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THE PROCESS OF OUTLAWRY IN NEW YORK: A STUDY OF THE SELECTIVE RECEPTION OF ENGLISH LAW

MARK DEWOLFE HOWE

It has been said that "one of the chief difficulties confronting a student of our legal history is that the whole subject of the reception of English law, both common and statutory, was not thought out in any consistent way, but was left unsettled and in the air."¹ It is doubtless true that during the colonial period the selective reception and discriminating rejection of English law had, in large part, been the product of empiricism, and that coherent theory had done little to clarify the nature of the process.² Some of the colonies, however, were aware of the importance of the problem. The preamble to an act of the Provincial Assembly of South Carolina of 1712 recited that "many of the statute laws of the Kingdom of England or South Britain, by reason of the different way of agriculture and the differing productions of the earth of this Province from that of England, are altogether useless, and many others, (which otherwise are very good) either by reason of their limitation to particular places, or because in themselves they are only executive by such nominal officers as are not in or suitable for the Constitution of this Government, are thereby become impracticable here."³ The legislature, recognizing this situation, re-enacted one hundred and sixty-seven British statutes which, upon the recommendation of Chief Justice Nicholas Trott, were found to be applicable to the condition of the colony.⁴ The tenth section of the act by which these laws were received within the colony provided that "all the statute laws of the Kingdom of England which are not enumerated and made of force in this Province by this act . . . are hereby declared impracticable in this Province."⁵ Three years later the legislature of North Carolina made a similar, though far less thorough, effort to accomplish the same purpose, and in general descriptive terms listed the British statutes which were to be treated as operative in the Province.⁶

¹Cardozo, C. J., in *Beers v. Hotchkiss*, 256 N. Y. 41, 54; 175 N. E. 506 (1931).

²See REINSCH, *The English Common Law in the Early American Colonies* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 367; Pope, *English Common Law in the United States* (1910) 24 HARV. L. REV. 6; Dale, *The Adoption of the Common Law by the American Colonies* (1882) 21 AM. L. REG. (N. S.) 554; MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* (1930).

³Stat. No. 322, 2 Statutes at Large of South Carolina, p. 401.

⁴*Ibid.* A valuable discussion of this legislation may be found in MCCRADY, *HISTORY OF SOUTH CAROLINA UNDER THE PROPRIETARY GOVERNMENT, 1670-1719* (1897) pp. 247-248, 517 *et seq.*

⁵*Ibid.*

⁶Laws of North Carolina, 1715, Ch. 31, Sec. 7. This act provided that "all statute Laws of England, made for maintaining the Queen's Royal Prerogative, and the Security of her Royal Person, and Succession of the Crown, and all such Laws made for the Establishment of the Church, and the Laws made for the Indulgence of

In other colonies where no conscious effort to specify the operative English statutes was made, the process of reception was summarized by generalizations.⁷ In 1774, Governor Tryon of the Province of New York reported to the King that "the common law of England is considered as the fundamental law of the Province, and it is the received doctrine that all the statutes (not local in their nature, and which can be fitly applied to the circumstances of the Colony) enacted before the Province had a legislature, are binding on the Colony . . ."⁸ Rebellious Americans, though they might find the general formula adequate, not surprisingly changed the emphasis of its implications. In the Declaration of Civil Rights of the Continental Congress it was asserted that "the respective colonies are entitled to the common law of England . . . [and] to the benefit of such English statutes as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances."⁹

Such generalizations as these survived the revolution and acquired constitutional dignity. The thirty-fifth article of the New York Constitution of 1777, as finally adopted, provided that "such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the Colony of New York, as together did form the law of the said colony on the nineteenth of April in the year of our Lord one thousand, seven hundred and seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same."¹⁰ The sweeping simplicity of this language inevitably concealed important and difficult questions,—just those questions which during the colonial period had been left "unsettled and in the air". What portion of the

Protestant Dissenters, and all Laws providing for the Privilege of the People, and Security of Trade; as also, all Statute Laws made for limitation of Actions, and preventing of vexatious Law Suits, and for preventing Immorality and Fraud, and confirming Inheritances and Titles of Land, are and shall be in Force here, although this Province, or the plantations in general, are not therein named".

⁷We are not here concerned with the analogous though essentially dissimilar problem of determining which British statutes, enacted after the foundation of the colonies, were there applicable. That that problem was one of which the colonists were aware is evidenced by such legislation as that of New York in 1767 by which a series of recent English statutes were extended to the province. 4 COLONIAL LAWS OF NEW YORK, 953 (Ch. 1327).

⁸1 DOCUMENTARY HISTORY OF NEW YORK (1849) 752, 754.

⁹1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 (W. C. Ford ed. 1904) 69.

¹⁰As originally introduced in the convention the clause provided for the reception of the common law *in toto*. It provided that "the Common Law of England and so much of the Statute Law of England and Great Britain as have heretofore been adopted in practice in this State . . . shall until altered or repealed by a future Legislature of this State continue to operate and be of force and effect". The changes made in the final draft were adopted from an amendment offered by Robert Yates. 1 LINCOLN'S CONSTITUTIONAL HISTORY OF NEW YORK (1906) 540-541.

common law, and precisely which statutes had formed part of the colonial law on April 19, 1775? Who was to decide these issues, the legislature, the courts, or the legal scholars of the future?

The New York legislature in 1786 endeavored to answer certain of these questions. The preamble to an act of that year recited that "such of the said [English] statutes as have been generally supposed to extend to the late Colony, and to this State, are contained in a great number of volumes; and those statutes . . . are conceived in a stile and language improper to appear in the statute books of this state."¹¹ Because it was deemed desirable that some definition of the operative British statutes should be made, and that language and style should be adapted to local needs and tastes, it was enacted that Samuel Jones¹² and Richard Varick,¹³ Esquires, should "reduce into proper form under certain heads or titles of bills all the said statutes . . . and lay the same bills before the legislature . . . to the intent that when the same shall be completed . . . none of the statutes of England or of Great Britain shall operate or be considered as laws of this State."¹⁴ The two men were also to submit for re-enactment any colonial acts which were believed to have been in force when the revolution started. Finally they were to publish these re-enacted laws, together with such additional statutes as might in the interval be passed by the legislature.¹⁵ Although the Jones and Varick revision was not published until 1789, the heaviest portion of their work was apparently performed within the allotted time of two years. During the sessions of 1787 and 1788 many English statutes were adopted by the legislature,¹⁶ and in 1788 it was enacted that after the first of May, 1789, "none of the statutes of England or of Great Britain shall operate or be considered as laws of the State."¹⁷ This legislative elimination of English statutory law was made permanent by the second state constitution of 1821.¹⁸

The work of Jones and Varick was not unparalleled. We have seen that

¹¹1786 N. Y. Laws, c. 35.

¹²See 10 DICTIONARY OF AMERICAN BIOGRAPHY (1933) 197.

¹³See 19 DICTIONARY OF AMERICAN BIOGRAPHY (1936) 226.

¹⁴N. Y. Laws 1786, c. 35, Sec. 1.

¹⁵*Ibid.* Section 2.

¹⁶In *Harmon v. Peats Co.*, 216 App. Div. 368, 214 N. Y. Supp. 353 (1926), *reversed on other grounds*, 243 N. Y. 473, 154 N. E. 314 (1926), it was held that the English Statute of Frauds, which had constituted part of the common law of the Province, had not, for conflict of laws purposes, become statutory law by its specific re-enactment on the recommendation of Jones and Varick in 1787. *Cf. Burns Mortgage Co. v. Fried*, 292 U. S. 487, 54 Sup. Ct. 813, 78 L. ed. 1380 (1934).

¹⁷N. Y. Laws 1788, c. 46, Sec. 37.

¹⁸By Section 13 of Article Seven of the Constitution of 1821 it was provided that "such parts of the common law and of the acts of the legislature of the colony of New York as together did form the law of the said colony on the nineteenth day of April one thousand seven hundred and seventy-five . . . and such acts of the legislature of this state as are now in force shall be and continue the law of this state . . ." It is, of course, noticeable that this section nowhere mentions the statutory law of England.

South and North Carolina during the colonial period had each endeavored to accomplish the same purpose. With political independence achieved it was natural that renewed attempts to limit and define the operative British statutes should be made. In 1776 the Virginia Assembly appointed a commission of five, among whom was Thomas Jefferson, whose duty it was to submit to the legislature for revision and enactment such statutes, British and local, as were believed to be desirable.¹⁹ Three of the commissioners carried out the task, and in 1779 submitted the laws which they had chosen.²⁰ During the sessions of 1785 and 1786 the most important of the bills were enacted, but their passage was spasmodic, and in 1786 it was necessary to appoint a special committee to consider those bills which had not yet been enacted into law.²¹ In North Carolina there was published in 1792, at the request of the legislature, a volume of those English statutes which were believed to have been operative there prior to the revolution.²² The preface to this volume expressed vividly the American desire to destroy, so far as possible, the British legal inheritance. The day was fondly anticipated when the people would "shake off this last seeming badge, and mortifying memento" of dependence on England.²³ The process of statutory specification continued into the nineteenth century. In 1807 the legislature of Pennsylvania requested the judges of the Supreme Court to determine which English statutes were then in force.²⁴ The judges' report was presented to the legislature in the following year, and was accompanied by a revealing introductory explanation of the character of the work which had been done.²⁵

¹⁹ HENING, STATUTES AT LARGE 175. The preamble contains an interesting recital of the reasons for the legislation: "Whereas on the late change which hath of necessity been introduced into the form of government in this country it is become also necessary to make corresponding changes in the laws heretofore in force, many of which are inapplicable to the powers of government now organized, others are founded on principles heterogeneous to the republican spirit, others which, long before such change, had been oppressive to the people, could yet never be repealed while the regal power continued, and others, having taken their origin while our ancestors remained in Britain, are not so well adapted to our present circumstances of time and place, and it is also necessary to introduce certain other laws, which, though proved by the experience of other states to be friendly to liberty and the rights of mankind, we have not heretofore been permitted to adopt . . ."

²⁰ See 12 HENING, preface. Also see Jefferson's account of the commission's work in his *Autobiography*, (P. L. Ford ed. 1914) p. 66 *et seq.* The three revisers were Jefferson, George Wythe, and Edmund Pendleton. George Mason and Thomas L. Lee, not being lawyers, excused themselves from taking part in preparing the revision. *Ibid.* p. 68.

²¹ 12 HENING, 409.

²² FRANCIS-XAVIER MARTIN, COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA (1792).

²³ *Ibid.* p. iv.

²⁴ 8 STATUTES AT LARGE OF PA. p. 418. (Ch. 1831).

²⁵ The report is reprinted in an appendix to 3 BINNEY at p. 593. The Pennsylvania judges, like the New York legislators, found the language of the ancient British statutes unsatisfactory for American purposes. "In perusing the statutes referred to in the report, the legislature will perceive, that in many of them the language is uncouth, and unsuited to our present form of government." *Id.* at p. 597. Jefferson in

Shortly after the revolution a similar program of reception was instituted in Maryland.²⁶ It finally bore fruit in 1811 in the publication by Chancellor Kilty of a volume of British statutes considered applicable to Maryland.²⁷

Any consideration of local efforts to absorb specific English statutes into the body of American written law must be treated in the light of this national endeavor. It is for this reason that a brief description of the general tendency has prefaced our examination of a neglected passage in American legal history. Our purpose is modest: to discuss with some care the re-enactment in New York State of a series of English statutes concerning outlawry, a process which, in civil cases, has generally been believed never to have constituted a part of American law. We shall see later how that instance of legislative reception was related to the work of Samuel Jones and Richard Varick. Their revision of the laws of New York has never received the detailed attention which it deserves.²⁸ It is hoped that a brief consideration of one small aspect of their work will not only indicate the importance of their labors, but will cast light upon the larger process of statutory reception as a whole.

It is well known that the technicalities of common law pleading put formidable difficulties in the way of a plaintiff who wished to bring suit against joint contract debtors, one or more of whom was beyond the reach of process.²⁹ Because the obligation was joint, all debtors must be made

characteristic terms described the same aspect of English statutes, "which, from their verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty, by *said*s and *afore-said*s, by *ors* and *ands*, to make them more plain, are really rendered more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves". *Supra* note 20, at p. 70.

²⁶See the two legislative resolutions (No. 10, Nov. Sess., 1794, and No. 22, Nov. Sess., 1809) reprinted in an appendix to Volume 7 of KILTY, HARRIS AND WATKINS, LAWS OF MARYLAND.

²⁷An annotated edition of Chancellor Kilty's Collection was published in 1870 by J. J. Alexander.

²⁸No more misleading summary of the provisions of the constitution of 1777 and of the work of Jones and Varick could well be devised than that of the New York Board of Statutory Consolidation which, in its report to the legislature in 1908, stated that "the first state constitution of 1777 had been in force but nine years when a revision of the laws was directed by the legislature. The state was then governed by the common law of England and Great Britain and the acts of the legislature of the colony of New York, except as abrogated by the constitution of 1777 or modified by the state legislature. In 1786 Samuel Jones and Richard Varick were appointed to 'collect, revise and digest' the acts of the colony of New York and the laws of the state passed since the Revolution". 1 MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, Annotated, pp. 1-33 at p. 2. Similarly hasty summaries of the Jones and Varick revision may be found in BUTLER, THE REVISION OF THE STATUTES OF THE STATE OF NEW YORK AND THE REVISERS (1889) p. 5, and in Arnot, *The Progress of Law Reform in New York* (1909) 43 AM. L. REV. 53. Chancellor Kent refers to the "enlightened and chastened spirit of moderation" which inspired the New York revisions of 1801 and 1829 (for the former of which he was himself largely responsible), but makes no mention of the Jones and Varick revision. 1 KENT'S COMMENTARIES 473, note b.

²⁹2 WILLISTON, CONTRACTS (Williston and Thompson rev. ed. 1936) § 327.

parties defendant, and all defendants must be brought into court. If the plaintiff failed to join one of the debtors the promise declared on might be successfully traversed, or, after the time of Lord Mansfield, the claim would be dismissed on a plea in abatement. The logic of these technicalities may well have afforded scholastic satisfaction to judges and lawyers, but the plaintiff who found himself without remedy because one of his joint debtors was able to elude the sheriff would find small comfort in the procedural symmetry of justice. It was imperative, therefore, that some weapon from the armory of the common law should be given to this plaintiff. Pollock and Maitland have stated that the weapon which the courts gave to him was "as clumsy as it was terrible".³⁰ That weapon was the process of outlawry.

Although there is no need here to discuss in detail the intricate confusion to which English courts had, by the 18th century, brought the process of outlawry, a brief suggestion of its characteristics is essential for our purposes.³¹ As applied to criminal proceedings its nature is not unfamiliar, at least in its more romantic aspects. A defendant who had been indicted or appealed of treason or felony and who eluded capture, or could not be found within the county where he stood charged, might through outlawry proceedings be put outside the king's peace and beyond his protection. In its early form the proceeding was instituted by the issuance of a writ of exigent from the court in which the defendant was appealed or indicted. By that writ the sheriff of the county was commanded to call the defendant at successive sittings of his county court, and if he did not appear judgment of outlawry was pronounced against him. The antiquity of the proceedings is evidenced by the fact that they took place in the ancient county court to the exclusion of the royal courts.³² There, although founded on the sheriff's acts, the judgment was entered by the coroners. The effect of the judgment was to deprive the defendant of substantially all of his civil rights,—his chattels were forfeited to the King, his lands escheated, and, until the 14th century, he might on discovery be killed by anyone.

Successive statutes in the reigns of Henry the Sixth,³³ Henry the Eighth,³⁴ and Elizabeth³⁵ gave the defendant somewhat greater assurance that if outlawry proceedings were instituted he would hear of them. By

³⁰2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (1898) 579.

³¹My summary of the nature of proceedings to outlawry is based primarily upon the following sources: 3 BLACKSTONE'S COMMENTARIES 297 *et seq.*; VINER'S ABRIDGMENT, Title Outlawry; 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (1923) 604 *et seq.*; Thompson, *The Development of the Anglo-American Judicial System. Part I. History of the English Courts to the Judicature Acts* (1932) 17 CORNELL L. Q. 9 at pp. 12, 13; TIDD'S PRACTICE, (2nd Am. ed.) 125 *et seq.*; MORRIS, THE EARLY ENGLISH COUNTY COURT (1926).

³²1 HOLDSWORTH 8.

³³8 HENRY VI, c. 10, Sec. 2.

³⁴6 HENRY VIII, c. 4.

³⁵31 ELIZABETH, c. 3, Sec. 1. See Appendix, *infra*.

these statutes it was provided that in addition to the writ of exigent there should issue a writ of proclamation directing the sheriff of the county where the defendant resided to make three proclamations ordering his appearance on pain of outlawry. These proclamations were to be made both in the sheriff's court and at the door of the local church after Sunday service. The defendant was also, through a writ of error, allowed to have a judgment of outlawry reversed.³⁶ Parliamentary solicitude for the rights of the defendant in outlawry proceedings was supplemented by the courts. Even such thick-skinned officials as the English judges found the unfairness of the proceedings offensive. To allow such severe punishments to be visited upon a person whose defense was never heard was, after all, out of line with a growing common law tradition. Such considerations as these led the courts to protect the rights of outlawed defendants by means of artificial technicalities. The most minute error in Latin spelling or grammar was enough to invalidate the entire elaborate proceedings.³⁷

By the time of Bracton, outlawry had been used in civil actions based on trespasses *vi et armis*. A series of statutes extended its application to all civil cases in which the writ of *capias* was permitted. The procedural requirements were substantially the same in civil and criminal proceedings, and the plaintiff who wished to assert a claim against an absent defendant would have to pick his way through a mesh of details. When the *capias* was returned *non est inventus*, an alias writ was issued, and after that was similarly returned, a pluries was issued. Upon the return of *non est inventus* to this writ the plaintiff would obtain his writs of exigent and proclamation, and these the sheriff would execute as in the criminal proceedings. Finally, if the defendant did not appear, the county court entered judgment of outlawry against him. In civil cases, of course, the consequences were not as drastic as in criminal proceedings, for although there was a similar forfeiture, the judgment did not operate as a conviction for crime.

Terrible and clumsy as these proceedings in many instances may have been, it is evident that in one situation they served a useful purpose. As we have seen, persons holding a claim against joint debtors were frequently unable to make service upon all of the necessary parties defendant, and the logic of pleading required that the action be abated unless the impossible

³⁶The fictitious character of the whole elaborate procedure and the unreality of the protection which was afforded the defendant were recognized by Parliament in the 19th century. See 9 HOLDSWORTH 254-256.

³⁷In *Markham v. Gargrave*, Palm. 121 (1620), *infra nominata* was misspelt *infra noninata* and *waviata* appeared as *wamata* in the writ of exigent. These errors were enough to invalidate the whole proceedings. In *Griffith v. Thomas*, Style 334 (1652), it was held that "there is a fault in the outlawry, for in the writ to the sheriff it is *praecipipimus vobis*, instead of *praecipimus vobis* . . . Roll, Chief Justice, If the word be *praecipipimus*, then there is no command to the sheriff, for that word signifies nothing, therefore let the outlawry be reversed . . .".

were achieved. It was in such cases that outlawry seemed to justify itself, for it enabled the plaintiff, by destroying the rights of a joint debtor who was outside of, or concealed within, the jurisdiction, to sue the others upon whom service could be made. If the absent co-debtor had been outlawed a plea in abatement would not lie. The severity of a judgment of outlawry was very great, but the injury which technical rules of pleading might do a plaintiff was some justification for its use in proceedings against joint debtors. It was only when the rules of pleading had been greatly liberalized that Parliament abolished outlawry proceedings in civil cases.³⁸

This brief account of the characteristics of English proceedings to outlawry will afford an adequate background for the consideration of that passage in American legal history which is our principal concern. It has been said that "the process of outlawry in civil cases seems to have been unknown in the United States"³⁹ and that "it appears that outlawry has never been known on this side of the Atlantic".⁴⁰ Such assertions have ample and distinguished judicial authority behind them. In *Harker v. Brink*,⁴¹ the Supreme Court of New Jersey had before it for consideration the so-called Joint Debtor Act of that state. The statute was derived from a colonial act of 1771 which, after its preamble reciting that "the proceedings to outlawry against persons who cannot be taken by process not being in use in this Colony . . .", provided a remedy for creditors who held claims against joint debtors, some of whom were beyond the reach of process.⁴² The court, in discussing that statute, asserted, with perhaps some local pride for New Jersey's priority, that "a provision of similar import, and almost identical in phraseology, was enacted in New York as early as 1789".⁴³ *Blessing v. McLinden*⁴⁴ was a later New Jersey decision in which the court, examining further the history of the Joint Debtor Act, again referred to the colonial act of 1771 and called particular attention to its preamble. The *McLinden* case, primarily because of its detailed analysis of the history of the legislation, has frequently been cited by courts and writers. In part, at least, because of the quoted preamble from the act of 1771, the local fact that outlawry was unknown during the colonial period has been gen-

³⁸42 and 43 VICT., c. 59, Sec. 3 (1879). As to the more recent status of outlawry in criminal proceedings in England, see Richards, *Is Outlawry Obsolete?* (1902) 18 LAW Q. REV. 297.

³⁹Magruder and Foster, *Jurisdiction over Partnerships* (1924) 37 HARV. L. REV. 793, 799.

⁴⁰Holdoegel, *Jurisdiction over Partnerships, Nonpartnership Associations and Joint Debtors* (1926) 11 IOWA L. REV. 193, 197.

⁴¹24 N. J. Law 333 (1854).

⁴²ALLINSON, ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY, 1702-1776, c. 543.

⁴³*Op. cit. supra* note 41, at 348. The New York statute referred to is in N. Y. LAWS 1788, c. 46.

⁴⁴81 N. J. Law 379, 79 Atl. 347 (1911).

eralized into a broad assumption. In *Kittredge v. Langley*,⁴⁵ Chief Judge Cardozo, after citing *Blessing v. McLinden*, refers to a Rhode Island⁴⁶ and a Massachusetts⁴⁷ decision, and asserts that "the process of outlawry is one unknown to our law".⁴⁸ We have pointed out the fact that the New Jersey court, in *Harker v. Brink*, had claimed priority over New York in the adoption of a joint debtor act. The New York court, by its failure to cite any earlier New York statute, seems to acknowledge that claim. Undoubtedly the attention of neither court was called to the New York colonial act of 1756⁴⁹ which provided substantially the same relief against joint debtors as that which New Jersey adopted fifteen years later.⁵⁰ But what is of importance to us—beyond incidentally determining which state may properly claim the distinction of priority—is the fact that the New York colonial act was prefaced with precisely the same recital as that which introduced the New Jersey statute. Had the court wanted some authority to establish the proposition that outlawry was never known in New York, it might have referred to the recital in the act of 1756 that it was not then known in the colony. We shall presently see how conclusive that evidence would have been.

What was it that led the American colonists to repudiate the traditional procedure of outlawry which, during the 17th and 18th centuries was of unquestionable importance in English law? Of course no conclusive answer to that question can be given; the factors which brought about the rejection of particular elements in English law are multiple and uncertain. In the case of outlawry, however, our cursory examination of its character may afford some explanation. Its clumsiness and its severity were noted by Pollock and Maitland; and American courts, in somewhat more American terms, have emphasized the same deficiencies. It has been described as "contrary to the spirit and principles of our government"⁵¹ and "inconsistent

⁴⁵252 N. Y. 405, 169 N. E. 626 (1930).

⁴⁶*Nathanson v. Spitz*, 19 R. I. 70, 73, 31 Atl. 690 (1895).

⁴⁷*Tappan v. Bruen*, 5 Mass. 193 (1809).

⁴⁸*Supra* note 45, at 413.

⁴⁹4 COLONIAL LAWS OF N. Y., c. 997.

⁵⁰The New Jersey act lacked the final proviso of the earlier New York law, which limited the plaintiff's right of execution to the property jointly owned by all defendants and the individual property of such defendants as had been served with process. The New York act stated that the plaintiff, subject to that restriction, might have judgment and execution against "the joint debtors named in the process . . .". The New Jersey act of 1771, as printed by Allinson, stated that judgment and execution might be had against "the joint debtors named in the proofs . . .". The New Jersey court in *Ford v. Munson*, 1 South. 93 (1818) discussed an amendment of 1797, by which the word "proofs" was changed to "process", as in the New York law. The court suggested that the change was the result of an error in engrossing the 1797 law. In view of the fact that the New Jersey act of 1771 was, with the exception of the concluding proviso, copied verbatim from the New York act of 1756 it seems not unlikely that the legislative error was made not in 1797 but in 1771.

⁵¹*McCall v. Price*, 1 McCord (S. C.) 82, 83 (1821).

with our institutions and repugnant to our constitution and laws . . . ”,⁵² and “not only dilatory and expensive to plaintiffs, but harsh and oppressive to nonresident defendants”.⁵³ Despite the high-sounding considerations thus emphasized it is not improbable that its inconvenience to plaintiffs was the principal reason for its repudiation. Although, as we have seen, it possessed some justification when applied to claims against absent joint debtors, the joint debtor acts and other procedural devices seemed to destroy whatever claim to utility it possessed.

In view of the more or less frequent dicta that outlawry was alien to American traditions and of the express recital in the preambles of the colonial acts of 1756 and 1771, it is, perhaps, not surprising that writers and judges have recently assumed that outlawry was never known in the United States. The New York constitution of 1777, by its cautious provision for the selective reception of English law, seemed to provide a sanction for the permanent repudiation of practices such as outlawry which are “inconsistent with our institutions”. The development of legal practices is not, however, as simple as we could sometimes wish. In 1787 the legislature of New York adopted an elaborate statute making detailed provision for outlawry proceedings in civil and criminal cases.⁵⁴ Because the law, with minor changes, was in effect for some forty-three years⁵⁵ it is manifestly inaccurate to say that outlawry as an incident of civil process was never known in this country.⁵⁶

In an appendix to this article are printed Chapter Nine of the Laws of New York of 1787 and the various English statutes upon which that act was apparently based. No useful purpose would be served by making a detailed examination of the various similarities between the American and British legislation,—the resemblances are evident without specific emphasis. Our primary concern is not to discuss the details of practice outlined in the New York act but to consider how the legislature came to adopt the statute. In view of the condemnation which proceedings to outlawry have commonly received from American courts, it is desirable to determine why the legislature of a recently rebellious colony, presumably anxious to rid

⁵²Dale County v. Gunter, 46 Ala. 118, 140 (1871).

⁵³Harker v. Brink, *supra* note 41, at 351.

⁵⁴N. Y. Laws 1787, c. 9.

⁵⁵The statute was repealed by Ch. 21, Sec. 1, Para. 57, Laws of N. Y. 1828, the repeal to be effective in 1830. In 1801 the act had been amended in small respects. See Laws of New York 1801, c. 51, and appendix, *infra*.

⁵⁶Several Virginia statutes indicate that outlawry in civil proceedings was for a time in force in that colony. See acts of Feb. 27, 1752 and Dec. 22, 1788, in 6 HENING 334 and 12 HENING 730, 736. See also Moss v. Moss's Administrator, 4 Hening and Munf. 293 (1809). Outlawry in criminal cases was recognized in Virginia after the Revolution. See Commonwealth v. Hale, 2 Va. Cas. 241 (1821); Commonwealth v. Haggerman, *ibid.* p. 244; Commonwealth v. Anderson, *ibid.* p. 245. British proceedings to outlawry in civil cases seem to have been adopted in no statutory revision.

itself of a cumbersome and confused inheritance, saw fit to adopt the elaborate and medieval process of outlawry. Were there no conflicting evidence it could be most persuasively argued that the outlawry statute was unrelated to the work of Jones and Varick. It will be remembered that in 1786 they were directed by the legislature to "collect and reduce into proper form . . . and lay" before the legislature for enactment such English statutes "as have been generally supposed to extend to the late Colony". In the preamble to the Joint Debtor Act of 1756, it was recited that the proceeding to outlawry against persons who cannot be taken by process was not in use in the colony. That act was still in force in 1772, for in that year Peter Van Schaack was directed by the legislature to publish a collection of colonial laws then in force,⁵⁷ and in his volume, published in the following year, the Joint Debtor Act was printed in full, with its preamble.⁵⁸ Furthermore, in a statute passed on March 9, 1774, it was stated that certain "disorderly Practices are highly Criminal and . . . it is indisputably necessary for want of Process to Outlawry (which is not used in this Colony) that special provision be made for bringing such offenders in future to trial . . ." ⁵⁹ Certainly these legislative recitals indicate that the process of outlawry was unknown in New York during the colonial period.⁶⁰ The possibility that at some time between March, 1774, and April, 1775, the elaborate proceedings were adopted by the colony and left no trace in local records is so remote as to be negligible. If English statutes concerning outlawry were not in force in New York when the revolution commenced, then Jones and Varick had not been directed to submit them to the legislature for re-enactment.

This is the logic of the argument which might be urged to deny that the act of 1787 was related to the work of Jones and Varick. Logic, however, cannot refute the testimony of contemporary records. In the Journal of the New York Assembly for January 13, 1787, appears the following entry: "Mr. Jones, pursuant to the law for revising the laws of this State, laid before the House the following bills, viz., . . . A bill entitled *An act declaring what process may be issued in certain Personal Actions, and for regulating*

⁵⁷5 COLONIAL LAWS OF N. Y. Ch. 1543, p. 355.

⁵⁸LAWS OF N. Y., 1691-1772, p. 352. This colonial joint debtor act was re-enacted almost verbatim by Sec. 23 of Chapter 46 of the Laws of 1788. Shortly afterward the criminal act was repealed. N. Y. Laws 1788, Ch. 73, Sec. 1.

⁵⁹5 COLONIAL LAWS OF N. Y. Ch. 1660. See also the recital in a special act for outlawing Phillip French and Thomas Wenham passed on April 30, 1702. It was there stated that "the want of Process of outlawry in Criminal and Civil Causes is a manifest defect in the Execucon of the Law within this Province". 1 COLONIAL LAWS OF N. Y. Ch. 105.

⁶⁰For one case in which the Court of Quarter Sessions of New York City seems to have outlawed a defendant in criminal proceedings, see *Queen v. Rideout* (1708), reprinted in GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS (1937) pp. 403-404.

Outlawries . . ."⁶¹ On that day the bill was read for the first time and ordered to a second reading.⁶² Two days later the second reading occurred,⁶³ and on the 25th the engrossed bill was read a third time in the Assembly.⁶⁴ On January 27, the Senate resolved that the bill should pass without amendment.⁶⁵ On February 5, in the Assembly, "a message from the Honorable the Council of Revision, was delivered by the Honorable Mr. Chief Justice Morris, that it does not appear improper to the Council, that the bill entitled, *An act declaring what process may be issued in certain Personal Actions, and for regulating Outlawries . . .* [and other named bills] should respectively become laws of this State".⁶⁶ And thus the statute concerning outlawry was adopted as part of the law of New York.

My purpose, as I have said, is not to discuss the details of the statute, as they relate either to criminal or civil proceedings. Some consideration of the imitative and creative aspects of the law will, however, reveal the character of the work of Jones and Varick. The first and second sections, though not directly traceable to parliamentary acts, contain a brief statement of the existent English law as summarized by Coke, Blackstone, and Viner. In many ways the second section is the most interesting. There was no English statute conferring jurisdiction in outlawry proceedings upon the County Courts, for the obvious reason that their jurisdiction in such cases was pre-Norman in origin. It will be remembered that the ancient County Courts derived from the shire moots presided over by the sheriffs, and that although their jurisdiction was frequently confirmed by Parliament and the king, in origin it was independent of both. The New York Constitution of 1777 had referred to the courts of common pleas and of general sessions as county courts,⁶⁷ and it has been suggested that they may have had some connection historically with the ancient county courts of England.⁶⁸ If that connection had been recognized it would have been simple and natural for the legislature in 1787 to give the common pleas and general sessions jurisdiction to conduct outlawry proceedings. Instead, the second section of the act provided that the sheriff of each county, or his deputy, should on the first and third Monday of every month, hold a court to be known as his County Court. Here, as in England, he was to demand persons on the exigents and

⁶¹JOURNAL OF THE ASSEMBLY OF THE STATE OF N. Y., 10th Session, 1787, p. 5. At that time Samuel Jones was a member and Richard Varick the speaker of the assembly, *ibid.* p. 3, 4.

⁶²*Ibid.*

⁶³*Ibid.* p. 8.

⁶⁴*Ibid.* p. 22.

⁶⁵JOURNAL OF THE SENATE OF N. Y., 10th session, 1787, p. 15.

⁶⁶*Op. cit.*, *supra* note 59, at p. 36.

⁶⁷See Articles 24, 25 and 28 of Constitution of 1777. See also *People v. Albany Common Pleas*, 19 Wend. 27 (1837).

⁶⁸RADIN, *ANGLO-AMERICAN LEGAL HISTORY* (1937), p. 174.

pronounce judgment of outlawry against those who did not appear. In one respect only was the practice of this court to differ from that followed in England; the sheriff himself might pronounce judgment. That act need not, as in England, be performed by the coroners. The striking fact, therefore, about the second section of Chapter Nine is its imitative adoption of British procedure; although one would expect that Jones and Varick and the legislature would, if outlawry were to be adopted, have fitted it into the existing judicial machinery of the state, instead, they transplanted to American soil the English tribunals which traditionally had exercised jurisdiction in such proceedings, and did so despite the fact that these ancient courts performed no other function in the new society.

Each section of the act from the third through the seventh re-enacts almost verbatim various English statutes from the time of Edward I. to that of William and Mary. If Jones and Varick, in submitting the statute to the legislature for enactment, went farther than they had been told to go, they did far less than had been requested in the way of altering the British "stile and language" which had been declared by the legislature to be "improper to appear in the statute books of this State". There was, to be sure, a certain amount of creative enactment in the statute; the last two sections evidence a marked departure from English practice. The provisions for jury trial of the issue of damages were probably unknown in English outlawry proceedings, as were those stating that the satisfaction of the plaintiff's claim would render the judgment of outlawry totally inoperative.

In endeavoring to understand why the legislature deemed it desirable to provide for such process in civil actions it is important to remember that the extent of relief which could be obtained under the Joint Debtor Act was very limited. It was useful only when one or more of the joint debtors could be served with process. Moreover, execution could be had only against property jointly owned and the individual property of the defendants who were brought into court. The process of outlawry, on the other hand, would permit recovery against any debtor, who could not be served, whether he was jointly indebted or not, and, as provided for in New York, it apparently permitted the satisfaction of the claim out of the individual property of the absent defendant. There were certainly theoretical advantages in the process of outlawry which relief under the Joint Debtor Act would not afford, and the elimination of the severe forfeitures which in England accompanied outlawry even in civil actions, made its unfairness to defendants much less real than under British practice. Although against an absconding or concealed debtor, solely indebted, the creditor might obtain relief by proceedings *quasi in rem*,⁶⁹ the intricacies of the procedure were such that

⁶⁹Act of April 3, 1775, 5 COLONIAL LAWS OF N. Y. 807 (Ch. 1731). This statute was re-enacted on April 14, 1786; see Laws of N. Y. 1786, c. 24.

creditors might well prefer some alternative remedy—a process which would obviate the necessity of an attachment being made in the first instance. Perhaps it is not surprising, therefore, that Jones and Varick felt that it would be desirable to make provision for the broader remedy, and in view of the peculiar safeguards afforded the defendant, it may not be strange that the vigilant Council of Revision allowed the statute, without questioning, to become law.

During the years when the statute was in force there were only occasional judicial references to its provisions. Three reports in Coleman and Caines' Cases indicate that the courts were aware of the possibility of a plaintiff proceeding to outlawry against an absent defendant⁷⁰—one indicating that it might be used in circumstances also covered by the Joint Debtor Act.⁷¹ The only detailed discussion of its character that has been found is in *Roosevelt v. W. & L. Crommelin*,⁷² a case in which it was held to be applicable to proceedings against residents of Mississippi for the enforcement of rights in a bill of exchange drawn by the defendants in Mississippi. It is to be hoped that some day sheriffs' records may be discovered which will cast more light on the details of the procedure in both civil and criminal cases than is given by the bare provisions of the statute itself. John A. Dunlap, in his *Treatise on the Practice of the Supreme Court of New York*, published in 1821, discusses the local statute in some detail, but indicates that it was seldom used.⁷³ Its repeal in 1828, effective in 1830, was due apparently to a characteristically American combination of practical and theoretical considerations. The report of the statutory revisers submitted to the legislature in 1828 stated that the proceeding to outlawry "is so tedious and expensive, that it has become obsolete, or if resorted to, it must be for purposes inconsistent with justice".⁷⁴

The provisions of the New York statute may well be deserving of more detailed consideration than I have given them. A reading of the statute and a comparison of its provisions with those of the English acts will suggest many questions which I have neither touched upon nor answered. I believe, however, that the simple facts established in this study are of some significance. We have seen that outlawry was an unknown process in the colonial period of New York's legal history, and we have determined that Samuel Jones and Richard Varick, going beyond the obligations imposed upon them

⁷⁰*Heyers v. Dening*, Coleman and Caines' Cases 75 (1799); *Jackson v. Cooper*, *ibid.* at 154 (1803); *Shaw et al. v. Colfax et al.*, *ibid.* at p. 450 (1805).

⁷¹*Shaw et al. v. Colfax et al.*, *supra* note 70.

⁷²18 John. Rep. 253 (1820).

⁷³Volume 1, p. 138 et seq. The process as used in New York is also briefly discussed in 1 BACKUS, DIGEST OF LAWS RELATING TO SHERIFFS (1812) 111.

⁷⁴N. Y. Revised Statutes, Reports of the Revisers, Benjamin F. Butler, John Duer and John C. Spencer, 1826-1828, Part III, Ch. VI, Title VI, Article Second, Sec. 7, p. 56.

in 1786, submitted to the legislature an elaborate statute making provision for that imported remedy. Their suggestion, combining imitative and creative elements, was found acceptable by the legislature and the Council of Revision and was adopted as a part of the law of New York.⁷⁵ This neglected instance of selective reception is of far more than local significance, and I suspect that when a detailed and comparative study of other similar efforts is made the broader relevance will be self-evident. It does not seem improbable that other post-revolutionary revisers may also have endeavored, under the guise of re-enactment, to achieve what a Marxist might term a counter-revolution in our law. The fact that the ancient remedy was too novel for Americans also possesses its historical importance. The erstwhile rebels, led by Jones and Varick, had turned to England for guidance. In 1828 the British remedy was found to be unwieldy, extravagant and unfair. Accordingly, they abandoned the imported process and relied upon the sufficiency of the remedies which Yankee ingenuity could provide. "It required time and experience to ascertain how much of the English law would be suitable to this country."⁷⁶ Jones and Varick endeavored to set aside the verdict of experience, but time proved their effort to have been in vain.

APPENDIX

LAWS OF NEW YORK 1787^a Chapter 9

AN ACT [declaring what process may be issued in certain personal actions, and] for regulating outlawries.

I. Be it enacted by the People of the State of New York, represented in Senate and Assembly, [and it is hereby enacted by the authority of the same], That in all actions of account, debt, detinue, annuity, covenant, conspiracy and of the case, and in all actions of replevin, after a *capias* in *withernam* is returned that the person against whom it is issued has no goods, the like process may [hereafter] be had [and used] as in actions of trespass, done with force and arms, and in these as well as in all other cases

⁷⁵In the sketch of Samuel Jones in the Dictionary of American Biography (*supra*, note 12), the author quotes a passage from the New York Legal Observer for October 1853, in which Jones was described: "His learning was vast. His principles . . . were ultra-conservative. . . . He was the man above all others to adapt the system of laws to the new condition of things, . . . and on every subject of that description the Legislature followed him implicitly, while upon any subject connected with politics, they were sure to be on the other side, with entire unanimity."

⁷⁶Tilghman, C. J., in *Guardians of the Poor v. Greene*, 5 Binney (Pa.) 554, 558 (1813).

^aWords in brackets were removed and words in italics were added by the amendment of 1801. See N. Y. Laws 1801, ch. 51.

where process issues for taking the body, if it be returned that the person against whom such process issued is not found, such process may be pursued to the exigent, and outlawry thereupon.

II. And be it further enacted [by the authority aforesaid], That [each and] every sheriff shall [respectively] in his county hold a court either in person or by his sufficient deputy, on [every] *the first and third Monday in every month, in case any process shall require it*, at the court house in his county to be called his county court, for the purpose of demanding persons upon exigents, and pronouncing outlawries thereupon; *and* [that it shall not be necessary for the coroners of the county, or any of them, to attend at such court, or to give judgment of outlawry]; [but] it shall be sufficient for the sheriff or his deputy to give the judgment of outlawry, and to return the same upon the exigent, without saying by the judgment of the coroners.

III. And be it further enacted [by the authority aforesaid], That in every original writ of actions personal, and in all [appeals], indictments and informations [and] in which the exigent shall be awarded to the names of the defendants, in such writs [original], [appeals], indictments and informations, additions shall be made of their estate or degree or mystery, and of the towns [or places] and counties of [which they were or be, or in] which they be or were conversant; and if by process upon the said [original] writs, [appeal], indictments or informations, in which the said additions be omitted, any outlawries be pronounced they shall be void, [frustrate and holden for none]; and [that] before any outlawries pronounced, the said writs, [appeals], indictments and informations *in which such additions shall be omitted*, shall be abated by the exception of [the] party [where in the same, the said additions be omitted]; provided always, that although the said writs [of actions personal], be not according to the records and deeds by the surplusage of the additions aforesaid, they shall not be abated for that cause.

IV. And be it further enacted [by the authority aforesaid], That no person charged as accessory in any indictment [or appeal] shall be outlawed, until the principal be attained; But such indictment[s] [and appeals] may be nevertheless prosecuted; [but] *and* the exigent against the accessory shall remain until the principal be attained by outlawry or otherwise.

1 HENRY V, C. 5 (1413)

Also, it is ordained and established, That in every original writ of actions personal, and appeals, and indictments, in which exigent shall be awarded, that to the names of the defendants in such writs original, appeals and indictments, addition shall be made of their estate or degree, or trade, and of the towns, or hamlets, or places, and the counties of the which they were, or are, or in which they are or were or may be conversant: And if by Process upon the said original writs, appeals, or indictments, in the which the said additions be omitted, any outlawries be pronounced, that they be void, frustrate, and holden for none; and that before the outlawries pronounced, the said writs and indictments shall be abated by exception of the party, for that the said additions be therein omitted. Provided always, That although the said writs of actions personal be not according to records or deeds, by the surplusage of the additions aforesaid, that for that cause they be not abated. . . .

3 EDWARD I, C. 14 (1275)

And forasmuch as it hath been used in some counties to outlaw persons being appealed of commandment, force, aid or receipt, within the same time that he which is appealed for the deed is outlawed; it is provided and [commanded] by the King, That none be outlawed upon appeal of commandment, force, aid, or receipt, until he that is appealed of

V. And be it further enacted [by the authority aforesaid], That after any person [is or] shall be indicted [or appealed] of treason [or felony], it shall be commanded to the sheriff to take the body of the person so indicted [or appealed by a writ of precept called a *capias*], and if the sheriff return on the [same] writ [or precept], that the body is not found, another writ [or precept] of *capias* shall be immediately made returnable at a certain day, not less than three months after the date of the same writ; and in the same writ shall be comprised, that the sheriff shall cause the goods and chattels of the person indicted [or appealed] to be seized, and safely kept until the day of the return of the writ [or precept]; and if the sheriff return that the body is not found, and the person indicted [or appealed cometh not] *shall not appear*, the exigent shall be awarded, and the goods and chattels so seized shall be forfeited to the people of this State. But if the person indicted [or appealed come and yield himself] *appear*, or be taken by the sheriff or other officer before the return of the second [*capias*] *writ*, then the goods and chattels shall be saved.

VI. And be it further enacted [by the authority aforesaid], That upon every indictment [and appeal] against any citizen of this State dwelling in [other counties] *any other county* than where such indictment [or appeal is or] shall be taken, of any treason [or felony] after the first writ [of *capias*] returned, another writ [of *capias*] shall be awarded directed to the sheriff of the county where the person indicted [or appealed] is or shall be supposed to be conversant by the same indictment [or appeal] returnable in the same court [or before the same justices] before whom the indictment [or appeal is or] shall be taken, at a certain day, not less than three months after the date of the same writ; by which [writ] the sheriff shall be commanded to take the body of the person so indicted [or appealed] if he or she shall be found in his [bailiwick] *county*,

the deed be attained, so that one like law be used therein through the realm; nevertheless he that will appeal shall not, by reason of this, intermit or cease to commence his appeal at the next county against them, as well as against them which be appealed of the deed; but their exigent shall remain, until such as be appealed of the deed be attained by outlawry, or otherwise.

25 EDWARD III, St. 5, Chapter 14 (1350-2)

Also it is accorded and assented, that after any man is indicted of felony before the justices in their sessions of Oyer and Terminer, it shall be commanded to the sheriff to attach his body by a writ or by precept which is called a *capias*; and if the sheriff return on the same writ or precept, that the body is not found, another writ or precept of *capias* shall be incontinently made, returnable at three weeks after; and in the same writ or precept it shall be comprised, that the sheriff shall cause his chattels to be seized and safely kept till the day of the return of the writ or precept; and if the sheriff return that the body is not found, and the indictee cometh not, the exigent shall be awarded, and the chattels shall be forfeit, as the law of the crown ordaineth; but if he come and yield himself, or be taken by the sheriff, or by other officer before the return of the second *capias*, then the goods and chattels shall be saved.

8 HENRY VI, C. 10, Sec. 2 (1429)

That upon every indictment or appeal by the which any of the said lieges dwelling in other counties than there where such indictment or appeal is or shall be taken of treason, felony, and trespass, to be taken thereafter before Justices of Peace, or before any other having power to take such indictments or appeals, or other commissioners or justices in any County, Franchise, or Liberty of England, before any exigent awarded upon any indictment or appeal in the form aforesaid to be taken, that presently after the first writ of *capias* upon every such indictment or appeal awarded and returned, that another writ of *capias* shall be awarded, directed to the sheriff of the county, whereof he which is so indicted is or was supposed to be conversant by the same indictment, returnable before the same justices or commissioners before

and if he or she shall not be found in his [bailiwick] county [that] the [said] sheriff shall make proclamation in two of his county courts before the return of the same writ, that the person so indicted [or appealed shall] appear at the said court [or before the said justices where he or she is or shall be indicted or appealed] at the day of the return of the same writ, to answer to the people of [the State of New York or the party] *this State*, of the treason [felony or trespass], whereof he or she [is or] shall be so indicted [or appealed], and after such writ [of *capias*] so served and returned, if [he or she] *the person* so indicted [or appealed] come not at the day of the return of the [same] writ [of *capias*] the exigent shall be awarded against such person [so indicted or appealed].

And where any such indictment [or appeal is or] shall be taken before [justices assigned to hear and determine, or before justices of the peace, or before] any other *court or officer* having [power] *authority* to take [such indictments or appeals] *the same*, and [shall] be removed [or delivered] into the supreme court [by certiorari or otherwise], no exigent shall be awarded by the [same] supreme court until such writ [of *capias*] with proclamation [shall] be awarded and served and returned as aforesaid.

And, if any exigent [shall] be awarded [upon any such indictment or appeal] before such [*capias*] *writ* with proclamation be awarded, served and returned as aforesaid, and outlawry be [upon that] *thereupon* pronounced, [as well] the exigent [so awarded] and [the] outlawry [thereupon, and every of them] shall be [holden for none and] void; [and the party against whom such exigent shall

whom he is indicted or appealed at a certain day, containing the space of three months from the date of the said last writ, where the county courts be holden from month to month, and where the county courts be holden from six weeks to six weeks, it shall have the space of four months until the day of the return of the same writ, by which writ of second *capias*, be it contained and commanded to the same sheriff to take him which is so indicted or appealed by his body if he can be found within his bailiwick, and if he cannot be found within his bailiwick that the said sheriff shall make proclamation in two county courts before the return of the same writ, that he which is so indicted or appealed shall appear before the said justices or commissioners in the County, Liberty, or Franchise where he is indicted or appealed, at the day contained in the said last writ of *capias*, to answer to our said Lord the King, and to the Party, of the felony, treason or trespass, whereof he is so indicted or appealed; after which second writ of *capias* so served and returned, if he which is so indicted or appealed come not at the day of the same writ of *capias* returned, the exigent shall be awarded against such persons indicted or appealed, and every of them.

10 HENRY VI, C. 6 (1432)

That if any such indictments taken, or to be taken, before any Justice of Peace or before any other having power to take such indictments or appeals, or other justices or commissioners in any county, franchise or liberty of England, shall be removed before the King on his Bench or elsewhere, by certiorari or otherwise, that then after such removing, before any exigent awarded upon any such indictment or appeal in the form aforesaid taken, or to be taken, that presently after the first writ of *capias* upon every such indictment or appeal, awarded and returned, that another writ of *capias* be awarded, directed to the sheriff of the county where he that is so indicted or appealed is of or was supposed to be conversant. . . .

8 HENRY VI, C. 10, Sec. 3 (1429)

And if any exigent hereafter be awarded upon any such indictment or appeal against the form aforesaid or any outlawry be thereupon pronounced, as well such exigent so awarded as the outlawry thereupon pronounced, and every of them, shall be holden for null and void, and that the party against whom such exigent contrary to the form aforesaid is

be awarded or outlawry pronounced, contrary to the form aforesaid, shall not be endamaged thereby, nor put to loss of his or her life, or goods or chattels, lands or tenements].

VII. And be it further enacted [by the authority aforesaid], That in every action personal, and in all cases of indictments and informations for trespasses or misdemeanors, wherein [or whereupon] any writ of exigent shall be awarded out of any court, one writ of proclamation shall be awarded [and made] out of the same court, having *the like* [day of] test and return as the said writ of exigent [shall have] directed [and delivered of record] to the sheriff of the county where the defendant at the time of the exigent so awarded shall be dwelling, which writ of proclamation shall contain the effect of the [same] action, indictment or information. And [the] *such* sheriff [of the county unto whom any such writ of proclamation shall be directed] shall [make or] cause to be made three proclamations in the form following, that is to say, one of the same proclamations in his open county court, and one other [of the same proclamations] at the general sessions of the peace [in those parts] where, the [party] defendant at the time of the exigent awarded shall be dwelling, and one other [of the same proclamations] one month at least before the fifth demand by virtue of said writ of exigent at or near [to] the most usual door of the church of the town [or place] where the defendant shall [be dwelling] *reside* at the time of awarding the said exigent; and if there be more than one church in such town, then at or near the most usual door of the church nearest the defendant's dwelling, and if there be no church in such town, then at or near the most usual door of the church in the next town nearest the defendant's dwelling, and upon a Sunday immediately after divine service [and sermon] if any there be. And if any such defendant shall at the time of awarding the exigent, reside out of this State, then such writ of proclamation shall be directed to and executed by the sheriff to whom the exigent shall be directed; and in such case such writ of proclamation shall be published in one or more of the newspapers to be printed in the city of New York for twelve [several] weeks before the return of the exigent. And [that] all outlawries [had and] pronounced [and no] *without* writs of proclamations awarded and returned according to the

awarded, or outlawry pronounced, be not endamaged nor put to loss of his goods, or chattels, land or tenements, nor of his life.

31 ELIZABETH, C. 3, Sec. 1 (1509)

That in every action personal wherein any writ of exigent shall be awarded out of any court, in or after the term of Easter next coming, one writ of proclamation shall be awarded and made out of the same court having day of *teste*, and return as the said writ of exigent shall have, directed and delivered of record to the sheriff of the county where the defendant at the time of the exigent so awarded shall be dwelling; which writ of proclamation shall contain the effect of the same actions: and the sheriff of the county unto whom any such writ of proclamation shall be directed, shall make three proclamations in this form following, and not otherwise; that is to say, one of the same proclamations in the open county court, and one other of the same proclamations to be made at the general Quarter-Sessions of the Peace, in those parts where the party defendant at the time of the exigent awarded shall be dwelling, and one other of the same proclamations to be made one month at least before the *Quint. Exact.* by virtue of the said writ of exigent, at or near to the most usual door of the Church or Chapel of that town or parish where the defendant shall be dwelling at the time of the said exigent so awarded; and if the defendant shall be dwelling out of any parish, then in such place as aforesaid of the parish, in the same county, and next adjoining to the place of the defendant's dwelling; and upon a Sunday immediately after Divine Service: And that all outlawries had and pronounced after the end of the next Easter term, and no writs of proclamations awarded and returned according to the form of this Statute, shall be utterly void and of none effect. . . .

form of this statute, shall be [utterly] void [and of none effect], and may be avoided by averment, without suing out any writ of error.

VIII. And be it further enacted [by the authority aforesaid], That before any reversal of any outlawry be had [by plea or otherwise] and before any allowance of any writ in error upon any outlawry, the defendant [and defendants] in the original action [or suit] shall put in bail, if bail was required in such [original] action [or suit], not only to appear and answer to the plaintiff in the former suit in a new action to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin such suit before the end of two terms next after the allowing of the writ of error, or otherwise avoiding of the said outlawry.

IX. And be it further enacted [by the authority aforesaid], That no person [or persons whomsoever] who [are or] shall be outlawed in any court, for any cause, [matter or thing] whatsoever, other than for treason or felony, shall be compelled [to come in person into] *personally to appear in court* [or appear in person in court] to reverse such outlawry, but [shall or] may appear by attorney and reverse such outlawry, without bail in all cases, except where special bail shall be ordered by the court.

X. And be it further enacted [by the authority aforesaid], That in all cases where an outlawry shall be had before judgment in any personal action, the plaintiff [at whose suit the same outlawry shall be had] may suggest and set forth his cause of action upon the roll of the exigent after the return of the same, upon which a writ shall [be issued] *issue* to the sheriff of the county where the action shall be brought, to summon a jury to appear in the [same] court where the action shall be brought, if the same shall be brought in any other court than the supreme court; and if the [same] action [shall] be brought in the supreme court, then before the [justices or] justice of the supreme court at the next circuit court to be held in the county where such action shall be brought, to inquire into the truth of the matters charged by the plaintiff, and to assess the damages that the plaintiff shall have sustained thereby. And if the action shall be in the supreme court it shall be commanded in the same writ to the [justices or]

31 ELIZABETH, C. 3, Sec. 3 (1589)

That before any allowance of any writ of error, or reversing of any outlawry be had by plea or otherwise, through or by want of any proclamation to be had or made according to the form of this Statute, after the end of Easter term next, the defendant and defendants in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit, in a new action to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit, before the end of two terms next after the allowing the writ of error or otherwise avoiding of the said outlawry.

4 and 5 WILLIAM AND MARY, C. 18, Sec. 3 (1692)

That from and after the first day of Easter term no person or persons whatsoever, who are or shall be outlawed in the said court for any cause, matter or thing whatsoever, (treason and felony only excepted) shall be compelled to come in person into, or appear in person in the said court, to reverse such outlawry, but shall or may appear by attorney, and reverse the same without bail, in all cases, except where special bail shall be ordered by the said court.

justice who shall hold such circuit court, that he [or they shall] make a return thereof to the supreme court, at the time in such writ mentioned and upon the return of such writ if the action shall be in the supreme court, or upon the execution of such writ, if the action shall be in any other court, execution shall be awarded for the sum found by the jury, with costs, both upon the outlawry and prosecution of the said inquiry. And further, that upon the execution of every such writ of inquiry the plaintiff shall prove his cause of action and [debt or] damages, in the same manner as if the defendant had appeared, and traversed the same.

XI. And be it further enacted [by the authority aforesaid], That upon the payment of the sum so found upon such inquiry [as aforesaid] with costs [as aforesaid] or where any outlawry shall be had after judgment in any personal action, upon payment of the debt or damages and costs adjudged or upon the same being levied by [any] execution, [or brought into court by the defendant], such outlawry and judgment shall be considered as satisfied, and shall cease to have any further or other operation; and an entry shall in such case be made on the roll of the exigent after the return of the same, and after the execution or return of the inquiry, where such inquiry [as aforesaid] shall be made, that the debt or damages and costs are paid or levied, [or brought into court], and [that the] defendant as to the outlawry, [or] *and any* judgment [and outlawry], and [all] execution thereupon, *shall* go without day. And further that no outlawry in any personal action shall work any disability or forfeiture whatsoever in favour of any other person, than the plaintiff at whose suit it shall be had.