutes would not extend, but the Maryland Court of Appeals, in 1821, took strong ground in opposition. In the opinion in the leading case of the State vs. Buchanan (5 H. and J. 356), the court said, "The Indians did not submit" to the colonists' "government, but withdrew themselves from the territory they acquired." The settlers "were, therefore, in the predicament of a people discovering and planting an uninhabited country; and as they brought with them all the rights and privileges of Englishmen, they, consequently, brought with them also, as their birthright, all the laws of England which were necessary to the preservation and protection of those rights and privileges." This common law is "nowhere to be found" in complete form, but "the evidences of it" are discovered in judicial decisions. The common law "in mass" was adopted by the State Constitution, "as it existed here, either potentially or

practically, and as it prevailed in England at the time, except such portions of it as are inconsistent with the spirit of this instrument, and the nature of our new political institutions." A concurring opinion by the chief judge, the learned Jeremiah T. Chase, stated the position of the State even more clearly (5 H. and J. 366, 367). "The common law of England, as it was understood at the time of the Declaration of Rights, was the law of Maryland and * * * it must be ascertained by the writing of learned men of the profession, by the judicial records, and adjudged cases of the court of England * * * I consider the adjudications of the courts of England, prior to the era of the independence of America, as authority to show what the common law of England was in the opinion of the judges of the tribunals of that country, and since that time, to be respected as the opinions of enlightened judges of the jurisprudence of England." There was no question in regard to the common law, as to whether it had ever been applied. The courts of justice might punish conspiracy, according to that law, although there had been no previous instance in Maryland of a charge of conspiracy. They determined whether "any particular parts of the common law are applicable to our local circumstances and situation and our general code of laws and jurisprudence." If the people did not like the judicial exposition of the common law, they could change that law through a legislative act. Such judicial decisions, the Court of Appeals said, whether made by English or Maryland courts, "must be received as expositions of the law as it before existed and not as creating a new law, or altering the old one." Nor are these decisions "expansions of the common law, which is a system of principles, not capable of expansion, but always existing, and attaching to whatever particular matter or circumstances may arise and come within this one or the other of them. * * * Precedents, therefore, do not constitute the common law, but serve only to illustrate principles."

Turning now from the common law to the Statutes of England, we find that the test of use is given, in order to discover whether they are in force. They must not only be applicable, but must have been "found applicable" or have been "introduced, used, and practiced in the courts." The General Court, in 1802, assigned as one reason for a decision, that "the writ of novel disseisin" should not be granted, that "the court know of no instance in this State in which the tenant by elegit has brought the writ of assize of novel disseisin to recover his possession." "And it does not appear to the court there can be

any other safe criterion by which the applicability" of "English Statutes which passed anterior to the first emigration of the inhabitants of Maryland" to "our local and other circumstances can be ascertained and established, but that of having been used and practiced under in this State." (Whittington vs. Polk, 1 H. and J. 250.) This was the first Maryland decision in which a Statute of the State was declared unconstitutional. The same court, which was not the highest in the State, in another decision rendered during the same year (Pancoast vs. Addison, 1 H. and J. 356) held that the Statute of 32 Henry VIII, ch. 2, § 2 (Kilty's Report, p. 74) does "not extend to the State of Maryland, the court not knowing of any judicial decision by which the same has been adopted and introduced into this State as the law thereof." (The disputed question was one of limitations.) This rule of the General Court seems to have been held too narrow by the Court of Appeals (Dashiell vs. Atty. Gen., 5 H. and J. 402) and the learned McMahon disputes its validity, saying, "There were many Statutes of such a character, that they might have been used and practiced under in the Province without the intervention of courts of justice; and such use would manifestly be a part of the experience of the colony. Judicial decisions are merely the evidence of its experience." (History of Md., p. 129.)

He well distinguishes "the experience of the colony," consisting of "use and practice generally," from "use and practice in the courts." The former was the test of the applicability of Statutes passed before the settlement of the Province, the latter, that of the Statutes passed between 1632 and 1776. Kilty, in his Report (p. VII) uses this distinction and criticises the General Court. He says: "It must be observed, that many Statutes relating to rights and rules of property have been tacitly and without contest acquiesced in, and that many have been used and practiced under without the sanction of any express decision of the courts."

In addition to these two classes of British Statutes, there were two other classes in force in Maryland, namely, those which were "enacted expressly for the colonies or expressly extended to them" and those which were expressly adopted by the General Assembly (Kilty Report, p. VI, McMahon History, p. 131). There was no difficulty, of course, as to which Statutes were expressly introduced, but as to the two classes referred to in the Bill of Rights, there was "considerable uncertainty." It was felt that it was unfortunate "that the question as to the applicability of English Statutes" should rest "upon the

general tests of the Bill of Rights, without a full and definite ascertainment of the Statutes falling within the operation of those tests." (McMahon, p. 129.) As a result, the General Assembly at its November session, in 1794, passed a resolution referring the question to the Chancellor, the Judges of the General Court, and the Attorney General, directing them to report the several Statutes which fell within the two classes covered by the provision in the Bill of Rights. (See Alexander's "British Statutes in Force in Maryland," p. VI.) Nothing was done under this resolution, but a similar one passed at the November session of 1809 was to have greater effect. Then the Chancellor and the Judges of the Court of Appeals were appointed a commission to report to the General Assembly all such parts of the English Statutes as were proper to be introduced and incorporated into the body of the Statute law of the State.

William Kilty, a most erudite jurist, was then Chancellor, and the entire burden of the work fell on him. At the next annual session of the Legislature he presented his report. For some reason it was not adopted, and the only action taken by the Assembly was that one thousand copies of the Report should be printed. With remarkable labor and skill, Kilty had searched the early judicial records of Maryland. His Report contained far more than had been demanded of him. Not only did he report the titles of the "Statutes and parts of Statutes which have been found applicable and are proper to be incorporated into the body of the Statute Law of this State," but, "for the purpose of enabling the Assembly to judge in the fullest manner as to the correctness of these selections," he "added lists of the Statutes which have not been found applicable to the circumstances of the people, so as to comprise the whole of the Statutes from Magna Charta to the 13th George 3, in 1773." (This boast was not fully carried out.) In most cases, he gave a reason for his decision as to each Statute, and he carefully excepted from the list of those "proper to be incorporated" into Maryland law, those "which have been found applicable, but are not proper to be introduced and incorporated into the body of the Statute Law of this State." These were mainly those Statutes whose existence depended on the connection with Great Britain, or on a monarchical form of government, or which were contrary to laws subsequently passed by the General Assembly, or to the relation of the State to the Federal Union. For these reasons we find that laws against piracy, the testamentary law of England, the Habeas Corpus Act, the Act of Succession, the Navigation Acts, and the

Toleration Acts are included in this class. The changed conditions of thought might also induce him to place acts in this class, as when he said of 9 George 2, ch. 5, against witchcraft, "This Statute is not necessary to be incorporated in the present state of society and under our Constitution * * *; no persons now being so absurd as to pretend to exercise such witchcraft." In all, Kilty found one hundred and ninety-one Statutes applicable and proper to be incorporated. The rule by which he determined that a Statute had not been found applicable was, undoubtedly, a rather vague one. For instance, he said of 34 Ed. III, ch. 8: "I have not found in the records of the provincial court any case of a prosecution under this Statute, or the others on the same subject, and as the offense is punishable at common law, there was the less necessity for their extension." Sometimes, as with reference to 2 Rich. 2, Stat. 1, ch. 51, Kilty seems to have thought the act had been used occasionally in the Province, but still was not applicable. Other Statutes had expired, were obsolete, were local, never extended to the Province. Statutes which had been held applicable in other colonies were not always thought by Kilty to have been in force in Maryland. The famous provision of 3 Ed. 1, Ch. 12, inflicting the *peine forte et dure* on prisoners standing mute, was disregarded in Maryland, though accepted in Massachusetts.

In order to save space, Kilty gave the heads of Statutes not applicable to the Province from the year 1360, instead of submitting the full titles. From the year 1461, he omitted such Statutes as were not contained in Cay's abridgment. The list of Statutes found inapplicable closes with 1760.

The existence of Kilty's report and the habit of referring to it by lawyers may have been one reason why the Constitution of 1851, changed the provision of the Bill of Rights and consolidated the two classes of the old clause into one. The preamble of the resolution of 1794 (Alexander British Statutes, p VI) declared that "in a free government all legislative acts, which respect the lives, liberties and estates of the people ought to be published and a knowledge of them diffused generally throughout the State." Though the text of the Statutes "found applicable and proper to be incorporated" by Kilty had not been separately published and though his work was not adopted by the Legislature, it was "received and respected" by the courts "as the repository" of English Statutes in force in Maryland, and was regarded by them as almost "an authoritative guide" (McMahon's History, p. 130). For instance, the Court of Appeals said in an important case, "The

only evidence" as to the applicability of early English Statutes "is furnished by Kilty's Report." "That book was compiled, printed, and distributed, under the sanction of the State for the use of its officers and is a safe guide in exploring an otherwise very dubious path." So the court declared the Statute of 43 Elizabeth concerning charitable uses not to be in force in Maryland, largely because Kilty had said it was not "found applicable" (Dashiell v. Atty. Gen., 5 H. and J. 403). This case did not stand alone. In Koones v. Maddox (2 H. and G. 107) the appellant's attorney was successful in winning his suit, establishing the fact that the English Statute on which he relied, obtained in the State, as it was classified by Kilty as one "found applicable."

The fact that Kilty did not regard a Statute as "applicable" did not of course preclude a court from having a different view. So the act of 4 and 5 William and Mary, ch. 24, was declared to be in force by the Court of Appeals (Sibley v. Williams, 3 G. and J. 63), though Kilty thought otherwise. The court said: "So far as regards that part of this Statute which relates to the subject under consideration, we apprehend the compiler was in error." The court added "there can be little doubt but that these Statutes (*i. e.*, the one quoted and 30 Ch. 11, ch. 7) were in force in this State. They concerned the administration of justice and it has always been understood that the judges under the old government laid it down as a general rule that all Statutes for the administration of justice, whether made before or after the charter, so far as they were applicable, should be adopted."

With regard to another Statute (9 and 10 William 111, ch. 15) the Court of Appeals overruled Kilty's opinion, without even referring to him (Shriver v. State, 9 G. and J. 11), and merely spoke of "this Statute, which we hold was received and adopted here," Kilty (Report p. 181) had admitted that the Statute had been used in provincial days (West v. Stigar, 1 H. and McH. 247), but held that it was "not proper to be incorporated," as an act of the State Legislature had superseded it.

These seem to have been the only two instances in which Kilty's opinion has been overruled. In reference to a third Statute (1 Rich. 111, ch. 1), not found applicable by the Chancellor, the Court of Appeals entertained certain doubts (Matthews v. Ward, 10 G. and J. 455). The Statute whose adoption was claimed "was confined by its terms to uses. It may be therefore doubted whether it applied to modern trusts and it is questionable whether it is in force in the State." The court does not seem to have pressed the question and the Statute has been referred to in no other case. We find, therefore, that in

only two cases, and these occurring in the first thirty years after the publication of the Report, were additional Statutes decided to have been found applicable, and that, in no case, was one found applicable by Kilty taken out of the list by the Court of Appeals.

In spite of the mass of new legislation, it was found that frequent reference was necessary to the English Statutes in force in the State, and in 1870, sixty years after Kilty's report, Julian J. Alexander, Esq., of the Baltimore Bar, published "A Collection of the British Statutes in force in Maryland, according to the report thereof made to the General Assembly by the late Chancellor Kilty, with notes and references to the Acts of Assembly and the Code and to the principal English and Maryland cases." This stout octavo volume of 847 pages has its purpose and accomplishment fully indicated in its title. It contains a complete text of those provisions of English Statute law "found applicable and proper to be incorporated" by Kilty, and to each Statute are appended erudite notes, often of considerable length. The most extensive ones, those on the Statute of Frauds, cover over forty-eight closely printed pages. With the publication of Alexander's "British Statutes," our story is ended. Though no official adoption of the book has ever been made, it is fairly certain that within its covers is the text of all the English Statute law in force in Maryland when Kilty's Report was made.

We have touched on only one side of the subject. The long and exciting struggle made by the colonists to secure the right of the initiative in legislation for the provincial assembly instead of for the proprietary, and to secure for themselves the protection of the common law and the extension of English Statutes, is a most interesting one. In that conflict with the proprietary which lasted for a century, the provincials were successful and obtained their aims. Another most useful chapter in our subject is the one which should trace the method in which the Provincial Court from the earliest days of proprietary rule, applied the common law and Statutes of England. We should see how the early acts "for Rule of Judicature" were followed.

Such topics, however, are far too large to be joined in one brief article with the one we have discussed. We can see that the Marylanders in throwing off the allegiance owed to Great Britain were following with consistency the course of the earliest settlers, when they cling to the "laudable law" of England.

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