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The Unwritten Law and Its Writers

By FREDERICK J. MOREAU*

Today in America vast concourses of youth are flocking to our colleges, eager for something, just what they do not know. It makes much difference what they get. They will be prone to demand something they can immediately use; the tendency is strong to give it them: science, economics, business administration, law in its narrower sense. I submit that the shepherd should not first feed the flocks with these. I argue for the outlines of what used to go as a liberal education—not necessarily in the sense that young folks should waste precious years in efforts, unsuccessful for some reason I cannot understand, to master ancient tongues; but I speak for an introduction into the thoughts and deeds of men who have lived before them, in other countries than their own, with other strifes and other needs.¹

I venture to believe that it is important to a judge called upon to pass on a question of constitutional law to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The words

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¹ HAND, THE SPIRIT OF LIBERTY 80 (IRVING DILLARD ed. 1952).
he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.  

INTRODUCTION

The subject—The Unwritten Law and Its Writers—calls for a few brief introductory words. In very primitive societies, rules for the guidance of its members are handed down from generation to generation, and there are what is known as speakers of the law, instead of writers of the law. In other words, one has true unwritten law. Blackstone has said that the main source of the common law was general custom and local custom, and that all the early writs, other than the writ of right to land, the writ of debt and detinue, and the writ of trespass, were laid to the law and custom of England. As was said in 2 Henry IV yearbook: Car comen ley de cest realme est the comen custome de realme. When the reporters came in, however, and told what occurred in the courts discursively, the customs became reported judicial experience. But the common law was still considered unwritten as distinguished from the civil law which consists of set rules, duly codified, and which always had to be resorted to as the basic principle. It should be noted, too, that no common-law country now is exclusively an unwritten law jurisdiction. The California statutes contain thousands of pages. No lawyer would be safe in proceeding without checking

2. Id. at 81.
3. The title of this study was originally submitted by a committee that arranged a series of Humanities lectures in 1952 at the University of Kansas on the history of civilization. Reference to another type of communication was apparent in a lecture entitled Cathedrals of Europe as the Bible of the Middle Ages. Statuary, paintings and stain glass windows presented biblical motifs to the illiterate populace. A vast array of parables, miracles and liturgical history was thereby transmitted to the people, thus inspiring an understanding and respect for the authority of the church. The collected lectures on civilization by Sir Kenneth Clark deal mostly with the arts [CLARK, CIVILIZATION (1969)]. Sir Kenneth states, “I thought one could tell more about a civilization from its architecture than from anything else it leaves behind.” [at 330] While he refers to the great works of genius in architecture, sculpture, and painting, in philosophy, poetry and music, in science and engineering, [at 347] the index does not refer to law in any way. He does emphasize humanism and adds that what he has described is a mere fraction of what western man has achieved in the last thousand years. Perhaps law is a larger fraction. However, we cannot very well discuss the unwritten law to the exclusion of the written law.
the statute, the written law. And no lawyer would be safe without checking reported cases—the unwritten law—the reported judicial experience.

**WHAT IS LAW?**

It was Aristotle who said: “Man is a social animal.” Only seldom does he live alone. His gregariousness is the fact underlying all social sciences, and surely the existence of laws governing conduct presupposes men living in a social organization; in other words, law presupposes a society. And it is doubtful if any society ever existed without some rules for the regulation of its affairs. Law consists of social cooperation which enables people to live together under mutual adjustments which are, or ripen into, duties and rights. Different societies may have different tests for distinguishing right from wrong, and the tests may be very crude, but all stages of civilization or social organization make the distinction.4

A number of theories have been advanced as to the sources and origins of law. Much has been written on the subject, but we can only note or mention the more important ones: (1) The law is made

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4. Research in the life of primitive people proceeds at a vigorous pace. People live together everywhere and form societies. All societies develop their own rules pursuant to which they resolve differences which are bound to arise. General mutual adjustments ripen into the creation of duties and rights in future circumstances.

In 1935 and 1936, two well-known Professors, Karl N. Llewellyn of Columbia Law School and E. Adamson Hoebel, an anthropologist of the University of Minnesota, spent some time living with the Cheyenne Indians in Wyoming to study their methods for adjusting differences among them. [See HOEBEL AND LLEWELLYN, THE CHEYENNE WAY (1941)]. They found settled practices for the handling of family disorganizations, murders, violations of hunting rules, determining who is entitled to lost horses—one who actually finds them first or one who finds their tracks which would lead him to the horses, and the rights of true owners as against finders. In the 1890’s, a group of Indians lived some miles from Salt Lake City; their crops were fenced in by mere willows. Some steers belonging to the neighboring white people crashed through the flimsy fences and ate up the crops. The Indians protested and asked the owners of the steers to pay for the crops. They were told that it was up to them to fence in their crops. Some time later, the Indians took the steers, butchered them, and distributed the meat to the crop owners. Thus did their philosophy of self-help according to their own rules clash with the white man’s rules. Similar clashes took place between the cattlemen and would-be settlers of our plains. It took many lives and years of wrangling to settle these conflicts.
up of the commands of the sovereign; (2) The law is a collection of rules administered by courts; (3) The law is what is good and equitable, that which reason defines to be good; (4) The law is what has existed in the common consciousness of the people—The Judges discover what this consciousness is; (5) The law is judicially created; and, (6) The law is, briefly, what the courts do.⁵

Certainly, the history of the various nations will reveal instances that illustrate all these and various other views.

**Early Efforts**

A 1000 years takes us back to pre-printing days, but codes of law were in existence long before that. The Pharaohs in Egypt had a code for the use of their officials as far back as 3000 B.C. In Babylon, the Code of Hammurabi,⁶ was engraved upon a stone tablet which still survives; it contains laws that are very just and favored the poor and defenseless. Later, about 1000 B.C. the Hittite king established a new code which bound even the conduct of the king. The Hittite code was more just than Egyptian codes, and was reputed to be more humane than the laws of Assyria and Babylon.⁷ Even as late as 600 B.C., the culture of Greece did not have written laws, and the law was passed along by word of mouth. It was true unwritten law, but eventually the people demanded that the laws be written and about 700 B.C. the Athenians obtained such laws from Draco;⁸ historians have judged these laws as harsh. The word Draconian is used accordingly today. These rigid laws were altered by Solon⁹ shortly thereafter so that mortgages on the lands of the poor were declared void, and anyone losing a law suit could appeal the decision to the people. In Rome the founding of the Republic (c. 500 B.C.) led to written laws 150 years later. These statutes constituted the first Roman codification—the written laws

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5. Those who claim that the law is what the courts do are known as realists. One of the chief exponents of this view was Karl N. Llewellyn. They are also the people who claim that the judges create law. On this point see Cardozo, The Nature of the Judicial Process (1921).
8. Seventh Century B.C. His code is dated circa 621. See Aristotle, Constitution of Athens; Tod, Greek Historical Inscriptions (2nd ed. 1946).
engraved upon the twelve bronze tablets. From this time people demanded the right to make new laws. A little later the Empire came into being with Justinian as Emperor.

In Roman law the Jurisconsults could make responses which were modifications of the law. These responses were educed from the code and later in edited form were called Institutes or Commentaries. This procedure was really Roman equity, which was simpler than English equity because it was related to the code. It constituted the laws of the people, based on natural reason, the law of nations and natural law. The code was developed to pacify foreigners with whom the Romans had commercial dealings. It was the jus gentium—what other races considered fair, the people's law as distinguished from the jus civile—the law for Roman citizens. While at its zenith the Catholic Church drew temporal strength from the ecclesiastical courts, the Roman law, morals and its supposed ethical superiority. English equity, on the other hand, admittedly has drawn strength from that body of legal experience gained by the Catholic Church. Readers will find a complete analysis of these principles in Sir Henry Maine's 1861 monumental work on ancient law. The law of nature was a Hellenic principle which the Romans adopted. Natural law was analyzed thoroughly in Latin by Pufendorf in his 1672 treatise. Adherents to the greatness of the common law should find satisfaction inasmuch as the Bill of Rights negates some fundamental principles of natural law.

12. At early Roman law, a system of equity used in cases between foreigners, or between Roman citizens and foreigners.
13. At early Roman law, considered to be peculiar to the people themselves and peculiar to the state itself.
15. Maine, Ancient Law (1861), see especially the introduction by T.W. Dwight. The reader is also referred to Arnold, Culture and Anarchy (1869) which contrasts the dichotomy between Hellenic and Hebraic contributions to modern western culture.
16. A German jurist, 1632-1694, he was best known for De Jure Naturae et Gentium Libri Octo, a treatise on natural and international law. On natural law as a viable legal theory see Towe, Natural Law and the Ninth Amendment, 2 Pepperdine L. Rev. 271 (1975).
Interestingly enough, the Bill of Rights was granted at the same time that Pufendorf wrote.\textsuperscript{17}

**Hebraic Law**

The Pentateuch, the first five books of the Old Testament, contains the Hebrew laws which were duly recorded in Hebrew manuscript form because the art of printing was still in the distant future. We find in *Genesis* 4:2 the first recorded murder case. Cain killed his brother Abel, and lawyers today, in pleading against severe sentences; point to the fact that God did not assess the death penalty. In *Leviticus* 27 we also encounter the servile status of women; the case with which husbands could divorce wives for no reason, while wives had no such right; and that blasphemy was punishable by death. In *Deuteronomy* we discover the law requiring the citizen to give a tenth of his increase to the church, because as Abram says: "The tenth is holy unto the Lord." We find too in *Deuteronomy* (the word meaning "the second giving of the law" of Moses) that Sodom was destroyed because its inhabitants committed bestial sins against the Laws of God. In fact, the crime against nature is named sodomy because of the supposed prevalence of that crime in the Biblical city of Sodom. In *Numbers* 27 a summary of the inheritance law of the times may be found. The daughters of Zelophehad appeared before Moses and the priest and princess by the door of the tabernacle of the congregation and explained that their father had died in the wilderness and had no son and that therefore they were entitled to a possession among the brothers of their father; and *Moses brought the cause before the Lord*, and the Lord told Moses:

7. The daughters of Zelophehad speak right: thou shalt surely give them a possession of an inheritance among their father's brethren; and thou shalt cause the inheritance of their father to pass unto them.

8. And thou shalt speak unto the children of Israel, saying, if a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter.

9. And if he have no daughter, then ye shall give his inheritance unto his brethren.

17. It is essential to realize that many efforts have been made to have basic laws established as anchors for the protection of individuals. Anthropologist Hoebel states that "Sir Henry Maine's work, *Ancient Law* still remains after eight decades the pre-eminent work on the origin and nature of primitive legal institutions." [L. J. Pospisil, *E. Adamson Hoebel and the Anthropology of Law*, 7 Law & Soc. 537]. Persons interested in early law will find the basic materials of study in *Law and Society*, magazine of anthropology.
20. And if have no brethren, then ye shall give his inheritance unto his father's brethren.
11. And if his father have no brethren, then ye shall give his inheritance unto his kinsman that is next to him of his family, and he shall possess it; and it shall be unto the children of Israel a statute of judgment, as the Lord commanded Moses.

JUDICIAL CREATION

If God was the lawgiver of the Hebrews, then Justinian certainly was a lawgiver when he directed his leading jurists to prepare a digest of the Roman law or pandects (c. Sixth Century A.D.) which became part of the Corpus Juris Civils (meaning body of civil law). Other lawgivers included William the Conqueror and Napoleon. Elie Faure in his brief but pointed biography of Napoleon says:

From the point of view of morality he is indefensible. Indeed he is incomprehensible. In actual fact, he violated the law, he killed, he sowed vengeance and death. Yet, he made the law, he tracked crime to its sources, crushed it, he established order everywhere.\(^1\)

The directions of Hitler to his judges, through his Minister of Justice, indicated to them that they were to look for authority in the development of the Nazi jurisprudence. Hitler said, "It has been said that the Nazi government recognized the independence of the courts and that the Dictator himself so declared."\(^2\) But in 1935 the Minister of Justice, in an address before the International Penal Conference at Berlin, is reported as saying: "For the judges of Germany the Nazi philosophy of life will be the guiding light to aid him in his task."\(^3\)

Statements by the late Justice Cardozo show that the work of the judge in its highest reaches is a matter of creation:

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found "with the voyagers in Browning's Paracelsus that the real heaven was always beyond." As the years have

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20. Id.
gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.  

Creation is making something out of nothing.  

Llewellyn, the realist, states that law is what the courts do: "What officials do about disputes is, to my mind, the law itself."

Just as there have been many tests as to the sources and origins of law, there have been many methods for trying the guilt or innocence of persons involved in violations of the rules. The trials by ordeal are well known—hot iron, boiling water, fire, cold water—these were the four that were approved by the church (c. 400 A.D.). And trial by battle was used in England in the time of Queen Elizabeth I. The theory of trial by ordeal was that a divine or supernatural power would make manifest the truth in a controversy when properly invoked. The normal form of the Anglo-Saxon trial was the wager of law, wherein the defendant brought witnesses who would swear that they believed his testimony. By this mode of trial, said a chief justice in an early yearbook, any dishonorable man with six rascals to aid him could swear any honest man out of his goods. The Norman judges refused to use this method in a few situations. It was a factor in the development of the law of contracts not under seal, which the common-law courts refused to consider seriously. Accordingly, people with rights under these contracts brought their disputes to the local courts where the parties insisted that the action be one of debt and wherein they could rely on their God-given right to the wager of law. The only remedy the injured party possessed was to go before the chancellor where he would not be met with a wager of law. Law students will recall Slade's case in this connection, wherein Coke brought assumpsit instead of debt on an implied promise. The defendant insisted that the plaintiff should have brought the action of debt in order that he not be deprived of his wager of law, for perchance he had paid the claim in secret and had no witnesses to prove it. The King's Bench allowed assumpsit to lie in such cases but the Common Pleas would not. Because of this conflict between the

two great common-law courts, the cause was argued before all the justices of both courts and the barons of the Exchequer chambers. After many conferences, it was resolved that the plaintiff should have judgment, thus denying the defendant his alleged defense by wager of law. The law was being modernized.

LEGAL SYSTEMS

Though we have noted that every culture has its own societal norms, we must realize that only a few have evolved into great legal systems. Rome and England built legal systems which in various forms have become operative in most of the world. Notable exceptions to this statement, however, include Turkey, North Africa, Persia, Turkestan, and Afghanistan, where Islamic Law prevails. China has its own peculiarly indigenous customs. And the Scandinavian countries have modernized the old Germanic customs.

The great diffusion of Roman law and English common law, the former over a period of 2500 years, the latter over approximately 300 years, presents a fascinating study. Rome moved about by conquest and adapted itself to whatever it encountered, whether in the more civilized areas such as Sicily, Macedonia, Carthage, and Greece or in the areas at a more primitive stage of social organization such as Gaul, Spain, and even Britain, which Claudius\textsuperscript{24} took over in 43 A.D. Rome did not disturb local laws, customs, or tribal usages, save as necessary to maintain order, collect revenue and dispense some sort of justice. Of course, this process has been true of the development of all civilized communities. Law comes to maintain public order but leaves private rights to local custom. In the formative period of the Roman law, Rome had the very formalized \textit{jus civile} for its citizens; this was actually local "Roman" law. The more flexible and informal \textit{jus gentium} adjusted the conflicts in which aliens were involved. Gradually, however, these two streams in the Roman legal system joined together to form a very effective and equitable method of settling conflicts among different peoples and races. The \textit{Corpus Juris Civilis} of Justinian\textsuperscript{25} promul-

\textsuperscript{24} Claudius I, reigned as emperor A.D. 41-54.

\textsuperscript{25} The \textit{Corpus Juris Civilis} consisted of 12 books or four compilations: (1) \textit{Codex constitutionum}; (2) \textit{Digesta} or \textit{Pandectoe}; (3) \textit{Institutions}; and (4) \textit{Novellae}. See T. Mommsen's edition of the Digest (1868-70) and P.
gated in 527 A.D. was the keystone; the best of all the Roman experience was therein integrated. After the disintegration of the Roman Empire, the Roman law continued as a viable source of principles through its extension via Constantinople to the Balkan countries, via Germany, France, and Holland through their legal scholars; via the revival of legal studies at Bologna in the latter part of the Eleventh Century; via the development of the canon law by Pope Gregory VII\textsuperscript{26}; via the codifications in 1667 to the five Napoleonic Codes\textsuperscript{27} (1803-1810); and via the transplantations by French, Dutch, Portuguese, and Germans into their colonies.

If one notes that Britain was also conquered by the Romans, that it was a regularly controlled Roman outpost for three and one-half centuries, and that only the English Channel separates Britain from the Continent, it is little short of miraculous that Britain was able to develop a strong and vigorous competing legal system of its own. This occurrence is even more strange when one considers that the Latin language was the only well-established written language during the First Centuries A.D. in the west. About all that is left of the physical aspect of Roman occupancy in England are the ruins of forts and roads. Yet these physical remains tell us little of the impact of the Roman mind and spirit upon the country. A reason in part, was one of lack of communication with Rome. Rome just ceased to send over governors. The Angles and Saxons invaded England (Engla land) about 400 A.D.; and the Britons returned to their hills in Wales and Scotland and resumed without molestation their Celtic cultures.

 Cultures have a way of living through many vicissitudes: witness the Jewish people in Babylon, the Poles after the historic divisions of their country; the French in Canada under English rule. During the Fourth and Fifth Centuries, the situation was confused, but the invading tribes established themselves. This Anglo-Saxon period lasts until the Norman Conquest in 1066. During the centuries prior to the Conquest, the Norsemen and Danes clashed

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\textsuperscript{26} St. Gregory VII (Hildebrand) c. 1025-1085, pope from 1073-1085, set down the \textit{Dictatus papae}, 27 short sentences meant as the beginning of a collection of canon law. See A. Filche, \textit{La Reforme Gregorienne} (1924-37).

\textsuperscript{27} Originally known as the \textit{Code Civil des Francais}, the title was changed in 1807 to honor Napoleon I who was responsible for its completion. Upon the fall of his empire in 1816, the old title was reinstated. The code was a direct outgrowth of the French Revolution. See Schwartz, \textit{The Code Napoleon and the Common-Law World} (1956).
with King Alfred\(^2\) in 879, and a century later, united England, Denmark, and Norway under King Canute.\(^2\)

The world’s legal systems are well analyzed by two great American writers, Wigmore\(^3\) and Burdick\(^4\).

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28. Alfred the Great, Anglo-Saxon king of Wessex who reigned from 871-879.
29. King of Denmark, England and Norway, reigned from 1017-1035.

Though best known for his work in the field of evidence, Wigmore retained a lifetime interest in international law. He taught law for three years at Keio University in Tokyo prior to accepting a professorship at Northwestern University.

31. See Burdick, Bench and Bar of Other Lands (1939). Dr. Burdick was a distinguished colleague of the writer at the University of Kansas. He had been Master of Greek and Latin in a famous eastern prep school—The Hotchkiss School. He became a great student of Roman Law, and taught the course for many years. He was influential in keeping the subject of Roman Law as one upon which candidates for the Kansas State Bar have been examined. He wrote the first Horn Book on real property for the West Publishing Company. He was thoroughly familiar with Westminster Hall where the three great courts in England, namely The King’s Bench, The Common Pleas, and The Exchequer, sat for 600 years, until 1875, after the legal system of England was completely overhauled.

Dr. Burdick sailed westward from San Francisco in 1932 and arrived in England in June 1933. This writer met him there and had a personally conducted tour of London and the English courts. We assisted (as the French say) at two trials: One, a murder case ending in a death sentence and a second involving a wills contest—a never to be forgotten experience. We entered the courtroom just as Justice Marivale was beginning to render judgment.

The facts indicated that a man in his eighties had remarried after the death of his first wife with whom he had several children. He had made a will several years before his death and made a new will shortly before his death. The young widow fared considerably better under the later will than she did under the earlier will. The claim of his children was that he was not competent to make the second will just prior to his death. His Lordship had to decide which will should be admitted to probate. He reviewed much of the evidence and then said,

Now we come to the testimony of the widow. When she was pressed by King’s Counsel on cross examination with the question, “Is it not true that your late husband accused you of infidelity?” she answered, “I can’t remember.” The court paused, then said, “The credulity of this court does not go that far.” His Lordship said, “I find for the first will.”

His Lordship continued,

There is just one matter left: the question of the costs in the case. The solicitor who drew the last will should have known better than to draw a will for a man who was obviously no longer qualified to do so. The solicitor must have known the requirements as to the required capacity to make a will as laid down by

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BEGINNINGS OF PROFESSIONAL LEGAL LITERATURE

During the years prior to the Norman invasion and during the first two centuries thereafter, we have very little professional literature. There are, of course, formal documents, laws issued by Anglo-Saxon kings which are written largely in English. But essentially this was a time of unwritten law. Proceedings in the courts were conducted in the vernacular. Few court records of those days are available as the law consisted mainly of local customs. Charters and landbooks were largely written in Latin. We do have in this period a unification of tribes into kingdoms and the coming of Christianity through the ambassadorship of St. Augustine\textsuperscript{32} from Rome and Pope Gregory I.\textsuperscript{33} Unification is always a first step to nationalism. The Anglo-Saxon laws were derived from Teutonic tradition. If reduced to writing at all, these laws were written in English. At this time traces of Kentish speech may be found, and Northumbrian and Danish words appear. These laws may be subdivided into: (1) laws and collections of laws, such as the laws of Aethelberht\textsuperscript{34} and Eadric; (2) statements of customs, such as the laws of the Northumbrian priests\textsuperscript{35} and local customs; and (3) private compilations of the laws of Canute.\textsuperscript{36} These Anglo-Saxon laws bear a relationship to various sources: (1) the barbaric laws of lower Germany, namely the Saxons, Fresians, and Thuringians; (2) the Frankish laws, especially after the Norman Conquest (1066); (3) the Scandinavian laws, after invasions in those areas specially populated by Danes; and (4) the Roman law, coming chiefly from the influence of the church. But by and large, the sum total of these laws consists of so-called folk-rights and privileges. The older law of real property, contracts, succession,

\begin{quote}
Sir George Jessel [one time master of the rolls, in a famous case, which he cited.] If the solicitor were an older man, I should order that his name be stricken from the roll of solicitors. Being that he is so young, I just ask him to pay half of the costs and the widow will pay the other half.

This case indicates how judges control counsel in England.
\end{quote}

32. Saint Augustine (d.c. 607) was the founder of the Christian Church in Southern England and the first archbishop of Canterbury. Chosen by Pope Gregory I to lead a mission to England in 596, he is credited with returning Christianity to that area. See Stenton, Anglo-Saxon England (2nd ed. 1947).

33. St. Gregory I the Great, pope from 590-604, ascended the papal throne as Rome's influence was waning.

34. Reigned as King of Kent from 560-616; he issued the first code of Anglo-Saxon laws. See The Laws of the Earliest English Kings (F.L. Attenborough ed. 1922).


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and customary fines were usually regulated by folk-rights administered by the Thanes, the high-ranking followers of the king. These folk-rights could be abrogated by royal power; this power fostered the development of the laws of tenure and privilege.

Following the conquest by the Normans, who had made Normandy a strong state in the course of their sojourn of over 100 years, we soon begin to find evidences of what may be termed a real professional literature. The Domesday Book (1085-1086), William's land survey of England, made the feudal system viable. It was a complete and fixed inventory of English lands, an administrative coup d'état. This accounting of property and holdings was a great step towards unification. In 1118, the laws of Henry I appeared. However, these laws are confused because several legal systems are competing for supremacy—the English laws, the Norman French laws, and the Roman laws. In 1189 Glanvill published his treatise on the laws and customs of England. This work was written probably at the request of Henry II, who had made Glan-

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37. See H. Adams, Mont-SAINT Michel and Chartres (1905). Henry Adams followed his father to England, who went there as our ambassador during the Civil War. He was in his early twenties with a great opportunity to study the English. In his book on the cathedrals which were built by the Normans, he explains his great regard for the Normans. The Normans went on crusades and profited by tying up with the church.

38. An ancient record of the lands owned during the time of William I the Conqueror (1086), this two volume compilation is considered to be the primary administrative accomplishment of this period. See V.H. Galbraith, The Making of Domesday Book (1961); 2 Douglas and Greenaway, English Historical Documents (1953); 2 Holdsworth, History of English Law (1927); Maitland, Domesday Book and Beyond (1897).

39. Reigned from 1100-1135, he extended the use of royal writs and justice beyond the feudal chiefs.


41. Reigned from 1154-1189, he is credited with further extending the use of writs to the common man and with allowing appeal as high as the King's Court. For his achievements in this area see F. Pollock and F.W. Maitland, History of English Law: Before the Time of Edward I (2nd ed. 1898). For one of the finest books on the history of English Law see Holdsworth, Makers of English Law (1938), consisting of 12 lectures given by Holdsworth in Calcutta, India between December, 1937 and January, 1938: English law begins in the 12th century with Glanvill and Brac-
vill Chief Justice of the King's Court. The book was a practical treatise on the forms of procedure in the King's Court. Although it was written in Latin, this work is really the first English law book. Here in the King’s Courts, Glanvill states, the English law was being integrated and replaces the old fluid institutions and the local or feudal courts which generally were going their own way. Here we have a court of wide powers, with itinerant judges who travelled the country hearing cases, and whose circuit ridings continued to unify English law. These King’s Courts had roughly the same influence as the Supreme Court of a state.

At the opening of the Thirteenth Century (1210) the plea rolls appeared and endured for close to two centuries. Written in Latin by royal officials, the rolls were public records of the several courts and administrative proceedings. They were hastily drawn and filled with many interlineations which indicate that they were prepared as cases were being heard. The rolls were a valuable source of law and procedure of the courts at that time. Generally, we can only know the workings of a court that is a court of record. The record was originally written on parchment for the purpose of establishing the rights of the parties and justifying the execution of the judgment. They were not intended to instruct lawyers. The Curia Regis signifies at first the place where the government work was done. The King sat in person in Curia Regis; and, of course, his court followed him in his travels. Again such courts had a centralizing influence.

The English genius for national strength and unity is evidenced by the care given to law and its administration. The Normans manifested this characteristic to a remarkable degree. Under Henry I the work was done by justices with a chief justiciar. Twice

Great Roman lawyers contributed to developments of English law, as well as great English Kings such as Henry II. Lord Coke is given much credit for effecting a transition from the middle ages at the end of the 16th century.

Other great jurists who were “makers” were Hale and Nottingham. Nottingham, as Chancellor, made law and equity become complementary legal systems. He is grouped with Ellesmere and Bacon, ending in 1681. The work of Holt and Mansfield is reviewed. Hardwicke and Eldon come in for effective treatment also. Hardwicke was trained in ecclesiastical, Roman and international law. He was chancellor for 20 years and gave final form to many equitable principles. Mansfield and Hardwicke were contemporaries, one on the King’s Bench, the other as chancellor. In Eldon's time the Judicature Act fused the two systems.

Holdsworth continues with the work of Jenkins, Stowell, and completed his last lecture with Maine, Maitland and Pollock. This is truly a remarkable survey of English law. Interested readers should try to find a copy of this small book by the unusually well-qualified Holdsworth.

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a year these justices sat around the chequered table as the Court of Exchequer and received the royal revenues and audited the sheriff's accounts. Occasionally, justices served as itinerant justices to hear pleas of the Crown. Any court in which the King sat in person or by representation was a Curia Regis. This court gradually developed into the central court and was called the Bench. It sat at Westminster in historic Westminster Hall for 600 years, until about 100 years ago. This is a historical spot for visiting lawyers to contemplate.

After 1234 there were two different benches: the Bench and the Coram Regi, which was the King's own court. At any rate, all these courts had their records as plea rolls, such as assize rolls, Goal delivery rolls, and Eyre (itinerant) Rolls or Curia Regis rolls, and Exchequer plea rolls. The latter plea rolls were more formal, and were prepared by lawyers instead of by government clerks. The important point is that these rolls are really records of what occurred in the courts: the rolls are recorded judicial experience. It is basic that the common law rests today in recorded judicial experience. That is the unwritten law. When these plea rolls started, there seemed to be no thought except to make records of what was done; there being no intention of writing law to aid in the decision of future cases.

Bracton

About 1256, the first great law book appears from the pen of Henry de Bracton. Bracton was an assize judge, i.e., an itinerant judge, of Devonshire. He was never on the Common Pleas, but for a short time he did sit on the King's Bench. He used the plea rolls as basic references with which to document his book; furthermore he made it his policy to focus on the judgments of the two judges whom he most respected, Judges Patteshall and Raleigh. He had a great fear that unlearned men on the bench would pervert the law, so he undertook to put forth a complete statement of it.

42. See Bracton's Note-Book (F.W. Maitland ed. 1887) which contained the collection of cases; and Bracton, De Legibus et Consuetudinibus Angliae 2 vol. (G. Woodbine ed. 1915-1922), sub. nom. Bracton on the Laws and Customs of England 2 vol. (S.E. Thorne ed. 1968); Maitland, Selected Passages From the Works of Bracton and Azø (Selden Society ed. 1895) which contains his work on legal procedure at this time.
His book (c. 1256) contains much basic legal philosophy and emphasizes the responsibility of kings, as distinguished from their powers, and so contributed much to Parliamentary supremacy in the struggles that lay ahead. In fact, Sir Edward Coke seized upon this idea in his battles with the Crown during the reigns of Elizabeth and James I. Bracton borrowed from the Roman law, incorporated many writs and cited over 500 cases. Pollock and Maitland refer to his book as the "crown and flower of English medieval jurisprudence." Hale, Blackstone, and Holdsworth all praise Bracton. Yet it can be said that the popularity of the book declined rapidly and remained at a low ebb until its resurrection after the development of printing. The lack of popularity of this work must not be construed as an adverse reflection on Bracton. After all, it was a philosophical discourse, and lawyers were more interested in what has been referred to as the more general science of procedure—the intricacies of procedure—the chore at hand. In fact, Maitland reflects that, while Bracton's thinking brought Parliamentary supremacy, he alienated the lawyers with his speculative approach and gave them a supremacy, which to a narrow profession, was quite costly. Bench, bar, Parliament, and even legal education were all under the control of lawyers, and have continued to be so according to Pollock and Maitland. Furthermore, Maitland suggests that the price paid for Parliamentary supremacy consisted of:

1. Extreme centralization of justice;
2. Decline of local institutions;
3. Subjection of custom to common law;
4. Growth of technicalities;
5. Opposition to reform; and,
6. Rejection of Bracton's liberalized attitude towards law.

45. This fact is still true today. If one wishes to set up a program for groups of lawyers, the better procedure is to offer something obviously practical, something that may be used tomorrow in a pending case. Here and there one may inject bits of philosophy, but they had better be sugar coated. All of this brings to mind a statement by the late George Bernard Shaw. He said,

\text{Lawyers, they don't know anything about law. I have had to deal with them all my life in connection with copyrights, and I have had to educate all of them on the subject. They are practitioners.}

46. F. Maitland, Lectures on Equity (2nd ed. 1936).
Following the appearance of Bracton's book (c. 1256), we have, for a long period, reports of what was happening in the courts, the King's Bench, the common pleas, and the exchequer. These reports, known as the yearbooks, roughly cover a period from 1250 to 1535. They are records of what happened in these courts and they are written in Norman French, which was the language then used by the average English businessman and professional man. These reports are analogous to the Latin plea rolls in that they recorded the procedures at court. Men were at this time groping for things certain, for things definite, and for forms for legal expression. Bracton's work was the sole source of composite legal thinking available at that time. Being in Latin, its impact was without effect in the vernacular world. The yearbooks purported to be merely general notes and even included bits of general gossip. It must be remembered that these reports came out years before the age of printing; they were in longhand with many interlineations. They did not purport to be material which would be available for use by practitioners in establishing the law of the future. Very often even the names of the parties are omitted.47

47. For example in Anonymous, Y.B. Pasch. 17 Edw. 4, F.7, Pl. 18 (1466) we have an opinion or argument by Brian, who became Chief Justice of the Court of Common Pleas in 1471. In the aforementioned case he is reported to have said:

In my opinion if a man does a thing he is bound to do it in such a manner that by his deed no injury or damage is inflicted upon others. As in the case where I erect a building, and when the timber is being lifted a piece of it falls upon the house of my neighbor and bruises his house, he will have a good action, and that, although the erection of my house was lawful and the timber fell without my intent. [Directness of injury controlled]

Similarly, if a man commits an assault upon me and I cannot avoid him if he wants to beat me, and I lift my stick upon me in self-defense in order to prevent him, and there is a man in back of me and I injure him in lifting my stick in that case he would have an action against me, although my lifting the stick was lawful to defend myself and I injured him without intent. Again, the state of mind is immaterial.

This case is translated from the Norman French and obviously is some indication of early English tort law that has come down to us from the middle of the fifteenth century. Apparently as Professor Prosser suggests, Brian was merely arguing fundamental tort principles which are no longer accurate today. [Prosser AND Wade, Torts 4 (5th ed. 1971)].

This case appears in most tort casebooks. It is usually considered with Brown v. Kendall, 6 Cush. 292, 60 Mass. 292 (1850), a Massachusetts case
These yearbooks are a strange phenomenon in the development of English law. To begin with, they were anonymously written, and there is no assurance of their accuracy. They are records not only of judgments but also of all the debates, the testimony of witnesses, and in general all the raw materials which make quarrels and conflicts in societies the subject matter of law suits. Accordingly, these records are earthy and different from what one would expect of an official court report. Composed in the very fire of debate, they are alive and personal. They contain the very essence of the social, linguistic, political, and economic life of the times. No such reporting existed elsewhere until the Nineteenth Century. Yet it happens in England in the Middle Ages. They are very important. In fact, Maitland, in referring to the yearbooks, said that, "It would appear some day miraculous that people could believe that they could write the history of medieval England without using the yearbooks." As previously mentioned, the language used was the spoken language, the Norman French. The spelling in this language was not fixed and different writers spelled the same words quite differently. Moreover, abbreviations were used for many words; the style was therefore a type of shorthand method, and in many instances these abbreviations were almost indiscernible. In all the haste, many mistakes were made which no one ever took pains to correct. In fact so many glosses were made that perhaps only the authors were able to read them accurately. Not only was there the desire to save time, but also the desire to economize on parchment, as all blank spaces and margins were filled with notes.

In Les Yearbooks de langue Francaise, the French historian Mr. Jacques Lambert says that

[The decisions of courts of justice constitute one of the most precious sources of the history of law. They reveal the real contents of judicial institutions and reflect both the social and economic states of people—much more so than legislative acts or customs. They give us not only the actual law, but its spirit.]

An indication of what the appearance of the writings were may be noted from the following legal expressions which appear in these

in which the law is being moralized; thus mere directness of injury is no longer a basis for liability and so today in California we have the case of Gallin v. Poul, 140 Cal. App. 2d 638, 295 P.2d 958 (1956) which holds that, "There is no liability for trespass unless it is intentional—or the result of recklessness, negligence, or extra-hazardous activity."

49. Lambert, Les Yearbooks de langue Francaise (1928).
50. Id. at 1.
yearbooks. The Normal French will be given first and followed by the English equivalent:

murust saunz issue—meaning died without issue
ele (about 1350)—meaning, of course, she
le voilletz vous meytutener ou noun?—do you wish to maintain it or not?
noun sayte—nonsuit
noun—name
porcion—portion
lenterete—the entirety
dettour—debtor
pleintif nounsuy—plaintiff nonsuit
darreyne—the last
vous veietz bien—you see clearly
dount—don’t
avoit purchases le dement—having purchased the demeane
lour for leur—their or his—the possessive pronoun
weybe lexception—waived the exception
mys par duresce de prisoun—compelled by

Latter examples reveal that lawyers and certainly the anonymous writers of the yearbooks gradually became less and less proficient in the use of French and the writing indicated that they combined both French and English. The great English writer Winfield,\(^5\) illustrates this development with excerpts from the yearbooks. One can note with interest the birth of modern English as reflected in these records as follows:

(1) In 1520 yearbook 12 Henry VIII 3 the scribe writes the argument of Newport and Newdigate:

Semble que toutes fois ou on ascun tort ou damage, la ley done a luy un remedy, et ceo per voye daccion; donq icy, il y ad fait a moy damage per cer prisel, car coment que cet chien soit chose de plaisir, ancora il est profitable pur hunting, ou pur ma recreacion. Car si j'ay un popingay ou thrush, que chante et refraische mes esprits, ceo est grand confort a moy, et donq si ascun prend ceo de moy, il fait a moy grand tort.

(1) Degenerate “law-French” Seventeenth Century. Rolle's Reports, i.p. 189

Cokes CEO n’est d’estre fait nisi request soit fait, come si jeo.
soie oblige a paisr un somme al jour certein sur request cea n’est ascun dutie devant request (R.[i.e. reporter]. Quaero ceo car augton semble a disallower, ceo, car il ahake son capit [sic] al ceo). (The Judge shakes his head).

(3) Dyer’s Reports, 188b, in the notes added in ed. 1688.
Pas. 37 Eliz. Carnes drew his sword sur le stairs de Court de Requests que est hors de view de ascun des Courts, & la si son indictment ad estre bien drawn il duist avert le punishment come icy.

(4) Richardson, ch. Just. de C. Banc al Assises at Salisbury in Summer 1931. fuit assault per prisoner la condemne pur felony que puis son condemnation ject un Brickbat a le dit Justice que que narrowly mist, & pur ceo immediately fuit Indictment drawn per Noy enevers le prisoner, & son dexter manus ampute & fix al Gibbet sur que luy mesne immediatement in presence de Court.

Viewing these excerpts from the yearbooks it is surprising that the Norman language had assumed such a leading role in the lives of the people of England. The Normans had claimed England since the Conquest 1066, a period of some 100 years. Yet more surprising is the fact that English survived the impact of the Norman people who controlled all the institutions. The Domesday Book had allocated all lands to a villinage status. This alien culture drove the native speech from respectable use. Scholars in reviewing this period have ascribed the survival of the vernacular to the popular pulpit and the dramatic spectacles. English linguistic vitality was rooted in the fact that the social, economic and intellectual causes in Medieval England were basically local and rural. Villagers con-

52. The following is a translation of the excerpts:
(1) It seems that in all cases where one is subject to a wrong or tort or damage, the law gives a remedy and this by way of an action. Thus here he did damage to me by this taking of my dog. Because this dog is a thing that pleases me and also because it is a thing of profit to me when hunting or for my recreation. For if I have a popinjay or thrush which sings and refreshes my spirits, it is a great comfort to me and thus if anyone takes these away from me he does me a great wrong or tort.

(2) Coke: This is not required of me unless a request is made. For if I am obliged to pay on a certain day on request there is no duty on me until the request is made. It seems that Haughton has denied this as he shook his head at this.

(3) Pas. 37 Elizabeth: Carnes drew his sword on the stairs of the court of request which is out of the sight of any of the courts and there if the indictment is well drawn he must avoid the punishment as here.

(4) Richardson, the Judge was assaulted by the prisoner who was condemned for a felony and after his condemnation he threw a brickbat at said justice which narrowly missed and for this an indictment was drawn immediately against the prisoner and his right hand as to the gibbet and he was immediately executed in the presence of the court.
continued their living and left the strangers largely by themselves. This explains how Shakespeare who was born in 1564 at the end of the yearbook period was able to demonstrate that the roots of vernacular English has survived. Reading Samuel Johnson's *Lives of the English Poets* will similarly confirm the fact. These poets wrote between the years 1618 - 1721. The French language, however, did not disappear from law reporting until early in the Eighteenth Century (c. 1731). Still Henry Adams indicates in his book on Mont St Michael and Chartres that at the present time the chances are that any Englishman of position has Norman blood in his veins.

In this period the techniques in the law practice were most detailed and rigid. In the Thirteenth and Fourteenth Centuries, justice was still essentially primitive. There had not yet been much of a departure from private vengeance; they had been enclosed by strict forms; and beyond or without these forms there was little, if any, compassionate justice. Well-defined writs existed in all feudalistic areas—on the Continents as well as in England. The procedure was oral and public during most of the Middle Ages.

Long before the appearance of the yearbooks the English used a system of writs issued by the King, or later by his chancellor. Obviously, the statute of Westminster II was passed in 1285 to remedy the great deficiency in writs as of that date, and this event occurred just a few years after the appearance of the yearbooks. The statute authorized the creation of new writs. The fact is, however, that we now have plea rolls in Latin and yearbooks in Norman French, covering reported cases in disorganized fashion over a period of almost 350 years, along with Bracton's Latin philosophical work wedged in there. All these works are in Latin and French. The recorded judicial experience was unwieldy. It was similar to having a large and valuable library all uncatalogued. The need to generalize; to integrate, and to classify was obvious. The legal system was the possessor of disorganized knowledge which needed to be put into a scientific basis.

54. See supra note 37.
56. As a latter day writer stated, lawyers were floundering in disorganization and need:
Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances.

It was clear, then, that the law was but a wilderness of single instances. The thousands of briefs written today show that the condition probably still exists. The answer in earlier times was the abridgment, the first modern common-law book.

**THE ABRIDGMENTS**

1495—Statham's
1516—Fitzherbert's
1568—Brooke's
1668—Rolle's

Some modern writers believe these abridgments resulted from the teaching methods by which law students bought large blank folios and filled them with cases under proper headings or titles. Fitzherbert's abridgment (1516) was the most complete and popular and was called "the great abridgment." It contained references to hundreds of cases from the plea rolls and yearbooks. The abridgments were all in Latin. To make the abridgment even more valuable, the later yearbook manuscripts made references to the abridgment; so that here we have the rough reporters of the yearbook period quoting from the only law treatise of the day. This practice was probably the first evidence of cross referencing, the interplay of case and treatise. The method of the common-law is set—the *habitude a prendre* is fixed.

**REPORTS**

We now pass to the era of court reporting. The first reporter...
was Dyer. His reports began in 1537—just about the time the yearbooks ceased to appear—and continued until 1582. The first printed edition appeared in 1585. Reporting, it must be observed, was not done by anyone in an official capacity. It was apparently a purely voluntary undertaking as it had been throughout the yearbook period. Fortunately, some of the volunteer reporting was done by very able judges or barristers. Dyer was Chief Justice of the Common Pleas Court, and his character and abilities were outstanding. His reports were of a high standard and ran into six editions in the original French. His system was to report a case fully including clean-cut summaries of the arguments made by each side.

The next reporter, Plowden, covered the years 1550 - 1580—

61. Sir James Dyer, 1512-1582. His case reports begin at 4 Henry VIII. Dyer is also well known for his personality and his talents as a judge, witness a poem written in his honor.

A “Remembrance of his Precious Virtues” was made by one of the poets of his day. The whole career of the eminent subject of our notice is described in verse not indeed always of the most harmonious, but not inferior to some produced by contemporary authors of greater fame. At the bar, it is said—

His wit was quick; his judgment was as sound.
His clients such as were with wrong oppressed.
His conscience good, him first with credit crowned,
Who, with much care, his clients' wrongs redressed.
By virtue thus he climbed above the rest,
And feared no fall, since Merit was his guide.

Describing him upon the bench, the poet presents him to us as the model of a pure and fearless Judge:—

Settled to hear, but very slow to speak,
Till either part at large his mind did break.
And when he spake he was in speech reposed.
His eyes did search the simple suitor's heart.
To put by bribes, his hands were ever closed.
His process just, he took the poor man's part.
He ruled by Law and listened not to Art.
Those foes to Truth (Love, Hate, and Private Gain
Which most corrupt) his Conscience would not stain.

To his high legal and judicial merits, Chief Justice Dyers added a taste for music.

For public good when care had cloyed his mind,
The only joy for to repose his spite
Was music sweet; which showed him well inclined.
For he that doth in music much delight,
A conscience hath disposed to most right.
The reason is, her sound within our ear,
A sympathy of heaven we think we hear.


62. Edmund Plowden, reported from 1550-1580, was considered one of the most accurate reporters of his time. See WALLACE, THE REPORTERS 143
about the same period as Dyer. His reports are sometimes called commentaries and rank among the best of any age according to Wallace, the official authority on reporting. 63 Throughout the years, members of the bench and bar have paid tribute to Plowden's reporting. He was a very modest person, and refused at first to publish his reports. Instead, he loaned his manuscripts to a few intimate friends, whose clerks copied them and sold them to printers, who in turn published them but in imperfect condition. In self-defense, he decided to publish them himself. Written entirely in French, these records were not translated until 1761, after they had been through six French editions.

The next reporter, Sir Edward Coke, is universally recognized as the greatest of all reporters prior to 1865 when official reporting began. 64 Coke's reports run from 1571 to 1616, roughly the Age of Queen Elizabeth I, James I, and Shakespeare. One cannot pick

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(4th ed. 1882). His reports were not only admired for their authenticity, but were interesting enough to have possibly been inspirational.

It has been supposed by a very grave writer, at once a lawyer and a critic, 2 and, indeed, has been very extensively believed, that Hales v. Petit, one of the Plowden's cases, 3 furnished to Shakespeare part of the scene of the grave-diggers in Hamlet. 4 Whether, as it has been thus supposed, Shakspeare ever studied the Reports of Plowden, then still in Norman French, or whether only in the prevailing ubiquity and power of his genius, he was uttering, in the unreal dialogue of clowns, the actual language of ermined nonsense, may not now be easy to decide. For myself, I should rather recall the suggestions of Gibbon, who, noting some beautiful lines of Gregory Nazianzen, which burst from the heart and speak the pangs of injured and lost friendship, directs attention to the coincidence of phraseology in these and the pathetic complaint which Helena in "The Midsummer Night's Dream" addresses to her friend, Hermia, upon the same subject. "Shakspeare," he adds, however, "had never read the poems of Gregory Nazianzen: he was ignorant of the Greek language; but his mother-tongue, the language of Nature, is the same in Cappadocia and in Britain." 5 Whether Shakspeare studied Plowden or not, his grave-diggers in Hamlet, it is certain, have left a satire on the "sober follies" of the court, by arguments so like their own as to have originated the conjecture that "Decisions in Westminster" must have been transcribed for the entertainment of groundlings at the "Globe Theatre" and "Blackfriars."


63. It is interesting to note that the foremost authority on the reporters was himself a reporter for the Supreme Court of the United States from 1863-1876 and whose reports of decisions span 23 volumes. See WALLACE, THE REPORTERS (preface to the 4th ed. 1882).

64. Sir Edward Coke, 1552-1634, a brilliant barrister, educated at Trinity College. He became Solicitor General in 1592 and Attorney General in 1594. In 1604 he was knighted by James I. In 1606 he became Chief Justice of Common Pleas and in 1616 Chief Justice of the King's Bench. He was wealthy and enjoyed entertaining royalty. His chief rival for legal and social position was Sir Francis Bacon. On Coke's life see THORNE, SIR EDWARD COKE (1957).
up the volume of English reprints containing Coke's reporting of the common law without realizing that here was really a master scholar, working indefatigably at all times, producing materials of tremendous volume in great quality.66

In Volume 75 of the English reprints containing his first reports, his careful reporting is evident. It is on the basis of these cases that Coke has been considered the greatest authority of his day on real property law.66 He not only relates the facts and the decisions but proceeded to write what may be considered treatises on every point of law.67 He hardly ever uses more than one name in his titles; so we have Shelley's case, Archer's case, Wilde's case, etc.68 Of these, Shelley's case is probably the most famous.69 Coke was counsel for the winning party, and it may be assumed that he emphasized his own contribution.

Among the lawyers of his day, his reports were known as "the" reports. He was actually restating the English law with unprecedented citation of authorities from the yearbooks and the plea rolls. Essentially a case lawyer, he placed little stock in the writing of others. Yet, he must have had a high regard for Littleton's tenures (c. 1400),70 for it was on Littleton that he chose to write his com-

66. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR A COMMENTARY ON LITTLETON (1628). Commonly known as Coke on Littleton and cited as Co. Litt. in treatises in this area. The work is considered an extensive comment on tenures and draws upon ancient reports.
68. See supra note 65.
69. The case held that Where an ancestor takes an estate of freehold and in the same gift or conveyance an estate is limited either mediate or immediately to his heirs in fee or in tail, the word 'heirs' is a word of limitation and not of purchase.
70. LITTLETON, LITTLETON ON TENURES (1481); WAMBAUGH, LITTLETON'S TENURES IN ENGLISH (1903); Littleton's text on property were published in French originally and was said to be the first of the classical texts not written in Latin which dealt with law.
mentaries. His great knowledge of medieval law and the respect with which his work was received certainly had a great influence upon the force which the common law exerted in English life. It has been said that but for his complete understanding of the medieval centuries, his deep roots and the force of his personality, the Reformation might well have overturned the legal system. But his work established a continuity between the law of centuries, long before him and the law of his own day. There were undoubtedly many proposals made suggesting radical changes in the English common law.

Hobbes and Austin, among others, favored codification of the law to make it more certain. There were those who looked to a fuller development of equity. Coke himself fought equity as something uncertained and undesirable, insisting that the common law could adjust itself to the needs of the times. In fact, in Twyne's case\(^2\) in 1601, involving an information by Coke, then the Queen's attorney general in the Star Chamber, he proceeded under the statute of 13 Elizabeth\(^3\) (the statute against fraudulent conveyances) maintaining, however, that the case would have been decided in exactly the same manner had there been no statute. The reporting of Coke cannot be overemphasized. It was because of his monumental labors, labors which had a tremendous following, that the supremacy of the common law was accepted.

Burrow's\(^4\) reports extended from 1756 to 1771 and Durnford's\(^5\) from 1785 to 1800. These were all private reports. Lawyers eventually became dissatisfied with private reporting, and in 1865 the official reports were finally begun.

Before progressing, it seems advisable to note that outside forces have influenced the common law. The Roman law had a great influence; more it is said than many eminent English writers are willing to admit. Blackstone, for example, denied any great indebtedness to the Roman system.\(^6\) This attitude probably springs from

\(^{71}\) See supra note 66.


\(^{73}\) 13 Eliz., C.5.

\(^{74}\) Sir James Burrow, 1701-1782, appears to have begun the case summary which now commonly precedes a report. Master of the Crown from 1724 until his death his reports began with a statement of facts, and a notation as to whether the facts were in pais or based on statutes, wills or deeds, etc.; the arguments of counsel; the opinion of the court. [Wallace, The Reporters 446, 448 (4th ed. 1882)].

\(^{75}\) Dunford and East published Term Reports, that is, one's which were published in parts at the close of each Term. Wallace, The Reporters 529-530 n.2 (4th ed. 1882).

\(^{76}\) Sir William Blackstone, 1723-1780, is probably the best known Eng-
religious prejudice or expediency. The canon or ecclesiastical law corresponded with, was borrowed from, or cross-fertilized with the Roman system. The complete English religious break from Rome, along with the establishment of the Church of England, made it obviously unpopular to glorify and eulogize Roman principles. But all chancellors up to and including Wolsey were churchmen, trained both in ecclesiastical and Roman law. Bracton drew upon both sources, as did Coke, as well as Lord Mansfield at a later period. In Lane v. Cotton, Holt, C.J. of the King’s Bench said:

_Inasmuch as the laws of all nations are doubtless raised out of the ruins of the Civil Law, it must be owned that the principles of our law are borrowed from the Civil Law, therefore grounded upon the same reason in many things._

Similarly, there are many American jurists who have decided cases following the Roman law rather than the common law.

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lish jurist. His work, _Commentaries on the Laws of England_ (1765-1769) has literary appeal which has attracted numerous American jurists. Like Coke, Blackstone attracted a famous rival, Jeremy Bentham. See _Bentham, A Comment on the Commentaries: A Criticism_ (C.W. Everett ed. 1928). For a biography on Blackstone, see _Warden, Life of Blackstone_ (1938).

77. Thomas Wolsey, 1473-1530, English Cardinal and Lord Chancellor during Henry VIII’s reign. He is credited with increasing the scope and importance of the Court of Star Chamber.

78. William Murray Mansfield, 1705-1793, Chief Justice of the King’s Bench for 34 years. Often called the “father of commercial law”, he sought to reform the English law of commerce by an incorporation of law and equity. See _3 Campbell, Lives of the Chief Justices_ (1849-57); _Holdsworth, History of English Law_ (1923).


80. Id. at 1463.

According to the common law, surface waters were regarded as a common enemy, and any owner could expel it without worrying about where it went or whether it damaged a neighbor. The Roman law rule was to the contrary. In an early Iowa case, Livingston v. McDonald, 21 Ia. 160 (1866), Dillon J., said:

_It would be inexcusable to overlook the doctrine of the Civil Law respecting it. That law embodying the accumulated wisdom and experience of the refined and cultivated Roman people for over a thousand years, though not binding as authority, is often of great service to the inquirer after principles of natural justice and right._

[at 168].

The Kansas case of Johnson v. Reynolds, 3 Kan. 251 (1865) relies on the Code of Napoleon to decide that a gratuitous bailee is only required to use slight care, “That care which persons of less than common prudence use in matters of their own concern”.

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To what extent is custom part of the unwritten law? How far has it become part of recorded judicial experience? *Leges et consuetudini regni* has been a regular collective name for English law ever since the common law developed a literature of its own.

Bracton's book was called *The Laws and Customs of England* and, as we have noted, Blackstone observed that the main source of English law was the general custom of the realm. We have indicated that suits were started in the English system by the use of writs. All but three of the common-law writs contained references to either a statute, charter, or to the law and custom of England as the foundation of the right to be enforced by that writ. The three which did not were the writ of the right to land, the writ of debt and detinue, and the writ of trespass for the reason that the injuries or damages were so obviously wrong that it was considered unnecessary to refer to any particular source as the basis for issuance of the writ. It would have been considered superfluous and absurd to allege that invasions of such rights were against the custom of the realm. The germs of most of our early common-law principles were developed in the local courts prior to the Norman Conquest but no written records were kept of their proceedings. The Anglo-Saxons did not keep any legal archives. The verdicts of the Hundred or Shire might be written on some paper belonging to a neighboring minister. References were always made to living testimony rather than to written matters. This might account for the fact that one of the requisites for the custom was that it should have existed from a time whereof the memory of man recalled not to the contrary. This phrase has little meaning at a time when everything is written. Long after the Conquest, the local court continued to be the only court readily available to the greater number of the people of England. Itinerant judges did not come around until the reign of Henry II. Even when they did come, the local customs were undoubtedly recognized. If the judges had been men of learning, they probably would have considered the principles of Roman law. But the courts in those days were only popular assemblies, councils of the hundred or county. If we imagine a county council, in addition to its administrative business, taking upon itself the decision of criminal and civil cases,

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82. In essence being the laws of custom of the kingdom, it derives itself from acceptance by the Roman people of various customs and decrees of the people themselves.
83. See supra note 42.
84. See supra note 41.
the members acting not only as judge and jury but also as witnesses and advocates, we have a rough picture of an English county court in the Anglo-Saxon, Norman, and Platagenet periods. It was upon the foundation of customs that had originated before courts of law came into existence, that the English common law has been built. The early common law grew mainly out of the custom affecting land tenure and in more recent times the commercial law was built on the custom of merchants.

Custom may mean mode, practice, habit, or universal usages. The distinction is stated by a New Jersey judge that, if a custom is general, it is no longer a custom but part of the law itself. An Alabama judge makes this distinction by saying:

Custom refers to those usages which have existed and have been universally recognized for so long a period as to acquire the force of law and to be binding without the consent of the individual, while "usage" refers to an established method of dealing, adopted in a particular place or by those engaged in a particular place or by those engaged in a particular vocation or trade which acquires legal force because people make contracts in reference thereto.

Conditions for the reception of local customs are that they be: (1) socially reasonable, i.e., not repugnant to justice; (2) certain; (3) ancient; (4) continuous; (5) and have a reasonable commencement. Examples of custom can be found in the areas of inheritance, tenures, and conveyances.

Occasionally the common law was greatly enriched and enlarged in its operations by the incorporation of whole bodies of special customs. The most outstanding example of this type of custom is the reception into the common law of what is known as the law merchant or more commonly the law of bills, notes and checks. These instruments were developed by merchants to facilitate their business operations. It was a common practice for a creditor to draw upon his debtor in favor of himself or in favor of anyone whom he chose to name. This procedure was contrary to the idea

85. Customs are sometimes classified as particular or local, and general. In fact, Sir Edward Coke said:

Consuetudo is one of the main triangles of laws of England, these laws being divided into common law, and particular customs; for if it be the general custom of a realm, it is part of the common law.

86. Albright v. Cortright, 64 N.J.L. 330, 331, 45 A. 634, 635 (1900).
of the common law, which recognized as parties to a contract only those parties whose names actually figured in the transaction. The citadel of privity was still quite impregnable, but the concept of negotiability was attacking. A bill of exchange, being designed to circulate as money, contemplated that rights should arise in people who became interested in that document at a time subsequent to its inception. Surely people were brought into privity by every transfer. These customs of merchants were recognized on the Continent by the Roman law, and it was a handicap to English merchants that the English courts refused to recognize the customs of the merchants in their dealing among themselves. These matters were handled by special tribunals under the authority of the chancellor. 88 It was inevitable, however, that the courts would finally yield; we find in 1603 the first case involving a bill of exchange in a common-law court. In 1704, however, Lord Chief Justice Holt in Bullen v. Crips 89 ruled that an ordinary promissory note could not be sued upon in a common-law court. He remembered when actions involving inland bills of exchange first began, stating that in those cases they relied upon particular customs existing between London and Bristol, and in each case the custom had to be proved. Holt admitted that he had questioned two of the most famous merchants in London with reference to the practice among them. It was his feeling that, if it was legal to do it by the bill of exchange and it could be done that way, why use the promissory note. Why not do it the legal way? In that same year, however, the Statute of Anne 90 was passed, decreeing that promissory notes were assignable and endorsable in the same manner as inland bills of exchange according to the custom of merchants. The stated purpose of the legislation was to encourage trade and commerce. Later in the Eighteenth Century, Lord Mansfield became Chief Justice of the King's Bench and it was largely through his efforts that appropriate incorporation of the customs of merchants into the common law became an established fact. In 1761 Lord Mansfield practically refused to receive any evidence of custom of usage saying:

I am very clear of opinion that at the trial I ought not to have admitted evidence of usage. But the point of law is here settled: and, when once solemnly settled, no particular usage shall be admitted to weigh against it: This would send everything to sea again. 91

90. 3 and 4 Anne, C.8 (1704). Prior to the Statute of Anne, a promissory note was not assignable or endorseable over.
Another illustration of the reception of custom into the common law is found in the reception into American case law of the usages and customs of the mining communities of the country. During the California gold rush, controversies often arose between rival claimants for desirable locations. People took the law into their own hands because there was no law to cover the situations which arose in the mining fields. Gradually the miners developed what was known as the law of the apex, which gave priority to the claimant who first discovered ore in place in sufficient quantities to justify a reasonably prudent miner to exercise his efforts and spend money in the development of the claim. In time, of course, the claims were patented, but the pre-patent rights were vital. Millions of dollars often hinged upon the testimony of a single illiterate miner who testified that he had found ore in place on a certain day at a certain hour. These rules which make up what is known as the law of the apex are all incorporated in great decisions. Judge Field of California, who later served on the Supreme Court of the United States from 1863-1897, was one of the justices who laid the foundations in California of the American mining laws. He stated that "The rival lawyers had demonstrated that there is no inconsistency between the most earnest contention and the highest courtesy."

Problems of custom arise in the professions. In *Ault v. Hall*, an Ohio case, in a surgical operation, a surgeon left a large piece of gauze or sponge inside the body of his patient necessitating additional surgery to remove the same; the mere fact that the surgeon followed the general custom among surgeons of delegating the matter of counting sponges did not automatically excuse the surgeon from liability. Generally, it can be said that people who practice a profession set their own standards. But, what is the proper practice in a given case must be established by expert testimony. What is considered proper practice or practices in reducing a fracture must be established by expert testimony. The lawyers representing the doctor in *Ault* insisted that their client had followed what was practically the universal practice—a practice designed to reduce the number of sponge cases—and they therefore prevailed on the judge to instruct the jury that, if the doctor had

92. 119 Ohio St. 422, 164 N.E. 118 (1928).
followed that practice, he should automatically be exonerated from any alleged negligence. The Supreme Court of Ohio reversed the trial judge's ruling, insisting that this was not a matter that could be delegated with entire impunity. Several entirely sound explanations of this decision have been made. In the first place, what method shall be used to insure that no sponges will remain inside of the body is not a professional matter. It is simply a mnemonic device which is a part of the practice to be established by the profession itself. Secondly, some customs are rooted in selfishness and in cheap operation. For example, you might say that doctors could make it unnecessary to use penicillin. In other words, adherence to custom as such prevents progress.

Several years ago, a case came before the federal courts in which a ship was not equipped with a radio receiving set and thus failed to receive warnings of a storm which caused the cargo to be lost. The defense was that the shipping business had not yet generally adopted the receiving sets as standard equipment. Judge Learned Hand pointed out that:

A whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.  

So there are customs which have no bearing on lawsuits, there are local customs which have much force in construing contracts made in the light of their existence, and there are general customs which become a definite part of the unwritten law and have accordingly become reported judicial experience.

**Canon Law**

A word should be said about the influence of the canon law or ecclesiastical law upon the common law. We have already noted that the ecclesiastical law and the Roman law overlap in many respects. Whenever common law borrowed anything from civil law, it was adopting some of the thinking of the churchmen. As most chancellors up to the time of Wolsey were churchmen, their practices in the equity courts naturally reflected what was done in the canon courts. The ecclesiastical courts exercised judicial power, not only over matters of a spiritual nature and matters of ecclesiastical economy, but over matrimonial and testamentary causes and pledges. They also punished for defamatory words.

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93. The T.J. Hooper, 60 F.2d 737 (2nd Cir. 1932).
The church considered itself responsible for the cleanliness of men's lives and undertook to punish anyone who used defamatory language, since defamation was considered a sin. The guilty party was then required to make apology to the person defamed. Added punishment included doing penance. Actions for defamation were common in the seignioral or manorial courts in the Thirteenth and Fourteenth Centuries. Many people resorted to the duel to settle these difficulties, but poor people resorted to these seignioral courts (i.e., Lords of manors). The handling of such matters by these courts probably explains to a certain extent the fact that these cases did not appear in the King's Courts until about the time of the reign of Elizabeth, at a time when the old local courts fell into decay.

During the period when both ecclesiastical and common-law courts took cognizance of defamatory matters, it was customary for common-law courts to limit themselves to cases in which temporal damage could be proved; thus, matters dealing with spiritual damage were left to the church. Gradually, however, ecclesiastical courts lost some of their power. About the beginning of the Seventeenth Century the court of Star Chamber took note first of political libels designed to suppress seditious utterances and later non-political libels. So we may note that such concerns as the law of persons, matrimonial problems, testamentary matters, and some phases of defamation all received a baptism in the ecclesiastical courts and gradually wended their way into the common-law courts.

The developments in the law of defamation pursuant to the First Amendment to the United States Constitution "that Congress shall make no laws abridging" rights of speech have of course liberalized the right to speak freely about public figures. The Supreme Court has reiterated the national commitment to keeping the people informed and that debate on national issues should be uninhibited and robust. This allows sharp attacks against public officials.

**Equity**

Let us now look at the so-called equity side of the English law. Many writers compare the law which was administered by these

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courts in England with that of the *jus gentium* administered by the praetors in Rome. Actually the parallels between the two are not numerous. The *jus civile* of Rome was somewhat a local system of law for Romans, just as the Hebrew law was for the Hebrews. The law administered by the praetors, on the other hand, was for the foreigners. However, in England, both the common-law courts and the equity courts administered law for Englishmen. In other words, the parties were the same in both types of courts. Yet it must be said that the law administered by the praetors in Rome was aimed at fairness and justice and right, as was the law in England. Whereas the *jus civile* was strict like the early common law, the *jus gentium* was the source of reform of the *jus civile*. This interplay of legal philosophies corresponds to the ameliorative effect of equity upon law in the English system.

In the days of Edward I at the end of the Thirteenth Century there were three common-law courts: the King's Bench, the Common Pleas, and the Exchequer. Each had its proper sphere, but each gradually extended its power so that by the end of the Middle Ages a plaintiff could bring his cause of action—any cause of action—in any of the three courts. Each administered the common law. This common law was contrasted with statute law, local custom, and royal prerogative. It was quite inflexible, based on writs, and resulted in numerous hardships. In fact, it permitted numerous injustices. At this time, there was no system of equity in England.

Aristotle had raised the question as to what the nature of equity was some time earlier. He asked: “If law be justice, what is equity?” His own answer was that it is a correction of the law, which because of its general nature cannot be so framed as to cover all cases that may arise in complex life. So when we find that in English history, equity began to develop at the beginning of the Fourteenth Century, the concept was not really something new.

The chancellors' powers developed out of the Exchequer, which was known as the administrative body of the King, as well as a court. It derived its strength from the King's ancient power to do justice at his discretion and by special methods when the usual methods were unsatisfactory. The chancery was the secretarial department, and the chancellor was usually a bishop. He kept the great seal and wrote for the King. The chancellor, in the early days, always being a church man, naturally administered matters in the same manner in which they had been administered in the

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ecclesiastical courts, such as punishing breaches of trust and confidence by spiritual censors and penance. Certainly at an early day equity chancellors administered what may be called a law of nature and sought guidance in the cannon law and the civil law. They handled matters more completely than law courts and more satisfactorily, at first as special privilege and royal bounty, but later, in the Seventeenth Century, as a matter of right. At this time reports of equity judgments were reported and there was equity law existing side by side with common law.

A few illustrations will indicate how these courts functioned:

1. The holder of a bond which had been paid could sue in covenant on it and collect it a second time. So the debtor brought a suit in equity to enjoin the suit at law, to enjoin the enforcement of the judgment if one had been obtained, or to obtain a cancellation of the bond which had been paid. The role of equity was coercive; it acted in personam; it compelled action by the party.

2. In cases of contracts not under seal, a person aggrieved would find himself confronted in the law courts with the opponent's right to wage his law with his compurgators. So the complaint went into equity where the wager of law was not recognized. He could truthfully say his remedy at law was inadequate. In time, of course, courts of law refused to allow the wager of law as a defense.

3. The chancellor conducted his court in English.

4. The common-law courts failed because their juries were afraid of being attained. Jurors could very well fear to bring in any verdict which might put them in prison or cause their forfeiture of their property.

5. The common-law could give only remedial justice and not preventive justice, i.e., at law one was required to wait until an invasion of a right had taken place. So again the worried party went to the chancellor and prayed for an injunction to prevent the invasion, thus locking the door before the horse was stolen. It was simply that equity acted in personam again.

6. No marshalling of assets was allowed at law, but the same was recognized in equity.

7. Choses in action were not assignable. Of course, most choses in action are now assignable by statute.
Courts which dealt with clean-cut judgments were considered incompetent to deal with fiduciary matters; thus a common-law court gave execution, but it could not operate a business, and it could not issue a decree in personam. But it was difficult to keep the two courts within their alleged respective fields; clashes were inevitable, for judges often became headstrong and extended their powers. In the Fourteenth Century, Parliament warned the chancellors to keep their hands off ordinary law cases. The battle for supremacy in the judicial system began in earnest. Here, early in the Seventeenth Century, the clash between Coke and Bacon is foreshadowed.\textsuperscript{96} In the Sixteenth Century, equity took over some of the work in the field of fraud, accidents, and breaches of confidence, but with some care, for it did not do so until it was obvious that the parties' remedy at law was not adequate. There had to be a showing to that effect before equity would act. It is significant to note that equity reports rarely appeared until after the Restoration in 1660; the official date of the first equity reports appears to have been 1557. This would indicate that equity did not follow precedents as the law courts had done throughout the formative years. But in time, the chancellors ceased to be ecclesiastics. Wolsey was the last of those. When the great Ellesmere\textsuperscript{97} became chancellor in 1596, he and Coke argued over the alleged powers of the chancellors. When the chancellors undertook by injunction to prevent people who had had judgments in courts of law from enforcing those judgments, Coke naturally rebelled. But at this point King James I issued a decree in 1617 in favor of chancery. This was done, writers indicate, on the advice of Bacon, Coke's enemy. But certainly from 1660 onward, equity was recognized as part of the law of the land. It is well to think of equity, not as being opposed to law, but as a supplement to law. Equity itself could not have functioned alone, although the common law might have been considered a self-sufficient system. It is true that in some respects the courts of law and the courts of equity had concurrent powers, and in some respects their powers were exclusive, and in some respects equity had powers which were auxiliary to the law courts' powers. The English legal house had rooms to be occupied by the common-law judges, some to be occupied by the equity judges, and some rooms were available to all.

Perhaps no American judge has expressed more clearly how a court of equity functions than Judge Lamm of Missouri. Some of

\textsuperscript{96} See supra note 64.

\textsuperscript{97} Thomas Egerton Brackley, better known as Lord Chancellor Ellesmere. See 5 Holdsworth, A History of English Law (3rd ed. 1945).
his explanations indicate much more clearly and epigrammatically than any words of my own would do:

   Equity is used as a shield, not as a sword.
Equity delights in amicable adjustments.
Equity does nothing grudgingly or by halves.
Equity knows no passion, except for justice.
In equity, lawyer and money lender meet upon a dead level.
Equity did not come to destroy the law, but to fulfill the law.
Equity discerns the essence of the law and administers the soul of it.
He who comes into equity must note the sanitary condition of his hands.
An eagle does not catch flies, so equity deals not with trifles, in its search for fraud.
It is the delight of equity to protect the orphan in his estate—to stand between the weak and the strong.
It is equity that he should have satisfaction who sustained the loss, and that he should make restitution who receives the benefit.
A plaintiff having once elected to go into chancery, that plaintiff must abide his choice, stay there, and take the bitter with the sweet.
The doctrine of laches is the handmaiden of equity, comes from her workshop, and may be invoked only in aid of an existing equitable right.
When equity lays hold of a subject matter, it does not lift its hand until plenary and perfect justice is done as near as may be under the issues.
Under certain facts, equity, which deals with the kernel of things, will open the mere shell of a conveyance and see a mortgage at its soul and purpose.
Equity as a code of conscience, takes cognizance of more delicate distinctions between right and wrong in human conduct, and enforces a subtler morality than the traditional procedure of courts of law.
When fraud comes in at the door, all contrivances to consummate it fly out the window in chancery.
The beautiful character of pervading excellency, if one may say so of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes.
In equity there is danger that advantage may be taken of the ignorant, the confiding and helpless by those who promise, reap performance, and then procrastinate, dally and die without living up to the great commandment of the law, to-wit: To do just and right, and to render everyone his due.98

98. Gleaned from the numerous decisions of Justice Lamm and integrated in a book about him; MULLENX, LEGAL PHILOLOGY (1923).
This dichotomy continued until the Judicature Acts of 1875,\textsuperscript{99} which abolished all the courts of law and courts of equity which had been in existence in England before that time and created new courts: a Court of Appeal superimposed upon a high court of justice consisting of (1) Chancery; (2) King's Bench; (3) Common Pleas; (4) Exchequer; and (5) Probate, Divorce, and Admiralty. The California Code of Civil Procedure provides substantially for the same division. The Code provides that distinctions between actions at law and suits in equity and the forms of action and suits existing heretofor are abolished and that there shall be hereafter one form of action which shall be called a civil action. Yet as Maitland said, "The forms of action we have buried but they rule us from their graves."

It will help to explain the different spheres of operation of the common law and of equity if we illustrate by using what has happened in the law of mortgages. In the Thirteenth Century a mortgage was a regular deed of property with a condition in it. In other words, if O, as owner of land, wanted to borrow money from E, who had money to loan, and secure the same by a mortgage, he gave to E a deed which recited that the land was conveyed to E with right to possession—certainly with right to possession on default. But there was a condition inserted into his deed which said that if the borrower could well and truly pay the money owing on a certain day, this deed was to be void, but otherwise it was to become absolute. When law courts looked upon these deeds as regular deeds upon condition and construed them literally, the moment the borrowers failed to pay on the law day, the land became the property of the mortgagee—title had become absolute. The rule created great hardships. The borrowers filed petitions with the chancellors, asking that something be done for them. Upon hearing the complaints, the chancellors looked through the form to the substance, found that these deeds were only security devices and created what became known as an "equity of redemption." They entered decrees prohibiting the mortgagee or grantee upon condition from using that property as his own and compelling him to accept payment from the borrower who was now ready to pay.

Lenders and their lawyers in those days framed a countermove or reply to the conduct of chancellors in allowing this equity of redemption. The reply devised was the foreclosure, strict foreclosure. This was a procedure whereby the lender went into equity

\textsuperscript{99} The Supreme Court of Judicature Act, 1875, 38 L 39 Vict., C.77.
and asked the chancellor to set a time within which or before which the borrower had to redeem or repay the loan or be forever foreclosed. The chancellor recognized that the lenders had a just complaint also and decreed that there should be a certain time within which to redeem or be forever foreclosed of any rights in those properties. Nearly the whole law of mortgages is administered today by courts of equity.\footnote{100}

\textbf{Modern Judicial Reporting}

The job of reporting today is not as difficult as it was in the

\footnote{100. A discussion of equity is properly ended here by bringing in a recently published book, \textit{Equity in the World's Legal System} (R.K. Newman ed. 1974). The book consists of a collection of articles by distinguished representatives of some 20 different countries or legal systems, and indicating the status of equity in their respective constituencies. It is interesting that they all profess to entertain equitable principles to soften the rigidities of their legal systems. Generally it is contrasted with statute law, local custom, and royal prerogative. Professor Newman wrote both the introduction to the book and a summary of the general principles of equity [at 589]. It happens that the writer who represented the countries of Islamic law in the book is Professor Hassan Afchar of the University of Tehran, Iran. In 1957-58 this writer assisted him in the teaching of a course in comparative law in Iran. In his discussion of equity in the book he indicates that in Islamic countries the principles of equity emanate from the Koran and are applied regularly in deciding cases. This practice should not bother us too much in view of the fact that early common law chancellors were trained canonists. While in many instances the students inquired as to the nature of equity, there was no disagreement as to its nature. Hassan Afchar was a very learned man, a member of the senate, who visited us and with whom we still correspond regularly. In fact his son is now doing graduate work at the University of Florida at Tallahassee.

This writer sees no real reason why there should be anything wrong with having a religious foundation for law. The best analysis of the matter might be that given by Lord Bryce, \textit{Relations of Law and Religion}, in 2 \textit{History and Jurisprudence} (1901). Readers are referred to his views which center on the great value of freemen's minds. Religious views tend to become fixed and so prevent adjustments to changing situations. Certainly the writer found great freedom of thought throughout Iran. Many Iranian teachers and students had done graduate work in France, Belgium or Switzerland. This was to be expected as the Civil Code of Iran is generally in accord with the French Civil Code except for those matters related to the family and things specifically within the scope of control of the many Koran teachers who spoke French fluently. The writings of Lord Bryce could very well be a real basis for a seminar on this subject. Law operates in a world which is free and spontaneous while religion relates to matters that are rigid and compulsive. Here is antithesis which cannot be reconciled until human nature comes into complete accord with God's will.}
days of Dyer and Plowden and Coke. Court opinions today come
to the reporter as a finished product. Of course, he has the job
of adding the various indices and the tables of cases, checking the
citations, noting the cases reported and cited and listing the statutes
which are involved in the opinions. It is probably not inaccurate
to say that the job is largely mechanical and that very little, if
any, writing is required. The headnotes are generally prepared by
the judges. Thus the writers of the unwritten law today are the
justices, not the reporters. Opinion writing is certainly the very
core of the existing legal system wherever the common law is in
force, and this has undoubtedly been true for over 200 years. All
the Supreme Court justices and federal judges take their job of
opinion writing very seriously. Of course, it would be impossible
to find two justices who do the job in the same way—no two justices
are equally effective.

The idea of opinion writing is deeply rooted in our judicial system.
Perhaps a judge feels more satisfied with his decision if he has put
down the reasons why he decided the case as he did. These opinions
constitute the primary source of our law. They involve every con-
ceivable problem of human life—every possible conflict, and each
opinion bears the stamp of the man who writes it. Something
about the justice goes into every opinion he prepares—something
about his background, his successes, his failures, his strengths, his
weaknesses, what church he attended, what sermons he listened to,
what kind of parents he had. The fact that all justices regard this
job seriously cannot be overemphasized. They realize that the
opinions that they write will remain in print for centuries, that
their opinions constitute a permanent record. All strive for clarity,
style, form, and dignity. It is sometimes argued that a legal opinion
should be terse and that form and style should be discarded in favor
of precision, that legal opinions should resemble statutes, the code
Napoleon, or the Restatement. But where does form end and sub-
stance begin? Is it not a matter of dividing the indivisible? The
discursive opinion containing alliteration, metaphors, analogies, tell-
ing quotations, and allusions is a common style. In a deceit case,
the judge may refer to Cordelia's words, "The glib and oily art,
to speak and purpose not."

101. Reporting, judicial or otherwise, is undoubtedly an art. Near the
end of Hamlet, just before he dies, he addresses Horatio and says, "Thou
livest; report me and my cause aright to the unsatisfied." This would indi-
cate that there was common talk in Shakespeare's day, while Coke was liv-
ing, of the importance of reporting, and it is not beyond likelihood that
Coke's fame as a reporter prompted Shakespeare to write those words.
If one were to ask any justice to explain how a legal opinion is written, he probably would find it very difficult. In fact, Justice Cardozo, indicates that the first reaction is to simply say that the language of the law is unintelligible to those untutored in the craft. But he then admits that such an excuse would be an ignominious retreat and proceeds to analyze generally how an opinion is written. He emphasises four methods: (1) the method of philosophy, (2) the methods of history and tradition, (3) the method of sociology, (where the judge becomes a legislator), and (4) the method of adherence to precedent. He points out that in certain cases a page of history is worth volumes of logic. He views the philosophical method as meaning logical progression; the historical approach he calls the evolutionary method; the method of tradition he calls the customs of the community; and the mores of the day he calls his method of sociology. Basically, a good judicial opinion contains five definite parts: (1) a clear, concise statement of the facts in which the parties involved are clearly identified; (2) a clean-cut statement of the legal issues or problems involved; (3) a case analysis of all authorities having a bearing on the legal problems involved; (4) a statement of what the authorities point to as the proper legal principles which are to govern; and (5) an application of the law to the facts involved. In meeting these five criteria, the justice may use humor or beautiful metaphors; he may draw upon the literature of any country, in any language. An early Kansas case, In re Bullen, will serve as an illustration. In it, Justice Brewer poured out his soul in discussing the nature of a home.

103. 28 Kan. 781, 28 Kan. 557 (1882).
104. 28 Kan. at 784-89, 28 Kan. at 560-63. The facts of the case involved a young man of British birth who had come to the U.S., married in Leavenworth, Kansas, and had a daughter. Two years later the father died, and two years later, in 1880, the mother died. Before her death, her child was accepted by St. Mary’s female academy conducted by the Sisters of Charity of St. Vincent of Paul, and the mother suggested that her child be sent to her grandfather in London.

The grandfather in London died in 1879 leaving a will providing that his granddaughter in Leavenworth should inherit her father’s share if she:
1. Was brought to England before 7 years of age;
2. Be brought up in the Protestant faith;
3. Not marry a Roman Catholic.

The question was whether the child, a native born U.S. citizen, should be
sent to England under the circumstances. Justice Brewer, nephew of Justice Field, cited no authorities but sent the child to England, saying,

This, I think, presents a fair summary of the facts of the case; and from this statement I pass to a consideration of the questions presented and discussed by counsel. On the one hand, it is claimed that the grandmother has no legal right to the custody of the child; that it is never the province of the court to expatriate a citizen, even though that citizen be a mere child; that the expressed wishes of the dying mother should be respected; and that, beyond all these matters, the child is at present happily situated, in good hands, kindly and properly cared for; and that there is not, under the testimony, enough to satisfy that the change asked for would substantially better its condition or promise its welfare. On the other hand, it is contended that upon a change, the little child will obtain that which she now lacks—the surroundings and blessings of a home, where personal attachment and not official duty is the controlling spirit; that she will secure a property sufficient for her support, and which will render her comparatively independent; and that, therefore, the interest of the child, which in all such cases as this is the paramount consideration, demands the change. Clearly the grandmother has no right to the child; there is on her part no legal obligation to support it, and therefore no legal right to its custody. It cannot be said that the child is illegally restrained of her liberty, deliverance from which, as counsel well say, was in the first instance the purpose and object of habeas corpus. Yet, as to children at least, the scope of the writ has been largely extended. Beyond the mere matter of forcible restraint, of technically illegal confinement, the courts will inquire whether the surroundings of the child are such as make for its highest welfare, and will do for it that which such welfare compels. In such cases, it is in fact the petition of the child; and I know of no duty more delicate and responsible than that which such petition places upon a judge. Take the case before me; the parents of the child, the ones who by every law, human and divine, are charged with the sacred duty of protection, support, care, and promotion of the highest welfare, are both dead. By this petition, in effect, she comes to me and says: "They who were my guardians by nature have passed away. My feeble steps are just commencing the walk of life. I know nothing of the world and its ways. I cannot tell what will be best for me. I appeal to you to decide for me, who am too young to decide for myself, and to place me where I can receive the highest advantages, and where the surroundings of my life shall win for it its best and highest fruition; and so that, when I reach the years of womanhood, I can look back to this hour and this decision, and say, 'I thank you.'"

Do I demean myself by saying I shrink from this responsibility; I cannot agree with counsel that it is never the province of the court to expatriate a citizen. In some cases I think the duty so to do is clear and absolute. As, for instance, where parents moving to a foreign country, and leaving their little child here for a while, come back to claim it, and are hindered by those who have it in possession. Nevertheless, it is a matter always to be considered. With pardonable partiality, we look upon our own land, its laws, institutions, and social life, as the best; and not lightly should a child be deprived of the benefit of them. Yet we may not ignore the fact that the mother country is a land of liberty and law, of education and social refinement, of morality and religion; and it would be wrong to make the matter of expatriation an excuse for depriving this little girl of that which would promote her welfare. Neither is it clear that sending this child to England would be technically an expatriation. The child was not born in this country, and there is nothing in the testimony which shows that either par-
ent ever ceased to be an alien or became a citizen. Further, the
guardian of this little girl, and, if now this petition is granted, she
will pass under the special care of those courts, the faithfulness of
whose watch in cases of this kind is a matter of universal recog-
nition. But I place comparatively little stress on this, and turn to
the paramount question and ask, What will be best for the welfare
of the child? And looking at this question in the light of experi-
ence, and testing it by the generally recognized facts of society and
life, I can but think that the welfare of the child, its best interests,
will be promoted by granting the prayer of the petition.

Two principal reasons control in my mind. First, her life here
would be a life in an institution; there, a life in a home. I need
not stop to recount the numberless blessings which home gives to
a child, especially a female child. The common judgment of all
voices the truth that the best development of a young life is within
the sacred precincts of a home. No institution, however cultured
and refined its instructors, however pure its life, however faithful
and devoted all its officers and teachers to the care, nurture, and
education of the many children within its walls, will give that
sweet, gentle, and attractive development to a young girl that
comes from the personal and affectionate training of a home. There
is something of the same difference as between hotel life and home
life. There is more publicity to the one; more privacy to the other.
There is something official, as it were, in one, and personal in the
other. The varied graces of true womanly nature ripen more
sweetly and more surely in one than in the other. I would not
detract in the least from the advantages which these institutions
afford to the young. I believe they are a large blessing and that,
even for those children who have homes, an occasional and tem-
porary sojourn in one is of lasting and incalculable benefit to the
development of the child. But when it comes to the question of
a life wholly within an institution, and one wholly a home life, I
think all will agree that the latter is to be preferred. I think every
parent, when asked whether he or she would have his or her child
forego during all the years of childhood the blessings of a home
life, for the sake of the advantages furnished by even the best insti-
tution in the world, would unhesitatingly answer in the negative.
And I doubt not the good sisters in this institution, many of whom
look back with sacred reverence to the home life of their childhood,
with all their pride in and affection for that institution to which
they have so sacredly devoted their lives, still feel in their inmost
hearts that that home life was a blessing which nothing else could
equal to their early days.

Second. There is a pecuniary consideration. I am not so sordid
as to believe that money is the one thing to be regarded; but, other
things being equal, that certainly is a matter to be considered. If
she remains here, she will come to maturity without means, and
dependent solely on her own labor or the help of others. There
she will have a little property,—not a great wealth, it is true, but
enough to keep want away, and to enable her to act freely in her
choice of place and work in life. There is also a possibility, though
perhaps only a remote one, of her becoming, through the death of
others, the heir to quite a property. It is true there are conditions
attached to the receiving of that property which to my mind are
odious and unjust. They indicate a bigoted spirit on the part of
the testator, so foreign to the free and catholic spirit of today that
Frequently justices go afield and say things that go beyond the bare needs of the specific case. Such utterances are known as dicta, although they also have been called “gratuitous impertinences.” For example, a landowner puts up a building whose eaves protrude over the neighbor's land at a height of 12 feet. In that opinion the judge said:

A landowner owns from the center of the earth up to the heavens.

This is the *usque ad coelum* theory.\(^{105}\) If you make this into a

every true man must condemn them. Yet this little girl ought to have the opportunity to decide for herself, when she comes to maturity, whether she will accept or reject the property burdened with those conditions. Today she knows nothing of the value of the property, or the meaning and import of the conditions. It would be wrong to refuse her the privilege of an intelligent choice. When she arrives at years of discretion, she may prefer to accept her mother's faith, and reject her grandfather's preoffered request, or she may prefer to accept the bequest, and walk in the faith of her father; but, unless the prayer of the petition be granted she will never have the opportunity of accepting it.

Counsel have made a most eloquent appeal that the wish of a dying mother as to the future of her child should be respected. The precious recollections of my own childhood, with all the shapings of my life through the gentle influence of a loving mother's care, from its first helping my infant steps, up through all the sunny days of childhood, to her dying blessing in manhood's morning hour, send this appeal home to my heart with tremendous force. But I interpret the mother's conduct and desire thus: She was a stranger in a strange land, alone, and dying. The uppermost thought in her heart was the future of her child. When with the ladies of the home, she turned to her husband's family home as the surest and most certain place of refuge for her orphan child, and she begged the ladies to see that it was sent thither. Afterwards, when she passed into the kindly care of the good sisters, and found what faithful friends they were to her in her time of need, she believed the same kind care would be extended to her little one, and begged of them to take it. In other words, thinking only of her child, she ever turned to that which at the time seemed the nearest and surest succor for its helplessness, and prayed for it. Evidently, from a letter written by her while at the hospital shortly before her death, her affection for her husband's family and her friends was strong to the last, and she committed her little one to the care of the respondent through no aversion to them.

If, from the calm and peaceful heights of heaven, the departed look back with living interest upon the things of earth, I can but think that she will look down approvingly upon the conclusion I have reached. I know she will approve the spirit with which I act, even though she may not the wisdom of my conclusion. The order then that will be made, is that the prayer of the petition be granted, and the child be given into the custody of Mr. Bullen, to be by him sent to its grandmother in London.

As the opposition of the respondent to this petition has not been from any factious spirit, but under a sense of obligation springing from a promise to a dying mother, I think the costs of this proceeding should be paid by the petitioner.

(All the justices concurring.)

\(^{105}\) Also referred to as a *coelo usque ad centrum* meaning from the heavens to the center of the earth, or as *cujus est solum ejus est usque*
ratio, it is 12 feet in infinity. And if you complete the proportion it runs: 12 feet is to infinity as decision is to dictum. Of course, when the airplane came in, the dictum had to be discarded. Lawyers understand that they must spend a good share of their lives separating dictum from decision.

CALIFORNIA LAW

In 1850, following the termination of hostilities in California, the question was should the civil or common law be adopted as the state's legal system. The State Senate met in San Francisco and a petition was filed urging that the civil law of Spain and Mexico be adopted. A judicial committee was appointed and it filed a report which is reprinted at the end of Volume I of the California Reports. This report contains an excellent analysis of the differences between the civil law and the common law. Of course, there were over one hundred common law lawyers in the city, and they voted overwhelmingly for the adoption of the common law system, denying the proposal in favor of the civil law. This is now Section 22.2 of the California Civil Code. It provides:

The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, is the rule of decision in all the courts of this State.

This section defines law as the expression of the will of the supreme power of the state while Section 22.1 states that “the will of the supreme power is expressed: by the Constitution and by the statutes,” and thus the basic law of the state is written. This

\[\text{ad coelum et ad inferos meaning the owner of the soil owns to the heavens. This theory is attributed to Lord Coke. See Frosser, Law of Torts 70 (4th ed. 1971).}\]

106. BOONE, NOTES ON THE CALIFORNIA REPORTS, Vol. 2, as revised by Thompson (1905), published as an addendum to 1 Cal. (located after 657) 5-55 (1850-51).


108. CAL. CIV. CODE § 22.1 (West 1970). After noting that the basic law of California, back in 1850, consisted of a written constitution, and the statutes, it is very important to note how the many codes in California were developed. See THE DEVELOPMENT OF THE LAW IN CALIFORNIA, WEST'S ANNOTATED CALIFORNIA CODES, THE CONSTITUTION, ARTICLES I TO IV, at 1-65 (1954).

In the beginning of this volume is a complete narration of the development of the law in California by William J. Palmer and Paul P. Selvin.
emphasizes the written law as the important phase of law;\textsuperscript{109} the
thinking, however, is that of the common law. Section 22.2 was
not intended to adopt the common law as influenced by statute
and equity.\textsuperscript{110} The organic law is the supreme law.\textsuperscript{111}

Though these statutes make no mention of equity, it penetrates
beyond the form to the substance of the controversy. It is inher-
ently bound with the law by its prescription and substance.\textsuperscript{112}
Courts have also stated that the established rules of equity prevail
over the rules of the common law. Such rules should prevail if
equity is a correction of the law when it is too rigid.\textsuperscript{113} Moreover,
many matters of substance and of exclusive equitable cognizance
in England have definitely been placed in the California Codes.
Thus, so-called equitable remedies are integrated in the Codes. The
following serve as examples:

(1) The constructive trust is an equitable remedial device or
formula by which the court's conscience functions in many situa-
tions.

One who gains a thing by fraud, accident, mistake, undue influence,
the violation of a trust, or other wrongful act, is, unless he has some
other and better right thereto, an involuntary trustee of the thing
gained, for the benefit of the person who would otherwise have had
it.\textsuperscript{114}

The wrongdoer as a constructive trustee of what he took has a duty
to return it to the owner.

\textsuperscript{109} Former Chief Justice of California, Roger Traynor, has indicated
that he favors legislation as directing new developments. He said that "it
is cheaper to legislate than to litigate." \textit{See Legal Institutions Today And
Tomorrow, Centennial Volume of the Columbia Law School} (Monrad
\textsuperscript{110} Martin v. Superior Court, 176 Cal. 289, 168 P. 135 (1917).
\textsuperscript{111} Dougherty v. Fair, 69 Cal. 255, 10 P. 674 (1886).
\textsuperscript{112} Elbert v. Federated Income Property Co., 120 Cal. App. 2d 194, 261
P.2d 743 (1953).
\textsuperscript{113} Willed v. Wozencraft, 22 Cal. 607 (1863).
(2) The equitable remedy of specific performance of contracts is also given full sanction by statutory enactments. Yet they are not self-executory. All these cases must be handled by Superior Court judges who are charged with the duty of construing the statutes, and determining whether the case is such as to justify the specific performance.

(3) The usual equitable procedure for the reformation of contracts erroneously written is also granted by statute, and when reformed can be specifically enforced. This reformation is allowed when fraud or mistake enter into the making of a contract. The statute specifically lists as grounds for reformation, fraud, or mutual mistake, or unilateral mistake coupled with knowledge by the other party as to the mistaken person’s state of mind.

(4) The California court has exercised considerable equitable thinking in reforming gifts made by deceased donors when the intention is clear and the donee is at least as worthy as the opposing claimant. The desire to carry out the intention of the parties is inherent in the statutes as well as in equity.

(5) Courts grant preventive relief by injunction pursuant to the Code.

116. See Henderson v. Fisher, 236 Cal. App. 2d 468, 46 Cal. Rptr. 173 (1965). The case presented an unusual set of facts. The owner of real property was 86 years old, blind, and in need of constant care. He entered into a contract with neighbor friends, husband and wife, to take care of him for the rest of his life, and the man was to deed them his property. The contract was very specific as to what each party was to do. The contract was duly signed and the purchasers performed all that was expected of them for 18 days, when the owner passed away. Were the vendees under the contract entitled to specific performance? The Superior Court Judge granted the plaintiff the reasonable value of services rendered, but denied specific performance. The District Court of Appeals, Justice Molanari, reversed and granted the specific performance. His analysis is worth careful study. The Supreme Court refused a hearing.
117. Cal. Civ. Code §§ 3399-3402 (West 1970). Section 3400 states a great principle that all parties to a contract would be presumed to have intended to make an equitable and conscientious agreement. This tallies with the fundamental principle underlying Section 1202 of the Commercial Code. Section 3401 gives the court considerable freedom in its scope of inquiry in arriving at the intention of the party. A good case on this is Tyler v. Larsen, 106 Cal. App. 2d 317, 235 P.2d 39 (1951). A joint tenancy was changed to a tenancy in common pursuant to Section 3399.
(6) The equitable remedy of recission of contracts, thus terminating rights therein is clearly statutory. The usual grounds are lack of effective consent due to mistake, duress, menace, fraud, undue influence, failure of consideration, and illegality of the contract where parties are not in pari delicto.

(7) In opening his lecture on mortgages, Maitland explained how equity came to interest itself in mortgages. In consequence of its doctrine that a mortgage is merely

a security for money, a security which can be redeemed, although, according to the plain wording of the mortgage deed, the mortgagee has become the absolute owner of the land, it drew almost every dispute about mortgages into the sphere of its jurisdiction, and had the last word to say about them.

The solution to this problem in California is entirely statutory. The statutes follow two lines of procedure. The first method is to allow the mortgagee a right to foreclose his mortgage and sell the property, but allowing the mortgagor rights of redemption. The subsequent mortgagees, if any, are also given rights of redemption at 60 day intervals. The second method employs the trust deed whereby the borrower conveys the title to a trustee who on default by the borrower has the duty to sell the property and pay any excess of the purchase price over the indebtedness to the grantor. This is the leading method followed in this state. No right of redemption is granted under the trust deed method. It is not the strict foreclosure of the common-law, however, because a sale is required. Still it is not as equitable as the English thinking appears.

120. CAL. CIV. CODE §§ 1688-1693 (West 1970). Under the older statute, California allowed two types of suits for recission. One was a suit at law (on) a recission, and the other one was a suit in equity (for) a recission. The difference between the two created problems for lawyers and in 1961 the statute was amended by adopting a statute from New York which limited these recissions to actions at law (on) a recission but requiring the plaintiff to only offer to restore what he had received instead of actually restoring pursuant to the old practice. [36 CAL. STATE BAR J. 677 (1961)].

The significant change here is that the statute states that, "a claim for damages is not inconsistent with a claim for relief based upon recission." The aggrieved party should be awarded "complete relief." A recent case involving the sale of an automobile on fraudulent representation entitles the buyer to sue for recission and for quasi-contractual recovery for the value of his used car trade-in, and monthly payments together with a $5,000.00 allowance as punitive damages. See Horn v. Chevrolet Company, 270 Cal. App. 2d 477, 75 Cal. Rptr. 871 (1969); Miller v. James, 254 Cal. App. 2d 530, 62 Cal. Rptr. 335 (1967). Prior to this the word damage had no place in a recission. This involved a shift from the statutes on recission of contract to the section on punitive damages for fraud, oppression and malice [CAL. CIV. CODE § 3294 (West 1970)].

121. MAITLAND, EQUITY, A COURSE OF LECTURES 179 (2d ed. revised 1936).
in Maitland's words. But it seems to work well and it is all pursuant to written law.

(8) In considering the duties owing by a landowner to people coming upon his premises, the common law adhered strictly to the idea that the duty varied according to the status of the stranger on the premises. There are three well-known categories of trespasser, licensee and invitee. However, statutory enactment on liability for negligence made the owner liable for the want of ordinary care or skill in the management of his property except when the intruder brought the injury upon himself.\textsuperscript{122} So, the common law premise favoring the landowner was not recognized in California civil law and was later completely rejected in case law.\textsuperscript{123} The written law had again prevailed in California.

The recent addition to California law of comparative negligence, placing a limitation on the effect of a plaintiff's contribution to his own misfortune or damages is the end of an epoch. The old "all or nothing" philosophy is now terminated in California, and juries will now perform what was considered an impossible task. The court has added another method of reducing the effect of the plaintiff's contributory negligence. This is now done judicially and not by statute. It will be argued whether this is written or unwritten law. The court merely construed the statute.

(9) In connection with the making of a contract, the Code contains concise enumerations of the essential matters as to the nature of a contract, how contracts are created, how they are interpreted, and how they are rescinded.\textsuperscript{124} Basically, the parties to a contract must consent, actually consent, to entering into it with a free mind. So anything that removes freedom of the mind will prevent the making of a contract. Duress, menace, fraud, undue influence, and

\textsuperscript{122} Cal. Civ. Code § 1714 (West 1970). This section of law is similar to section 1382 of the French Civil Code.
\textsuperscript{123} In the case of Fernandez v. Consolidated Fisheries, 98 Cal. App. 2d 91, 219 P.2d 73 (1958), Counsels Belli and Olshie challenged this common law idea, and got a reversal of the judgment for the defendant on the basis that plaintiff had been a trespasser. This decision led to the complete rejection of the categories in Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). There Justice Peters effectively removed this common law limitation upon the duty to exercise ordinary care, as stated in Cal. Civ. Code § 1714 (West 1970).
mistake are the five categories of conduct that will prevent an apparent consent from being real, and this consideration is closely related to the issue of materiality. Materiality is indicated by the fact that the party would not have entered into the contract except for the operation of one or more of these five types of conduct on his mind. The above five factors that may influence the making of a contract are largely of a tortious nature. In subsequent statutes, those situations that prevent the making of a contract are defined. These matters are always discussed in a basic course in Contracts or in connection with remedies.

Any student of law knows how difficult it is to find out just what conduct constitutes fraud. Basically we are told that three basic words are involved: suggesting as a fact that something is true when it is known to be false, asserting something to be true without sufficient information even though one believes it to be true, or suppressing something which is true, knowing it to be false, and making a promise to perform without an intention to perform. Always, in this connection, we consider whether the great case of Derry v. Peek is law in California. That case required a specific intent to deceive. Probably these sections of the statute indicate that something less than the specific intent to deceive will be sufficient to constitute fraud in California. But in any event, re- cession can be had even if there was no evil state of mind. The remedy is in quasi contract.

Freedom to make contracts is considered a very valuable right. When freedom does not exist, there can be no contract. The statute of frauds and the parol evidence rule supposedly operate to protect this freedom, but in some instances they curb and restrict freedom.

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125. CAL. CIV. CODE § 1567 (West 1970).
129. Two or three cases recently gave us some thought on the matter. In Masterson v. Sine, 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968), the grantor conveyed real property and retained an option to repurchase the land for the same price. Grantees were members of the grantor's family. Grantor went into bankruptcy and the trustee sought to exercise the option for the benefit of the creditors. The grantor and grantees sought to show that the option was limited to members of the family. Justice Traynor favored admitting the oral testimony as the statute of frauds was not violated by so doing. No doubt the decision rests on the right to make contracts as to matters not integrated. As to matters not integrated the freedom remains. The modern trend is to allow extrinsic evidence to decide the extent of the integration and to retain the freedom of contract as to
(10) Dating back to the case of Merryweather v. Nixon,130 the common law adhered strictly to the doctrine that there could be no contribution among tortfeasors. Most courts agreed that this was proper where the tortious acts were intentional; but there was genuine opposition to having this rule continued where the parties were merely negligent.131 In 1957 California enacted laws allowing for contribution among tortfeasors.132 However, it requires a joint judgment, and this limitation negates its adequacy since there does not seem to be any method by which a negligent defendant can interplead and bring in other parties who he claims are equally guilty. Then, too, he must pay more than his share before he can proceed against others. It does, however, save rights of indemnity.133

(11) The rights of an innocent improver of another man's property have long constituted a peculiar equitable problem.134 It was thought that owners should not profit from an occupier's innocent mistake. In California, there has been a code section addressing the problem since 1872.135 It allows only a set-off as against a suit by the owner for damages for the retention of the property. In the absence of such a suit by the owner, there was no relief. How-

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131. California adopted most of the provisions of the Uniform Contribution Among Tortfeasors Act (1955).
133. This principle is well illustrated in City of San Francisco v. Ho Sing, 51 Cal. 2d 127, 330 P.2d 802 (1958) discussed by the author in Torts, 69 Cal. Law 334 (1969). In Ho Sing a business man negligently created a dangerous condition in the street in front of his establishment, and the city was negligent in not removing the condition. The party injured by the defect sued Ho Sing and the city. Judgment was recovered against both. The city paid its half and then successfully sued Ho Sing for indemnity. Ho Sing was the active wrongdoer and the city was only passively so. The city had just paid the debt of another and therefore was entitled to be subrogated to the rights of the person paid. So again the statutory basis of liability prevails over the common law.
134. Courts have been citing Justice Storey's opinion in Bright v. Boyd, 4 Fed. Cas. 127 (No. 1875 c.c. Me. 1841) for decades. Storey was an equity enthusiast. He wanted the innocent improver to be paid for the benefits conferred and he joyously pointed out that this rule was implicit in the Roman Code. He and Chancellor Kent of New York often sought judicial help from Roman thought.
ever, in 1968 the Code was amended, allowing the innocent improver to start proceedings himself. Yet, this did not repeal the original statute which is still considered in arriving at the best solutions.

(12) Our labor code grants to an employer whose employee is injured by another party the right to reimburse itself from any recovery by the injured employee from the wrongdoer. His insurer under workmen's compensation is also entitled to such reimbursement. The underlying theory, while statutory, can be considered as equitable, inasmuch as it involves the paying of the debt of another, and subrogation is proper. The statute gives the employer a lien on any judgment recovered, and he may sue the tort feasor in his own right.

(13) A problem which has given trouble is what should be the rights of a putative wife in property which she and her "husband" have accumulated together? The marriage being void or voidable, the property shall be termed quasi-marital property, and the court can divide it according to the community property statutes. Such division is essentially equal. While a good faith belief in the legality of the marriage was formerly required, the court has done away with this need.

(14) Teachers of torts, and lawyers who specialize in tort cases, are quite familiar with efforts which have been used to overcome the defense that plaintiff was guilty of contributory negligence, and therefore not entitled to recover. The contributory negligence

137. Roe v. Workman's Compensation Appeals Board, 13 Cal. 3d 884, 117 Cal. Rptr. 683, 528 P.2d 771 (1974). This recent case presents a novel problem, namely if it happens that the employer himself is also negligent, how will this affect his right to repayment and the lien that the statute gives him. In Roe, the Supreme Court held that the wrongdoing of the employer prevented his right to be subrogated to rights of his employees. The dissenting opinion, however, insisted that this statutory right is absolute. Now, if it is not recoverable, does this mean that the injured employee simply keeps both funds? Or will he simply be entitled to one recovery to be apportioned among the two negligent parties? Of course, these are statutory problems resulting from the legislative efforts to adjust relations arising among our people. Would it be helpful to ask what would be equitable here?

141. See Restatement (Second) of Torts §§ 479-480.
rule is going the way of the guest statutes, which are being repealed by legislatures or held unconstitutional by the courts. The contributory negligence rule was originally established by courts, so it can be overruled by them. The appearance of the rule in the statutes, however, renders them less vulnerable. It is usually argued that the legislature should do the repealing. By judicial act, California has now added the doctrine of comparative negligence to the list of exceptions.\textsuperscript{142}

This is now part of the written law of California. In such a case as this, the court creates the law. It could be argued that the statute is still on the books and that the court has merely decreed a new interpretation. It is no longer an all-or-nothing law and money will change hands, in most cases. Only when a jury finds the parties equally at fault will no money change hands. This is an example of judicial law making. This type of a decision is indicative of statesmanship as well as judicial creativeness. And, of course, a court often reflects the excellent work of lawyers. The same action occurred when the court held the guest statute unconstitutional. These are situations where as Justice Cardozo expressed, “principles that have served their day expire and new principles are born.”\textsuperscript{143} So, in \textit{Ostrowe v. Lee}\textsuperscript{144} Justice Cardozo’s explanation of the difference between slander and libel, using a very short compound sentence, “The spoken word dissolves, the written word abides,”\textsuperscript{145} reflects the importance of what is set down by lawmakers in writing. It similarly reflects the creativity often necessary to overturn what was once considered important enough to be written down as law.

\begin{thebibliography}{9}
\bibitem{Li} Li v. Yellow Cab Co., 13 Cal. 3d 804 (1975).
\bibitem{Cardozo} Cardozo, \textit{The Nature of the Judicial Process} (1921).
\bibitem{Ostrowe} 256 N.Y. 36, 175 N.E. 505 (1931).
\bibitem{Jones} A classical scholar colleague commented that he was just quoting Seneca. We find him again when on the Supreme Court of the United States in Jones v. Securities Exchange Commission, 298 U.S. 1 (1935), Jones filed a petition to be authorized to issue securities. The commission thought a hearing should be ordered to examine the facts whereupon Jones decided to withdraw his petition rather than be examined. The issue was simply whether Jones should be entitled to withdraw his petition as a matter of course. Justice Sutherland, writing for the majority, decided that he could. He compared the Commissioner’s action to that of the Star Chamber of the Stuarts.
\end{thebibliography}
Nevertheless, the examination of any volume of California reports will reveal the great extent to which court decisions simply involve statutory constructions. In Volume 65 of the California Reporter, for example, (chosen at random) we find that the following codes are therein construed: The United States Code Annotated; the U.S. Constitution; Uniform Laws Annotated; the California Constitution; the Business and Professions Code; the Civil Code; the Code of Civil Procedure; the Education Code; the Evidence Code; the Financial Code; the Government Code; the Health and Safety Code; the Insurance Code; the Penal Code; the Probate Code; the Public Utilities Code; the Revenue and Taxation Code; the Streets and Highways Code; the Unemployment Insurance Code; the Vehicle Code; the Welfare and Institutions Code; the California Rules of Courts; City Charters, and County Charters. And, an examination of the cases reveals that the courts are usually construing the written laws.

The legislative impact on law is great indeed. Statutes produce generalizations which courts must apply to particular situations. In making adjustments, courts will make variations. Statutes take the place of old customs and usages, and courts must supplement statutes—the bare bones of laws—with their own law-making powers. They are still creators as a number of our ablest justices have shown. Our justices have overcome the injustices resulting from the over-use of the statute of frauds by the constructive trust or promissory estoppel. And then, too, the doctrine of stare decisis is much stronger under a common law system than under the civil law. Arbitration proceedings have been used in many areas also since the litigation method is too costly and often very slow to get results. The Commissioners on Uniform Laws have expedited the passage of statutes and have brought uniformity, a much needed uniformity for the integration of a national jurisprudence. Statutes are usually prepared by legislative committees composed by experts in the area of law involved.

CONCLUSION

The unwritten law as we have seen is a composite of many forces and influences; it is flexible, constantly being shaped according to the needs of the times. It is related that the great Joseph Choate was arguing the law to the court and a judge said, “But Mr. Choate,
that is not the law.” With great deference, Mr. Choate replied, “Pardon me, your honor, it was until you spoke.”

Life is constantly impinging on the old postulates, and old syllogisms must be constantly modified or replaced entirely. The law must have its principle of growth as well as stability. The law books are full of discarded postulates. What scientific field is not strewn with discarded postulates? Even an atom is no longer an atom. It has now been split.

The law is undoubtedly the broadest discipline extant. Every phase of human life finds its way into the law books—medicine, chemistry, physics, every form of business activity. The lawyers and judges who are the writers of the law must be able men indeed. They must be prophetic, wise, and have an ear to the trend of the times. They must realize clearly at all times that the legal profession is a public profession. Upon the profession rests the burden of protecting freedoms of enterprise, free institutions and the freedom to be wrong, always guiding the ideological struggles involved.

A number of medical students once asked about the best way for doctors to guard against unfounded suits against them. It was explained to them that they should join others in insisting that the courts remain open at all times to good faith suitors, and even to bad faith suitors if they had probable cause to believe that they had good causes of action; that unfounded law suits usually fell of their own weight; and that courts usually discover the lack of foundation for law suits. The hope of the world is in the law. The hope of man must lie in law at all levels, including the international level.

The story of law shows how much of human life and effort is wrapped up in the science of the legal structure. Any study of law shows that, after all, it simply is the story of social cooperation which enables people to live in balanced conditions of mutual understanding and adjustment. Man is the only animal that has developed his reasoning power, enabling him to overcome his physical environment. He is the only creature who handles ideas, and handling ideas always depends upon language. Without language, no system of thought can exist. The controlling element of law has always been something intangible—the need for the good, the moral government of the universe; and this is also the
basis for man's reason. It is what man has thought about. Job said: "For there is hope of a tree, if it be cut down, that it will sprout again." Man's moral responsibility has been the basis of all law, and moral law has done more for the law of peoples than any statute. The stages of man's development are fairly clear and run something as follows:

1. Hunting state—use of weapons;
2. Association of people—gave development of language and reason;
3. Use of domestic animals—meant fixed means of livelihood;
4. Cultivation of food plants—more means of livelihood;
5. Villages and towns;
6. Tribal property such as grazing grounds and hunting grounds;
7. Land becomes a private property;
8. Civilized and uncivilized groups clash;
9. Barbarians drop in on more civilized, and destroy usually the more civilized; and culture starts over again;
10. The Babylonians had a civilization of their own and they were destroyed by the Assyrians;
11. The law passed to the Hebrews;
12. Hebrew law passed through various transformations and gradually emerged out of Hebrew law the doctrine of individual responsibility;
13. The Greeks developed the city-state idea, but they never were able to develop adequate tribunals;
14. Rome comes in and sets up adequate tribunals;
15. The German barbarians again ruin everything and destroy the Roman Empire and the world is reduced to the feudal system, but out of that system emerged the modern states;
16. The Normans conquer Britain and with their genius for law begin the doctrine of separation of powers with kings, legislatures, and courts;
17. There were great struggles for supremacy among these three. It has been said that the battles for English freedom, though often apparently lost, were constantly won;
18. In 1669 the Restoration—the judges held office during good behavior;
(19) Colonies survive and the colonies begin to believe in people’s government, so people begin to charter governments instead of having governments charter liberties;

(20) The aspirations of humanity for things to come depend on law—judges and lawyers with statesmanlike vision.

Now, is there any one rubric or principle which lies at the foundation of all law? I think there is—moral responsibility. I hope that it is true that the legal judgment corresponds with moral judgment 95% of the time. Bracton spoke of the moral responsibility of kings. The parable of the good Samaritan yields its force to our theme. Man’s moral responsibility is the basic principle of all law, and the moral law has done more for law than judges and legislators have been able to do. The Indian chief told Professors Llewellyn and Hoebel:

The Indian on the Prairie, before there was the White man to put him in the guardhouse, had to have something to keep him from doing wrong. (Chief High Forehead).147

The law abounds in moral terminology, and increasingly becomes more moral; for primitive law did not search the heart very much. The quest has been for justice and right, for equality instead of priority, for curbing self-help, such as duelling, the private vengeance. We want to make sure that as civilization progresses, the amount of self-help decreases. Or we can say that self-help should vary inversely with the development of civilization. At all times an ever-increasing proportion of the people have craved for something ultimate—something good.

147. HOEBEL and LLEWELLYN, TCW (1941).