

*John V Orth\**

## THE STRANGE CAREER OF THE COMMON LAW IN NORTH CAROLINA

The common law began its career long ago and far away, in England in the 12<sup>th</sup> century. Unlike other of the world's great legal traditions, the common law did not produce an authoritative law book comparable to the *Corpus Juris Civilis* of Roman law or the *Code Napoleon* of French law. Instead, the common law generated a collection of judicial decisions, a set of institutions and a distinctive way of resolving disputes. Common law rules, derived mainly from decided cases, were multifarious and sometimes seemingly contradictory, yet susceptible to rational organisation and harmonisation. Common law institutions, principally courts, were for many years a confusing collection of ancient offices with often unclear and overlapping jurisdictions, but they benefited from a tradition of orderliness and a crude but recognisable effectiveness. The 'common law way' of reasoning from case to case within a rigid set of procedures was at bottom and necessarily practical, but it included an element of ancient anachronism that contributed an air of mystery and majesty.

After the voyages of discovery begun by Christopher Columbus in 1492, England acquired a far-flung Empire and English colonists carried the common law with them wherever they went. From its first permanent settlement in the early 1600s, the colony of North Carolina on the east coast of North America accepted as much of the common law as suited its frontier conditions.<sup>1</sup> On 4 July 1776, North Carolina joined with 12 other adjacent colonies of Great Britain to issue a unilateral declaration of independence. The American Revolution severed the colony's ties with the British Empire but not with the common law. Within months of declaring independence, the

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\* William Rand Kenan, Jr Professor of Law, University of North Carolina School of Law. AB 1969, Oberlin College; JD 1974, MA 1975, PhD (history) 1977, Harvard University. An earlier version of this paper was presented at the Conference on the Legal Histories of the British Empire, 'Laws, Spaces, Cultures and Empire: Engagements and Legacies', sponsored by the Faculty of Law, the National University of Singapore and the Faculty of Law and Centre for Asia-Pacific Initiatives, University of Victoria, British Columbia, held at the National University of Singapore, 5–7 July 2012.

<sup>1</sup> For the operation of the common law in North Carolina prior to independence, see William E Nelson, 'Politicizing the Courts and Undermining the Law: A Legal History of Colonial North Carolina, 1660–1775' (2010) 88 *North Carolina Law Review* 2133. See also *Act of 1715*, ch 31, 23 *The State Records of North Carolina* 38 (Walter Clark 1905) ('*State Records*'). An earlier statute from 1711 is to the same effect. See *Act of 1711* ch 1, 25 *State Records* 152.

State adopted a constitution that incorporated sections from *Magna Carta* (1215)<sup>2</sup> and the *English Declaration of Rights* (1689) in its own *Declaration of Rights*.<sup>3</sup> Soon thereafter, the State re-adopted the colonial legislation and received ‘such Parts of the Common Law, as were heretofore in Force and Use within this Territory’.<sup>4</sup>

In 1782, a courtroom drama in a backwoods county of North Carolina demonstrated that the American Revolution — unlike the French Revolution of 1789 or the Russian Revolution of 1917 — did not mark a dramatic break with the pre-revolutionary legal tradition. More than a year before a final peace treaty formally severed ties with the former colonial master, a prosecution for treason against the republican State was decided by analogy to a prosecution for treason against the Crown. As enumerated in bills of indictment, a grand jury in Rowan County charged Samuel Bryan, John Hampton and Nicholas White with:

The Taking a Commission from the King of Great Britain.  
The Levying War against this State, and the Government thereof.  
The Aiding and Assisting the Enemy, by joining their Army, and by enlisting and procuring others to enlist for that Purpose.  
The forming and being concerned in forming a Combination, Plot and Conspiracy for betraying this State into the Hands and Power of a foreign Enemy, to wit: the King of Great Britain.  
And the giving Intelligence to the Enemies of this State for that Purpose.<sup>5</sup>

In 1780, Colonel Bryan had raised a company of six or seven hundred loyalists and alongside Hampton and White served with British dragoons of the 71<sup>st</sup> regiment until the regiment was withdrawn from the State and the three were captured. The prosecution, conducted by North Carolina Attorney-General Alfred Moore (later appointed a justice of the United States Supreme Court by President George Washington), proved that Bryan had been resident in the State at the time of the passage of the State’s treason law in 1777<sup>6</sup> and had subsequently committed the overt acts charged in the indictment. A distinguished team of defence counsel, including William R Davie (a signatory of the *Declaration of Independence*), admitted that Bryan had served ‘his Britanick Majesty whom the prisoner considered as his liege sovereign’, and argued that Bryan ‘knew no protection from nor ever acknowledged

<sup>2</sup> *North Carolina Constitution of 1776, Declaration of Rights* § 12. Cf *Magna Carta* (1215) § 39 (also referred to as the *Great Charter*).

<sup>3</sup> *North Carolina Constitution of 1776, Declaration of Rights* §§ 5, 6, 10, 17, 20. Cf 1 Wm & M sess 2, c 2, s I (preamble), cls 1, 8, 10, 13.

<sup>4</sup> *Act of 1778*, ch 5, 24 *State Records* 162. An ordinance of the 1776 Independence Convention, 23 *State Records* 992, and two earlier *Acts of 1777*, ch 25, 24 *State Records* 36 and ch 14, 24 *State Records* 113, are to the same effect.

<sup>5</sup> *State v Bryan* (Rowan County Superior Court, April 1782), quoted in David L Swain, ‘British Invasion of North Carolina in 1776’ in William D Cook (ed), *Revolutionary History of North Carolina in Three Lectures* (William D Cook, 1853) 101, 229.

<sup>6</sup> *Act of 1777*, ch 3, 24 *State Records* 9.

any allegiance to the State of North Carolina', so could not be guilty of treason against the State.<sup>7</sup>

Rather than join issue on the delicate question of when and how the North Carolinian's duty of loyalty switched from that owed the King to that owed the new Republic, the Attorney-General argued that even resident aliens could be guilty of treason. For authority, he cited the 1594 case of the Portuguese Stephano Ferrara da Gama and Emanuel Lewes Tinana, who were convicted of treason for participating in the conspiracy of Dr Roderigo Lopez to poison Queen Elizabeth I.<sup>8</sup> The defence attempted to distinguish that case by arguing that the Portuguese 'publicly claimed and enjoyed the protection of the Laws' of England and therefore owed 'a local or temporary allegiance', while Bryan, by contrast, 'maintained that Degree of Secrecy necessary to ensure the success of a Military Enterprise, was unknown to our Laws, and could not offend as a Citizen'.<sup>9</sup> Probably to no one's surprise, the argument failed to convince. The defendants were convicted and sentenced to death, but were subsequently pardoned and exchanged for American officers who had been captured by the British.

Although a State statute created the offence, its application was governed by English precedent, and the method of argument was the familiar thrust and parry of the common law. If the government's case in *State v Bryan* was like that in *Regina v Da Gama* almost 200 years earlier, then the result should be the same. *Stare decisis*. Far from being rejected by Britain's former colony, the common law was retained and domesticated — parts incorporated in a written constitution, parts superseded by statute and parts modified by judicial decision. The accommodations necessary to suit the postcolonial State, begun in 1776, continue to this day. By the early 21<sup>st</sup> century, North Carolina common law, while bearing an obvious family resemblance to its English ancestor and to common law jurisdictions throughout the English-speaking world, displays its own distinctive and remarkable characteristics.

In 1776, when the colony claimed its independence, the distinction between constitutional law and common law was not sharply drawn. Although as colonists North Carolinians had occasionally referred to the *Royal Charter* as their 'constitution'<sup>10</sup> — in

<sup>7</sup> Swain, above n 5, 232, quoting *State v Bryan* (Rowan County Superior Court, April 1782).

<sup>8</sup> *Regina v Da Gama* (1594). The case cited is described in Sir Matthew Hale's *History of the Pleas of the Crown*, published posthumously in 1736. A 1778 edition, perhaps the very one consulted in *State v Bryan* (Rowan County Superior Court, April 1782), is in the collection of the Kathrine R Everett Law Library of the University of North Carolina.

<sup>9</sup> Swain, above n 5, 232, quoting *State v Bryan* (Rowan County Superior Court, April 1782).

<sup>10</sup> William S Powell, *North Carolina Through Four Centuries* (University of North Carolina Press, 1<sup>st</sup> ed, 1989) 88. The *Royal Charter* created the Crown Colony of North Carolina.

the Aristotelian sense of the organisation of their government<sup>11</sup> — they (like other English colonists throughout the British Empire) believed their civil rights were secured by the common law. In that very important regard, the common law *was* the constitution. The North Carolinians acted swiftly to adapt that tradition to the institutions of their new society.

The positivistic proposition that statutes trump the common law had barely been established in the Mother Country when the rebellious colonies re-complicated the issue by ‘constitutionalising’ (in the American sense of the word) parts of the common law. When the General Assembly purported to deprive expropriated Tories of the right to trial by jury,<sup>12</sup> North Carolina judges in 1787 held that ‘no act ... could by any means repeal or alter the constitution’,<sup>13</sup> which guaranteed trial by jury in all cases concerning property.<sup>14</sup> It was to be 16 years before the United States Supreme Court reached the same conclusion in the famous case of *Marbury v Madison*.<sup>15</sup>

At the centre of the new State’s *Declaration of Rights* — literally right in the middle of the text — were echoes of the famous words of *Magna Carta*: ‘No freeman ought to be taken, imprisoned, or disseised of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property but by the law of the land.’<sup>16</sup> That meant, as a North Carolina judge held in 1794, ‘according to the course of the common law’.<sup>17</sup> While an English statute of 1297 had declared that *Magna Carta* was to be received as common law,<sup>18</sup> the North Carolinians 500 years later wrote its most important section into their state

<sup>11</sup> Cf Aristotle, *Politics* (B Jowett trans, 1984) [trans of: *Politica* (first published 1885)] in Jonathon Barnes (ed), *Complete Works of Aristotle: Revised Oxford Translation* (Princeton University Press, 1984) vol 2, 1986, 2029. ‘A constitution is the arrangement of magistracies in a state, especially of the highest of all.’

<sup>12</sup> *Act of 1785*, ch 7, 24 *State Records* 730. The Act required the courts to dismiss suits challenging title acquired by purchase from a commissioner of forfeited estates.

<sup>13</sup> *Bayard v Singleton*, 1 NC (1 Mart) 5, 7 (1787).

<sup>14</sup> *North Carolina Constitution of 1776, Declaration of Rights* § 14. ‘[I]n all Controversies at Law respecting Property, the ancient Mode of Trial by Jury is one of the best Securities of the Rights of the People, and ought to remain sacred and inviolable.’

<sup>15</sup> 5 US (1 Cranch) 137 (1803).

<sup>16</sup> *North Carolina Constitution of 1776, Declaration of Rights* § 12. Cf *Magna Carta* (1215) § 39.

<sup>17</sup> *State v Anonymous*, 2 NC (1 Hayw) 28, 29 (Williams J) (1794). Concerning the constitutionality of the specific statute at issue, Williams J’s colleagues, Ashe and Macay JJ, disagreed, although Ashe J confessed to ‘very considerable doubts’ about the judgment and admitted that ‘he did not very well like it’.

<sup>18</sup> The 13<sup>th</sup> century statute was familiar to 18<sup>th</sup> century lawyers. See William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, first published 1765–9, 1979 ed) vol 1, 124 (‘*Commentaries*’). ‘By the statute called *confirmatio cartarum* ... the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void ...’

constitution. A statute trumps the common law, but the common law, to the extent that it is incorporated into the constitution, trumps a statute.

Although the North Carolina common law reception statute, still contained within the State's *General Statutes*, expressly excepts all such parts of the common law as are 'destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established',<sup>19</sup> the successful revolutionaries recognised that legislation was required to clarify what was retained and what was discarded. To adapt the English common law to the republican social order, feudal elements accumulated over the centuries had to be purged.

Because of its association with the landed aristocracy, property law needed immediate attention. The *Declaration of Rights* singled out perpetuities and monopolies in particular as 'contrary to the genius of a free state'<sup>20</sup> and the *North Carolina Constitution of 1776* directed that the future legislature 'shall regulate entails in such a manner as to prevent perpetuities'.<sup>21</sup> In 1784 the General Assembly duly complied as part of a wide-ranging reform of land law. The fee tail was eliminated as a present estate.<sup>22</sup> 'Entails of estates', the legislators explained in the preamble to the *Act of 1784*, 'tend only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances the source of great contention and injustice.'<sup>23</sup> Another section of the same statute abolished primogeniture, substituting partible inheritance among all male heirs.<sup>24</sup> The common law presumption

<sup>19</sup> NC Gen Stat § 4-1 ('*General Statutes*').

<sup>20</sup> *North Carolina Constitution of 1776, Declaration of Rights* § 23; now *North Carolina Constitution of 1971* art I § 34.

<sup>21</sup> *North Carolina Constitution of 1776* § 43.

<sup>22</sup> *Act of 1784*, ch 22 § 5, 24 *State Records* 572, now codified at NC Gen Stat § 41-1: 'Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple.' Literally, the statute does not apply to estates in tail in remainder, so strict settlements of land which depend for their effectiveness on keeping the tenant in tail out of possession remain theoretically possible. See John V Orth, 'Does the Fee Tail Exist in North Carolina?' (1988) 23 *Wake Forest Law Review* 767.

<sup>23</sup> *Act of 1784*, ch 22 § 5, 24 *State Records* 572, 574. Ironically, in 2007 North Carolina repealed the Rule Against Perpetuities, allowing perpetual trusts, commonly known as 'dynasty trusts': NC Gen Stat §§ 41-15, 41-23. The constitutionality of the repeal was upheld in *Brown Brothers Harriman Trust Co v Benson*, 688 SE 2d 752 (NC Ct App, 2010). See John V Orth, 'Allowing Perpetuities in North Carolina' (2009) 31 *Campbell Law Review* 399. See also Steven J Horowitz and Robert H Sitkoff, 'Unconstitutional Perpetual Trusts' (2014) 67 *Vanderbilt Law Review* 1769.

<sup>24</sup> *Act of 1784*, ch 22 § 2, 24 *State Records* 572. Eleven years later, females were admitted to an equal share: *Act of 1795*, ch 435, 1 *Laws of the State of North-Carolina* (Henry Potter 1821). See John V Orth, 'After the Revolution: "Reform" of the Law of Inheritance' (1992) 10 *Law and History Review* 33.

in favour of joint tenancy, associated with settlements of property through uses or trusts, was abolished at the same time.<sup>25</sup>

North Carolina might have been a free state in one sense, but it was a slave state in another, and the integration of slavery into the common law posed special problems. While the General Assembly confessed in 1792 that the existing difference in legal treatment between the murder of a slave and the murder of a white person was ‘disgraceful to humanity and degrading in the highest degree to the laws and principles of a free, Christian, and enlightened country’,<sup>26</sup> it was unable — despite repeated attempts — to decide what to do about it. At last, in an extraordinary piece of legislation in 1817, the legislature simply left the dirty work to the judges: ‘The offense of killing a slave shall hereafter be denominated and considered homicide and shall partake of the same degree of guilt when accompanied with the like circumstances that homicide now does at common law.’<sup>27</sup> As Judge Leonard Henderson acknowledged in a subsequent case, the ‘law of the land’ was not the common law of England but an indigenous common law — ‘cut down’, as he put it, ‘by statute or custom so as to tolerate slavery’.<sup>28</sup> The North Carolina Supreme Court was forced to remodel the common law to suit the peculiar institution. ‘The result’, it has been observed, ‘was a peculiar common law.’<sup>29</sup>

Within a few decades of Independence, the dynamic was established that was to mark the State’s common law into the 21<sup>st</sup> century — the continuing interaction of constitution, statute and case. The post-Independence reception statute made Sir William Blackstone’s *Commentaries on the Laws of England*, fortuitously appearing in its first edition only a few years earlier, a godsend to the State’s lawyers and judges. Aspiring North Carolina lawyers into the 20<sup>th</sup> century were required to read Blackstone, and

<sup>25</sup> *Act of 1784*, ch 22 § 6, 24 *State Records* 572, now codified at NC Gen Stat § 41-2:

[I]n all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common.

The effect of the 1784 statute was to eliminate the so-called right of survivorship and make the joint tenancy indistinguishable in effect from the tenancy in common. In 1991 the old joint tenancy was restored so long as the instrument creating the estate expressly provides for a right of survivorship. See John V Orth, ‘The Joint Tenancy Makes a Comeback in North Carolina’ (1990) 69 *North Carolina Law Review* 491.

<sup>26</sup> *Act of 1792*, ch 4, § 3, 1791 NC Pub Laws 8-9.

<sup>27</sup> *Act of 1817*, ch 18, § 3, 1817 NC Pub Laws 18-19.

<sup>28</sup> *State v Reed*, 9 NC (2 Hawks) 454, 457 (Henderson J) (1823).

<sup>29</sup> Joseph L Hyde, ‘The Common Law Cut Down: Homicide and Human Property in Post-Colonial North Carolina’ (2012) 36 *Australian Bar Review* 176. For a further example of just how peculiar the North Carolina common law of slavery was, see John V Orth, ‘When Analogy Fails: The Common Law & *State v. Mann*’ (2009) 87 *North Carolina Law Review* 979 (comparing *State v Mann*, 13 NC (2 Dev) 263 (1829) with *Somerset v Stewart* (1772) Lofft 1; 98 ER 499).

the State's leading law professors prepared textbooks that restated Blackstone — 'from', as one subtitle advertised, 'a North Carolina standpoint'.<sup>30</sup>

As if to demonstrate the point, when in 1971 the State Supreme Court held that the reception statute 'adopted the common law as of the date of the signing of the Declaration of Independence',<sup>31</sup> it was to explain why English cases on sovereign immunity decided post-1776 were irrelevant to its decision. North Carolina courts had long since gone their own way. The process continues to this day. After piously claiming in a 1967 case that 'no state has been more faithful to *stare decisis*',<sup>32</sup> the State Supreme Court proceeded to eliminate the century-old immunity of charities to actions in tort, a reform the legislature belatedly codified.<sup>33</sup> And at the very end of the 20<sup>th</sup> century, the Court held the year-and-a-day rule in criminal law, plainly set out in Blackstone's *Commentaries*,<sup>34</sup> to be (or perhaps to have become) 'obsolete'.<sup>35</sup>

As throughout the common law world, the initiative in legal change passed from courts to legislatures. In North Carolina, the General Assembly became the principal agent of common law development. In 1987, for example, it ended the long reign of the Rule in *Shelley's Case*<sup>36</sup> with the laconic sentence: 'The rule of property known as the rule in *Shelley's Case* is abolished.'<sup>37</sup> Similarly in 2012, the legislature abolished 'the rule of property known as the Rule in *Dumpor's Case*'<sup>38</sup> — in both

<sup>30</sup> Samuel Mordecai, *Law Lectures: A Treatise, From a North Carolina Standpoint, on Those Portions of the First and Second Book of the Commentaries of Sir William Blackstone Which Have Not Become Obsolete in the United States* (Edwards & Boughton Printing, first published 1907, Commercial Printing, 2<sup>nd</sup> ed, 1916). See also John Manning, *Commentaries on the First Book of Blackstone* (University of North Carolina Press, 1899). For a general discussion of Blackstone's influence in the State, see John V Orth, 'Blackstone's Ghost: Law and Legal Education in North Carolina' in Wilfrid Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Hart Publishing, 2014) 125.

<sup>31</sup> *Steelman v City of New Bern*, 184 SE 2d 239 (NC, 1971).

<sup>32</sup> *Rabon v Rowan Memorial Hospital*, 152 SE 2d 485 (Sharp CJ) (NC, 1967).

<sup>33</sup> See Anna R Hayes, *Without Precedent: The Life of Susie Marshall Sharp* (University of North Carolina Press, 2008) 281–7.

<sup>34</sup> Blackstone, above n 18, vol 4, 197–8.

<sup>35</sup> *State v Vance*, 403 SE 2d 495, 499 (NC, 1991).

<sup>36</sup> *Wolfe v Shelley* (1581) 1 Co Rep 93b; 76 ER 206 ('*Shelley's Case*').

<sup>37</sup> NC Gen Stat § 41-6.3. See John V Orth, 'Requiem for the Rule in *Shelley's Case*' (1989) 67 *North Carolina Law Review* 681. See also John V Orth, *Reappraisals in the Law of Property* (Ashgate Publishing, 2010) ch 2.

<sup>38</sup> NC Gen Stat § 41-6.4. See John V Orth, 'North Carolina Bids Goodbye (Again) to the Rule in *Dumpor's Case*' (2013) 35 *Campbell Law Review* 193.

cases making reference to the common law a continuing necessity in order to know what exactly was abolished.<sup>39</sup>

Not only does the General Assembly repeal old common law rules, but it also creates new causes of action, such as equitable distribution of marital property on divorce<sup>40</sup> and the ‘constitutional tort’ of state violation of individual rights.<sup>41</sup> Nonetheless, there remains a question to this day whether the legislature may constitutionally eliminate a common law cause of action. As our Supreme Court put it in 1983: ‘We refrain from holding, as our Court of Appeals did and as other courts have done, that the legislature may constitutionally abolish altogether a common law cause of action.’<sup>42</sup> ‘Neither do we mean to say’, the Court unhelpfully added, ‘that it cannot.’<sup>43</sup> Perhaps for this reason, the State still recognises the anachronistic torts of alienation of affections<sup>44</sup> and criminal conversation.<sup>45</sup>

<sup>39</sup> Cf AW Brian Simpson, *Leading Cases in the Common Law* (Clarendon Press, 1995) 41: ‘When I studied property law in Oxford in 1952 we still had to know what [the Rule in *Shelley’s Case*] was, since otherwise, it was argued with perverse but yet compelling logic, we could not understand what precisely had been abolished.’ The General Assembly stumbled when it attempted a similar sweep of the Doctrine of Worthier Title. In 1974 it adopted a statute simply providing: ‘The common-law doctrine of worthier title, both the wills branch and the deeds branch, is hereby abolished’, which was codified in NC Gen Stat § 28A-1-2. Uncertainty about what exactly that meant led five years later to its repeal and the adoption of the current statute:

The law of this State does not include: (i) the common-law rule of worthier title that a grantor or testator cannot convey or devise an interest to his own heirs, or (ii) a presumption or rule of interpretation that a grantor or testator does not intend, by a grant, devise or bequest to his own heirs or next of kin, to transfer an interest to them. The meaning of a grant, devise or bequest of a legal or equitable interest to a grantor’s or testator’s own heirs or next to kin, however designated, shall be determined by the general rules applicable to the interpretation of grants or wills.

NC Gen Stat § 41-6.2(a).

<sup>40</sup> NC Gen Stat §§ 50-20, 50-21.

<sup>41</sup> *Corum v University of North Carolina*, 413 SE 2d 276 (NC, 1992).

<sup>42</sup> *Lamb v Wedgwood South Corp*, 302 SE 2d 868, 882 (NC, 1983).

<sup>43</sup> *Ibid.*

<sup>44</sup> 2 Lee, *North Carolina Family Law* § 207 (1980) 553–4: ‘An action for alienation of affections is comprised of wrongful acts which are said to deprive a married person of the affections of his or her spouse, including love, society, companionship and comfort.’ According to *North Carolina Lawyers Weekly*, ‘there are more than 200 alienation of affections cases currently in the state’s Superior Courts’: Phillip Bantz, ‘One Heart-Balm Challenge Ends in N.C., Another Begins’, *North Carolina Lawyers Weekly* (Charlotte, North Carolina), 4 February 2013, 1–3.

<sup>45</sup> See Blackstone, above n 18, vol 3, 139:

Adultery, or criminal conversation with a man’s wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury, (and surely there can be no greater) the law gives satisfaction to the husband for it by an action of trespass *vi et armis* against the adulterer, wherein the damages recovered are properly increased or diminished by circumstances ...



The interaction between statute and common law in North Carolina is complex.<sup>46</sup> A statute may incorporate the common law by reference; the crimes of arson and burglary, for example, remain by statute ‘as defined at the common law’,<sup>47</sup> while robbery is prosecuted to this day without any statutory authorisation.<sup>48</sup> A statute may codify a judicial decision that changed the common law, such as the statute that abolished the defence of charitable immunity in tort immediately after the Supreme Court had abandoned it.<sup>49</sup> A statute may even direct the judges to develop the common law. Deposit accounts, for example, that do not conform to the statutory norm are governed ‘by other common law provisions of the General Statutes or the common law as appropriate’,<sup>50</sup> and several statutes direct the courts to be guided by ‘the principles of common law as they may be applied in the light of reason and experience’.<sup>51</sup>

Reliance on precedent continues to be the primary form of judicial reasoning. Even when deciding a case concerning a statute, North Carolina courts commonly cite a prior judicial decision rather than the statute itself. Occasionally, this leads to a line of cases that rely on a statute that has been subsequently amended or even repealed.<sup>52</sup> It would be possible to dismiss such cases as sloppy judging, but they may also be seen as examples of the persistence of the common law habit of looking for law in the prior decisions of judges, rather than in the acts of legislators.

The complex interaction between constitution, statute and case that began in North Carolina after Independence continues into the 21<sup>st</sup> century. In 2004, the State Supreme Court finally admitted that ‘North Carolina common law may be modified or repealed by the General Assembly’, but cautioned that this does not include ‘any parts of the common law which are incorporated in our Constitution’,<sup>53</sup> without

<sup>46</sup> A word search of the State’s *General Statutes* reveals that the term ‘common law’ appears in statutes over 150 times.

<sup>47</sup> NC Gen Stat §§ 14-51 (burglary), 14-58 (arson).

<sup>48</sup> *State v Black*, 209 SE 2d 458, 460 (NC, 1974), defining robbery at common law, and stating that a statute that imposes more severe punishment if firearms are used in the perpetration of the crime creates no new offense.

<sup>49</sup> NC Gen Stat § 1-539.9. ‘The common law defence of charitable immunity is abolished and shall not constitute a valid defence to any action or cause of action [arising after 1 September 1967].’ See *Rabon v Rowan Memorial Hospital*, 152 SE 2d 485 (NC, 1967).

<sup>50</sup> NC Gen Stat § 53-146.1.

<sup>51</sup> *Ibid* §§ 130A-26.1, 143-215.6B, 143-215.114B.

<sup>52</sup> See, eg, *Re Woodie*, 448 SE 2d 142, 145 (NC Ct App, 1994); *Re Lowery*, 423 SE 2d 861, 864 (NC Ct App, 1993). See *Re McCray*, 697 SE 2d 526 (NC Ct App, 2010), recognising that prior cases indirectly relied on repealed statute.

<sup>53</sup> *Rhyne v K-Mart Corp*, 594 SE 2d 1, 16 (NC, 2004) (internal quotation marks eliminated), quoting *Gwathmey v State ex rel Department of Environment, Health, and Natural Resources*, 464 SE 2d 674, 679 (NC, 1995). Cf *Pinkham v Unborn Children of Jather Pinkham*, 40 SE 2d 690, 692 (NC, 1946): ‘No person has a vested right in a continuance of the common or statute law’.

specifying what parts they are. In 2011, a statute invited — because it could not compel — the judges to revisit and overrule a prior constitutional decision.<sup>54</sup> And in 2012, the North Carolina Court of Appeals quoted Blackstone as authority for just how much (or how little) ‘entry’ was sufficient in a prosecution for breaking and entering.<sup>55</sup>

North Carolina law today is the common law — but, then again, it is not. Parts would be familiar to Blackstone. But it is not the English common law of the 18<sup>th</sup> century, let alone that of modern England. Nor is it identical to the common law of other American states. And parts would be totally unrecognisable in the common law world outside the United States. North Carolina common law today is what late 18<sup>th</sup> century English common law could have developed into — and in one corner of the old British Empire did.

<sup>54</sup> Act of 8 March 2011, ch 2011-6, 2011 NC Sess Laws, urging the State Supreme Court to revisit and overrule *State v Carter*, 370 SE 2d 553 (NC, 1988), which refused to recognise an exception to the exclusionary rule in cases in which the officer conducting the search acted in a good faith, but mistaken, belief it was lawful. The State Supreme Court sidestepped the issue in *State v Heien*, 737 SE 2d 351 (NC, 2012), affd 135 SC 530 (2014).

<sup>55</sup> *State v Watkins*, 720 SE 2d 844, 849 (NC Ct App, 2012), quoting Blackstone, above n 18, vol 4, 227.