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AFTER REPEATED efforts to plant a colony on the coast of Carolina had failed, immigrants came from Virginia and made settlements extending from Chowan River to Currituck Sound. Gradually the population spread toward the south and the west. Subject to the jurisdiction of Virginia, these pioneers did not contemplate an independent government, which indeed was organized after the territory had been formed into a royal province. On March 24, 1663, Charles II granted to the Lords Proprietors their first charter, and ordained that the territory therein described should be known as the Province of Carolina.[1] Of these eight noblemen only Sir William Berkeley, Governor of the Colony of Virginia, set foot on soil in the provincial region. On September 8 he was clothed with power to set up a government in Albemarle, so the King should see that "they slept not with their grant." At this time their plan of government was indefinite; but on January 7, 1665, under the sanction of a document called the "Concessions,"[2] they provided for the organization of eight counties—each, named after a proprietor, to have a government distinctly its own, but identical in form and character with that of the others. They conferred upon the governor "power to make choyce of and to take to him six councillors at least or twelve at moast, or any even number between six and twelve," with whose consent he was to govern according to specified "lymitacons and instructions." They enjoined the governor, councillors, assemblymen, and other officers to discharge their respective trusts "trewly and faithfully" and "to doe equal justice to all men to the best of their skill and judgment, without corruption, favor or affection." They further

[1] Colonial Records of North Carolina, Vol. I, p. 20. Thorpe, *American Charters, Constitutions and Organic Laws*, Vol. 5, p. 2743.

[2] Colonial Records Vol. 1, p. 79. Thorpe, *Am. Charters, etc.* Vol. 5 p. 2756.

provided that the inhabitants, pending the organization of the counties, should choose among themselves twelve representatives to sit with the governor and his council in making such laws, ordinances, and constitutions as they deemed necessary for the several counties; and that the inhabitants of the respective parishes or districts, after the organization of the counties, should, on the first day of January, choose freeholders for each parish, who with the governor and his council should make the laws. This was the genesis of our legislature.

The form of government established under the "Concessions" continued as modified by the Second Charter until the adoption in July, 1669, of John Locke's unique Fundamental Constitutions of Carolina.

The Second Charter was granted the Proprietors by Charles II on June 30, 1667.[3] Under its terms the grantees were authorized and empowered with the advice of the freeman of the province, or the greater part of them, to ordain and publish laws and constitutions appertaining to the whole province, or to any particular county, barony, or colony; from time to time to assemble the freemen or their delegates in such manner and form as should be best for enacting laws; to execute the laws by the imposition of penalties, imprisonment, or any other punishment, even to the taking away of member and life if the quality of the offense required it; to remit, release, pardon, and abolish all crimes before or after judgment; to do everything necessary to the complete establishment of justice; through their judges to award process, hold pleas, and determine in courts and places of judicature "all actions, suits, and causes whatsoever, as well civil, real, mixt, personal, or of any other kind or nature whatsoever." The grantees were authorized to confer upon the people marks of favor and titles of honor which should differ from those conferred in England; in their discretion as to time and limitation to grant indulgences and dispensations to inhabitants whose religious opinions did not conform to the liturgy and ceremonies of the Church of England; to see that these inhabitants should not be molested or called in question for "any difference in opinion or practice in matters of religious concernments" unless they disturbed the peace; and to take care that the laws should be convenient, consonant to reason, and conformable to the laws and customs of England.

"The Fundamental Constitutions of Carolina" was prepared by John Locke at the instance of Lord Shaftsbury.[4] The original draft was completed on March 1, 1669, and signed by the Proprietors on the 21st. day of July. It purported to be unalterable, but it was amended at least five times. This cumbersome document, ill adapted to the wants of the colonists, has been described as a "complicated and involved engine of governmental machinery." The "engine" was indeed both complicated and involved, and the machinery which it put in motion was equipped for the production of a palatine, admirals, chamberlains,

[3] Revised Statutes of North Carolina (1837) p. 1; Colonial Records Vol. 1, p. 102; Thorpe, *Am. Charters, etc.*, Vol. 5, p. 2761.

[4] Revised Statutes (1837) p. 449; Colonial Records Vol. 1, p. 187; Thorpe, *Am. Charters, etc.* Vol. 5, p. 2772.

chancellors, constables, chief justices, high stewards, treasurers, and landgraves and caciques, besides eight seigniories, eight baronies, four precincts of six colonies each, a manor court, a precinct court, a barony court, a constable's court, a county court, a leet court, a palatine's court, a chancellor's court, and eight supreme courts. In practical operation these courts yielded to the justices' courts, precinct courts, the general court, the court of chancery, the court of oyer and terminer, and a court for the trial of slaves.

Moreover, provision was made for a Parliament to be composed of the Proprietors or their deputies, the landgraves and caciques, and one freeholder from each precinct. These lawmakers were to sit together in one room and to have each member one vote. No one was eligible to this dignity whose freehold was less than five hundred acres, and no one was qualified to vote whose freehold fell below fifty acres. No law was to survive the next biennial Parliament unless ratified meanwhile under the hand and seal of the Palatine and three other Proprietors and published by their order at the next session; and at the end of one hundred years "after their enacting" all laws were to become null and void without the necessity of express repeal. All births, marriages, and deaths were to be entered in a registry kept in each seigniory, barony, and colony. One's age was reckoned from the date of this entry, and all marriages were legalized by registration. It was likewise ordained that no man should be "permitted to be a freeman of Carolina, or to have any estate or habitation within it, that did not acknowledge a God, and that God was publicly and solemnly to be worshiped." Parliament was "to take care for the building of churches and the public maintenance of divines who were to be employed in the exercise of religion, according to the Church of England." The terms of admittance into the church and of communion with its members were to be written in a book and subscribed, and no person over seventeen years of age, unless a member of some church or profession, was to have any benefit or protection of the laws or be capable of holding any place of profit or honor.

The exact time when this constitution was abandoned does not appear. The Proprietors sought to enforce it in 1702 and retained control of the proprietary government until July 25, 1729.

The proprietary government covered a period of sixty-six years, during which the Parliament enacted sundry laws to be administered by the courts. If it be true that laws and judicial opinions reflect the habit of a people's thought may we not cite two or three cases typical of the period and illustrative of the conception of justice then prevailing?

It is recorded that in 1722 a defendant was charged with stealing a sheep, or rather a lamb, and, after his confession of guilt, was regaled by this sentence: "He appearing to have been so very drunk at the time of the fact committed as to be scarce capable of knowing what he did (and being very aged) it is considered by the court that he be carried hence to the public whipping-post, and

have his hands put in the bilboes; and that afterwards he be set in the stocks for being drunk."[5] The whipping post, the stocks, and the bilboes were retained as fatuous instruments of punishment until a comparatively recent period.

In the same year a white servant for unknown dereliction listened to these grave words: "It is considered and adjudged that the defendant be tied to the tail of a cart, and be whipped on the bare back with thirty-nine stripes, through Edenton, this day; and that next Friday he be whipped in like manner through Bath Town."[6] Let us assume that the citizens of these towns dealt with the offender more tenderly than the women of Marblehead dealt with old Floyd Ireson.

Some years before this (in 1697) in the "precinct of Curratuck in the county of Albemarle," Plater, *pro domina regina,* drafted an indictment charging Susannah Evans with having devilishly and maliciously bewitched and afflicted with mortal pains the body of one Deborah Bourthier. The bill was returned with the endorsement "Ignoramus." Lawson said that the only instances of capital punishment he had heard of were those of a Turk for murder and of an old woman for witchcraft. But Hawks said the case of Susannah Evans is the only one of the kind to be found in the records of the province.[7]

When a person was convicted of a capital felony the chief justice and his associates, after pronouncing a sentence of death, were required to send a certified copy of the sentence to the governor, who thereupon signed the death-warrant. In 1729 Gov. Richard Everard declined to sign such a warrant because he claimed the court had not been legally constituted, and because, moreover, he was at loss to know whether the court meant hanging until the prisoner was dead, and whether he should be hanged by the neck, the leg, or the arm.

Before the adoption of our first constitution "The General Court," while the supreme court of the province, was also a trial court, and exercised equitable as well as common law jurisdiction. For a number of years it was composed of the governor and his council. In 1685 the Lords Proprietors instructed the governor to appoint "four able, discreet men" as justices who, together with a sheriff, should hold this court; but more than a decade passed before the order was made effective. In 1712 a chief justice was appointed who held his commission directly from the Proprietors. He presided over the court which was thereafter composed of an indefinite or variable number of associates. Thrice a year the court convened and dispensed justice as a court of King's Bench, Common Pleas, Exchequer, Oyer and Terminer, and General Gaol Delivery. The Court of Chancery was held by the governor and his council, who also probated wills, examined the accounts of personal representatives, tried public officials for misconduct in office, and heard appeals from the General Court. During this time

[5] Hawks, *History of North Carolina,* Vol. 2, p. 127.
[6] *Ibid,* p. 127.
[7] *Ibid,* p. 117.

a curious custom permitted the judges temporarily to discard their judicial character and to come down from the bench to represent clients before the court; but the practice was subsequently prohibited.

In 1746 the seat of government was fixed at New Bern and there, each year, were held two sessions of the General Court. From this court writs were issued returnable to *nisi prius* terms to be held by the chief justice twice a year in Chowan, Edgecombe and New Hanover; but in 1767 the province was divided into five judicial districts—Edenton, New Bern, Wilmington, Halifax, and Hillsboro—in each of which two terms were held annually by the chief justice and his associates, who were required to be "learned in the law." The act of 1767 was in force five years, and in consequence of hostility between the governor and the legislature, there were no courts in the province between 1773 and 1777. Between August 1775 and November 15, 1777, judicial functions were discharged by Committees of Safety.

The Provincial Congress, convening at Hillsboro on August 20, 1775, organized a form of civil government which was to be administered by a Council and a Committee. On April 4, 1776, a similar Congress met at Halifax, and on the thirteenth appointed a committee to prepare a temporary civil constitution. This body adjourned on May 14 to meet again at Halifax on the 10th of November. The Congress, reconvening at Halifax on November 12, 1776, ratified a Declaration of Rights on December 17th., and on the next day, a Constitution or Form of Government. Meanwhile, from the adjournment in May until the adoption of the Constitution, the government was conducted by the Provincial Council.

The Constitution of 1776 marked an era in our judicial history. It was the product of forces which were inspired by a spirit of independence while yet bound by the shackles of provincial environment. It represented a period of transition in thought and action—the bounding energy of youth impatient with the halting step of age, which still lingered,

> "Like some poor night-related guest
> That may not rudely be dismist."

Under the provincial government the chief justice was a member of the council or senate which shared in the functions of the executive, but the Constitution provided that the General Assembly by the joint ballot of both houses should appoint judges of the supreme courts of law and equity and judges of admiralty who should hold their offices during good behavior and should not have a seat in the senate, house of commons, or council of state. Those who framed it had no conception of a system in which the judges of the appellate court should not themselves sit in the trial of causes. They made no provision for judges of the Superior Court, because following the custom of colonial days they concluded that the Supreme Court should be composed of the Superior Court judges. Indeed, no appellate court was created until 1799.

The judiciary Act of 1777 divided the State into six districts—Wilmington, New Bern, Edenton, Halifax, Hillsboro, and Salisbury. In 1782 and in 1787 Morganton and Fayetteville respectively were added. The first judges—Samuel Spencer, of Anson, Samuel Ashe, of New Hanover, and James Iredell, of Chowan —jointly held a term twice a year in each district.[8]

In 1790 the districts were divided,—Halifax, Edenton, New Bern, and Wilmington constituting the Eastern Riding, and Fayetteville, Hillsboro, Salisbury and Morganton the Western. The number of judges was increased to four —two of whom jointly held the courts of the eastern and two of the western districts.

In 1799 James Glasgow, Secretary of State, was charged with the fraudulent issue of land warrants, and the Legislature provided that the court should meet twice a year in Raleigh for the trial of these causes and incidentally to hear appeals. This act, which was to expire in 1802, was in 1801 extended three years for the hearing of appeals, and the court was styled the "Court of Conference." In 1804 it was made a court of record and the judges were required to file written opinions, which by the act of 1810 were to be "at full length," and in the following year the name was changed to the "Supreme Court."

In 1806 the number of judges of the Superior Court was increased to six, and for the first time it was provided that a court should be held by one judge twice a year in each county. The custom of assigning themselves to the various districts continued among the judges until 1856, but no judge was permitted to preside in one district twice in succession. In 1857 a system of rotation for the whole state was adopted, but the constitution of 1868 confined each judge to his own district. This provision was changed in 1876 by the re-establishment of rotation, and in 1915 the State was divided into two judicial divisions.

In the Court of Conference any two of the six judges made a quorum. In 1810 they were authorized to elect a chief justice and adopt a seal, but not until 1818 was the Supreme Court created by legislative enactment. Its existence really began on January 1, 1819. The sessions were held in Raleigh; but in 1846 lawyers from the western part of the state persuaded the General Assembly to order a term to be held at Morganton on the first Monday in August for hearing appeals from counties west of Stokes, Davidson, Union, Stanly, and Montgomery. This arrangement was not satisfactory and the Constitution of 1868 ordained that the terms should be held in the city of Raleigh, unless otherwise provided by the General Assembly, and that the judges should be elected by the qualified voters of the State for a term of eight years.

The first judges of the Supreme Court were John Louis Taylor, Leonard Henderson, and John Hall. There was legislative provision that the governor by special commission should appoint a judge to sit in cases where one of the

[8] Judge Ashe was afterwards elected governor and Judge Iredell was appointed Associate Justice of the Supreme Court of the United States. Judge Spencer suffered a singular death. Sitting in a chair under the shadow of a tree on a warm day, he placed a red handkerchief on his head to keep off the flies. He fell asleep and a turkey gobbler enraged by the handkerchief attacked the judge and thereby, or by the consequent fall, caused his death.

three was disqualified to take part in the decisions. In several instances during the first years of the court the distinguished Judge Murphy served in this capacity.

Neither the Constitution of 1776 nor the Convention of 1835 restricted the number of the judges. From January 1, 1819 to 1868 the Supreme Court consisted of three members; from 1868 to January 1, 1879, of five; for the next ten years, of three; and since January 1, 1889, of five. The number of judges of the Superior Court was gradually increased—three, four, six, seven, eight—until the Constitution of 1868 provided that the State should be divided into twelve judicial districts. The Convention of 1875 amended the Constitution of 1868 by providing for nine judicial districts and by conferring upon the General Assembly authority to reduce or increase the number. Accordingly, the Legislature of 1876-77 reduced the number to nine, which in turn was increased to twelve in 1885. In 1900 four districts were added and four in 1913,—making the present total of twenty judicial districts and twenty judges of the Superior Court.

This historical outline suggests an inquiry as to some of the influences which shaped the decisions of the Supreme Court during the half-century first succeeding its organization, for we must regard these decisions as embodying the expression of prevailing juristic thought. By some of these influences the Court, if perchance subconsciously, was yet perceptibly affected, and by others it was governed in formulating its fundamental policy. In the former class were two factors which may be considered as affecting the social life of the State no less than the trend of judicial utterance.

The first was the convenient means of avoiding the extreme penalty of the criminal law, known as the benefit of clergy. The popish ecclesiastics in particular cases granted exemption of the persons of clergymen from criminal process before the secular judges, which the clergy afterwards claimed as an indefeasible right. In course of time the exemption was extended to every one who could read. The benefit of clergy availed the defendant after conviction by way of arresting judgment, or mitigating to a lesser degree the prescribed punishment. It became a source of perjury, and for the purpose of avoiding perjury it was provided that the offender who was allowed his clergy should be branded in the hand and set at large.[9] So Chief Justice Taylor said, "All felonies were clergiable at common law; that is all who could read were burnt in the hand."[10] In the same case Judge Henderson observed: "At the common law, all felonies (murder inclusive) were punishable with death. But a clergyman, from the veneration in which the clerical character was held by the founders of our law, was exempted from the punishment of death, if the bishop would claim him as a clerk,—and of his being so, reading was the evidence. Hence came the benefit of clergy. In process of time, this benefit was extended to all persons; and thence it came to pass, that the most enormous crimes were unpunished. The

[9] 4 Blackstone, ch. 28.
[10] *State* v. *Scott* (1820) 8 N. C. 27.

Legislature perceiving this, hath proceeded from time to time, to take away the benefit of clergy from certain offences. The consequence is, that clergy is allowable in all felonies, but where it has been expressly ousted by statute."

The Statute of 4 Henry VII, c. 13, prescribed burning in the hand upon conviction of clergiable felonies. The General Assembly provided alternative punishment,[11] but in 1837 Chief Justice Ruffin held that a person convicted of manslaughter might be burnt in the hand,[12] and seven years later Judge Daniel remarked, "Where clergy has once been regularly allowed to a person, it operates as a pardon to him of all clergiable felonies committed by him anterior to the time of such allowance of clergy."[13] Further citation or extended comment is not necessary. To the student of our judicial decisions it need only be said that this super-serviceable custom prolonged its attendant evils until 1855, when it was abolished by the Code Commission.

Another of these influences was slavery. The demoralizing effect of this social malady is inscribed in our law as well as on ancient monuments. In the slaveholding states it was a mooted question whether a slave had any right under the common law which the master was bound to respect. In 1801 the subject was discussed in the Court of Conference.[14] Judge Hall suggested a negative answer. He said that a slave, his condition being more abject, had not even the rights of a villein in England; that there was no instance in North Carolina prior to 1774 of capital punishment for the homicide of a negro, and that the constitution was not made for slaves. But Judge Taylor expressed the opinion that a slave might become the victim of preconceived malice, and that reason, religion, humanity, and policy revolted against the claim that a master had absolute dominion over the life of his slave. The judges agreed that if a white person killed a slave after 1774 under such circumstances as constituted murder he might be convicted and punished for that offence; but if the homicide was extenuated to manslaughter, the accused was uniformly acquitted, because the statute applied only to murder.[15] This situation was changed by the act of 1817, which "gave to a slave the character of a human being and placed him within the peace of the State."[16] The statute was construed as meaning that the manslaughter of a slave should be punished in like manner with that of a white person, but the provocation by which murder should be extenuated to manslaughter was liberally construed in the white man's favor. Fourteen years later, in the famous case of *State* v. *Will,* Judge Gaston said that while there was no legal limitation to the master's power of punishment except that it should not reach to the life of his offending slave, the slave nevertheless had a right to defend himself against the master's unlawful attempt to deprive him of life.[17] But in 1857 Judge Pearson,

[11] Revised Statutes, ch. 34, sec. 26.
[12] *State* v. *Henderson* (1837) 19 N. C. 543.
[13] *State* v. *Carroll* (1844) 27 N. C. 143.
[14] *State* v. *Boon* (1801) 1 N. C. 191.
[15] *State* v. *Tackett* (1820) 8 N. C. 217.
[16] *State* v. *Scott* (1820) 8 N. C. 24.
[17] (1834) 18 N. C. 121.

holding that the law applicable to homicide by a slave who resisted his master's assault bore no analogy to a freeman's right of self-defense, said, "Resistance to the master is a species of petit treason, and the master not only has the right, but it is his duty, to overcome it at all hazards."[18] The theory that the slave was doomed in his own person and in his posterity to toil that another might reap, to live without knowledge and without the capacity to make anything his own, produced a train of social evils that dulled the edge of mental perception and narrowed the range of moral vision. The serf was a chattel, subject to sale, mortgage, devise,—the larceny of whom was a capital felony; the absence of whom from the owner's plantation invited the recurring chastisement of the patrolman's lash. He should not be set free except for meritorious services adjudged by the courts. Granted the prerogative of testifying in a criminal action against another slave, but not against a free negro, he was admonished to the path of truth by the menace of extreme bodily torture.

It was inevitable that the effect of slavery should be written in the economic, social, and legal history of the State. Sentiment changed from time to time. In the Hillsboro Convention James Iredell said, "When entire abolition of slavery takes place, it will be an event which must be pleasing to every generous mind and every friend of human nature; but we often wish for things which are unobtainable." In 1804 the Legislature adopted a resolution proposing that Congress be given authority to prohibit the slave trade. As a result of the political philosophy of the Revolution anti-slavery opinion was expressed in laws which prior to 1830 manifested a liberalizing tendency of public thought. Its influence, indeed, was subsequently felt by some of the more conservative leaders. In 1832 Judge Gaston, in an address to the graduating class of the University said, "Disguise the truth as we may, and throw the blame where we will, it is slavery which, more than any other cause, keeps us back in the career of improvement. It stifles industry and represses enterprise—it is fatal to economy and providence—it discourages skill—impairs our strength as a community, and poisons morals at the fountain head."

Gradually the tide of liberalism began to ebb. The laws were made more restrictive. Slaves should no longer be taught to read and write; manumission was made more difficult; free negroes were forbidden to preach before slaves; prejudice and hostility increased, and finally came—Appomattox, and the Constitution of 1868.

These influences may be regarded as incidental; but other forces, more active and more potential were at work in formulating the juristic policy of the State. Among them may be mentioned:

1. The attitude of the Court toward the common law. The orthodox view that the colonists brought the common law with them and that the English law has obtained in this country from the beginning is only a legal theory. In 1715

[18] *State* v. *David* (1857) 49 N. C. 354.

the colonists of North Carolina approved an act entitled "An act for the better observing of the queen's peace," which declared the colony to be "a member of the crown of England" and provided that the common law should be in force "so far as shall be compatible with our way of living and trade." This provision was modified by subsequent legislation and culminated in the following statute:[19] "All such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this state and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this state."

The theory of this legislation accords with the conclusion of Mr. Justice Story: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."[20] With respect to the colonists' estimate of the common law as a system of positive and subsidiary law applying when not replaced by statute or local custom, Professor Reinsch has said: "While this legal theory has obtained acceptance as a satisfactory explanation of the jurisprudence of to-day, it is not complete enough to afford an adequate synthesis of colonial legal facts for the historian. It contains, of course, the great truth that men cannot all at once cut themselves loose from a system of thought or action under which they have lived; that, though they transfer themselves entirely to new conditions, their notions and institutions must necessarily be circumstanced and colored by their former experience. Thus, of course, the more simple, popular, general parts of the English common law were from the first of great influence on colonial legal relations. This is, however, very far from declaring the common law of England a subsidiary system in actual force from the beginning of colonization. On the contrary, we find from the very first, originality in legal conceptions, departing widely from the most settled theories of the common law, and even a total denial of the subsidiary character of English jurisprudence."[21]

It was under these conditions that the courts of North Carolina essayed the task of adapting parts of the common law to the economic, social, and political status of a commonwealth recently created. That the task was not altogether grateful is manifest from the difficulty encountered in marking the boundary beyond which the common law should not extend. It was not to be doubted that such boundary must be fixed, for the entire body of the common law could not be transferred to the new commonwealth. Yet the law of England was recognized as the foundation upon which the laws of the State should rest.[22] It was

[19] C. S. sec. 970.
[20] *Van Ness* v. *Packard* (U. S. 1829) 2 Peters 141.
[21] Select Essays in Anglo-American Legal History Vol. 1, p. 368.
[22] *In re Bryan* (1863) 60 N. C. 42.

natural that with its importation there should come, not only the dross of pedantry, but a profound appreciation of its fundamental principles and their scientific classification. The Supreme Court from time to time expressed approbation of many of its features. For instance Judge Pearson uttered the following special tribute: "One excellence of the common law is that it *works itself pure* by drawing from the fountain of reason, so that if errors creep into it, upon reasons which more enlarged views and a higher state of enlightenment, growing out of the extension of commerce, and other causes, prove to be fallacious, they may be worked out by subsequent decisions."[23] The interrelation of the common law, the canon and civil law, and the rules of the ecclesiastical courts was thus expressed by Judge Ruffin: "That the rules of the ecclesiastical courts, although most sensible deductions of facts, are not parts of the law of this country, but only of the law of those courts, we deduce, not only from the manner in which the judges of those tribunals speak upon this question, but from the nature of the subject itself."[24] "But it is an entire mistake to say that the canon and civil laws, as administered in the ecclesiastical courts of England, are not parts of the common law. Judge Blackstone following Lord Hale, classes them among the unwritten laws of England and as parts of the common law, which by custom are adopted and used in peculiar jurisdictions. They were brought here by our ancestors as parts of the common law, and have been adopted and used here in all cases to which they were applicable, and whenever there has been any tribunal exercising a jurisdiction to call for their use."[25]

The whole of the common law, of course, could never have been adapted to conditions prevailing here, and the courts were not reluctant to reject many of of its characteristics, among them, for example, such antiquities as the demurring of the parol,[26] outlawry,[27] special custom,[28] fine and common recovery,[29] and the merger in felony of a civil trespass.[30]

To the common law the Supreme Court generally adhered—sometimes, we think, too rigidly. Upon no other theory can be explained such lapses, infrequent to be sure, as the anachronistic arrest of judgment in *State* v. *Carter*,[31] because in an indictment for murder the letter "a" had been omitted from the word "breast." Judge Johnston, "bound by all the authorities which required the greatest strictness and accuracy in all capital proceedings," intimated that the decision "attained a degree of critical exactness not easily to be reconciled to good sense or sound understanding," but was unwilling to run counter to the opinion of "the most learned and respectable judges who had written or decided in like cases." Two of the judges concurred, but Judge Taylor dissented on the

[23] *Shaw* v. *Moore* (1856) 49 N. C. 25.
[24] *Downey* v. *Murphey* (1834) 18 N. C. p. 92.
[25] *Crump* v. *Morgan* (1843) 38 N. C. p. 98.
[26] *Baker* v. *Long* (1790) 2 N. C. 1.
[27] *Sherrod* v. *Davis* (1796) 2 N. C. 285.
[28] *Jones* v. *Allen* (1845) 27 N. C. 473.
[29] *Barfield* v. *Commr's.* (1834) 15 N. C. p. 516
[30] *White* v. *Fort* (1824) 10 N. C. 251.
[31] *State* v. *Carter* (1801) 1 N. C. 319.

ground that the alleged defect was the "omission of a single letter, a vowel, which if inserted could not be sounded in articulation, and the want of which could not possibly mislead the jury who found the bill, or any one who read it, as to the true meaning of the word."

Such deference to technical interpretation was intensified by a feeling akin to reverence for the common law; and although the application of equitable doctrines professed to keep pace with the demand of civil and social needs the dominant judicial thought had frequent recourse to the maxim, "Equity follows the law." Indeed, this characteristic, easily discernible in the earlier opinions of the Court, continued during several succeeding years.

2. Another characteristic of the earlier decisions was pronounced respect for precedent. The doctrine of judicial precedent, said Judge Dillon, is this: "That a decision by a court of competent jurisdiction of a point of law lying so squarely in the pathway of judicial judgment that a case could not be adjudged without decision, is not only binding upon the parties to the cause or judgment, but the point so decided becomes, until it is reversed or overruled, evidence of what the law is in like cases, which the courts are bound to follow not only in cases precisely like the one which was first determined, but also in those, which, however different in their origin or special circumstances, stand or are considered to stand upon the same principle."

Accordingly the Court, approving the doctrine that judicial precedent is an established and essential part of the English and American systems of law, assimilated this saying of Lord Kenyon's: "I cannot legislate, but by my industry I can discover what my predecessors have done and I will tread in their footsteps." The judges resolved to adhere to decided cases and settled principles. They had scant respect for the theory that because in the alien systems of continental Europe a judicial decision has no authoritative force in any other case, judicial precedents should be abolished and every question decided upon the basis of reason and common sense. In their minds, no doubt, arose the inquiry as to whose reason or whose common sense should become the ultimate arbiter in case of litigation. To undertake to avoid the multiplicity of precedents in this way would entail an appeal in every case and substitute whim, caprice, vagary for law and orderly procedure. To go in search of a reason for this aberrant fancy reminds one of Milton's quaint remark: "It is as the Prophecy of Isaiah was to the Eunuch, not to be understood without a guide." Fearne answered the proposal years ago: "If rules and maxims of law were to ebb and flow with the tastes of the judge, or to assume that shape which in his fancy best becomes the times; if the decisions of one case were not to be ruled by or dependent at all upon the former determinations in cases of a like nature, I should like to know what person would venture to purchase an estate without first having the judgment of a court of justice respecting the identical title which he means to purchase."

Upon this subject a wholesome lesson may be drawn from two historic incidents. It is said that a Roman soldier, awed into silence when he approached the image of a deity, afterwards defiantly struck it down with his battleaxe and suffered no harm; but when the Thasians erected a statue to Theogenes, a victor in the games, one of his rivals went to it by night and endeavored to throw it down by repeated blows, until at last he moved it from its pedestal and was crushed to death beneath its fall.[32]

3. The third characteristic may be called the individualistic tendency in the opinions of the Courts,—a trend toward an individualism having all the features characteristic of the economic independence of the individual. In the civil law there was stressed the right of private property in capital, the right to accumulate wealth, and the freedom of rivalry in individual effort, while in the criminal law one of the ever recurring problems was the suppression of an individual self-assertion which in practical affairs frequently claimed exemption from social control.

What of the future? Beyond doubt a contest is waging. It is idle to deny that changing conditions have produced new conceptions of the common law and of its adaptability to progressive thought. Notwithstanding its triumph and its establishment as a law of the world by the side of the Roman law, the common law in certain aspects has become the subject of bitter attack.[33] The doctrine of individualism is giving way to the theory that individual effort must be supplemented, if not supplanted, by governmental energy.[34] Relief from the multiplicity of precedent is sought in codification or restatement of the law. We may not foresee what the future holds in store, but with confidence we await the result. Underlying all laws and all governments worthy of preservation are the fundamental principles of justice which may be likened to a "gyroscope that through storm and stress keeps the ship on a steady course and an even keel."