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Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri

*Joseph Fred Benson**

What is the significance of the phrase “fourth year of the reign of James the First,” and how has the Supreme Court of Missouri interpreted Missouri’s reception statute of the common law?

This is an article of first impression, the very essence of which is to explore the meaning of Missouri’s reception statute of the common law as embodied within the four corners of Missouri Revised Statutes Section 1.010. How we think of our reception statute and the meaning of the “*common law*” will, to a degree, shape the future of the law, its institutions, and ultimately our lives. Missouri’s reception of the common law is codified under Missouri Revised Statutes Section 1.010 (2000). The statute reads:

The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.

This Article discusses the significance of the phrase “fourth year of the reign of James the First” in Missouri’s reception statute of the common law.

* © Copyright Joseph Fred Benson, October 16, 2001. All rights reserved. Judicial Archivist, Supreme Court of Missouri. The opinions expressed herein are those of the Author, and do not reflect the opinion of the Supreme Court of Missouri. A.B. 1976, A.M. 1977, J.D. 1985, St. Louis University.

I. THE HISTORICAL ANTECEDENTS OF THE PRESENT STATUTE

When France ceded the Louisiana Territory to the United States in 1803,¹ civil law was the rule of decision. In the wake of France's cessation of Louisiana to the United States, a violent conflict occurred "between the citizens, who were attached to their law [civil law] on the one side, and the government, along with the new immigrants, that wanted to introduce the common law."² To quell the unrest in the new territory, the federal government recognized "the need to bend with the will of the people and to clarify the existing law."³ To this end, the federal government established a commission in 1806 to codify the law of Louisiana.⁴ If there was a doubt as to what legal system governed the new territory, Judge John Prevost of the Superior Court of the Territory of Orleans "decreed that Roman, Spanish, and French civil law would be enforced as the customary law of the territory in all cases."⁵ A year later, in 1806, Governor Claiborne⁶ muddied the waters as to whose law governed when he "vetoed a bill enacted by the Legislature of the Territory of Orleans that would have provided for the statutory reception of Spanish law."⁷ The issue became what civil law system controlled the Louisiana territory?⁸ In 1808, the Civil Code, termed *A Digest of the Civil Laws now in force in the territory of Orleans*, became a reality; but the code was not based upon Spanish law; its flavor was distinctly Napoleonic.⁹ Not until 1816 did Missouri's territorial legislature enact its first

1. See Treaty Between the United States of America and the French Republic, April 30, 1803, U.S.-Fr., in 2 *Treaties and Other International Acts of the United States of America* Document 28 (Hunter Miller ed., 1931); DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 257-58 (1965).

2. Jose Mariá Castán Vazquez, *Reciprocal Influences Between the Law of Spain and Louisiana*, 42 LA. L. REV. 1473, 1477 (1982).

3. *Id.*

4. *Id.*

5. See Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, 42 LA. L. REV. 1485, 1492 (1982).

6. Governor Claiborne's full name was William C. C. Claiborne. See Philip F. Dur, "Louisiana and the Code of Napoleon," at <http://www.ucs.louisiana.edu/~pfd2009/bar-jrnl.html>.

7. Rabalais, *supra* note 5, at 1492. In *Cottin v. Cottin*, 5 Mart. (O.S.) 93, 94 (La. 1817), the Louisiana Supreme Court held that the Code of 1808 did not drive out all of the old Spanish law thus bringing to an end the debate of whose law controlled.

8. See, e.g., Elizabeth Gaspar Brown, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 AM. J. LEGAL HIST. 35 (1957), quoted in Rabalais, *supra* note 5, at 1493 n.18.

9. See Rabalais, *supra* note 5, at 1493 n.18; Roscoe Pound, *The Influence of French Law in America*, 3 ILL. L. REV. 354, 359-60 (1909). Dean Pound attributes four factors that led to the influence of French law in early American legal culture, namely:

reception statute.¹⁰ The 1816 act lasted until 1825. During that brief period the

(1) the rise of the law merchant (*lex mercatoria*); (2) the hostility towards England and English institutions during the latter half of the eighteenth century; (3) the great influence during the first half of the nineteenth century of Justice Story and Chancellor Kent who freely cited to French law in their opinions and treatises; and (4) the “movement for reform in practice and pleading which created great dissatisfaction with the common law at a time when the effects of the other causes were making themselves felt.” *Id.* at 355. At the time of the American Revolution, the law merchant had not been fully incorporated into the body of English common law; this despite the efforts of Lord Mansfield to whom “that result is chiefly, if not entirely, due.” *Id.* Though French law had an initial impact on Louisiana, that influence waned during the nineteenth century. By 1908, Louisiana decisions and American decisions outside of Louisiana had relegated the influence of French law to a mere sixty-seven cases. *Id.* at 359 n.24, citing 120 La. (1908). The theory that Dean Pound articulated in his 1909 *Illinois Law Review* article has survived the test of time and historical debate. See Lawrence M. Friedman, HISTORY OF AMERICAN LAW 108-09 (2d ed. 1985); Lawrence M. Friedman, AMERICAN LAW 44 (1984).; *Hickman v. Boffman*, 3 Ky. 356, 364-65 (1808). In *Hickman*, the Chief Justice of Kentucky interrupted Henry Clay’s argument, reminding him that the state legislature had enacted a law prohibiting the reading in open court, and the citation to, any “[r]eports and books containing adjudged cases, in the kingdom of Great Britain, which decisions have taken place since the 4th day of July, 1776.” *Id.* at 372 (internal quotation marks omitted). *Hickman* exemplifies the hostility by early Americans toward post-1776 English concepts, including the common law. Nor was anti-English common law sentiment confined to the western frontier. In 1776, the Commonwealth of Pennsylvania repealed the common law, but soon found that they had thrown the baby out with the bath water. In 1777, the Commonwealth revived the common law up to and including May 14, 1776. See Act of January 28, 1777, § 2, in Purdon’s Digest 1700-1861, at 40 (Frederick C. Brightly ed., 1862); *Respublica v. Chapman*, 1 U.S. (1 Dall.) 53, 58 (Pa. 1781).

10. See An Act Declaring What Laws Shall Be in Force in This Territory, 1816 MO. LAWS 32 (Jan. 19, 1816). In 1804, Congress divided the Louisiana Territory into two districts. Lower Louisiana remained under the civil law jurisdiction, while the Indiana Territory under the common law initially governed Upper Louisiana, which became the District of Missouri. See Northwest Territory Ordinance of 1787 § 4, 1 Stat. 51 (1787). Not until 1812, however, did Congress enact legislation providing for the establishment of a government for the new Territory of Missouri. See An Act Providing for the Government of the Territory of Missouri, ch. 95, 2 Stat. 743 (1812). The act of 1812 did not provide for the reception of the common law. The congressional legislation of 1812, does, however, carry over the laws and regulations of “the territory of Louisiana, at the commencement of this act, and not inconsistent with the provisions thereof . . . until altered, modified or repealed by the general assembly.” *Id.* § 16; see also Justice Brent E. Dickson, *Indiana’s Constitutional Past*, Address at the Indiana State Library and Historical Building (Dec. 8, 1996), at <http://www.statelib.lib.in.us/www/ihb/publications/dickson.html>. Despite the Northwest Ordinance of 1787, which adopted the common law as the rule of decision in the territory, Indiana did not enact a common law reception statute until 1852. See IND. CODE ANN. § 1-1-2-1 (Michie 1998); Grimes’ Ex’rs v.

territorial reception statute read in pertinent part:

The common law of England, which is of a general nature and all statutes made by the British parliament *in aid of or to supply the defects* of the said common law, made prior to the fourth year of the reign of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of the territory, and are not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory.¹¹

Early Missouri cases that involved statutory interpretation of the 1816 act were the Spanish land grant suits.¹² *Landes v. Perkins*¹³ is one of the many Spanish land grant suits that were decided by the Supreme Court of Missouri during its formative years. At issue was whether or not the Spanish law of abandonment prevailed in the Missouri Territory prior to 1816.¹⁴ Holding that Spanish law applied to the case at bar, the court noted that prior to the Act of January 19, 1816, common law had not been introduced into the territory. This is the extent of the court's discussion of the 1816 act. The opinion offers no direct or indirect mention of Jamestown (which the Author believes is vital to understanding the reception of the common law) as grounds for the reception statute. Nor does the court give an explanation as to why the reception statute adopted the common law prior to the fourth year of the reign of James the First.¹⁵ In *Baker's Administrator v. Crandall*,¹⁶ the court refers to the reception statute and Chancellor Kent's Commentaries on the law,¹⁷ but the court's opinion and *Kent's Commentaries* are void of historical analysis.¹⁸ Though these cases are

Harmon, 35 Ind. 198, 237 (1871), *overruled in part by* *Erskin v. Whitehead*, 84 Ind. 357 (1882).

11. 1816 MO. LAWS 32 (emphasis added).

12. *See, e.g., Lindell v. McNair*, 4 Mo. 380, 381 (1836) (addressing the law of coverage and conveyance under the Spanish land grants); *Picotte v. Cooley*, 10 Mo. 312 (1847) (following the rule articulated in *Lindell* regarding the Spanish law of real and personal property acquired during the course of marriage).

13. 12 Mo. 238 (1848).

14. *Id.* at 256-57.

15. *Id.* at 257; *see also* *Riddick v. Walsh*, 15 Mo. 519, 525, 534 (1852).

16. 78 Mo. 584 (1883) (survival action).

17. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 473 (1st ed. 1826-1830); *Baker's Adm'r*, 78 Mo. at 586-87.

18. *See* Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416, 416 n.2 (1931) (observing that there has been no comprehensive discussion regarding the relation of the reception statutes to the judicial

rich in Missouri and American history, they provide no meaningful analysis of the statute. Nor does nineteenth-century case law provide a sound definition of what the common law is, because it is couched in romantic terminology: “Our ancestors, when they came into this new world, claimed the common law as their birthright.”¹⁹ In *Elks Investment Co. v. Jones*,²⁰ the Supreme Court of Missouri held: “When Missouri came into the Union of the states under its first Constitution, it brought with it the common law which it had adopted as a territory in 1816.”²¹ But this is as far as the court’s historical analysis goes in interpreting the reception statute. In this respect, *Elks Investment* is akin to the nineteenth-century decisions framing the adoption of the common law in romantic terms.²²

A. The 1825 Reception Statute

On February 12, 1825, the Missouri General Assembly repealed the territorial reception statute of 1816 and enacted in lieu thereof Missouri’s second reception statute, which is carried forward in Missouri Revised Statutes Section 1.010.²³ The act of 1825 omitted the 1816 phrase that read, “The common law of England . . . made by the British parliament in aid of or to supply the defects of the said common law.”²⁴ Decisions of the Supreme Court of Missouri have not addressed *why* this change occurred.

B. “Made Prior To The Fourth Year of James I, 1607”

Fifty years ago Professor William L. Eckhardt proffered: “The date selected [1607] has reference to the first permanent English settlement in the new world.”²⁵ R. T. Barton’s edition of Sir John Randolph’s *Virginia Colonial*

elaboration of the actual details surrounding them).

19. See, e.g., *Sackett v. Sackett*, 25 Mass. 309, 329 (1829) (quoting *Commonwealth v. Knowlton*, 2 Mass. 530, 534 (1807)); *State v. Campbell*, T.U.P. Charlton, 166, at 167 (Ga. 1808); *Baker’s Adm’r.*, 78 Mo. at 586-87.

20. 187 S.W. 71 (Mo. 1916).

21. *Id.* at 74.

22. See, e.g., *Barry v. Village of Port Jervis*, 72 N.Y.S. 104, 112 (1901) (describing the common law of England as “*derived from immemorial usage and custom*”) (emphasis added); *M’Cord v. Ochiltree*, 8 Blackf. 15, 19-20 (Ind. 1846), *overruled in part by Grimes’ Ex’rs v. Harmon*, 35 Ind. 198 (1871); Jesse Root, *Observations Upon the Government and Laws of Connecticut: On the Common Law of Connecticut*, 1 Root i, ix, at xii (Conn. 1798). See generally 15A C.J.S., *Common Law*, § 11 (1967).

23. See 1825 MO. LAWS 491.

24. 1816 MO. LAWS 32.

25. William L. Eckhardt, *Property*, 17 MO. L. REV. 398, 398-99 (1952); see also

Decisions supports the Eckhardt proposition. The Supreme Court of Tennessee reached the same conclusion during the early years of the twentieth century.²⁶

1. Jamestown Charter

Prior to the *Susan Constant*²⁷ setting sail from London on December 20, 1606, to the New World, William Fitzhugh, a merchant, planter, shipper, and lawyer, was retained by King James the First to draft the charter for the future Jamestown colony.²⁸ Referring to His Majesty's instructions in drafting the charter for Jamestown, Fitzhugh explains that James I directed that "the laws of the colony 'be in substance consistent with the laws of England or the equity' hereof."²⁹ Colonel Fitzhugh then disputed the contention "that the Laws and

2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 35:4, at 56-57 (Norman J. Singer ed., 6th ed. 2001). Professor Singer takes the view that the year 1606 or 1607 was adopted by the colonies as the dateline for reception of the common law to mark either "the year in which the Virginia Company of London dispatched the expedition which settled Jamestown, or 1607, the date of their arrival in America." *Id.* § 35:4, at 57. The Supreme Court of Kentucky has adopted a different view regarding the reception of the common law. In *Ray v. Sweeney*, 77 Ky. 1 (1878), the court held that in 1607, James the First "sought to enforce in this state [then part of Virginia] any rule of English common law." *Id.* at 10. Because of this fact, and the staunch independence of the colonies, Kentucky's reception statute of the common law reads "prior to the fourth year of James the First." KEN. REV. STAT. ANN. § 446.080(1) (Michie 1999). Missouri case law is void of such analysis.

26. See *Moss v. State*, 173 S.W. 859, 861 (Tenn. 1915). *Moss* and other state supreme court opinions are discussed *infra* Part III, *infra*.

27. See 1 SAMUEL ELIOT MORISON ET AL., THE GROWTH OF THE AMERICAN REPUBLIC 39 (6th ed. 1969). The *Susan Constant* was one of three ships under the command of Captain Christopher Newport that "dropped down the Thames at Christmastide 1606" for the "Virginia Voyage." *Id.* The other two ships that set sail from London to Virginia were *Godspeed* and *Discovery*. *Id.*

28. See 1 SIR JOHN RANDOLPH & EDWARD BARRADALL, VIRGINIA COLONIAL DECISIONS: 1728-1732, at 159 (R.T. Barton ed., 1909); Goebel, *supra* note 18, at 416. Professor Goebel makes a two-point argument. First, the royal charter with its "mandate that the law in the lands granted should be agreeable or not repugnant to the law of England, is commonly regarded as a forecast of what was to transpire." Goebel, *supra* note 18, at 416 (citation omitted). Second, the reception statute, "with its declaration that the common law of England, in so far as it had been adopted at a particular date, was the law of a state, is held to have marked the consummation of the forecast." Goebel, *supra* note 18, at 416. Though Missouri is not one of the original thirteen states founded by royal charter, the question arises, must we look to the Treaty of St. Ildefonso of October 1, 1800 in which Spain ceded Louisiana to France as a forecast of what was to transpire before we can interpret our reception statute?

29. 1 RANDOLPH & BARRADALL, *supra* note 28, at 160.

Statutes of England were not binding to us here, except such statutes wherein we are particularly named.”³⁰ Fitzhugh’s argument is historically and legally sound, due to the 3000 miles of ocean between colony and mother country, and the difference in interpretation of the common law in England, as opposed to the New World.

Missouri’s 1825 reception statute, and the present statute adopting the common law as found in Missouri Revised Statutes Section 1.010, do not mirror Virginia’s broad reception statute of 1606.³¹ When one speaks of the pioneering Missourians or the colonials of the eighteenth century, there is an undeniable truth: British colonists and the founders of Missouri placed limitations on the long arm of the common law.³²

The limitations on the common law stem from Sir Edward Coke’s opinion in *Calvin’s Case*,³³ an opinion that drew a distinction between lands conquered from Christians and those taken from infidels. British colonial plantation owners viewed themselves as Englishmen with all the rights and privileges of the common law, and not as infidels to be treated differently than Englishmen living on the isle. Even after 1720, when Coke’s dichotomy fell by the wayside, his dichotomy “continued to influence the debate over the authority of British statutes right up to the Revolution.”³⁴

Another limitation upon the common law, once thought to have defined the history of state reception statutes, was Coke’s opinion in *Fuller’s Case*,³⁵ holding: “That the King is not under man, but is under God and the laws.”³⁶ *Fuller’s Case* articulates the modern concept: the *rule of law*. It does not define why Missouri adopted the common law prior to the fourth year of the reign of James the First.

C. The Regnal Calendar and 1607

When we speak in terms of prior to the fourth year of the reign of James the First, we must adjust our calendar back in time to the Age of the Stuarts when the Julian calendar was the dateline in England. Under the Julian calendar

30. 1 RANDOLPH & BARRADALL, *supra* note 28, at 160.

31. See 1816 MO. LAWS 32; 1825 MO. LAWS 491.

32. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 6 (1977).

33. 7 Coke’s Rep. 1 (C.P. 1608).

34. HORWITZ, *supra* note 32, at 6.

35. 12 Coke’s Rep. 65 (C.P. 1607).

36. The Latin is “quod Rex non debet esse sub homine sed sub deo et lege.” See also FREDERIC WILLIAM MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 269 (1st ed. 1908, 1974 reprint) (H.A.L. Fisher, ed.).

March 24 was the last day of the year, and March 25 was the first day of the new year. This changed in 1752 when England adopted the Gregorian calendar.³⁷

D. Statutes Which Are General, and Not Local

As early as 1681, Sir William Jones, as the attorney-general for the Colony of Virginia, issued an opinion which rejected the concept that Parliament could enact laws for the colony or any plantation in the New World which did not expressly name Virginia.³⁸ A primary reason for adopting general rather than local laws was the firm belief that absent naming the colonies or plantations in an act of parliament, there was a presumption that the act lacked particularity³⁹ and, therefore, was local to the kingdom. Missouri and other states adhere to this early legal opinion.⁴⁰

II. MISSOURI SUPREME COURT OPINIONS

The opinions of the Supreme Court of Missouri have not definitively addressed the meaning of Missouri Revised Statutes Section 1.010. *Osborne v. Purdome*⁴¹ was a criminal contempt case in which petitioners argued that purgation by oath entitled them to be discharged from their convictions. Rejecting this argument, the court observed that purgation by oath was not known to the common law in 1607.⁴² *Kansas City v. Bibbs*⁴³ involved an ordinance violation charging attempt to obtain money through false pretense.⁴⁴ *Bibbs* quotes the court's opinion in *Osborne* for the proposition that Missouri adopted the common law made prior to the fourth year of James the First.⁴⁵

37. See *Chronology of Dating*, at <http://www.medievalgenealogy.org.uk/guide/chron.shtml>.

38. 1 RANDOLPH & BARRADALL, *supra* note 28, at 160.

39. 1 RANDOLPH & BARRADALL, *supra* note 28, at 160.

40. See *Osborne v. Purdome*, 244 S.W.2d 1005 (Mo. 1952), *cert. denied*, 343 U.S. 953 (1952); *Indus. Acceptance Corp. v. Webb*, 287 S.W. 657, 660 (Mo. Ct. App. 1926). These cases are discussed *infra* Part II; see also *Moss v. State*, 173 S.W. 859, 861 (Tenn. 1915). See Appendix for a collection of state reception statutes.

41. 244 S.W.2d 1005 (Mo. 1952), *cert. denied*, 343 U.S. 953 (1952).

42. *Id.* at 1011; see also Charles P. Curtis, Jr. & Richard C. Curtis, *The Story of a Notion in the Law of Criminal Contempt*, 41 HARV. L. REV. 51, 60 (1927) ("the notion probably arose after 1641 and sometime before 1682"). Though purgation by oath is found as early as 1419 in England, the common law courts did not adopt it until 1650. *Curtis and Curtis* at 62 n.39. The opinion in *Osborne* does not reflect this fact.

43. 548 S.W.2d 264 (Mo. Ct. App. 1977).

44. *Id.* at 265.

45. *Id.* at 267.

Bibbs, however, is not instructive regarding the meaning of Missouri's reception statute. *Industrial Acceptance Corp. v. Webb*⁴⁶ was an action to recover an amount due with interest. *Industrial Acceptance Corp.* is instructive from the historical perspective that allowance of interest due on a promissory note existed in Elizabethan England.⁴⁷ The opinion falls short, however, in historical analysis of why Missouri adopted the common law of England prior to the fourth year of the reign of James the First. These Missouri cases and those discussed above (i.e., the Spanish land grant cases), do not address the connection between the drafting of the Jamestown charter, nor do they speak to *why* the reception statute has not been definitively interpreted as being historically tied to the founding of Jamestown.

A. Equity and The Reception Statute

In *Dickey v. Volker*,⁴⁸ a will contest case that centered around the law of charitable trusts, the Supreme Court of Missouri addressed whether early chancery proceedings announced common law rules within the meaning of the reception statute.⁴⁹ Rejecting appellant's argument that equity principles were part of the common law as adopted by Missouri,⁵⁰ the court looked to *Williams v. Miles*,⁵¹ a 1903 Nebraska Supreme Court decision defining the common law.⁵² The court in *Dickey* held that chancery, Roman, or Civil law is not included in the definition of what is the common law.⁵³ What equity jurisprudence embodies is "only evidence of law."⁵⁴

The opinions in *Williams* and *Dickey* are historically and legally unsound. At the time King James retained William Fitzhugh to draft the charter for the Colony of Jamestown, the prevailing legal opinion was that the common law and principles of equity were to prevail in the New World.⁵⁵ Despite the historical record that connects the founding of Jamestown to the reception statute, the late Professor Richard Powell in his treatise *Real Property* wrote: "[T]he courts of Missouri have commendably insisted on their power to reach independent

46. 287 S.W. 657 (Mo. Ct. App. 1926).

47. *Id.* at 660.

48. 11 S.W.2d 278 (Mo. 1928), *cert. denied*, 279 U.S. 839 (1929).

49. *Id.*; *see also* MO. REV. STAT. § 1.010 (2000).

50. *Dickey*, 11 S.W.2d at 285.

51. 94 N.W. 705 (Neb. 1903).

52. *Id.* at 708.

53. *Dickey*, 11 S.W.2d at 285-86.

54. *Id.* at 285. *But see* *Campbell v. Colo. Coal & Iron Co.*, 10 P. 248, 250 (Colo. 1886) ("We use the term 'common law' in its broader sense, as including those doctrines of equity jurisprudence which have not been expressed in legislative enactments.")

55. 1 RANDOLPH & BARRADALL, *supra* note 28, at 159.

conclusions as to the operation of the common law, resorting to the decisions of sister states for aid in this endeavor, and excepting more recent expositions of the common law than those existing in England in 1607.”⁵⁶ Powell’s argument is premised upon the court’s opinion in *Reaume v. Chambers*.⁵⁷ Reaume brought an action of ejectment to recover one-fifteenth of certain premises in the possession of Chambers.⁵⁸ At issue in *Reaume* was whether Spanish law or common law controlled conveyance of property between husband and wife.⁵⁹ *Reaume* restates the doctrine in *Lindell* that acknowledged the adoption of the common law under the 1816 reception statute⁶⁰ and the enforcement of contracts made under Spanish law prior to the territorial reception statute.⁶¹ *Reaume* fails to provide a *scintilla* of evidence relating to the history of Missouri’s adoption of the common law prior to the fourth year of James the First. Other will contest cases, such as *Robertson v. Jones*,⁶² have involved interpretation of the reception statute, but have not addressed the plain meaning of the statute.

III. INTERPRETATION OF OTHER STATE RECEPTION STATUTES

It should be noted that state supreme courts have reached an array of conclusions⁶³ as to the meaning of “made prior to the fourth year of the reign of James the First” and similar phrases in their reception statutes, though the

56. See 1 RICHARD POWELL, REAL PROPERTY, par. 80, at 290 (1949). Other scholars in the field of real property have taken a more diplomatic approach to how courts have interpreted the reception statutes. In 1952, Lewis M. Simes of Hastings College of the Law wrote: “It should be noted that, in those states where legislation concerning the adoption of English law exists, the qualification that the adoption is made only to the extent applicable to our circumstances and condition is made by the courts even though not found in statute or constitution.” Professor Simes lumps Missouri and Virginia into this category. See 1 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES, § 1.40, at 57 (A. James Casner ed., 1952).

57. 22 Mo. 36 (1855).

58. *Id.* at 37.

59. *Id.* at 52.

60. *Id.*

61. *Id.* at 52-53.

62. 136 S.W.2d 278 (Mo. 1940).

63. The eminent Chief Judge of the New York Court of Appeals tried in vain to make sense of New York’s reception statute. But even Judge Cardozo’s attempt to historically detail New York’s reception of the common law as an ascertainable fact created more research problems “not to be foreclosed by *a priori* theories about the ‘applicability’ of English rules.” 1 AMERICAN LAW OF PROPERTY, *supra* note 56, § 1.40, at 57; see Judge Cardozo’s opinion in *Beers v. Hotchkiss*, 175 N.E. 506, 510-11 (N.Y. 1931).

historical record does not always support the conclusions reached by those courts.⁶⁴

A. Colorado Law

In *Herr v. Johnson*,⁶⁵ the Colorado Supreme Court merely refers to the year 1607 without giving any explanation as to why the territory adopted the common law prior to 1607.⁶⁶ In *Chilcott v. Hart*,⁶⁷ Colorado's Supreme Court interpreted the state's reception law adopting the common law prior to the fourth year of James the First as being based upon the evolving rule against perpetuities, parts of which had their foundation in Elizabethan law.⁶⁸

B. Illinois Law

Illinois has interpreted its reception statute⁶⁹ to mean the period beginning March 24, 1606 and ending on March 23, 1607.⁷⁰ Though *Lasier v. Wright*⁷¹ informs us that the fourth year of James the First began on March 24, 1606, this is the extent of historical analysis.⁷² *Penny v. Little*,⁷³ a little-noticed 1841 opinion, holds that the adoption of the common law prior to the fourth year of the reign of James the First marked the "first territorial government established in America, and with it the common law of England as it then existed."⁷⁴

C. Wyoming Law

Wyoming has interpreted its reception statute to mean: "The common law is not exactly the common law of 1607."⁷⁵ Because of decisions such as these, which have only added to the confusion as to the meaning of "prior to the fourth year of James the First," the Supreme Court of Missouri should not look to these

64. See *Beers*, 175 N.E. at 510-11.

65. 18 P. 342 (Colo. 1888).

66. *Id.* at 343.

67. 45 P. 391 (Colo. 1896).

68. *Id.* at 396 (citing *Smith v. Warren*, Cro. Eliz. 688 (1599)).

69. See ILL. COMP. STAT. ANN. 5/50-1 (Smith-Hurd West 1993).

70. See *Lasier v. Wright*, 136 N.E. 545, 547 (Ill. 1922).

71. *Id.*

72. See *id.* at 547.

73. 4 Ill. 301 (1841).

74. *Id.* at 304.

75. See *Krug v. Reissig*, 488 P.2d 150, 152 (Wyo. 1971); WYO. STAT. ANN. § 8-1-101 (Michie 2001).

jurisdictions for clarification of Missouri Revised Statutes Section 1.010. Rather, the court should look to the decisions of the Supreme Court of Tennessee for legal and historical guidance in interpreting the Missouri reception statute.

D. Tennessee Law

As noted in *supra* Part I(B),⁷⁶ Tennessee has held that its reception statute of the common law prior to the fourth year of James the First is inextricably connected with the founding of the Jamestown colony. In *Glasgow's Lessee v. Smith*,⁷⁷ Justice Overton addressed Tennessee's reception law, holding: "The statutes contemplated by the act, were those which passed previously to the fourth year of Jac. 1st when the charter to the colony of Virginia was granted, which included, what was afterwards called North Carolina."⁷⁸ The Supreme Court of Tennessee has firmly held to this early decision. In *Moss v. State*,⁷⁹ the court interpreted the Tennessee Constitution⁸⁰ to mean all laws prior to the fourth year of the reign of James the First.⁸¹

E. Arkansas Law

Arkansas's reception statute adopts the common law prior to March 24, 1606.⁸² The Arkansas reception statute is based upon the Julian calendar in which March 24 marked the end of the calendar year.⁸³ *Moore v. Sharpe*⁸⁴ is cited as precedent in interpreting the reception statute to mean the common law of England prior to March 24, 1606. Though the decision in *Moore* is statutorily sound, it nevertheless fails to analyze the meaning of the state reception statute.

76. See *supra*, notes 25-36 and accompanying text.

77. 1 Tenn. 144 (1805).

78. *Id.* at 154.

79. 173 S.W. 859 (Tenn. 1915).

80. TENN. CONST., art. XI, § 10 (1870).

81. *Moss*, 173 S.W. at 861; see also *Brice v. State*, 2 Tenn. 254 (1814), to the same effect as the opinion in *Glasgow's Lessee*, 1 Tenn. at 154-55. The Supreme Court of Tennessee has been consistent in its historical and statutory interpretation of the phrase "prior to the fourth year of the reign of James the First" in the state's reception statute adopting the common law.

82. See ARK. CODE ANN. § 1-2-119 (Michie 1996).

83. See *supra* Part I(C) and note 37 discussing the regnal calendar of Stuart England.

84. 121 S.W. 341 (Ark. 1909).

IV. CONCLUSION

Due to incomplete and, at times, inaccurate analysis, the history and plain meaning of Missouri's reception statute have been plagued in stygian darkness. The doctrine of anticipatory breach did not exist at the time the *Susan Constant* left port in London for Jamestown in December 1606, but judicial opinions have liberally interpreted the "common law" to reach this result.⁸⁵ The law of champerty did not exist in 1607, but in *Duke v. Harper*,⁸⁶ the court inferred that champerty was regarded as being in force in Missouri.

The best analysis of both the plain language of Missouri Revised Statutes Section 1.010 and the case law of Missouri and other states is that the phrase "prior to the fourth year of the reign of James the First" is historically and legally rooted in the founding of the Jamestown colony.⁸⁷

In interpreting the meaning of Section 1.010, the Supreme Court of Missouri should look to the history surrounding the founding of Jamestown, to the colony's charter of 1606, and to the opinions of the Supreme Court of Tennessee for guidance.

APPENDIX: STATE RECEPTION LAWS

ALA. CODE § 1-3-1 (1975) (Alabama does not state a cut-off year for the common law in its reception statute);

ALASKA STAT. ch. 10, § 01.10.010 (Michie 1962) (same as Alabama, no cut-off year for adoption of the common law);

ARIZ. REV. STAT. § 1-201 (1956) (same as Alabama);

ARK. CODE ANN. § 1-2-119 (Michie 1987) (adopts the common law prior to March 24, 1606; this would have been the fourth year of the reign of James I; see *Moore v. Sharpe*, 121 S.W. 341, 342-43 (Ark. 1909));

COLO. REV. STAT. § 2-4-211 (1998) (Colorado's reception statute specifically adopts the common law prior to the fourth year of the reign of James I; see *Chilcott v. Hart*, 45 P. 391 (Colo. 1896), observing that the reception statute adopting the common law is premised on the fact that the rule against perpetuities began to evolve in the 1599 case of *Smith v. Warren*, Cro. Eliz. 688. In *Herr v. Johnson*, 18 P. 342, 343 (Colo. 1888), the Court did not engage in historical analysis of their reception statute and why the territory and later the State adopted the common law of England prior to the fourth year of the reign of James I.);

85. See *Hawkinson v. Johnston*, 122 F.2d 724, 728 (8th Cir.1941), cert. denied, 314 U.S. 694 (1941).

86. 66 Mo. 51 (1877).

87. See *supra* notes 25-30 and accompanying text.

CONN. CONST. art. I, § 10 (no year given for reception of the common law);
DEL. CONST. sched. § 18 (reception of the common law as it existed in 1776; see *Quillen v. State*, 110 A.2d 445, 450 (Del. 1955));
D.C. CODE ANN. § 49-301 (2000) (reception of the common law in force in Maryland on February 27, 1801, the date on which Maryland ceded land to the Federal Government for the establishment of the District of Columbia);
FLA. STAT. ANN. § 2.01 (West 1998) (common law adopted down to July 4, 1776);
GA. CODE ANN. § 1-1-10(c)(1) (1933 & Lexis Supp. 2000) (as the common law existed on May 14, 1776);
HAW. REV. STAT. § 1-1 (1993) (no year set forth in the reception statute for cutoff date of the common law);
IDAHO CODE ANN. § 73-116 (Michie 1999) (no year set forth in reception statute for adoption of the common law);
ILL. COMP. STAT. ANN. ch. 5/50-1 (Smith-Hurd 1992) (common law adopted prior to the fourth year of the reign of James I). (*Lasier v. Wright*, 136 N.E. 545, 546-47 (Ill. 1922), held: "The common law of England and all statutes of parliament in aid thereof prior to the fourth year of King James I, except certain specified statutes, has been in force in this state ever since, and even before, its organization as a state, except as it has been modified or repealed by the legislative authority." The exception to the reception statute was the State's adoption of the English statute of frauds and perjuries of 29 Car.II, c.3, 8 Stat. at Large 405 (1677));
IND. CODE ANN. § 1-1-2-1 (Michie 1998) (reception statute adopting the common law prior to the fourth year of James I in 1607);
IOWA CODE ANN. § 4.2 (West 1994) (reception statute does not adopt a year as the cutoff date);
KAN. STAT. ANN. § 77-109 (1997) (reception statute does not set forth a cutoff date for adoption of the common law);
KY. REV. STAT. ANN. § 446.080(1) (Michie 1999) (reception law does not give a cutoff date for the adoption of English common law);
LA. REV. STAT. § 1:16 (West 1987) (Louisiana is a civil law jurisdiction);
ME. CONST. art. X, § 3 (amended 1983) (Maine constitution does not state a year as to adoption of the common law);
MD. CONST. Declaration of Rights, art. 5 (amended 1992) (reception statute adopts the common law up to July 4, 1776);
MASS. CONST. pt. 2, ch. 6, [§ 97] (does not state a year as to when the Bay State adopted the common law of England); see also MASS. ANN. LAWS ch. 4, § 1 (Law. Co-op. 1999) (to the same effect);
MICH. CONST. art. 3, § 7 (no year set forth in constitution as to cutoff date of adoption of the common law);
MINN. STAT. ANN. § 599.03 (West 2000) (reception statute does not state a cutoff date as to adoption of the common law of England);

MISS. CONST. art. 15, § 274 (state constitutional provision does not specify a cutoff date as to adoption of the common law; *see also* MISS. CONST. sched. par. 5 (1817) (to the same effect as present constitutional text));

MO. REV. STAT. § 1.010 (2000) (state reception law adopts the common law of England prior to the fourth year of the reign of James I in 1607); *compare* 1816 Mo. Terr. Laws ch. 154 (same as present reception statute on this point));

MONT. CODE ANN. §§ 1-1-108, 1-1-109 (1999) (under § 1-1-108 there is no common law in any case unless declared by statute);

NEB. REV. STAT. § 49-101 (1998) (state reception law does not set forth a cutoff date regarding the adoption of the common law);

NEV. REV. STAT. § 1.030 (1999) (state reception law does not have a cutoff date as to the adoption of the common law);

N.H. CONST. pt. 2, art. 90 (does not state cutoff date as to adoption of the common law);

N.J. REV. STAT. tit. 40A, § 1-4 (1993) (does not set forth a date for the adoption of the common law);

N.M. STAT. ANN. ch. 38, §§ 1-3 (Michie 1998) (statute does not set forth date of adoption of the common law);

N.Y. CONST. art. I, § 14 (The constitutional provision adopts the common law of England as it was on April 19, 1775. Judge Cardozo's opinion in *Beers v. Hotchkiss*, 175 N.E. 506 (N.Y. 1931), is an erudite rendition of the common law, but fails to explain why the constitutional provision adopts the common law of England as it was on April 19, 1775. History provides the answer: April 19, 1775 marks the date when the British engaged in battle with the colonists resulting in the "shot heard round the world." *See* 1 SAMUEL ELIOT MORISON ET AL., *THE GROWTH OF THE AMERICAN REPUBLIC* 166 (6th ed. 1969));

N.C. GEN. STAT. ch. 18B, § 128 (1997) (This statute does not set forth the date of adoption of the common law. North Carolina's reception statute of 1715 used language referring to the common law as brought over to the New World by their "ancestors." Act of 1715, ch. 31, § 6. During the Revolutionary War, North Carolina enacted a second reception statute, adopting the common law as in force in 1778. When North Carolina ceded land to what is now the State of Tennessee, it reenacted the reception statute and adopted the common law in force in 1789. *See Moss v. State*, 173 S.W. 859, 861 (Tenn. 1915); *Nunnely v. Doherty*, 9 Tenn. (1 Yer.) 26, 27 (1820));

N.D. CENT. CODE §§ 1-01-04–1-01-06 (1987) (statute does not give cutoff year for the adoption of the common law);

OHIO REV. CODE ANN. § 1.49 (1993) (The statute does not set forth a year stating the cutoff date for the adoption of the common law. The common law in Ohio, however, has no effect except as judicially recognized. *See McAllister v. Schlemmer & Graber Co.*, 177 N.E. 841, 842 (Ohio Ct. App. 1930));

OKLA. STAT. ANN. tit. 12, § 2 (West 2000) (the statute does not have a cutoff date for adoption of the common law);

OR. CONST. art. XVIII, § 7 (amended 1999) (The constitutional provision does not give a date regarding the cutoff year for the adoption of the common law. Nevertheless, Oregon's constitution has been interpreted to mean adoption of the common law at the time of "the American Revolution." See *United States Fid. & Guar. Co. v. Bramwell*, 217 P. 332, 333-34 (Or. 1923) (en banc));

PA. R. CIV. P. 130 (the rules of civil procedure in Pennsylvania do not specify a cutoff date regarding adoption of the common law);

P.R. LAWS ANN. tit. 31, § 7 (1993) (Puerto Rico is a civil law jurisdiction);

R.I. GEN. LAWS tit. 43, § 3-1 (1999) (adopts the common law prior to July 4, 1776);

S.C. CODE ANN. tit. 18, § 1-170 (Law. Co-op. 1985) (does not set forth a cutoff date for the adoption of the common law);

S.D. CODIFIED LAWS tit. 2, § 14-12 (Michie 1992) (does not state a cutoff date for the reception of the common law);

TENN. CONST. art. XI, § 1 (the constitutional provision has been interpreted to mean the adoption of the common law prior to the fourth year of the reign of James I in 1607); see *Brice v. State*, 2 Tenn. (2 Overt.) 254 (1814); *Moss v. State*, 173 S.W. 859, 861 (Tenn. 1915));

TEX. CIV. PRAC. & REM. § 5.001 (Vernon 1986) (does not set forth a cutoff year for the adoption of the common law);

UTAH CODE ANN. tit. 68, § 3-1 (2000) (does not specify a cutoff date for the adoption of the common law);

VT. STAT. ANN. tit. 1, § 271 (1996) (Vermont adopts the common law and statutes in force on October 1, 1760. Though the statute does not have a cutoff year, the Vermont Supreme Court in *Comstock's Admr. v. Jacobs*, 96 A. 4 (Vt. 1915), interpreted the statute to mean October 1, 1760);

VA. CODE ANN. §§ 1-10-1-11 (Michie 1995) (Though Virginia's reception statute does not read prior to the fourth year of James the First, it has been interpreted to mean that. See 1 WILLIAM WALLER HENNING, STATUTES AT LARGE . . . OF VIRGINIA 74 (1821); see also 1 SIR JOHN RANDOLPH, VIRGINIA COLONIAL DECISIONS (1728-1732) 159-60, 162 (R.T. Barton ed., 1909). The common law, however, was not formally adopted in Virginia until 1660-1661. *Id.* at 162. A 1776 act of the Virginia legislature reenacted the reception of the common law of England prior to the fourth year of the reign of James the First. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 96 (1st ed. 1973) (citing 9 WILLIAM WALLER HENNING, STATUTES AT LARGE . . . OF VIRGINIA 127 (1821));

V.I. CODE ANN. 1, § 4 (1995) (adoption of the common law as of July 1, 1921; see *Smith v. deFreitas*, 329 F.2d 629, 633 n.2 (3d Cir. 1964); prior to July 1, 1921, the rule of decision in the Virgin Islands was Danish law);

WASH. REV. CODE ANN. § 4.04.010 (West 1988) (through judicial opinions, the state's reception law has been interpreted to mean adoption of the common law

up to July 4, 1776); see *In re Hudson*, 126 P.2d 765, 771 (Wash. 1942); *Compton v. Evans*, 93 P.2d 341, 342 (Wash. 1939));
W.VA. CODE ANN. § 2-1-1 (Michie 1994) (adoption of the common law prior to June 20, 1863; § 2-1-1 of the state code is to be read in connection with W. VA. CONST. art. VIII, § 13 (amended 1872));
WIS. CONST. art. 14, § 13 (amended 1848) (Wisconsin's constitutional provision has been interpreted to mean adoption of the common law prior to the "Revolutionary War." See *Davison v. St. Paul Fire and Marine Ins. Co.*, 248 N.W.2d 433, 439-40 (Wis. 1977));
WYO. STAT. ANN. tit. 8, § 1-101 (Lexis 1999) (prior to the fourth year of the reign of James I; see *Krug v. Reissig*, 488 P.2d 150, 152 (Wyo. 1971)).

