

The Relevance of English Law in a Colonial Setting

Presenter: Andrew Buck, Associate Dean (Research), Faculty of Arts and Professor of Law, Macquarie University

Abstract: The common law arrived in Australia with the First Fleet in 1787, but it eventually put down roots in its new environment. At what point did English law become Australian law? In *Attorney General v. Brown* (1847) the defense counsel, Richard Windeyer, made a bold attempt to establish that the British Crown not, and had never been, possessed of the land of Australia. “There was a distinction to be drawn,” he stated, “between dominion and possession..., and she [Queen Victoria] could not be regarded as possessed of it in her own absolute right.” The bench, however, found against Windeyer, stating that “if the feudal system of tenures be, as we take it to be, part of the universal law of the parent state, on what ground shall it be said not to be the law of New South Wales?” This paper will examine Windeyer’s argument and interrogate the decision of the court, as the case raises profound questions for the issue of the relevance of English law in a colonial setting.

St. George Tucker and the Reception of the Common Law in Post-Colonial Virginia

Presenter: Christopher Curtis, Professor of History and Head of the Dept of History and Sociology, Claflin University

During the course of a lifetime, St. George Tucker was poised in diametric opposition to two poles of thinking about the authority of the common law. On one pole, stood the famous declaration by William Blackstone that the English common law “had no allowance or authority” in the American colonies. At the other pole, stood the subsequent Federalist position, as it was articulated during the controversy over the Alien and Sedition Acts, that maintained that because the English common law served as the unwritten law in each of the states it had been fully incorporated into the corpus of federal law. Tucker recognized this polarity and staked his own position firmly on the middle ground – albeit a shifting middle ground that was being propelled by the dynamic challenges and changes to legal theory during the age of Revolution. Indeed, Tucker’s legal theory was contemplated and articulated at a time when the common law itself was undergoing profound change and being re-conceptualized as a system of jurisprudence. His project to republicanize the common law, like Bentham’s effort to replace it, was only made possible by the systematic framework imposed by Blackstone. Accordingly, his writings on reception are significant because they provided a learned and contemporary definition of what he understood the common law to be and offer insight on the process by which it was adapted to the commercial demands of capitalism in the Anglo-American world.

The Common Law and the Constitution: The Judicial Amendment

Presenter: John V. Orth, William Rand Kenan, Jr. Professor of Law, University of North Carolina

Abstract: The Eleventh Amendment is unique among the twenty-seven amendments to the U.S. Constitution. Unlike amendments that enumerate civil rights – such as the Bill of Rights and the Fourteenth Amendment – or amendments that make what might be called mechanical changes to the original set-up – such as the Twelfth Amendment (concerning presidential election) and the Seventeenth (concerning the election of Senators) – the Eleventh Amendment is not so much concerned with adding to or altering the text as with changing how it is to be “construed.” More like a common law judicial decision than a constitutional amendment, the Eleventh Amendment spurred the development of a body of law that is best understood as the development of a precedent, albeit one of an extraordinary sort, rather than as a case of tortured textual exegesis, what the Supreme Court has called “ahistorical literalism.” The Eleventh Amendment, in other words, is the “judicial amendment” in more ways than one – an amendment to the Judicial Article but also a common law decision in the form of a constitutional amendment.

The Common Law & Slavery in Post-Colonial North Carolina

Presenter: Joseph L. Hyde, J.D. (2009), University of North Carolina; clerk to Hon. James Wynn, U.S. Court of Appeals (4th Cir.)

Abstract: North Carolina Courts, in the years preceding the Civil War, struggled to square a common law that, as one judge put it, “knows no difference of caste,” with a de facto caste system. The North Carolina Supreme Court more than once worried about whether the murder of a slave was a common law crime. The issue was relevant because after several abortive attempts to legislate, the General Assembly in 1817 had simply codified the common law, effectively passing the buck to the courts to develop a coherent system. In light of the draconian implications of such opinions as *State v. Mann* (1829), in which Judge Thomas Ruffin vaunted the absolute power of the master, it is rather surprising to find the court occasionally upholding convictions for murder when masters killed their own slaves and even recognizing a slave’s right to self-defense and to the defense of others. The explanation for such protections is found partially in the tug-of-war between the state legislature and the state judiciary, but also in social and environmental factors that are never made explicit in the court’s decisions. This paper examines the curious history of the common law’s protection of the slave’s life in North Carolina. How could a criminal law that recognized no action of battery between a master and his slave at the same time proscribe such batteries as resulted in death? Once the law recognized the absolute dominion of the master, how did North Carolina judges continue to justify an interventionist policy that placed the power of the people between the master and his man?