Washington and Lee Law Review Online

Volume 71 | Issue 1 Article 1

5-14-2014

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Recommended Citation
Horace, *Commonwealth v. Morris: The Disappearance of 169 Years of Common Law?*, 71 WASH. & LEE L. REV. ONLINE 1 (2014), https://scholarlycommons.law.wlu.edu/wlulr-online/vol71/iss1/1

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Commonwealth v. Morris: The Disappearance of 169 Years of the Common Law?

Horace*

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I. Introduction

In *Commonwealth v. Morris*,[1] the Supreme Court of Virginia properly decided that the writs of *coram vobis* and *audita querela* may not be used to modify a final criminal conviction order more than twenty-one days after its entry.[2] The court decided the inapplicability of *coram vobis* under Virginia Code § 8.01-677[3] and its own precedent.[4] It decided the inapplicability of *audita querela* under the English common law, citing cases from 1670, 1701, and 1792.[5] In the course of the opinion it conflated Virginia Code §§ 1-200 and 1-201[6] and held in dictum that Virginia's adoption of the common law of England "ends in 1607 . . . . From

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1. 705 S.E.2d 503 (Va. 2011).

2. *See id.* at 509 (finding that the alleged errors of fact were not sufficient for the purposes of *coram vobis* and holding that the "writ of *audita querela* may not be used to seek postconviction relief from criminal sentences").

3. VA. CODE ANN. §§ 8.01-677 (2012).

4. *See Morris*, 705 S.E.2d at 506–08 (discussing the *coram vobis* issue).

5. *See id.* at 508–09 (discussing the *audita querela* issue).

6. VA. CODE ANN. §§ 1-200, -201 (2012).

that time forward, the common law we recognize is that which has developed in Virginia."[7] This was dictum because the opinion holds the common law of England on the use of the writ of *audita querela* was the same before and after 1607.[8] Your author submits this dictum is erroneous considering the years of decision of the English cases cited, the plain meaning of the two applicable statutes, and the court's own precedent.

Blackstone did not believe the common law of England had any force in the American colonies.[9] Colonial and republican legislation rendered unnecessary a theoretical inquiry on the subject in Virginia. After the Restoration, the General Assembly in a preamble to a restatement of the law "endeavoured in all things (as neere as the capacity and constitution of this country would admitt) to addhere to those excellent and often refined laws of England, to which we profess and acknowledge all *due obedience and reverence*."[10] The convention that enacted Virginia's Declaration of Rights and first Constitution in May of 1776 also ordained:

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that kingdom, together with several acts of the general assembly of this colony now in force, . . . 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.[11]

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7. Commonwealth v. Morris, 705 S.E.2d 503, 508 (Va. 2011).

8. *See id.* at 509 ("[T]he writ of audita querela, which was part of the common law prior to 1607, is the law of the Commonwealth.").

9. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *107–08 (noting that "the common law of England, as such, has no allowance or authority there").

10. *Preamble to the Acts of the General Assembly of 1661–62*, *in* 2 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OR VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 41, 43 (William W. Hening ed. 1823) [hereinafter HENING'S STATUTES AT LARGE]. Note that the spellings in this and all subsequent quotations have been carried over from the original text.

11. *Ordinances of Convention, May 1776, Chap. V, §VI*, *in* 9 HENING'S STATUTES AT LARGE, *supra* note 10, at 126, 127. "As a general rule a statute speaks as of the time it takes effect and not as of the time it was passed." Cnty. Sch. Bd. of Fairfax Cnty. v. Town of Herndon, 75 S.E.2d 474, 477 (Va. 1953) (citation omitted). The ordinance did not have a delayed effective date, nor did it have an effective date of 1607. It must have spoken as of 1776. In 1789, the

The phrase "prior to the fourth year of the reign of king James the first" modifies only "statutes or acts of parliament." Any doubt about that is resolved by the phrases: "which are of a general nature, not local to that kingdom." Although some local customs were sometimes referred to as the common law, the common law properly understood was of a general nature throughout England, the *ius commune*.[12] Furthermore, it was the common law of England and of no force in Scotland, the Isle of Man, or the Channel Islands.[13] It would be nonsense to apply these phrases to "the common law of England." By contrast, acts of Parliament applied to England and (from 1707 on) Scotland, unless Scotland was specifically exempted, and applied to dependencies of the Crown and colonies if specifically included.[14] Thus, an act of Parliament could be of a general nature, not local to England. The Supreme Court of Virginia so construed the ordinance (without the parsing) in *Foster v. Commonwealth*.[15] This ordinance is now codified at Virginia Code §§ 1-200 and 201, which confirm this interpretation of it.

II. The Statutes

Virginia Code § 1-200 provides:

General Assembly repealed so much of the ordinance as adopted the acts of Parliament, *see Laws of Virginia, October 1789, Chap. XVII, §1*, *in* 13 HENING'S STATUTES AT LARGE, *supra* note 10, at 23, 23–24, but postponed its effective date until 1793. *See An Act Repealing, Under Certain Restrictions, All Statutes or Acts of the Parliament of Great Britain, Heretofore in Force within this Commonwealth*, *in* THE REVISED CODE OF THE LAWS OF VIRGINIA 135, 135–37 (1819). The ordinance, as amended, was divided into the two present statutes in the Virginia Code of 1849, Title 9, §§ 1 and 2. The statutes have had only a few stylistic amendments since then.

12. *See* BLACKSTONE, *supra* note 9, at *63, *67–68 (describing what was understood to be the "common law").

13. *See id.* at *98, *105–06 (discussing the scope of the common law of England).

14. *See id.* at *105–08 (discussing the areas that are governed by the common law of England); R. v. Cowle, (1759) 97 Eng. Rep. 587 (K.B.) 598; 2 Burr. 834, 853 (noting that even if Berwick was "no part of the realm of England," it was still a "dominion of the Crown").

15. 31 S.E. 503 (Va. 1898). The Supreme Court of Virginia also seems to have so construed the ordinance in *Hanriot v. Sherwood*, 82 Va. 1, 15 (1884).

> The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.

Virginia Code § 1-201 provides:

> The 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 the fourth year of the reign of James the First, of a general nature, not local to England, shall still be saved, insofar as the same are consistent with the Bill of Rights and Constitution of this Commonwealth and the Acts of Assembly.

The latter statute explicitly limits writs made in aid of the common law by statute or act of Parliament to those in existence in 1607.[16] The former statute contains no such limitation.

"Rule of decision," the phrase used both in the ordinance and § 1-200, is the principle upon which a disputed issue in a case is decided. That was the use of the phrase in the English courts at the time of the American Revolution,[17] and in the courts of Virginia before and after the Revolution.[18] One of the English decisions, *Somerset's Case*,[19] would have been well known to the

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16. It seems certain that the writ of *audita querela* was first used during the reign of Edward III (1327–1377). It is uncertain, however, whether the writ was created in the courts or by an act of Parliament. *See* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 393–94 (1956) (noting that there are grounds for believing the writ was authorized by Parliament in 1336); ALFRED W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT, 131–32 (1975) (discussing the development of the writ of *audita querela*). Therefore, *Morris* could not have been decided solely under §§ 1-201.

17. *See generally* Campbell v. Hall, (1774) 98 Eng. Rep. 1045 (K.B.) 1047; 1 Cowp. 204, 208; Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.) 509; 1 Lofft 1, 18; Triquet v. Bath, (1764) 97 Eng. Rep. 936 (K.B.) 938; 3 Burr. 1478, 1481; Hamilton v. Mendes, (1761) 97 Eng. Rep. 787 (K.B.) 792; 3 Burr. 1198, 1209; Scrimshire v. Scrimshire, (1752) 161 Eng. Rep. 782 (Consistory) 787, 2 Hag. Con. 395, 408.

18. *See generally* Watson & Hartshorne v. Alexander, 1 Va. (1 Wash.) 340, 353 (1794); Kennon v. M'Roberts, 1 Va. (1 Wash.) 96, 99 (1792); Shelton v. Shelton, 1 Va. (1 Wash.) 53, 55 (1791); Giles v. Mallecote, 2 Va. Col. Dec. B71, B75 (Gen. Ct. 1738), *in* THOMAS JEFFERSON, REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA 52, 56 (1829); *infra* note 31 and accompanying text.

19. Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.) 509; 1 Lofft 1, 18.

members of the Convention of 1776. There, Lord Mansfield granted a writ of habeas corpus freeing a slave who had been purchased in Virginia and brought to England by his master.[20]

If you think this is entirely an academic dispute among antiquarians, consider first that the Supreme Court of Virginia has relied on or cited English cases four times since January 2011. Consider second the experience that most Virginia attorneys have had at some time. You try to find authority for some basic principle of nonstatutory law in *Michie's Jurisprudence*. You find a statement that precisely fits your need, and you look at the footnote for the citation. The only case cited is a decision of the Supreme Court of *West* Virginia. If the principle of law in question was decided in the English courts and none of the exceptions in the statute apply,[21] § 1-200 provides that the common law of England is "in full force" and makes it your "rule of decision." Nothing ambiguous there. But is it the common law of 1607 or 1776?

III. The Court's Precedent

The competence of a wife to testify in a case in which her husband was not immediately but might eventually be interested was the issue in *Baring v. Reeder*.[22] The court held 3–2 that she was competent. The practice at the time was for the judges to give separate opinions. Judge St. George Tucker, who three years earlier had published the American edition of Blackstone's *Commentaries*, believed she was not competent and cited an English case:

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20. *See id.* at 510, 1 Lofft at 19 ("Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England . . . .").

21. There is also the judicially created "incompatible with our situation" exception. *See infra* notes 35–38, 46, and 51 and accompanying text. The exception seems to have its origin in *Thornton v. Smith*, 1 Va. (1 Wash.) 81 (1792), which found that a declaration in an inferior court must allege that the cause sued upon was "within the jurisdiction of the court," and in *Coleman v. Moody*, 14 Va. (4 Hen. & M.) 1, 20 (1809), which noted that the application of the common law "adapt[s] . . . to the circumstances of the case" when approving the provision of refreshments to jurors in violation of the English rule.

22. 11 Va. (1 Hen. & M.) 154 (1806).

> The case . . . which I cite [is] not [ ] a precedent, (for no decision in England since our independence commenced, has any authority in this Court,) but merely as an apposite case decided by able Judges upon the same law which as to this point prevails in this country.[23]

Judge Tucker's nemesis on the court,[24] Judge Spencer Roane (who was in the majority), then went on for two pages about the precedential effect of English decisions. He sometimes sacrificed clarity for floridity, and he somewhat mischaracterized Judge Tucker's opinion, but he seems not to have felt himself bound by any English decision, especially an older one. However, he wrote that he could avail himself of English decisions before and after the Revolution:

> I do not see why, upon principles of stable and unvarying law, such as those of evidence, for example, the epoch of our independence should be clutched with so much avidity: nor that, in relation to such principles, the testimony of Lord Mansfield delivered in 1777, is not of equal weight with his testimony delivered in 1775. I wish it, however, to be clearly understood, that I would not only confine the reception of the modern decisions in England to doctrines of this description, but would not receive even them, as binding authority. I would receive them merely as affording evidence of the opinions of eminent Judges as to the doctrines in question, who have at least as great opportunities to form correct opinions as we have, and are influenced by no motives but such as are common to ourselves: and with respect to ancient decisions in England, what Judge would wish to go further? Who will contend that they are binding authorities upon us, in all cases whatsoever? Shall we not have the privilege every day exercised in England, of detecting errors of former times? . . . [B]ut certain I am, that inasmuch as from the very outset of our independence up to this day, this Court, and perhaps every other Court in the union, has been in the habit of inspecting and acting upon the modern decisions in England, under the restriction I have mentioned; and as those decisions have become the basis of their judgments, great inconvenience and

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23. *Id.* at 158. Had Tucker seen the *Morris* dictum coming, his time might have been better spent preparing an American edition of the first edition of Sir Edward Coke's *Institutes of the Laws of England* (1628) rather than William Blackstone's *Commentaries*.

24. *See* Charles F. Hobson, *St. George Tucker, Spencer Roane, and the Virginia Court of Appeals, 1804–11*, 121 VA. MAG. HIST. & BIOGRAPHY 1, 2–43 (2013) (describing Judge Tucker's relationship with Judge Roane).

> mischief would result from making a sudden alteration in this particular; thereby shaking the authority of our own solemn decisions, and re-establishing the authority of such ancient decisions in England, as the modern ones, in both countries, had detected of error and exploded.[25]

Are we to believe that the Convention of 1776, which rebelled against the Whiggish Hanoverian regime, intended to adopt as the rule of decision in republican Virginia the law of England of the early years of Stuart absolutism when the notion of Parliamentary supremacy was unheard of and the right to habeas corpus was not secure?[26]

Some support for 1607 as the time of adoption can be found in the opinion of Judge John Green in *Stout v. Jackson*.[27] The issue there was the measure of damages a purchaser of land could recover from the seller in an action of covenant based on a breach of the seller's warranty of title when the purchaser was evicted from the land. To oversimplify, Judge Green held the purchaser could recover the value of the land at the time of purchase under the ancient action of *warrantia chartae*. "Thus stood the law in England when Virginia was settled, and is now our law . . . ."[28] Judge Green did not, however, write that our adoption of the common law ended in 1607.

Judge John Coalter held *warrantia chartae* was an obsolete action based on feudal principles that never existed in Virginia. He would have given damages equal to the value of the land at eviction.[29] Judge Francis Brooke agreed with Judge Green on the measure of damages on a narrower basis and "regretted that, there being but a bare Court, it is not to be finally settled in this case."[30] Two of the five members of the court did not participate in the decision.[31]

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25. *Baring*, 11 Va. (1 Hen. & M.) at 162–63.

26. *See* WINSTON CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES, THE NEW WORLD 154–57 (1990) (discussing the role of Parliament and the King in England during the early seventeenth century); 3 BLACKSTONE, *supra* note 9, at *134–35 (discussing the writ of habeas corpus in the seventeenth century and abuses that served to defeat the benefit of "this great constitutional remedy").

27. 23 Va. (2 Rand.) 132 (1823).

28. *Id.* at 146.

29. *Id.* at 155–71.

30. *Id.* at 171.

31. Additional support for 1607 as the year of demarcation can be found in

The U.S. Court of Appeals for the Fourth Circuit observed forty years ago that "Virginia courts have applied [§ 1-200] to justify reliance on contemporary as well as pre-enactment common law doctrines."[32] In *Long v. Vlasic Food Products Co.*,[33] the Fourth Circuit cited *Foster v. Commonwealth*,[34] which adopted the common law rule that a boy under the age of fourteen was conclusively incapable of committing or attempting to commit rape, whatever may be the real facts.[35] The court in *Foster* cited Hale's *Historia Placitorum Coronae* (1736) and English cases decided between 1828 and 1893.[36] The court also compared Virginia's adoption of the common law and British statutes:

> Although, by the terms of the ordinance of 1776, the common law was adopted generally and without a qualification similar to that annexed to the adoption of the British statutes, yet it has always been considered that the same principle governs the adoption of the common law. Such of its doctrines and principles as are repugnant to the nature and character of our political system, or which the different and varied circumstances of our country render inapplicable to us, are

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the opinion of Justice James Iredell, a North Carolinian, sitting as a circuit court judge in *United States. v. Mundel*, 10 Va. (6 Call) 245 (1795). The issue was whether the marshal had a right to require bail of a defendant arrested in an action of debt at the instance of the United States under an act of Congress. *Id.* at 253. Justice Iredell concluded that Virginia law controlled as Congress had not passed a statute on the issue and that the law of Virginia included "the common and statute law of England, as they existed in England, at the time of the first settlement of the country" so far as they were applicable to its situation and had not been altered by the General Assembly. *Id.* at 260–61, 263–64, 266. He made no reference to the ordinance or to the repeal of British statutes, *see supra* note 11 and accompanying text, but then the facts stated do not indicate if Mundel's arrest occurred before or after 1793. In any event, these statements were dicta as Justice Iredell decided a 1788 Virginia statute controlled and was the "rule of decision." *Id.* at 268.

32. Long v. Vlasic Food Prods. Co., 439 F.2d 229, 231 (4th Cir. 1971).

33. 439 F.2d 229 (4th Cir. 1971).

34. 31 S.E. 503 (Va. 1898).

35. *See id.* at 505 (concluding that the common law rule applies, presuming "the accused being under fourteen years of age . . . to be incapable of committing the crime of rape"). This was changed by 1994 *Acts of Assembly,* c. 339. *See* VA. CODE ANN. §§ 18.2-61 (2012) (failing to distinguish between accused rapists over and under the age of fourteen).

36. *See Foster*, 31 S.E. at 503 (providing English sources for the common law rule at issue).

> either not in force here, or must be so modified in their application as to adapt them to our condition. It is a reasonable and substantial compliance with the common law, "'whose peculiar beauty is that it adapts itself to the rights of parties under every change of circumstances,'" rather than a literal one, which is exacted by its adoption.[37]

Thus, the parts of English common law not in force in Virginia were to be determined not by their vintage but by their compatibility with our political system and circumstances.[38]

In *U.S. Fidelity Co. v. Carter*,[39] a bank holding a deposit of state and county taxes "closed its doors," and the bank's surety paid the county treasurer the amount on deposit, was subrogated to the treasurer's rights against the bank's receivers, and brought suit against them.[40] The court framed the issues thus:

> The [surety's] major premise, upon which its whole contention rests, is that, by virtue of the adoption by Virginia of the common law of England, the Commonwealth became entitled, in the absence of any statutory provision to the contrary, to have a debt due to it from an insolvent bank, which has arisen from the deposit of public funds therein for or by it, paid in preference to the general depositors and other general creditors of the bank. If this be not true, there is no basis for the preference to which it contends the county and county treasurer are entitled.
>
> To determine whether this primary contention of the appellant is well made, it is necessary to consider two questions: (1) What was the common law of England, as understood at the time of the American Revolution, with reference to the right of the king, or crown, to have his, or its, debt paid in preference to a debt due by his, or its, debtor to another creditor? (2) To what extent, if any, has the Commonwealth of Virginia adopted the common law of England on this subject as being applicable to debts due it;[41]

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37. *Id.* at 504–05 (citations omitted).

38. *See* Shirley v. Shirley, 525 S.E.2d 274, 276–77 (Va. 2000) (making no mention of 1607 and relying on an 1840 English decision in holding that the common law rule barring a reservation to a stranger to the deed was not incompatible with Virginia jurisprudence). Three of the justices in *Shirley* were also on the *Morris* court.

39. 170 S.E. 764 (Va. 1933).

40. *Id.* at 764–65.

41. *Id.* at 766.

There followed a lengthy discussion of English law related to the King's right to a preference over a debtor's other creditors, and whether the Commonwealth acceded to the King's rights by the adoption of the common law. The court found that the common law regarding the King's prerogative to have his debts preferred had not been adopted in Virginia without modification, and it held the Commonwealth did not have such rights for commercial debts owed to it, such as deposits in a bank.[42] Thus, its examination of the common law "as understood at the time of the American Revolution" could be considered dictum.[43]

As county taxes were included in the money the treasurer had deposited in the bank, the court also had to consider whether the county was entitled to a preference. The court held it was not so entitled:

> In our rather extensive examination of the English precedents and authorities we have found no authority which even intimates that at the time of the American Revolution any political subdivision of the kingdom or body politic was regarded as being entitled under the common law of England to have its debts preferred.[44]

This was *not* dictum. The decision was unanimous—six of the seven justices participated, and Judge Tucker was vindicated. The court in *Morris* made no mention of *U.S. Fidelity*.

Since *Foster* and before *Morris*, when the court cited § 1-200 (or its predecessors) and English cases and treatises as the rule of decision, it more often cited cases decided and treatises written after 1607.[45]

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42. *Id.* at 773 ("In the view which we have taken of the case, neither the Commonwealth, the county, nor the county treasurer was entitled to any preference . . . .").

43. *Id.* at 766.

44. *Id.* at 772.

45. *See, e.g.*, Shirley v. Shirley, 525 S.E.2d 274, 276 (Va. 2000) (citing an 1840 case); Campbell v. Commonwealth, 431 S.E.2d 648, 651 (Va. 1993) (citing a 1727 case and postsettlement English treatises); Wackwitz v. Roy, 418 S.E.2d 861, 864–65 (Va. 1992) (citing Blackstone); Williamson v. The Old Brogue, 350 S.E.2d 621, 623 (Va. 1986) (citing a 1981 Maryland case); Bruce Farms v. Coupe, 247 S.E.2d 400, 402–03 (Va. 1978) (citing Coke, Littleton (1633) and declining to follow 1931, 1938 and 1955 cases); Johnson v. Commonwealth, 189 S.E.2d 678, 679 (Va. 1972) (citing a 1603 case and then distinguishing it); Evans v. Asphalt Roads, 72 S.E.2d 321, 327 (Va. 1952) (citing a 1595 case and Virginia cases on the same issue); Carter v. Hinkle, 52 S.E.2d 135, 136 (Va. 1949) (citing an 1884

In several cases the court has abrogated the common law as previously declared, not because the previous authority was post-1607, but because the court believed it was no longer compatible with contemporary conditions. In *Weishaupt v. Commonwealth*,[46] the defendant had been convicted of attempting to rape his wife and claimed a husband could not be so convicted at common law.[47] The defendant relied on a statement from Hale that supported his position.[48] The court found that Hale's statement was not an accurate statement of the common law, and it cited English decisions from 1721 through 1974 in support of its view.[49] However, it decided that even under those decisions Weishaupt's conviction would have to be reversed.[50] Nonetheless, it affirmed the conviction because the English common law on this subject, even as of 1974, did not reflect the independence of women in contemporary Virginia or "fit our way of life."[51]

*IV. Post-*Morris *Decisions*

In *Bevel v. Commonwealth*,[52] the court restated the *Morris* dictum and cited Blackstone and a 1591 decision, *Marsh and his Wife*,[53] in concluding that the death of a convicted defendant did

case); Butts v. Commonwealth, 133 S.E. 764, 768 (Va. 1926) (citing an 1869 English case and several American cases); Wiseman v. Commonwealth, 130 S.E. 249, 251 (Va. 1925) (citing an 1801 case).

46. 315 S.E.2d 847 (Va. 1984).

47. *See id.* at 850 (explaining defendant's claims that the statutory law had not altered the common law rule adopted by Virginia).

48. *See id.* at 849–50 (quoting "17th century English jurist Sir Matthew Hale" for the common law rule).

49. *See id.* at 850 (determining that "Hale's statement was not law" and that he "cites no authority for his view nor was it subsequently adopted, in its entirety, by the English courts").

50. *See id.* at 852 ("The English common law rule, if applied directly to this case, would require us to reverse Weishaupt's conviction.").

51. *Id.* at 852–54. In three other cases, the court abrogated intrafamilial tort immunity, but that was American common law, and no English cases or treatises were cited. Surratt Adm'r. v. Thompson, 183 S.E.2d 200 (Va. 1971); Smith v. Kauffman Adm'r, 183 S.E.2d 190 (Va. 1971); Midkiff v. Midkiff, 113 S.E.2d 875 (Va. 1960).

52. 717 S.E.2d 789 (Va. 2011).

53. (1591) 78 Eng. Rep. 481 (Q.B.) 528; Cro. Eliz. 225, 273.

not cause the criminal case to abate.[54] As Blackstone's fourth volume was cited, it is apparent English law on the question had not changed by 1769. A postsettlement English decision was to the same effect as *Marsh*.[55]

In *Wyatt v. McDermott*,[56] a 4–3 decision, the majority restated the *Morris* dictum and cited a 1599 decision, not as authority for the new tort it recognized of tortious interference with parental rights, but rather as some pedigree for it.[57] The English case had held that a father had a cause of action for the abduction of his heir but for no other child.[58]

In the court's most recent reference to English common law, *Cline v. Dunlora South*,[59] the majority, in another 4–3 decision, cited an 1890 English case regarding tort liability of adjoining landowners.[60] Neither the majority nor the dissenters mentioned *Morris*.

* * * *

You may still be asking what practical effect any of this has. The answer: The quantum and usefulness of authority available to the Virginia judge or lawyer as the rule of decision. The leading authority on Anglo-Virginian legal history has written:

> [T]here are relatively few reports of decisions before 1607 and many of these were, by the eighteenth century, antiquated by later English developments or inapplicable to the social conditions of Virginia, and thus of little use or authority.[61]

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54. *See Bevel*, 717 S.E.2d at 795 (determining that the decision of whether a criminal case will abate due to the death of the defendant is "more appropriately decided by the legislature, not the courts").

55. King v. Ayloff, (1689) 91 Eng. Rep. 194 (K.B.); 1 Salk. 295. The same decision seems to be published at 90 Eng. Rep. 375, Comberbach 114.

56. 725 S.E.2d 555 (Va. 2012).

57. *See id.* at 564 (citing Barham v. Dennis, (1599) 78 Eng. Rep. 1001 (K.B.); Cro. Eliz. 770).

58. *See id.* (explaining that in *Barham* it was determined that "a father could only seek the pecuniary loss of his heir's marriage prospects under an action of trespass for the taking of his heir").

59. 726 S.E.2d 14 (Va. 2012).

60. *See* at 16 (citing Giles v. Walker, 24 Q.B.D. 656 (Eng. 1890)).

61. W. HAMILTON BRYSON, VIRGINIA CIVIL PROCEDURE 2–9 (4th ed. 2005). Full disclosure: the clause immediately preceding the quotation states, "English cases decided after 1607 were taken to be persuasive rather than binding

The decisions of the courts are the principal monuments of the common law, the *lex non scripta.*[62] Before the Revolution, Virginia's judges were not lawyers and the General Court, the colony's highest, delivered no written opinions.[63] There are no extant reported decisions before 1728 or between 1741 and 1768, and the reported decisions are mostly the arguments of the reporter.[64] Thus, much of Virginia's colonial common law development is truly a *lex non scripta.* If the 1607 line of exclusion is taken strictly, we are deprived of almost two centuries of authoritative common-law development and much of the wisdom of Sir Edward Coke, Sir Matthew Hale, Blackstone, and Lord Mansfield, the leading judges and writers of the Augustan Age of the English common law.

As a dictum, the statement is not binding in future cases, and it is of no real concern if we share Blackstone's conclusion that a subsequent change to the common law does not mean the earlier decision was bad law, but that it was not law, it having been erroneously determined.[65] Nor is it of concern if post-1607 English cases are followed as the "common law of Virginia." The dictum was nonetheless an unforced[66] error.

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authority." *Id.* It is believed the good professor is Jacobean on the question presented.

62. *See* BLACKSTONE, *supra* note 9, at *63 ("The *lex non scripta*, or unwritten law, includes . . . the common law properly so called . . . and, likewise those particular laws, that are by custom observed only in certain courts and jurisdictions.").

63. *See* R. T. Barton, *Introduction* to 1 VIRGINIA COLONIAL DECISIONS 208–12, 236 (1909) (noting that "[t]he chief colonial court, however, was the General Court," and it "delivered no written opinions, and generally gave no reasons at all for their conclusions").

64. *See id.* at 1 (explaining that Randolph's Reports cover cases from 1728 to 1732 and Barradall's Reports cover cases from 1733 to 1741); *id.* at 8–9 (explaining that Jefferson's Reports cover cases from 1730 to 1740 and 1768 to 1772); 1 VIRGINIA COLONIAL DECISIONS R1-114 (providing Randolph's reports); 2 VIRGINIA COLONIAL DECISIONS B1-383 (providing Barradall's reports). Most of the decisions of the earlier period in Jefferson's Reports are from Randolph and Barradall. Barton*, supra* note 63, at 8–9.

65. *See* BLACKSTONE, *supra* note 9, at *70 ("For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.").

66. Unforced for a second reason: no party in *Morris* on brief contended that Virginia's adoption of English common law ends in 1607.