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NOTE

ENGLISH COMMON LAW AND INDIANA JURISPRUDENCE

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INTRODUCTION

More than two hundred years ago, the Northwest Territory, which was comprised of present day Indiana, Wisconsin, Illinois, Ohio, and parts of Michigan and Minnesota, adopted a reception statute which brought elements of the English common law into the decisional case law of the Territory.[1] This statute was substantially similar to a provision passed by the General Convention of Virginia Representatives and Delegates in 1776,[2] which adopted portions of the English common law as well as statutes passed prior to 1607 in furtherance of the common law.[3] The act, and those like it, are known as common law reception statutes.

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1. Act of July 14, 1795, ch. 46, 1795 Northwest Terr. Laws 191. Short v. Stotts, 58 Ind. 29, 31-32 (1877); Stevenson v. Cloud, 5 Blackf. 92, 93 (Ind. 1839).

2.

> And be it further ordained, that the common law of England, all statutes and acts of Parliament made in aid of the common law prior to the fourth year of the reign of King *James* the first [1607], and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations and resolutions of the General Convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.

Virginia General Convention Ordinance of May 6, 1776, ch. 5, § 6, 1776 Va. Colony Laws 33, 37.

In 1792, the Virginia General Assembly readopted this ordinance. Act of Dec. 28, 1792, ch. 28, 1792 Va. Acts 85. At present, Virginia adopts the English common law as the rules of decision in Virginia courts except where the common law is inconsistent with the bill of rights, the Virginia Constitution and acts of the Virginia General Assembly. VA. CODE ANN. § 1-10 (Michie 1995). Virginia also "saves" English statutes "insofar as [they] are consistent with the Bill of Rights and the [Virginia] . . . Constitution and the Acts of the Assembly." *Id.* § 1-11.

3. Virginia had first given legislative recognition to the English common law in 1662. Preamble, 1661-62, Virginia Colony Session Laws, 1661 Va. Colony Laws 1, 1-2. The 1795 law of the Northwest Territory created some controversy. There was some doubt concerning its validity. This was in part because the Northwest Ordinance of 1787 only allowed the governor and judges

Variations of these statutes are in force of many states.[4]

The first part of this Article traces the background of Indiana's common law reception statute from its roots in the Northwest Territory to its present day embodiment. The second part examines the reasons for its adoption and explores the circumstances in which it was readopted. The third section examines the gap-filling application of the statute to areas of law not covered by existing law and its use as a source of equity jurisdiction, development of law merchant and conflict of laws. Finally, the fourth section examines contemporary uses of the reception statute by the Indiana Supreme Court, which has been increasingly willing to entertain arguments based on singularly Indiana documents such as the Indiana Constitution and, in one notable case, the common law of England.

I. BACKGROUND

The significance of adopting the English common law into the decisional law of Indiana is twofold. First, the English common law provides Indiana with a broad body of substantive law drawn from generations of human experience on the British Isles. As Justice Shake observed in *Helms v. American Security Co. of*

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of the Territory to adopt laws (i.e., laws in force as of the date of adoption) of the original states. The editor states that the Virginia statute as adopted by the Northwest had ceased to be in force in Virginia in 1792. LAWS OF THE NORTHWEST TERRITORY 1791-1802, at 191 (Cincinnati, n.p. 1833). This would have made the 1795 law void.

The law in Virginia as it relates to English statutes did change. The Virginia Convention ordinance received the English statues enacted prior to 1607 and gave them the force of law *until* they were altered by the legislature. Later Virginia statutes demonstrated a slight change. English statutes enacted prior to 1607 would be saved (i.e., brought into the law of Virginia) *only* if they were not inconsistent with the bill of rights, state constitution or acts of the general assembly. VA. CODE tit. 9, ch. 16, § 2 (Ritchie, Dunnavant & Co. 1860). *See also* Scott v. Lunt, 32 U.S. (7 Pet.) 596, 604 (1833) (stating that Virginia law as of 1819 was similar to law in 1776). *See also* Francis S. Philbrick, THE LAWS OF INDIANA TERRITORY ci (Francis S. Philbrick ed., Historical Bureau of the Indiana Library and Historical Department 1931); Earl D. Bragdon, The Influence of the Virginia Code on the Development of the Laws of Indiana Territory 1800-1816 (1956) (unpublished M.A. thesis, Indiana University) (on file with Indiana University School of Law—Bloomington).

4. MD. CONST. art. 5; ALA. CODE § 1-3-1 (1977); ARK. CODE ANN. § 1-2-119 (Michie 1996); CAL. CIV. CODE § 22.2 (West 1982); COLO. REV. STAT. ANN. § 2-4-211 (West 1989); FLA. STAT. ANN. § 2.1; GA. CODE ANN. § 1-1-10(c)(1) (1990); HAW. REV. STAT. ANN. § 1-1 (Michie 1995); IDAHO CODE § 73-116 (1989); ILL. COMP. STAT. ANN. 5/50-1 (West 1993); MO. REV. STAT. § 1.010 (West 1969); MONT. CODE ANN. § 1-1-109 (1995); NEV. REV. STAT. ANN. § 1.030 (Michie 1989); N.Y. STAT. § 4 (McKinney 1971); 1 PA. CONS. STAT. ANN. § 1503 (West 1995); R.I. GEN. LAWS § 43-3-1 (1995); S.C. CODE ANN. § 14-1-50 (1977); TEX. CIV. PRAC. & REM. § 5.001 (West, WESTLAW through end of 1995 Reg. Sess.); UTAH CODE ANN. § 68-3-1 (1996); VT. STAT. ANN. tit. 1, § 271 (1996); W. VA. CODE § 2-1-1 (1994); WYO. STAT. ANN. § 8-1-101 (1989).

Another method for receiving the English common law into a jurisdiction is by judicial decision. *See, e.g.*, State v. Twogood, 7 Iowa 252, 253-54 (1858).

Indiana, Inc.,[5] "[t]he common law of the land is based upon human experience in the unceasing effort of an enlightened people to ascertain what is right and just between men."[6] Although the early law of England and Indiana changed significantly over time, English common law, whatever its faults, provided early Indiana judges and practitioners a baseline from which to build the jurisprudence of a new sovereign. As a practical matter, English common law, which is often reduced to the four volume Blackstone's Commentaries as a convenient shorthand, was also far more accessible than any other source of law. In the early nineteenth century, systematic reporting of appellate court decisions and the well-stocked courthouse library had yet to be developed.[7]

Second, adoption of the common law reception statute is significant because it initiated a common law judiciary in Indiana. Neither Indiana nor the Northwest Territory was required to adopt a common law system. Instead of incorporating the common law of England, the Indiana Territory could have adopted a civil law system derived from non-British sources, such as the Napoleonic Code or Roman Law. Early Hoosier lawmakers could have taken an entirely different approach and allowed the courts to find their own common law in the Indiana wilderness. It was not a forgone conclusion that Indiana would adopt the English common law. The Virgin Islands provides an interesting example. The Virgin Islands were a Danish Territory until 1917.[8] Under Danish sovereignty, the Virgin Islands received Danish statutory and common law.[9] After cession to the United States, Danish law continued until 1921,[10] when the Islands adopted a statute receiving the English common law.[11] Currently, the rules of decision in courts of the Virgin Islands are found in "the restatements of the law [as] approved by the American Law Institute, . . . as generally understood and applied in the United States . . . ."[12] Danish law still survives to some extent, particularly in the area of property relationships.[13]

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5. 22 N.E.2d 822 (Ind. 1939).

6. *Id.* at 824 (citing Kansas v. Colorado, 206 U.S. 46 (1907)).

7. The Honorable Oliver H. Smith writes about his first fee as an attorney in Versailles, Indiana, for a case involving one neighbor boring a hole into the sugar tree of another. The aggrieved neighbor consults with young Mr. Smith. Smith relates that the case was a "plain case of *trespass quare clausum fregit*, as my Blackstone told me." OLIVER H. SMITH, EARLY INDIANA TRIALS AND SKETCHES 10 (Cincinnati, Moore, Wilstach, Keys & Co. 1858).

8. Treaty on the Cession of the Danish West Indies, Jan. 17, 1917, U.S.-Denmark, 39 Stat. 1706.

9. "The Common and Statute Law of Denmark shall as hitherto be applicable in the colonies, as more accurately defined by Laws and Ordinances." Colonial Law of Apr. 6, 1906, § 67, *in* VIRGIN ISLANDS CODE ANNOTATED (Historical Documents vol.) 22 (1995).

10. Smith v. de Freitas, 329 F.2d 629, 633 n.2 (3d Cir. 1964).

11. The current version of this statute is at title 1, section 4 of the Virgin Islands Code.

12. V.I. CODE ANN. tit. 1, § 4 (1995). *See also* Pascal v. Charley's Trucking Serv., Inc., 436 F. Supp. 455, 456 (D.V.I. 1977) (explaining that Virgin Islands courts are *bound* by the restatements, unless local law is to the contrary).

13. *Id.* §§ 6-7 (1995). *See also Smith*, 329 F.2d at 633-34 (applying Danish property law

On the other hand, because there were several cultural forces at work, the outcome could have been different. William Henry Harrison was Governor of the Indiana Territory when the reception statute was passed for a second time in 1807. It seems inconsistent for Harrison to embrace the very same common law system used by England.[14] Indeed, it was by no means certain that the United States would adopt a common law at all.[15] On the subject of a Federal common law Thomas Jefferson wrote to Edmund Randolf on August 18, 1788:

> Of all the doctrines which have ever been broached by the Federal government the novel one, of the Common Law being in force and cognizable as an existing law in their courts, is to me the most formidable. All their other assumptions of un-given powers have been in the detail. The Bank Law, the Treaty Doctrine, the Sedition Act, the Alien Act, the undertaking to change the State laws of evidence in the State courts by certain parts of the stamp act, etc., etc., have been solitary, inconsequential, timid things in comparison with the audacious, barefaced and sweeping pretension to a system of law for the United States without the adoption of their legislature, and so infinitely beyond their power to adopt. If this assumption be yielded to, the State courts may be shut up as there will then be nothing to hinder citizens of the same state from suing each other in the Federal courts in every case, as on a bond for instance, because the Common Law they say is their law.[16]

However, the revolutionary break was something less than a complete split from England. As Judge Staton wrote in *Morton v. Merrillville Toyota, Inc.*,[17] "[a]lthough the United States became politically emancipated from Great Britain in the late eighteenth century, it did not divorce itself culturally from the mother country. Among the cultural baggage retained by our infant nation was the English common law system."[18]

It is useful to evaluate the common law in sociological terms. If the common law was cultural in nature and Indiana settlers were of English origin, it would be nearly impossible to divorce the English common law from whatever law those settlers would forge for themselves. Put another way, if the common law represented the settlers' collective perception of what was right and just between men, any subsequent laws passed would reflect common law influence.

However, the English common law was not easily assimilated into Indiana's legal framework. Not all Hoosier pioneers were of English or even European descent.[19] In 1800, free "colored" persons and slaves made up 6.11% of the

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where property rights vested prior to 1921).

14. Harrison gained notoriety by fighting American Indians who were financed by the British.

15. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 230, 231 (1966).

16. *Id.*

17. 562 N.E.2d 781 (Ind. Ct. App. 1990).

18. *Id.* at 783.

19. U.S. CENSUS OFFICE, THE SEVENTH CENSUS OF THE UNITED STATES: 1850, at 781

population of Indiana. In 1850, more than 10% of the population had been born in a foreign country, and almost half of the population had been born in a state other than Indiana.[20] Additionally, Indiana has had sizable Native American tribes and their lineal descendants located within its borders, although they were not extended full rights within Indiana until after the organization of the state. Notions that one culture holds to be self-evident may not be so unequivocal to another. Indiana was not a homogenous society, least of all, one derived solely from English ancestry.[21]

The leadership of the state, however, was probably of English ancestry. On a practical level, once it was decided that Indiana was to have common law courts, some form of judicial baseline was necessary. The courts had to begin with something. And after all, as a part of the Northwest territory, the common law of England had already been extended over the state.[22] The adoption of the English common law may best be characterized as a forward-looking step that not only acknowledged Indiana's cultural debts to England, but strove to build on the accomplishments of the English common law with the creation of a new one.[23]

II. ADOPTING THE RECEPTION STATUTE

Whether the adoption of the English common law was routine or enlightened, William Henry Harrison signed a second reception statute into law in 1807. The 1807 act was simply titled: *An Act declaring what laws shall be in force.* The act reads:

> The Common Law of England, all statutes or act 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 eighth,) 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, until repealed by legislative authority.[24]

The act adopted the common law of England and acts of the British Parliament made in aid of the common law prior to 1607, as the "rule of decision" for the Indiana Territory.[25]

(Daniel J. Boorstin ed., Arno Press 1976) (1853).

20. *Id.* at 780.

21. *See also* Act of June 16, 1852, ch. 45, 1852 Ind. Acts 129 (providing funds for printing 1000 copies of the acts of the general assembly to be printed in German).

22. Of course, the British had also extended the common law over the land that would become Indiana. The extension via the Northwest territory is relevant because it was voluntary.

23. *See infra* note 24.

24. Act of Sept. 17, 1807, ch. 24, *in* Francis B. Philbin, LAWS OF THE INDIANA TERRITORY 1801-1809, at 323 (1930) [hereinafter the 1807 act].

25. *Id.* Alman v. Walters, 111 N.E. 921, 923 (1916); Short v. Shotts, 58 Ind. 29, 32 (1877).

The act excludes the reception of three English statutes. The first excluded statute limited the recovery of costs in the Westminster courts in most causes of action.[26] The other two excluded statutes dealt with the legal rate of interest.[27] The modern statute contains the same exclusions and substantially the same language as the 1807 act.[28]

In 1852, the common law reception statute was enacted for a third time.[29] The

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The year 1607 was chosen because that was when Jamestown, the first permanent English settlement in North America, was founded. Many other states have chosen that date. Governor St. Clair, who was governor of the Northwest Territory in 1795, favored using the date of the Declaration of Independence, 1776.

> St. Clair's favorite topic was the perfection of the common law. He favored, very sensibly, adoption as of the beginning of the Revolution; and to the first assembly of the Northwest Territory he pointed out that adoption as of the earlier date deprived the people of many improvements, such as the writ of habeas corpus and the statute of frauds.

Philbrick, *supra* note 3, at c-ci. Other states that have similar common law reception statutes have chosen dates other than 1607. N.J. CONST. art. XI, § 1, para. 3 *construed in* State v. Smith, 426 A.2d 38, 41-42 (N.J. 1981). *See also* W. VA. CODE § 2-1-1 (1984) *construed in* Markey v. Wachtel, 264 S.E.2d 437, 445 (W. Va. 1979). In *Marley*, the court found that West Virginia adopted the English common law as of 1863. *Id. Cf.* W. VA. CODE § 56-3-1 (1966) (statute giving "right and benefit" of all writs, remedial and judicial, given by any statute or act of parliament made in aid of the common law prior to [1607] of a general nature and not local to [England] . . .").

26. 43 Eliz., ch. 6, § 2 (1601) (Eng.) The statute limited the award of costs to the amount of damages in actions which concerned neither title to land, an interest in land, nor an action for battery, where the damages were less than forty shillings. *Id. See also* Stevenson v. Cloud, 5 Blackf. 92, 94 n.1 (Ind. 1839) (outlining subject matter of the three statutes excluded from reception).

27. 37 Hen. 8, ch. 9, (1545) (Eng.) (This act was entitled, "a bill against usury."); 13 Eliz., ch. 8 (1570) (Eng.) (reviving the 1545 statute which had been repealed). The two statutes set the highest legal rate of interest at ten percent. *See also Stevenson*, 5 Blackf. at 94 n.1.

28. A close literal reading of the 1807 act shows that 1607 was the cut-off date for the reception of *both* the English common law *and* the statutes. Section 1-1-2-1 of the Indiana Code uses the 1607 cut-off date for the statutes, but not for the English common law. IND. CODE § 1-1-2-1 (1993). The difference in the meaning stems from the lack of a comma in the present statute. The present act reads, "The common law of England, and statutes of the British Parliament made in aid thereof prior to [1607] . . . ." Because there is no comma after the word, "thereof," the modifier "prior to" only modifies "statutes of the British Parliament," and does not modify "common law of England." The 1807 act has a comma before the modifier, "prior to," which means that the modifier applies to both the statutes and the English common law.

The missing comma seems to be the result of a scrivener's error in transcribing the statute as it was found in the Revised Statutes of 1852 into the present Indiana Code. This may or may not have any significance, but it may call into doubt the validity of considering post-1607 English cases as part of the Indiana common law. *E.g.* Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808).

29. 1 IND. REV. STAT. pt. 1, ch. 61, §§ 1-2 (1852) (§ 1 codified at IND. CODE § 1-1-2-1 (1993); § 2 codified as amended at IND. CODE § 1-1-2-2 (1993)).

1852 act is codified in the present Indiana Code. The act delineated four distinct sources of law governing Indiana. First, of equal import, were the United States Constitution and the Indiana Constitution.[30] Second and third were the statutes of Indiana and the United States, respectively.[31] In making the common law of England a fourth source, the act used language almost identical to that of the 1807 act.[32]

The current code provisions are almost identical to the 1852 act. (An amendment in 1978 slightly changed section two of the act. There are also punctuation changes.) Section two of the 1852 act abolished common law offenses in Indiana. Criminal offenses in Indiana are statutory.[33]

With each passing year, the English common law prior to 1607 becomes more and more remote. The English common law is not consulted with the same regularity or precision as is Indiana statutory law or the common law decisions of Indiana courts. This may be in part because every passing year renders the English common law less and less accessible. Furthermore, Indiana courts may view the common law as the statute dictates; secondary to the constitutions and statutes written specifically for Indiana and the United States.[34] Therefore, as substantive law, the English common law is most often used for its gap-filling qualities. In this manner the common law can function as positive law.

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30. *Id.*

31. *Id.*

32. *Id.*

33. IND. CODE § 1-1-2-2. Criminal defenses in Indiana, however, need not be statutory. Although Indiana recognizes a dozen or so statutory defenses, its courts have been willing to consider other defenses. *See e.g.*, Toops v. State, 643 N.E.2d 387 (Ind. Ct. App. 1994). In *Toops*, the Indiana Court of Appeals formally recognized the defense of necessity. *Id.* at 390. It noted that one writer had traced the roots of the defense to the Bible: "Then the mariners were afraid, and cried every man unto his god, and cast forth the wares that were in the ship into the sea, to lighten it of them." *Id.* at 388. (quoting CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 90 (15th ed. 1993) (quoting *Jonah* 1:5)) This passage suggests that the Bible may be a source of the amorphous common law. *See also* George O. Dix, *The Progress of the Law*, 2 IND. L.J. 92, 93 (1926) ("... a majority of the rules, both criminal and civil, promulgated by Moses are at least in principle the law in all civilized lands.") (comparing progression and codification of laws, on the one hand, and the reflection of human experience in the biblical code of behavior, on the other)). The court also relied on a more recent Indiana common law decision, *Walker v. State*, 381 N.E.2d 88 (Ind. 1978). *Toops*, 643 N.E.2d at 389. *Walker* recognized the defense of necessity in criminal cases. Previously, the Indiana Supreme Court had recognized necessity as a defense to a tort action in *Conwell v. Emrie*, 2 Ind. 35 (1850). *Walker* left the parameters of the defense open. In *Toops*, the Indiana Court of Appeals defined the scope of the defense largely by adopting a formula crafted in the California courts. *Toops*, 643 N.E.2d at 390 (citing People v. Pena, 197 Cal. Rptr. 264, 271 (Cal. App. Dep't Super. Ct. 1983)).

34. IND. CODE § 1-1-2-1 (1993).

III. EQUITY, THE LAW MERCHANT AND CONFLICT OF LAWS: GAP FILLING WITH THE ENGLISH COMMON LAW

A. Equity Jurisdiction

Today, it is taken for granted that Indiana courts have both common law and equity jurisdiction.[35] However, in the mid-nineteenth century, that conclusion was not compelled by any rule of law.[36] In England, the ecclesiastical courts were a source of equity jurisprudence. However, the ecclesiastical courts were separate from the common law courts of England by 1607. If the reception statute adopted only common law and not equity, an argument could be constructed that Indiana courts lacked equity jurisprudence entirely.

In *Short v. Stotts*,[37] the defendant made just such an argument. *Short* dealt with a mutual promise to marry. On July 1, 1869, Ms. Stotts, the plaintiff, promised to marry Mr. Short. The consideration given was a similar promise made by Mr. Short to Ms. Stotts. Ms. Stotts remained "ready and willing to marry the defendant" for some time thereafter.[38] Unfortunately, Mr. Short never married Ms. Stotts. Instead, he married another woman two years later.

Mr. Short's failure to marry Ms. Stotts caused her to become "sick and greatly afflicted in body and mind. . . ."[39] She claimed damages of $5000. At the trial, Mr. Short demurred[40] stating specifically that the "complaint contained no good cause of action. . . ."[41] Mr. Short argued that such a case would have been heard in an ecclesiastical court in England. He contended that Indiana adopted only common law jurisdiction and not the powers of the ecclesiastical courts.[42]

The court rejected Mr. Short's argument. The court opined that the ecclesiastical courts were not separated from the common law courts in England until after the Norman conquest in 1066.[43] Further, marriage did not move from the common law courts to the ecclesiastical courts until the pontificate of Pope Alexander III in 1159.[44]

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35. *See* IND. TR. R. 1-2.

36. Indiana courts in the mid-nineteenth century treated equity jurisdiction as deriving from the ecclesiastical courts. The roots of equity are beyond the scope of this Article. In 1852, the Indiana General Assembly spoke on the subject. 2 IND. REV. STAT. pt. 2, ch. 1, § 1 (1852). "[T]he distinction between actions at law and suits in equity . . . [is] abolished, and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action." *Id.*

37. 58 Ind. 29 (1877).

38. *Id.* at 30.

39. *Id.*

40. A demurrer is a motion similar to one made pursuant to Indiana Rule of Trial Procedure 12(B)(6).

41. *Short*, 58 Ind. at 29.

42. *Id.* at 32.

43. *Id.* at 35.

44. *Id.*

The court concluded that creation of the ecclesiastical courts in 1066 and thereafter was in derogation of common law. An entire system of English ecclesiastical courts was considered by the court as foreign to the English common law, as were laws promulgated to aid ecclesiastical jurisdiction.[45] Therefore, the court concluded that the common law courts of Indiana actually derived their jurisdiction from English courts prior to 1066 and retained equity jurisdiction from a time before such jurisdiction was transferred to the ecclesiastical courts. Thus, the court had jurisdiction to address an action for breach of mutual promise to marry.[46]

The court's reasoning underscores the difficulty in determining what is received through the reception statute. The conclusion that the Indiana statute was meant to adopt the common law system as it actually existed in 1607 would include the conclusion that Indiana courts did *not* have equity jurisdiction. Regardless, the court's decision shows that it was willing to use the flexible common law to arrive at the result it felt appropriate. This is a pattern that is repeated in many of the early decisions applying the common law reception statute. Equally interesting is the fact that at that time in Indiana's history, a defendant thought he could successfully demur to the complaint on the ground that the Indiana common law courts did not have the authority to hear matters that the ecclesiastical courts would have heard in 1607. It is possible, of course, that Mr. Short was without any other credible argument and was attempting to avoid judgment in whatever manner he could.[47]

In *Henneger v. Lomas*,[48] the court found that it had equity jurisdiction, albeit with a vastly different rationale. In *Henneger*, a wife brought suit against her former husband for her seduction when she was sixteen years of age. The court agreed with out-of-state precedent that a married woman could not maintain an action against her husband for torts he may have committed against her in the course of their marriage. The plaintiff's right to sue the man who seduced her was extinguished by their subsequent marriage,[49] and she could not maintain such an action even after a divorce.[50]

Ms. Henneger, however, argued that her marriage was ended by an annulment. She asserted that her divorce was granted on the ground of fraud. In equity, fraud was a ground for an annulment and not a statutory ground for a divorce. Mr. Lomas argued that the end of their marriage would have had to be a divorce because the divorce statute did not allow courts to perform annulments.[51] The Indiana Supreme Court found that trial courts did have the ability to declare de

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45. *Id.* at 36.

46. *Id.*

47. Not all uses of the reception statute are in good faith.

48. 44 N.E. 462 (Ind. 1896).

49. *Id.* at 463; Indiana courts finally did away with the hoary notion of spousal tort immunity in *Brooks v. Robinson*, 284 N.E.2d 794 (Ind. 1972).

50. *Henneger*, 44 N.E. at 465.

51. *Id.* at 465-66.

facto annulments[52] due to Indiana's reception of the common law.[53] The court concluded that the powers of the ecclesiastical courts were part of the common law of England in 1607 and therefore adopted by the reception statute. This decision is in stark contrast to that of *Short v. Stotts*.[54]

In *Short*, the court concluded that ecclesiastical courts were not part of the common law of England but that Indiana courts retained the powers of the ecclesiastical courts from a time before the courts were separated.[55] In *Henneger*, the court arrived at the same conclusion by simply asserting that the powers of the ecclesiastical courts were common law powers and thus grafted into the Indiana common law.[56]

The difference between the two cases illustrates the confusion about the meaning of the common law reception statute. One problem relates to timing. Does the reception statute accept the theoretical unfettered common law of 1607, or does it refer to the actual practice in England in 1607? Another problem is whether the common law was *binding* authority or able to be discarded or modified as judges saw fit when developing Indiana's common law.[57] In *Henneger*, it appears that the decision was based on an understanding that Indiana courts would provide exclusive remedies for all cases, not just those at law. The common law did not compel the conclusions in the equity cases above. The divergent paths to the same conclusion suggest the effect of English common law is more than advisory but less than stare decisis.[58]

B. Law Merchant

In other cases the court applied the English common law as a body of substantive law. For example, early Indiana courts occasionally turned to the custom of merchants, or lex mercatoria or law merchant, for substantive law on

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52. Equity jurisdiction and jurisdiction to annul marriages are now provided by statute. IND. CODE §§ 33–5–25–5, 33–5–8–5, 33–5–26–6, 33–5–32.5–4, 33–5–39–7 (1993).

53. *Henneger*, 44 N.E. at 466.

54. 58 Ind. 29 (1877).

55. *Id.* at 35-36.

56. *Henneger*, 44 N.E. at 466.

57. "The common law has always had the inherent capacity to develop and adapt itself to current needs; indeed, if this were not true it would have withered and died long ago rather than have grown and flowered so gloriously." Collopy v. Newark Eye & Ear Infirmary, 141 A.2d 276, 284-85 (N.J. 1958). "But this does not mean that common-law rules are forever chiseled in stone, never changing. The common law is dynamic, evolves to meet developing societal problems, and is adaptable to society's requirements at the time of its application by the Court." Williamson v. Old Brogue, Inc., 350 S.E.2d 621, 623 (Va. 1986).

58. *See* Campbell v. Criterion Group, 605 N.E.2d 150, 156 (Ind. 1992) (citing Union Trust Co. v. Curtis, 105 N.E.2d 562 (Ind. 1914)) ("Finally, the traditions of equity have force in Indiana under Ind. Code Ann. § 1–1–2–1 just as do those of the common law proper."). Another question is whether the received common law has the force of a statute. *See infra* notes 90-101 and accompanying text.

subjects the legislature had not yet delineated.

Early Indiana Supreme Court decisions define lex mercatoria simply as the "custom of merchants."[59] The laws of the law merchant emerged as a quick and efficient method to resolve differences between merchants from different legal systems. For many years the lex mercatoria was an important link between the British Isles and continental Europe. Modern lex mercatoria is international in flavor and is more comprehensive than its 15th century predecessor.

Litigants in Indiana occasionally sought refuge in the law merchant from transactions not covered by statute. In *Bullitt v. Scribner*[60] the court was called upon to determine whether the law merchant was within the jurisprudence of Indiana but declined to do so on the facts of the case. *Bullitt* dealt with the assignment of a note executed by Elliott and payable to Scribner. Scribner assigned the note to Bullitt. Bullitt sought to collect on the note from Elliott and successfully sued Elliott on the note. Elliott was insolvent, and so Bullitt sued Scribner in assumpsit for satisfaction of the note.

As part of his defense of nonassumpsit, Scribner asserted that Bullitt failed to comply with the law merchant because he failed to give Scribner adequate notice of Elliott's default. The court concluded that the law merchant did not place promissory notes, the subject of the suit, on the same footing as inland bills of exchange.[61]

Inland bills of exchange were subject to the notice requirements of the law merchant. Ordinary promissory notes were not. The court concluded that promissory notes, not raised to the level of commercial paper in England until after 1607, did not carry with them the same formalities as inland bills. Therefore, the court affirmed that the plaintiff had an action against the endorser at common law and that Bullitt had brought suit in the appropriate fashion.[62]

Two years later, in *Piatt v. Eads*,[63] the Indiana Supreme Court once again had occasion to contemplate the role of the law merchant in Indiana jurisprudence. The court first asked whether the law merchant was part of the common law of England and concluded that "[t]he whole current of authorities, from the commencement of the history of our system of jurisprudence down to the present day, goes to establish the doctrine that the custom of merchants is and always has been regarded as a part of the common law of England."[64]

The court determined that the "custom of merchants" was a law of a general nature, not local to the kingdom, but comprehended within the law of Indiana.[65] The court found support for this contention in the language of an Indiana statute which "provides that notes payable at a chartered bank shall have the same effect

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59. Piatt v. Eads, 1 Blackf. 81, 82 (Ind. 1820); Bullitt v. Scribner, 1 Blackf. 14, 14–15 (Ind. 1818).

60. 1 Blackf. 14 (Ind. 1818)

61. *Id.*

62. *Id.* at 15.

63. 1 Blackf. at 81 (Ind. 1820).

64. *Id.* at 82.

65. *Id.*

and be negotiable in like manner as inland bills of exchange according to the custom of merchants."[66]

Although the law merchant is important mostly for historical reasons, the UCC does contain a provision that includes the law merchant for gap-filling purposes, indicating its influence on our substantive law.[67] The legislature, through selective adoption of the UCC, provided that the judiciary need not wrestle with the law merchant in routine commercial paper or secured transactions matters.

The two cases dealing with the law merchant are significant because they show the deference early Indiana courts gave the common law as inherited from England. The common law, in this context, is not a litany of platitudes linked together and used as a persuasive source of law. With respect to the law merchant, the common law is technical in nature and demanding. In the reported decisions the courts did not apply the law merchant often, but they did find occasion to use it as a determinative body of law.

C. Conflict of Laws

The common law reception statute has also been used to ease problems that might otherwise be issues of first impression. Before the development of comprehensive conflict of laws rules, courts used the reception statute as a practical tool to apply the laws of other states. Today, the application of the law of other states is not a complicated question in Indiana, at least on a procedural level. The Indiana Code requires that Indiana courts "shall take judicial notice of the common law and statutes of every other state, territory and jurisdiction of the United States."[68]

Before this act was passed in 1937, application of the law of another state took one of two approaches. The first was to require that statutory law of another state to be offered into evidence.[69] Then the court was required to judicially notice it.[70] The second method was to presume that the other state had the same common law origins as Indiana and thus the same decisional law. Then, the court would take judicial notice of the other state's common law.[71]

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66. *Id.*

67. *See* IND. CODE § 26-1-1-103 (1993).

68. IND. CODE §§ 34–3–2–1 to 7 (1993) (adopting the Uniform Judicial Notice of Foreign Law Act). *See also* IND. R. EVID. 201(b).

69. 2 IND. REV. STAT. pt. 2, ch. 1, § 285 (1852).

70. *Id.*; Blystone v. Burgett, 10 Ind. 28, 32 (1857).

71. The law in this area seemed to undergo some fluctuation. In *Blystone*, the court found that the rule of "presuming the existence of the common law in a sister state, is very much shaken, if not entirely overthrown . . . ." *Blystone*, 10 Ind. at 30. However, a later decision of the Indiana Supreme Court stated, "In the absence of any averment [pleading] upon the subject, the courts of this state will indulge the presumption that the common law is in force in [other states] . . . ." Pennsylvania Mut. Life Ins. Co. v. Norcross, 72 N.E. 132, 136 (Ind. 1904). If there was no pleading outlining the decisional law of that state, then "[the courts] will judge what the law is for themselves . . . ." *Id.* If another state's law was applicable to the case, Indiana courts would follow

In *Blystone*, the court declined to presume that Illinois retained the English common law with respect to chattel mortgages. In this case, Blystone sought to recover oxen from Burgett. Burgett bought the oxen from Yeatly, although the oxen were mortgaged to Blystone. The mortgage was executed and recorded in Illinois.

The court was called upon to determine whether the oxen should go to a note-holder from another state or to a native bona fide purchaser.[72] The validity of the mortgage depended on whether the court would take judicial notice of Illinois law or presume that the common law prevailed in another state.[73] The court was reluctant to presume that the common law still prevailed in Illinois on this matter.[74] Chattel mortgages were unknown at common law,[75] and such a presumption would immediately end Blystone's claim to the oxen.[76]

The court stated, however, that had "the laws of Illinois been brought judicially to the notice of the Court in this case . . ." so that the court could be sure of the validity of the mortgage, it would have had no difficulty in sustaining the mortgage.[77] Blystone's mistake was not brining the proper law to the court's attention.

In *Krouse v. Krouse*,[78] the Indiana Court of Appeals decided to apply Indiana law instead of the foreign jurisdiction's law. In this case, the court had occasion to consider an agreement, executed in California, between a husband and wife in which the husband pledged to repay $150 that he had apparently borrowed from his wife. Mr. Krouse's estate, as a defense, argued that the contract was the product of duress and that Indiana courts were to presume the common law prevailed in other states. Specifically, the defense argued that the court should presume the common law defense of duress prevailed in California. The estate also argued that at common law a wife would have no contractual recourse against her former husband.[79] Indiana law, on the other hand, did provide a remedy.[80]

The court, in considering Mr. Krouse's claim, traced the admission of California into the United States. The court noted that before its "purchase"

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the decisional law of that state as a matter of comity. Clark v. S. Ry. Co., 119 N.E. 539, 547 (Ind. App. 1918). Of course, that decisional law would have had to be "brought to [the court's] attention." *Id.*

72. *Blystone*, 10 Ind. at 29 (using the terms "innocent purchasers" and "*bona fide* creditors without notice.")

73. *Id.* at 30.

74. *See supra* note 71.

75. The plaintiff argued that because he attempted to foreclose the mortgage in Indiana, it should be presumed that the mortgage was *executed* in Indiana. The court declined to disregard the plain language of the mortgage instrument which showed that it had been executed in Illinois. *Blystone*, 10 Ind. at 31.

76. *Id.*

77. *Id.* at 32.

78. 95 N.E. 262 (Ind. App. 1911).

79. *Id.* at 263.

80. *Id.* at 264.

California had been a part of Mexico and that its judicial system was "that of Roman law, modified by Spanish and Mexican legislation."[81] Thus, the court determined, the presumption that common law prevailed in California was overcome by historical fact.[82] The court therefore determined that California did not have a system based on the English common law but declined to take judicial notice of the statutory law in California.[83] The court then concluded that it would apply Indiana law to resolve the dispute. The court also rejected the defendant's prayer of duress and affirmed the trial court's ruling in favor of the plaintiff.[84]

Indiana courts used the common law as a bridge between states when it was necessary to apply the law of another state, yet retained common sense as to whether outdated notions of the common law could be presumed to be the law of another state. One cannot help but wonder if the *Blystone* court was aware that Illinois had passed laws allowing for chattel mortgages. In short, the courts valued the significance of the common law but also recognized that it was not particularly suited to certain modern endeavors. The judicial notice taken of the history of California, but not of its laws, underscores the previously suggested notion that litigants and even courts probably did not have access to all decisions from other states. Although courts of the time did cite cases from other states, they did not cite cases from all states, and sometimes they did not take judicial notice of statutes from other states. This suggests a cautious view towards sources of foreign law that were possibly unreliable. Today, courts have access to the laws of other states and even countries with a stroke on a keyboard.

IV. Modern Application

The modern application of the common law reception statute must be

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81. *Id.* (quoting Fowler v. Smith, 2 Cal. 568 (1852)). The court took judicial notice of history and the California Constitution.

82. *Id.*

83. It is important not to read *Krouse* too broadly. Part of the problem seems to be the fact that Mr. Krouse did not offer California law into evidence. (It appears from the opinion that he did not.) Had he done so, the Full Faith and Credit Clause would have forced the Indiana court to observe California law. A federal statute in effect at that time also commanded this result. Act of May 28, 1790, ch. 11, 1 Stat. 122 (current version at 28 U.S.C. § 1738 (1994)). If Mr. Krouse did offer evidence of California law, the *Krouse* decision is seriously flawed. It seems that if a litigant wanted the law of another jurisdiction, the litigant had the burden of bringing that law to the court's attention.

84. The counsel for the defendant argued that the defendant, who was an attorney, had been deprived of his clothing by his wife following a severe earthquake and fire in San Francisco. Counsel argued that the defendant needed good clothing to properly undertake his duties as an attorney and that he signed the note to get his clothing from his wife. The court concluded that since there had been no showing that the defendant actually had any clients, there had been no showing that the attorney needed to wear fine vestments. And finally, the court reasoned that wearing old clothing would not be inappropriate following a natural disaster on the order of the 1906 San Francisco earthquake. *Krouse*, 95 N.E. at 265.

understood in light of other trends within Indiana courts. Perhaps the most significant trend within the last decade is the rediscovery of the Indiana Constitution and its Bill of Rights. Adopted in 1851, the Indiana Constitution has always been the backbone of Indiana jurisprudence. However, the Indiana Supreme Court has been increasingly willing to forge distinctly Indiana jurisprudence in recent years. The trend may have begun with an article by Justice Brennan published some two decades ago.[85] The Brennan article is a celebration of American federalism, suggesting the replication of the Warren Court's activism on the state level. Ten years after the Brennan article, Justice Robert F. Utter of the Washington Supreme Court and his clerk, Sanford E. Pitler, wrote an article published in the *Indiana Law Review* suggesting techniques for preserving and properly raising state constitutional arguments.[86] Finally, in his article *A Second Wind for the Indiana Bill of Rights*,[87] the Chief Justice of Indiana, Randall T. Shepard, highlighted Indiana's history of using its own constitution independent of the federal constitution and called for more effective advocacy of Indiana constitutional claims.[88]

Although the English common law is a distant fifth to the state and federal constitutions and statutes, when construing the Indiana Constitution, jurists sometimes use the intent of the framers to back the guarantees of that constitution. Both the 1851 Constitution and the third, and present, common law reception statute were passed at roughly the same time. There is little doubt the common law of England was on the minds of the delegates to the constitution.[89] When the court attempts to discern the intent of the framers of the Indiana Constitution, the English common law, to the extent it was understood in the mid-nineteenth century in Indiana serves as a useful tool.

In the remarkable case of *Campbell v. Criterion Group*[90] the Indiana Supreme Court used the English common law to refine its interpretation of the Indiana Constitution. In *Campbell*, the court authorized in forma pauperis appeals to the

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85. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

86. Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment of Theory and Technique*, 20 IND. L. REV. 635 (1987).

87. Randall T. Shepard, *Second Wind for Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

88. *Id.* at 584-586.

89. 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 722-24 (Indianapolis, A.H. Brown 1850). At the 1850 debates, Mr. Tague offered a resolution to abolish the common law of England. Tague gave a short synopsis of the reasons he and his constituents thought the English common law should be abolished. At the conclusion of his remarks Mr. Nave rose and moved to delay the vote on the resolution until such time as Tague would have "time to read and understand what the common law is." *Id.* at 723. That motion being denied, various amendments were offered including amendments to "forever abolish logic and the mathematics," to abolish "Queen Victoria and the Fugitive Slave law" to abolish "the chills and fever" and finally to notify "Her British Majesty, by telegraph, that the common law *in* England is abolished." *Id.* at 723-24.

90. 605 N.E.2d 150 (Ind. 1992).

appellate courts in Indiana for civil cases. In a unanimous opinion, Chief Justice Shepard recognized the right to pauper counsel based upon statutory permission, common law power, and constitutional direction.[91] In its opinion, the court weaved together the common law of England with that of Indiana. The court detailed Indiana's long tradition of accommodating the indigent within the legal system. It sought to extend what Justice Stewart in *Lane v. Brown*[92] recognized as Indiana's "conspicuously enlightened policy in the quest for equal justice to the destitute."[93] With this guiding purpose, the court found that an act of British Parliament[94] was made in aid of the common law and that it authorized the court to permit pauper appeals in the appropriate case.[95] The court further reviewed Indiana constitutional and statutory authority and determined that the English statute in aid of the common law which provided authority for pauper civil appeals was the law of Indiana.[96]

There are occasions when the courts have not been receptive to ancient English statutes. *Hosts, Inc. v. Wells*[97] provides a spirited decision on an award of attorney's fees. Mr. and Mrs. Wells sought satisfaction on a promissory note executed and delivered to them by Hosts, Inc. The trial court granted summary judgment for the Wells and awarded them $5000 as well as $1800 in attorney's fees. The trial court did so under authority of the Statute of Gloucester[98] which the court concluded had been adopted through the common law reception statute.

The court of appeals, by a two to one vote, rejected the trial court's incorporation of the statute into Indiana law. The majority decision lists ten Indiana cases to the effect that "a successful litigant is not entitled to recovery of his attorney fees."[99]

Judge Staton, in dissent, argued that the cases established only that earlier courts were unaware of any authority to award attorneys fees.[100] Judge Staton further observed that Indiana law did not provide for automatic repeal of unused laws through disuse or non-enforcement.[101] Moreover, he argued that the Statute of Gloucester had the force of an act of the Indiana General Assembly because it had been brought into the law of Indiana by statute. Therefore, he concluded that

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91. *Id.* at 159.

92. 372 U.S. 477 (1963).

93. *Campbell*, 605 N.E.2d at 159 (citing *Lane*, 372 U.S. at 478).

94. 11 Hen. 7, ch. 12 (1494) (Eng.).

95. *Campbell*, 605 N.E. 2d at 155-56.

96. *Id.* at 156-58.

97. 443 N.E.2d 319 (Ind. Ct. App. 1982).

98. Statute of Gloucester, 6 Edw., ch. 1, §§ 1-2 (1278) (Eng.).

99. *Hosts*, 443 N.E.2d at 321.

100. The ten decisions listed by the majority may have been decided on the *mistaken assumption*, not the *determination* that, Indiana law did not generally allow the award of attorneys fees. *Id.* at 324 (Staton, J., dissenting). *See* Printing Ctr. of Texas, Inc. v. Supermind Publ'g Co., 669 S.W.2d 779, 782 (Tex. App. 1984, no writ) (court proceeded on "doubtful assumption" that UCC controlled decision because the parties tried suit as if UCC applied.).

101. *Hosts*, 443 N.E.2d at 324 (Staton, J., dissenting).

the Statute of Gloucester was still in effect in Indiana as it had never been explicitly overturned or disapproved by any Indiana common law court.[102]

The original 1807 reception act included the English common law as decisional law. Therefore, the Statute of Gloucester would be decisional, rather than statutory, law. As such, it could be repealed without specific reference to the act being repealed. Judge Staton's observation that those decisions disallowing the award of attorneys fees were done without consideration of the English common law has merit.

What Judge Staton's dissent provokes, however, is the threat of a flood of old English statutes and common law principles, less well known than the Statute of Gloucester, being suddenly rediscovered as positive law. Surely there are some hoary, old notions in the English common law that have not been specifically stricken from the canon.

It may be impractical for practitioners in Indiana to familiarize themselves with the intricacies of the English common law. However, the decision in *Campbell* makes it plain that the present court is willing to consider and construe the English common law in the appropriate case.

CONCLUSION

The contrast between Judge Staton's dissent in *Hosts* and the Indiana Supreme Court decision in *Campbell* underscores the continuing relevance and the selective application of the English common law. The English common law exists in Indiana as surely as the courts have the common law power to make law. It is tempered by its age and the nature of common law jurisprudence. The common law of a society may embody or model its commonly held ideas or aspirations about the way the judicial system should work and the way society should order itself. It is without the ink and paper permanence and stricture of statutory law, and lasts only so long as its core notions are supported and commonly believed. The English common law is useful as a tool of construction for both the constitution and statutory law, as a gap-filler, and as a theoretical bedrock to the common law system. The common law may be increasingly used as a tool to ascertain the intent of the framers of the constitution. It will be used less and perhaps never again to fill gaps in existing law. But it will always mark the beginning of Indiana's common law courts and the starting point of a common law system.

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102. *But cf.* Northwest Calf Farms, Inc. v. Poirier, 499 N.E.2d 1165 (Ind. Ct. App. 1986). In *Northwest Calf Farms*, Judge Staton wrote an opinion disallowing an award of attorney's fees based on another Act of Parliament. 17 Rich. 2, ch. 6 (1393) (Eng.).