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THE MATRIX OF THE COMMON LAW*

GEORGE L. HASKINS**

Great men have admonished us never to forget the continuing relevance of history in the Anglo-American legal system. Holmes wrote that the “rational study of law is still to a large extent the study of history” because without it we cannot know the scope of the original rules.¹ Cardozo warned that in many areas “there can be no progress without history,”² that the law of real estate is incomprehensible without history.³ Maitland wrote that we have survived the ancient writs, the old forms of action, but they still rule us from their graves.⁴ Dean Pound has reminded us of the value of history in identifying traditional elements in our law to which judges customarily have recourse in defining premises and finding analogies from precedents in order to deal with new problems.⁵ We are cautioned to remember that the highly individualistic character of much of our law is explained by its Germanic rather than its Roman roots and, further, that the Anglo-American system has built upon countervailing concepts of relationships which are feudal in origin, and to which rights and duties attach without regard to the will of individuals, which is the underlying principle of classical Roman law, the only other elaborate and mature system in western jurisprudence. Thus, in our law, powers, rights, and duties stem from relationships such as principal-agent, vendor-purchaser, landlord-tenant and the like.⁶

This article is concerned with history, but less from the standpoint of narrative than to illustrate the sources and functions of one of the most powerful of Anglo-American legal institutions, the common law. It is one of the major legal systems of the world, and it is the oldest body of law common to a whole kingdom and administered by central courts with a nation-wide competence. Its traditions and its principles have afforded refuge from greed, incompetence, hatred, violence, and the tyranny of special interests. Its great political importance is apparent in the survival of its principles in the face of formidable efforts to supersede or overthrow

* This article is an expanded version of a lecture delivered before members of the Cleveland Bar Association on April 29, 1991, and is part of a longer essay on the development of the common law from the 12th to the 17th century.

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¹ O.W. Holmes, Jr., 10 HARV. L. REV 457, 469 (1896-97).

² B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 54 (1921).

³ *Id.* at 54-56.

⁴ F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW (1958) [hereinafter F.W. MAITLAND, FORMS OF ACTION].

⁵ R. POUND, THE SPIRIT OF THE COMMON LAW 20-24 (1921).

⁶ *Id.*

them, and those principles often seem to have become more firmly settled after each crisis. Its qualities of vitality and tenacity are part of its tradition, and its conveniences have been almost countless.

The term "common law" has had several meanings, changing from time to time in various periods of its long history. Yet it has had an identifiable hard core of permanence since at least the 13th century. At that time, a large body of law was becoming "common" and was being differentiated from its rivals, in the ecclesiastical courts, in the feudal courts of local lords, in the courts of the county and the hundred, and in the courts of the manor and borough. Three centuries later, St. Germain, author of *Doctor and Student* in 1523, could define the common law as the law of the king's central courts of justice, as distinguished from "baser" courts, such as feudal, manorial, and local courts.⁷ Lord Coke, in his exchange with King James I, on that memorable Sunday morning of November 1612, emphasized the constitutional aspect of the common law when he stated that it was the essence of the rules protecting individual life and property which were to be determined by the regular central courts of common law and not by the king in person or by appointees in his newly created prerogative courts.⁸

Sir William Blackstone's analysis, at the end of the 18th century, had changed little from St. Germain's when he identified common law as "that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed."⁹ Indeed it differs little from that of F. H. Lawson in a recent book in which he describes the common law as the decision of the central courts at Westminster.¹⁰ Although Blackstone had a great influence on American law after the Revolution, there were divergencies of opinion as to what was meant by the common law and to what extent it could serve as precedents for decisions in this country. Opinions varied from the full acceptance of English decisions as of a set date, and not inconsistent with local conditions,¹¹ to generalizations such as that of Chancellor Kent of New York, that the common law "includes those principles, usages, and rules of action applicable to the government and security of person and property. . . ."¹²

Misapprehensions about the term "common law" in America were clarified by Justice Holmes in a dissenting opinion in the *Black and White Taxi Co.* case,¹³ concurred in by Justices Brandeis and Stone, where it is stated:

⁷ 91 SELDEN SOCIETY, *ST. GERMAN'S DOCTOR AND STUDENT* 47 (T. Plucknett & J. Barton eds. 1974).

⁸ Summarized by POUND, *supra* note 5, at 60-61. The interview is reported in *Prohibitions Del Roy*, 12 Co. Rep. 63, 77 Eng. Rep. 1342 (K.B. 1610).

⁹ 1 W. BLACKSTONE, *COMMENTARIES* 68 (1765).

¹⁰ See F.H. LAWSON & B. RUDDEN, *THE LAW OF PROPERTY* 8 (2d ed. 1982).

¹¹ *United States v. Worrall*, 2 U.S. (2 Dall.) 384, 393-95 (1798).

¹² 1 J. KENT, *COMMENTARIES* 536 (*469) (O.W. Holmes 12th ed. 1873); cf. *Norway Plains Co. v. Boston and Maine R.R.*, 67 Mass. (1 Gray) 263, 266 (1854).

¹³ *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518 (1928).

Books written about . . . the common law treat it as a unit. . . . [as if] there were . . . a transcendental body of law outside of any particular State. . . . But there is no such body of law. . . . The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally [i.e. the law as expressed in decisions of the English courts] but the law of that State. . . . It may be adopted by statute . . . It may be changed by statute. . . . It may be departed from deliberately by judicial decisions. . . ."¹⁴

Thus, each State has developed its own "common law," partly on the basis of reception of some part of English common law decisions but, more important, on the basis of a State's own traditions and precedent.¹⁵ For example, the Supreme Judicial Court of Maine has recently made clear that the common law of that State is the accretion of and the adherence to rules and procedures identifiable in long lines of decisions reaching back to Massachusetts in the colonial and provincial periods of that Commonwealth, and developed by the Maine Court in its years of statehood.¹⁶ If the common law of Ohio is not that of New York, neither is New York law that of Illinois, but there are nevertheless common grounds, based on English law, among the States. Thus, there is a general understanding in nearly all States as to what constitute the elements of a tort, a contract, or an estate in land "at common law".

Fully as important to American law as the traditional elements of the English common law is the mode of juristic thinking inherited from the process of English decision-making which we call the doctrine of precedent. The English tradition to which we have adhered is for judges to move empirically from case to case, from one reality to another, and the concept has become a chief characteristic of the common law down to modern times.

With these two traditions in mind, special interest attaches to the beginnings of the common law. Those beginnings are to be found in history, partly in the needs and demands of successive groups and classes in society, partly in the ethical and moral ideals of particular eras. More pragmatically, however, its beginnings are to be found in two vital factors of a bygone age: the greed and ambitions of the early Norman and Plantagenet kings, and the convenience of the legal remedies that they made available to their subjects. Recently, a few scholars, notably S. F. C. Milsom,¹⁷ have taken the position that the great changes and reforms of

¹⁴ *Id.* at 533-34 (Holmes, J., dissenting) (citations omitted).

¹⁵ See generally Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6 (1910-11).

¹⁶ Bell v. Town of Wells, 575 A.2d 168, 171-73 (Me. 1989).

¹⁷ See generally S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW*, chs. 1, 2 (2d ed. 1981), and J. HUDSON, *Wilson's Legal Structure*, 59 *TJDSCHRIFT VOOR RECHTSGESCHIEDENIS* 47 (1991).

those first kings came about in the interest of strengthening the efficiency and functioning of the feudal system. That view, which is contrary to the expositions of scholars such as Maitland,¹⁸ C. H. Haskins,¹⁹ and Julius Goebel,²⁰ has won few adherents, particularly in light of the careful analyses of Richardson and Sayles²¹ and the brilliant work of Van Caenegem²² — all of whom, in one degree or another, have stressed the self-aggrandizing exploitations of the Norman and Plantagenet kings. Having imported Norman feudalism into England for purposes of effectuating their conquest, they soon began to transform it in order to centralize governmental power for their own benefit, and ultimately — within approximately 200 years — practically to destroy it.

To understand how the English common law began, how it was shaped and developed, one must go back some 900 years to the Norman Conquest in 1066. The Normans were a shrewd, dominating, ruthless, acquisitive and resourceful race. Above all, they were efficient organizers who brought with them to England few institutions of their own, but utilized to the full existing Anglo-Saxon institutions, reshaping them for their own benefit but seldom abolishing them. The first Norman kings, and their Plantagenet successors, were bent on restructuring, elaborating and refining the chief features of continental feudalism which they brought with them. Under them, from the 11th to the late 12th centuries, English feudalism became both a political arrangement and a system of government, backed by a standing military army of occupation. It became a system of law interwoven with a scheme of land ownership and tenure. In addition, it developed into a system of economy and a structure of class status based upon the kinds and types of tenure by which men held land of other persons in return for stipulated services.²³

In principle, all land was held of the king, who was at the apex of a theoretical pyramid. Thus, A, a tenant-in-chief, held of the king, who was his lord; but B, a subtenant, held of A who was B's lord. The tenant owed a service to his lord: it might be military (knight-service), it might be agricultural, or even consist of a money payment (free socage). It might be in frankalmoign lands held in free alms in return for prayers recited for the souls of the dead. Nearly every piece of land was usually held by several persons and often by different sorts of tenures, even though only one tenant would have actual possession. Thus, a chief lord might hold all his land by the service of providing one knight to the king's army, but most of it would be held of that lord by several subtenants or sub-

¹⁸ F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 23-39 (1963) [hereinafter F.W. MAITLAND, *CONSTITUTIONAL HISTORY*].

¹⁹ C.H. HASKINS, *NORMAN INSTITUTIONS* (1918).

²⁰ J. GOEBEL, JR., *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* (1946).

²¹ H. RICHARDSON & G. SAYLES, *THE GOVERNANCE OF MEDIAEVAL ENGLAND* (1963).

²² R. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* (1973).

²³ F.W. MAITLAND, *CONSTITUTIONAL HISTORY*, *supra* note 18, at 24-26, 30-32.

subtenants in agricultural or socage tenure. Then, further down the social scale, was a supporting manorial organization consisting of the large but anonymous mass of nonfreemen. Yet each manor was a part of some feudal domain and in the jurisdiction of some lord, from the king down. These various interlocking tenures provided at least three basic needs: a standing army for the new military occupation, revenues in the form of agrarian produce, and various special services according to the rank or wealth of the lord and tenant.

As an incident of property tenure, every lord, particularly every chief lord, including of course the king, had a right to hold a court, and at their sessions his tenants were obliged to attend, as "suitors." There, matters of tenure and service were adjudicated, regulations made, civil disputes settled, fines and other revenues collected. Since nearly all rights and duties connected with feudalism were inextricably interwoven with the fabric of the land law, the entire system of government, central and local, was part of the law of property. What today we might call public law or public rights were then seen as private rights — even the holding of an office was viewed as an individual property right. Thus, in the Norman and succeeding periods the land law was the basis of all public law.²⁴

At one time in England, prior to the early 13th century, there was little "common law" in any modern sense. Instead, the law was customary — the custom of particular lands held by some tenure of some other person or persons. The face of England was covered with a network of intermingling feudal jurisdictions whose courts applied widely differing aspects of local customary law. In the court of each lord, which was appendant to each fief, it was the task of his "suitors" to "find" the applicable customary law and to enforce it: the suitors were not jurymen, they were "doomsmen" or judges. In the still surviving Germanic tradition "law" was thought of as a folk-way, it was not "made" but "discovered" by distilling the living conviction of the community in particular jurisdictions in particular localities.²⁵ Law was believed to be immemorial, as old as the community itself, like the boundary stone or the ancient oak tree. In reality, however, the "finding" of law and the rendering of a judgment often involved a decision as to some new procedure, and hence a displacement of existing custom. Changes were necessary because men could scarcely have lived by the rigidities, even the absurdities, of much of the ancient customary law of the clan, the family or the tribe. Yet as new law invaded customary law, it was not regarded as being changed but rather as "clarified" or "improved".

Along with the customs of local feudal courts there was the custom of the king's own feudal court, where matters affecting him and his tenants-in-chief were decided, where procedures were devised and claims settled. In his court, the use of techniques for discovery, clarification, and improvements in the law had almost limitless possibilities for the making of new substantive law within the interstices of new procedures.

²⁴ See *id.* at 538-39.

²⁵ *Id.* at 22-23.

In the course of the 12th century it became a chief objective of the Plantagenet kings, who had succeeded the first Normans, to enlarge and extend the "custom" of the king's court. They coveted for themselves control of the new feudal jurisdictions, not only as a means of enhancing their own power and obtaining a firmer grip on the entire kingdom, but also for the revenues which poured into the local feudal courts — the fines, amercements, wardships, marriages, reliefs and other payments that passed into the hands of lords from their tenants. The plan was a bold one because it involved invasions of the property rights of court-holding on the part of feudal lords and hence was violative both of customary law and of the feudal contract. As "king's law" was spread through royal orders and new mechanisms to enforce them, it began to provide innumerable conveniences not only to the king but to large numbers of his subjects. However, those innovations benefited primarily the "free-men" class, those of Norman and French descent, but slowly as the country became more English with intermarriages, the benefits spread more widely and were of increasing popularity.²⁶ Nonetheless, expansion of king's law was obviously seriously *inconvenient* to the feudal lords whose jurisdictions it displaced.

A chief basis of the power of the first Norman rulers was the preservation of the ancient English tradition of kingship, with its associations of saintliness and veneration. As the "lord of lords" the king owed much to his station, to the symbol of the crown on his head. Writers of the 12th century are full of awe for the majesty of kings and the image of divinity. The king was also *parens patriae*, a guarantor of the law with a general duty to do justice to all his subjects. By further extending the principle of the "king's peace," originally imported from Normandy as the Duke's peace, or the "Peace of God,"²⁷ he claimed jurisdiction over crime and physical wrong-doing throughout England. His position also owed much to proprietary rights derived from the extent of his own lands and revenues from them, as well as from his inexorable exaction of dues and services from his tenants-in-chief. The latter, in turn, were expected to draw upon the resources of their own feudal tenants, from whom they received stipulated services as well as revenues from the courts the tenants were obligated to attend. It was the jurisdiction of and the revenues from those courts that the Anglo-Norman kings coveted.

The extension of royal authority, which was the foundation of the common law, began its direct course in the 12th century. The process was accelerated by forceful royal orders, new court procedures, and by the expansion of existing institutions of government and the framing of new ones. At the same time the king added a growing number of personnel necessary to man them. Except for the basic rules of land-holding, fiscal arrangements, and certain court proceedings, classic feudalism was on the wane, and England was soon to become a semi-bureaucratic state.

²⁶ *E.g.*, LEGES HENRICI PRIMI, c. 6, 2a, at 97 (L. Downer trans. 1972).

²⁷ C.H. HASKINS, *supra* note 19, at 37-39.

The changes were first apparent in the enlargement of the functions of the king's court (the *curia regis*), which was at the heart of royal power. That court, like those of other feudal lords, was originally made up of the baronial tenants-in-chief, as well as important ecclesiastics and others who held directly of the king. Also included were advisors whom the king chose periodically to summon or invite. In addition, there were his "household" advisors: his treasurer; his chancellor who could read and write; together with minor officials and bureaucrats — men in almost constant attendance — who carried out basic administrative and judicial duties. Because the latter performed regularly assigned tasks and were always close to the king, the *curia* soon took two forms, of which the more important was the small "inner *curia*" which had to be available at all times to perform continuous duties — undifferentiated executive, legislative and judicial tasks. The all-encompassing large *curia*, later referred to as the Council, began to meet only for matters of general or national import.²⁸

As the twelfth century progressed into the reign of Henry II (1154-1189), royal expansionism resulted in large demands for manpower and even more for specialization. One can see that development in at least three directions. First, a few of the officials of the small inner *curia* were assigned to deal with fiscal matters, and since no system of collection and audit of accounts was possible without a court, there emerged the Court of the Exchequer.²⁹ Second, for judicial business, some officials were directed to follow the king in his peregrinations about the country. These men stood on a special footing and soon became the principal officials of the Court of King's Bench.³⁰ Third, others were directed to remain at Westminster and be available continually to hear cases at a "fixed place." They formed the nucleus of the Court of Common Bench.³¹ Those who manned these offshoots of the *curia* were the chosen associates of the king. Justice was delegated to appointees who were becoming trained administrators, with full powers to act in the place of the king himself and applying "king's law" as it expanded in the new tribunals. Justice was thus ceasing to be feudal in the old sense of chief barons, ecclesiastics, and other suitors meeting to "find" the law and adjudge cases.

In addition to the proliferation of tribunals resulting from differentiation of functions, the Plantagenet kings early hit upon the device of using non-feudal instrumentalities to help displace the autonomy of feudal lords in judicial and other matters affecting the interests of the king. One of the earliest of these instrumentalities was the special commission, consisting of royal appointees sent out into the country, at first on no regular

²⁸ G. ADAMS, *THE ORIGIN OF THE ENGLISH CONSTITUTION*, 344-46 (1912).

²⁹ J. JOLLIFFE, *THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND* 186 (4th ed. 1961).

³⁰ 1 SELDEN SOCIETY, *SELECT PLEAS OF THE CROWN* xii-xvii (F.W. Maitland ed. 1887).

³¹ 55 SELDEN SOCIETY, *1 SELECT CASES IN THE COURT OF KING'S BENCH UNDER EDWARD I* xxxvii (G. Sayles ed. 1936).

schedule, but to act for and in place of the king on some assigned judicial or administrative task. Immediately, these officials availed themselves of a device which was a revised version of the Norman inquest, and which was one of the few institutions brought over to England.³² Predecessor of the sworn jury, it was employed at least as early as the Domesday survey of 1086, when local men, locally informed, had testified under oath as to rights in land throughout England.³³ In the reign of Henry II, when special commissions became institutionalized, they evolved in one important direction as the itinerant justices in eyre, who began to ride a regular circuit in several counties, making inquiries of local men, receiving factual testimony on behalf of the king, and making themselves available for any royal business that their presence demanded.³⁴ Acting *in loco regis*, these justices were also professionals, skilled in the king's law like those who manned the Exchequer, the King's Bench, and the Common Bench.

Against the foregoing institutional background, one can perceive the importance of the methods already referred to by which the twelfth century kings, particularly Henry II (1154-1189), extended the royal administrative and judicial authority. Chief among those methods was the vastly increasing use of royal writs, which were the essential vehicles for bringing litigation before the king's courts and for changing traditional customary law into a law that was to become common to the entire realm. A royal writ, though similar in form, was more powerful and threatening than any writ which even an important tenant-in-chief could send forth.³⁵ In form, it was usually an order relating to some aspect of litigation. Multiplying in numbers as time went on, and issued in return for a money payment, these writs soon provided litigants who were not even the king's primary tenants with access to judgments that were more speedy than those available in local feudal courts, judgments that were immediately enforceable by fine or threat of contempt. Royal centralization resulted in increasing amounts of litigation, which normally would have originated in local courts and been decided there, coming before royal justices.³⁶ In addition, regular use of the writs of *pone* and *tolt* brought up cases from the ancient courts of the county and hundred.³⁷

Several royal writs had a very wide reach, and of these three types were of particular importance: those which extended the king's jurisdiction into the courts of lesser lords, those which removed cases from a competing feudal or local jurisdiction, and those which permitted or facilitated an "appeal" from a lower feudal jurisdiction.³⁸ Most of the early

³² C.H. HASKINS, *supra* note 19, at ch. 6.

³³ See J. ROUND, *FEUDAL ENGLAND* 133 (1964).

³⁴ J. JOLLIFFE, *supra* note 29, at 193-95.

³⁵ See e.g., J. GOEBEL, JR., *supra* note 20, at 29.

³⁶ Particularly through use of the writ of right, the writ of debt, and the *praecipe*. F.W. MAITLAND, *EQUITY* 319-20 (A. Chaytor & W. Whittaker ed. 1913); see also, F.W. MAITLAND, *FORMS OF ACTION*, *supra* note 4.

³⁷ See generally 2 F. POLLOCK & F.W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 666-68 (1895).

³⁸ See *id.* at 62-63, 69-70.

civil cases concerned land or related to land. If the king were not the immediate lord, he had, or would allege, some financial interest in the law suit; but failing that, he could fall back on the principle that, as the lord of lords, he had supervisory judicial authority over lower feudal courts.³⁹ Where freehold land was concerned, it was early established that a plaintiff who was not even a direct tenant of the king could prevent the lord himself from hearing the complaint in his own court until a royal writ had set the process in motion.⁴⁰ It is noteworthy that the king's jurisdiction seems to have been based not on the wrong done to the plaintiff, but on disobedience to the king's command which was behind the entire process of royal expansion.⁴¹

Other writs proved available for what we would probably term "review" but which, for the lack of understanding of that modern concept in medieval times, was one of deliberate transfer to the king's court for "false judgment" rather than a genuine appeal.⁴² Another and more commonly used writ was the writ of error, which made its appearance a generation or so later. This writ would issue after judgment, to supplement or amend defects and errors of the king's justices.⁴³ Essentially, it was an order to specified royal judges to examine the record and either affirm or reverse a judgment. As a *certiorari* to bring up the record, the writ also operated as a *supersedeas* to stay proceedings on the original judgment. It should be emphasized that most of these writs involved the use of a record, which was a primary tool of royal justice and its extension. The greater certainty of written words backed the power and prestige of the king's orders. The importance of records and recordation will be discussed below.

Contemporaneously with the expanding use of royal writs was the introduction of various "assizes" — hearings before one of the special commissions referred to but responding to writs ordering inquests, later juries, of local men in the counties to find the truth about some alleged fact, usually relating to possession of land, and to present the finding to the king's justices.⁴⁴ Trial of many such matters would normally have been in the court of a feudal lord, with the outcome to be decided by wager of battle, but a litigant could avoid that procedure and put himself on the "grand assize," which would then inform the king's justices as to who had the better right.⁴⁵ Soon came the assizes of "novel disseisin" and of "mort d'ancestor," ordering a panel of local men to report facts about recent possession to the king's itinerant justices so as to have restored

³⁹ F.W. MAITLAND, *EQUITY*, *supra* note 36, at 319-20.

⁴⁰ F.W. MAITLAND, *CONSTITUTIONAL HISTORY*, *supra* note 18, at 111.

⁴¹ F.W. MAITLAND, *EQUITY*, *supra* note 36, at 319-20.

⁴² GLANVILL, *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND* 101 [vii, 9] (G. Hall trans. 1983).

⁴³ See examples in J. GOEBEL, JR., *supra* note 20, at 128-29.

⁴⁴ See *id.* at 130.

⁴⁵ See generally GLANVILL, *supra* note 42, at 26-29 [II, 4-7].

promptly the "recent" and hence more lawful possession of the disseisee.⁴⁶ The speedy procedure was in marked contrast to the slow and cumbersome proprietary action known as the writ of right, which determined full rights in the land, as distinguished from recent possession.⁴⁷

At this point it should be recalled that early in the Norman period the bulk of the law was regarded as customary, to be "found" and not "made". Yet, well before the reign of Henry II, the king's orders had begun to alter ideas about a rigid or customary law as a result of new procedures initiated by writ which had begun to spread king's law throughout England. Glanville's treatise on the Laws of England, written toward the end of the 12th century, refers to the "laws of the realm" as if the law was indeed becoming "common."⁴⁸ As early as 1201, there are official references to the "law and *custom* of England," and to the "*custom* of the realm."⁴⁹ Thus, the law was becoming "common" without ceasing to be "customary." However, the term "common law" itself does not seem to have been used as a term of art until the reign of Edward I (1277-1327).⁵⁰ By then it may properly be said that the law of England was to a very large extent the law administered by the king's own courts. If custom was once a folk-way it had become the way of the folk with power.⁵¹

The creation of "new" law in English feudal society was not limited to the issuance of new writs by the chancellor or periodic royal ordinances. Maitland has reminded us that in the 12th century "[a] few words written or but spoken [by Henry II] to his justices might establish a new mode of procedure,"⁵² and thus seem to be the outcome not of some special or declared ordinance but part of the traditional law.⁵³ In the 12th century, at least, it is clear that the crown *qua* crown possessed and exercised a vast power similar to legislation "that persistently interfered with or changed the course of procedure or individual rights."⁵⁴ Yet, a hundred years later, as Maitland writes, the king's mere word cannot make law.⁵⁵ Nevertheless the process was not limited to the king's courts. What was clearly "new" law was constantly being made not only there but in lower feudal courts, in boroughs, and in the chapters of ecclesiastical foundations.⁵⁶ Whether termed "ordinances" or "judgments," they set forth rules

⁴⁶ 2 F. POLLOCK & F.W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 145-48 (1895). The thoughtful suggestion that the assize may have originated with the advisers of Henry II, from Sicily and hence Islamic law, is explored by Makdisi, *An Inquiry into Islamic Influences during the Formative Period of the Common Law*, in *ISLAMIC LAW AND JURISPRUDENCE* 135 (N. Heer ed. 1990).

⁴⁷ 2 F. POLLOCK & F.W. MAITLAND, *supra* note 37, at 47-52.

⁴⁸ GLANVILL, *supra* note 42, at *Prologue* 1-3.

⁴⁹ *E.g.*, 62 SELDEN SOCIETY, *INTRODUCTION TO THE CURIA REGIS ROLLS, 1199-1230 A.D.* 27 (1200 A.D.), 379, 404 (1201 A.D.) (C. Flower ed. 1944).

⁵⁰ See *Hellis v. Sandwich*, reprinted in 29 SELDEN SOCIETY, 3 *THE EYRE OF KENT* 43 (W. Bolland ed. 1913).

⁵¹ J. GOEBEL, JR., *FELONY AND MISDEMEANOR* 231 n.80 (1976).

⁵² 1 F. POLLOCK & F.W. MAITLAND, *supra* note 46, at 136.

⁵³ *Id.*

⁵⁴ J. GOEBEL, JR., *supra* note 20, at 154.

⁵⁵ 2 F. POLLOCK & F.W. MAITLAND, *supra* note 46, at 181.

⁵⁶ Extensive references to sources may be found in J. GOEBEL, JR., *supra* note 20, at 155-57.

that were more than statements of prior custom. They were not merely "improvements," they were genuine changes which were prospectively valid.

The principal writs earlier referred to, and the machinery of the new courts for effectuating their purpose, provided procedures that seemed to have few bounds. However, as the 13th century progressed, objections to the creation of new writs and extensions of the ambit of old ones began to be heard. King John had been ignoring accepted procedures and abusing the use of available writs such as the *praecipe*.⁵⁷ The chief barons of the realm, prompted in part by their success in obtaining Magna Carta in 1215 and in running the government during the minority of Henry III, thereafter sought continued and more enduring power as a reformed Council.⁵⁸ At an earlier time, the king had consulted periodically with the barons who were his tenants-in-chief on matters of national importance, but the strength of his royal prerogative seems nevertheless to have been paramount. By the late 1250's, however, the power of the magnates had become institutionalized to the point that in the Council they could insist on a share, through counsel and consent, in the governance of the kingdom.⁵⁹ Among their complaints was that the multiplication of new types of writs was becoming an abuse of the law of the realm and should not be issued by the chancellor at his or at the king's pleasure.⁶⁰ Ultimately responding to that complaint was the enactment of the Statute of Westminster II (1285), in which Chapter 24 prohibited the framing of entirely new writs, unless they were *in consimile casu*, that is, of a type similar to those already in use.⁶¹ Thereafter, proceedings in the king's courts were threatened by demands for increasing formalism and inflexibility, and the possibilities of "inconvenience" in the king's courts began to loom.

The growing powers of the Council, which by the reign of Edward I included the most outspoken of the baronial tenants-in-chief, as well as professionals belonging to the small "inner" *curia*, had four consequences of importance. First, the writ system ceased to expand rapidly. So closely were the procedures of "king's law" tied to the writ system, which provided the warrant for jurisdiction, that redress without writ was impossible — "no writ, no right." Second, the partial closing of the writ window meant that the king felt obliged to resort to new devices, such as expanded use of the prerogative writs of *mandamus* and *quo warranto*,⁶² in order to

⁵⁷ See generally F.W. MAITLAND, CONSTITUTIONAL HISTORY, *supra* note 18, at 93.

⁵⁸ G. SAYLES, THE MEDIEVAL FOUNDATIONS OF ENGLAND 420-21 (2d ed. 1950).

⁵⁹ G. HASKINS, THE GROWTH OF ENGLISH REPRESENTATIVE GOVERNMENT ch. 2 (1948).

⁶⁰ W. MCKECHNIE, MAGNA CARTA 346-47 (2d ed. 1960).

⁶¹ STAT. WESTMINSTER II c.24, 13 Edw. I [1285], 1 Statutes of the Realm 83, *quoted in* J. GOEBEL, JR., *supra* note 20, at 82; 57 SELDEN SOCIETY, 2 SELECT CASES IN THE COURT OF KING'S BENCH UNDER EDWARD I lxxxviii (G. Sayles ed. 1938).

⁶² See J. GOEBEL, JR., *supra* note 20, at 131-32.

continue his process of consolidation and expansion. Third, the royal judges, in turn, became adept in the use of the old writs to provide new remedies in the courts. Fourth, with the emerging needs for remedies to meet the problems of an expanding commercial society in the 13th century, new, more available, and more flexible methods had to be found to take the place of writs which were not available. One such remedy lay in informal petitions known as "plaints," first presented to the itinerant justices in the mid-13th century, later to the king, or to his Council, to complain of a lack of remedy.⁶³

These petitions that sought such relief involved questions of property, franchises, disputes between merchants, a widow's dower, and seemingly countless wrongs for which no ready or speedy remedy was available in the regular courts.⁶⁴ Often a petitioner complained that justice had been denied by a royal officer, or that his adversary was too powerful and the complainant poor. Generally, if a petition had merit, relief was forthcoming.⁶⁵ So popular did this procedure by bill become, and so great were the number of petitions presented to the Council, especially in time of parliament, that a special panel was required to hear and act on them. Indeed, this function was a primary root of Chancery jurisdiction.⁶⁶ These practices ultimately became antecedents of the petitions presented to the Tudor Council and to its offshoots in the royal prerogative courts such as the Star Chamber, the Court of Requests and the like, but for the time being many of the inconveniences of the common law procedures were being remedied directly by the king in his Council through their officials.

The demands made by baronial tenants-in-chief for assurances that customary law would be observed were partly responsible for the development of written law, as distinct from the recorded judgments of the regular courts. This type of law, which today we would call legislation, emerged as a distinct form in the reign of Edward I. With it appeared a relatively new word — "statute" — which was soon to become a word of art.⁶⁷ Statutes must be distinguished from temporary ordinances, and particularly from the recordation of judgments in the king's courts and tribunals. When portions of established law were first recorded, as in the case of Magna Carta, such writings were accorded a special status as confirmations of existing custom, of which they were seen as only a fragment. Thus a tradition developed that the early statutes merely recorded

⁶³ See generally, L. EHRlich, *PROCEEDINGS AGAINST THE CROWN 1216-1377* (1921).

⁶⁴ For the general background of these petitions presented in parliament, see Haskins, *The Petitions of Representatives in the Parliaments of Edward I*, 53 *ENG. HIST. REV.* 1 (1938).

⁶⁵ See *id.* at 7.

⁶⁶ F.W. MAITLAND, *SELECTED ESSAYS 13-28* (H. Hazeltine *et al.* ed. 1968).

⁶⁷ G. HASKINS, *THE STATUTE OF YORK AND THE INTEREST OF THE COMMONS* 39-40 (1935).

existing law, even when in fact they were innovative.⁶⁸ Yet the fact that the early statutes were in writing, and formally recorded in a special collection, gave them a validity that marks the threshold or dividing line between customary law that had special sanction and law that was innovative in the modern sense of legislation.⁶⁹

Although many of the early statutes were indeed solemn declarations of old law, more often, as the reign of the first Edward proceeded, they did in fact create new law, as indicated by the Statutes of Westminster II, Mortmain, *De Donis* (the new estate in fee tail) and *Quia Emptores* (the "end" of subinfeudation). The hallmark of the new statute was its permanence, it was "forever," as contrasted with temporary measures or regulations contained in ordinances.⁷⁰ Indeed, several of them survive in the United States today. Their pedigree was royal, but their approval was commonly stated or deemed to have been with the consent of the Council, the large *curia*, which was increasingly referred to as the "community of the realm."⁷¹ Moreover, in form they were generally of wider application than the temporary regulations usually contained in ordinances, which the king or his Chancellor could still promulgate or rescind.⁷²

Occasionally, a statute was the result of a petition from some group or groups, the outgrowth of the older practice of petitioning the king or his itinerant justices for the redress of grievances which had not been or could not be redressed elsewhere.⁷³ More commonly, statutes reflected wide consultation, as in the case of those which radically altered aspects of the land law.⁷⁴ Sometimes a statute was drafted by royal judges, yet even in the mid-14th century, it was presumed that the king was the legislator, not parliament, which by then had become part of the enacting process.⁷⁵ There are also indications that at that time it was considered to be the task of the judges to interpret statutes, to integrate new law with the old, and to assure that statutes in derogation of established common law were declared void.⁷⁶

⁶⁸ T. PLUCKNETT, *STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY* 30 (1980).

⁶⁹ See generally Richardson & Sayles, *The Early Statutes*, 50 *LAW Q. REV.* 201-17, 540-70 (1934).

⁷⁰ G. HASKINS, *supra* note 67, at 41-43.

⁷¹ *Id.* at 33-34, 50.

⁷² 17 *SELDEN SOCIETY*, 1 *YEAR BOOKS OF EDWARD II* 116 (F.W. Maitland ed. 1903).

⁷³ For a general discussion of the practice, and references to its beginnings, see Haskins, *The Petitions of Representatives in the Parliaments of Edward I*, 53 *ENG. HIST. REV.* 1 (1983).

⁷⁴ "Do not gloss the Statute"; stated Hengham, J. "we understand it better than you do for we made it." *Y.B. 33-35 Edw. I*, 82, *quoted in* J. GOEBEL, JR., *supra* note 20, at 160-61.

⁷⁵ See *Y.B. 22 Edw. III, Hil fo. 3b*, *quoted in* J. GOEBEL, JR., *supra* note 20, at 160.

⁷⁶ *E.g.*, G. HASKINS, *supra* note 67, at 27-28.

Lest it be thought that throughout the processes described the Norman and Angevin kings were engaged only in a systematic expropriation of the rights of their tenants-in-chief and others, five points require emphasis. First, the king was believed to have an overriding duty to administer justice to all. That duty was affirmed in his coronation oath, and it was enhanced by the uniformity, consistency and certainty with which the procedures of his law were expected to be applied. Second, the new procedures, which were developed and made available in the king's courts, strengthened a belief in their independence, even their sanctity. That belief was consonant with the medieval ideal that law should be just and right, for "law" was believed to be primary and sacred, government secondary.⁷⁷ Third, the new procedures had the appearance of practicality and reasonableness, especially those which were quietly or unobtrusively absorbed into custom. Moreover, the processes for invading feudal jurisdiction were selective, that is, in most instances "king's law" accelerated litigation in feudal courts, or gave new remedies in place of cumbersome old ones, or provided remedies where none had existed. Thus, the introduction of the assizes of novel disseisin and mort d'ancestor permitted a litigant speedily to recover possession of land. Again, it was the royal judges who fashioned a new action of battery out of trespass, and who also devised new writs of dower to protect widows.⁷⁸ Such actions were not viewed as arbitrary because they were popular, especially among those who were not the king's immediate tenants. Law, in the final analysis, depends for its effectiveness on the acceptance of those to whom it applies.⁷⁹ Fourth, a great deal of manorial jurisdiction was allowed to remain in the hands of local lords who continued to oversee the enforcement of customary law in their own domains. Fifth, the jurisdiction of the church courts remained securely entrenched, especially in matters affecting clerics, unruly behavior, and in matrimonial and testamentary causes.

That there were excesses on the part of the king is strikingly illustrated by the events preceding the agreements embodied in Magna Carta, and by those preceding the Provisions of Oxford in 1258.⁸⁰ The result of King John's arbitrary interferences with accepted procedures of due process had resulted in Magna Carta, which was a detailed formulation of the jural relationships between the king and his tenants-in-chief. That famous treaty was not so much a statement of new law as it was an affirmation of the "old" law (including many of Henry II's innovations) which was not being observed. The Charter thus bears witness to the acceptance

⁷⁷ F. KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES* 153-54 (S. Chrimes trans. 1939).

⁷⁸ F.W. MAITLAND, *FORMS OF ACTION*, *supra* note 4, at 50 (battery), 36-37 (dower).

⁷⁹ G. HASKINS, *THE GROWTH OF ENGLISH REPRESENTATIVE GOVERNMENT* 131 (1948).

⁸⁰ G. SAYLES, *supra* note 58, at 395-98, 420-27.

of new customs, as well as restorations of what had become accepted as "old" law. Of highest importance, is the clear recognition of the rule of law, to which the entire Charter bears witness.⁸¹

One may well inquire how the vast extension of royal judicial machinery in the 12th and 13th centuries was administered and financed. No simple answer can be provided, but at least four significant factors can be identified. First, the king had very large personal revenues from his own estates and from those tenants-in-chief holding directly under him. Second, he saw to it that his aides, his counselors, and other officials were well rewarded for the loyalty of their services, either in money payments or by grants of land. Third, the king's private revenues were supplemented by special "gracious aids" approved by the Council and paid for ultimately by tenants down the feudal scale. Fourth, the use of the king's process — his writs, his special commissions and his courts — although available to litigants who sought them, had to be paid for by those who wished to avail themselves of it, either for the speedier justice afforded or to avoid the ignominy of losing a trial by battle, ordeal, or compurgation in a feudal court. Those revenues were vast, and they increased steadily, so that the judicial system not only paid for itself but brought large profits. Finally, a much-overlooked source of "revenue" was the labor provided free of charge by local men at the county level at the direction of the king. This final point deserves elaboration.

As stated earlier, one of the few new institutions introduced from Normandy was the inquest, which was later to be turned into the sworn jury.⁸² As time passed, inquests, requiring local knowledge of local men, were conducted on an ever increasing scale for revenue purposes, for estimates of costs, for reports on crime, and for facts relating to the possession of land. Those burdens fell primarily on the class of freehold tenants and sub-tenants known as knights of the shire. Almost as heavily they fell also on the burgesses of the towns.⁸³ On these men also devolved the task of bearing the record of a case before the itinerant justices, or to one of the central courts at Westminster.⁸⁴ By the early 13th century, these men, although in no sense royal officials, constituted a regular and frequently used means of communication between the king and the local communities of England.⁸⁵

⁸¹ Haskins, *Executive Justice and the Rule of Law*, 30 SPECULUM 529, 534-35 (1955); G. SAYLES, *supra* note 58, at 407-08.

⁸² C.H. HASKINS, *supra* note 19 at ch. 6.

⁸³ W. STUBBS, SELECT CHARTERS (5th ed. 1884); G. HASKINS, *supra* note 79, at 50.

⁸⁴ G. HASKINS, *supra* note 79, at 50, nn. 11-13.

⁸⁵ *Id.* at 48; G. ADAMS, *supra* note 28, at 321-22.

These services were unpaid, and they were rendered at the king's command.⁸⁶ Indeed, they provided an early but rigorous form of compulsory self-government.⁸⁷ The expense to the counties and towns who footed the costs, as well as to the individuals who performed the duties, was obviously great, and the king's insistence on their performance was frequently complained of as an abuse and too burdensome, but to no avail. If the record was not brought on the appointed day, a fine or penalty would be exacted from the county or town.⁸⁸ Nevertheless, they became an integral part of the system of "king's law," especially through service on juries, through their fact-finding missions, and through the duty of bearing the all-important record to designated courts. These compulsory duties are examples of the *inconveniences* of the common law, in the sense that they were onerous insofar as the local freemen and the knights of the shire were concerned. On the other hand, by aiding the machinery of law and administration, they were instrumental in extending king's law and making its *conveniences* available at the local as well as the national level.⁸⁹

The processes of legal development, as distinguished from its course, are implicit in the preceding discussion, but three of them deserve further emphasis. First was the continued use of the concept of "custom," which has been constantly referred to in order to illustrate how "king's law" infiltrated older procedures and intruded on feudal jurisdictions. Despite inherited ways of thinking about law as being discovered or found but not made, from the 12th century on "new" law was constantly made and introduced either by royal fiat or by writ. Thus, as earlier stated, law became common without ceasing to be customary. The process was facilitated through the expansion of conciliar functions as well as by the creation of non-feudal institutions. Moreover, new offices, such as those of the the justices of the peace, were created, and new duties were found for the older offices of the coroner and the sheriff.⁹⁰

A second process of legal development was enactment — at first the affirmation of old law, and then the beginnings of a conscious creation of new law in the form of the statutes which appeared in the reign of Edward I and were to become a dominant feature of the maturing legal system.

Roots of a third process have been apparent in the preceding discussion: the importance of records and recordation throughout the entire judicial system, slowly leading towards a concept of precedent, which was to

⁸⁶ G. HASKINS, *supra* note 79, at 48-49.

⁸⁷ *Id.* at ch.3.

⁸⁸ *Id.* at 51.

⁸⁹ When the house of commons had "won the initiative" by the early 17th century, those forced duties had prepared them for self-government in a way not then apparent in other European countries. *Id.* at ch. 3.

⁹⁰ See the summary of sources in J. GOEBEL, JR., *supra* note 20, at 57-61.

become a principal characteristic of the common law down to modern times. Precedent, unless embodied in immemorial custom, is essentially dependent on records. In the 12th and 13th centuries, records of a judgment in the king's courts, or of a settlement made there with a record of the proceedings, had great evidentiary importance because they spoke authoritatively on the issues involved. Local feudal courts seldom kept records of judgments, which were usually oral and hence lacked both certainty and authority. The advantage of a record from the king's court was that it was official and was backed by the prestige of the king: no one could traverse the king's record. Moreover, the records were carefully preserved in collections that have survived till today — in the rolls of the Exchequer, King's Bench, Common Bench, justices in eyre, coroners' rolls, etc., and men could turn to them to prove the outcome of earlier litigation.

Until the time of Edward I, the chief forms of recorded law affected primarily individual privileges or rights, as in the case of judgments or local charters.⁹¹ However, to the extent that judgments contained definitions of individual rights and privileges as well as pleas, they could provide "models" and hence help to explain how a judgment had been reached under early circumstances.⁹² That feature not only gave heightened importance to recordation but could provide a root of *stare decisis*. Because royal records could speak authoritatively to the reasons by which a conclusion was reached, the official mind began to cross the line between *res judicata* in a decided case and *stare decisis* as precedent for future cases. When Year-Book reporting began at the end of the 13th century, the manuscripts were available to the royal judges, whose search for precedents grew to become a habit of mind and a mode of thought. Thus, in 1356, one of the judges stated, "I think you will do as others have done in the same case, or *else we do not know what the law is.*"⁹³ In this way, decided cases became part of the accretions absorbed into the common law.

By the mid 14th century, the common law had largely won its battles against feudalism, which in fact, though not in form, was dead. Not only had the royal courts established that its "conveniences" were protective of individual rights, but, ironically, the common law had come to subject the king himself to confining rules of due process which he and his predecessors had helped to create. The "rule of law" had clearly become the rule of writs.⁹⁴

⁹¹ H. STEINACKER, *JAHRBUCH DES VEREINS FÜR LANDESKINDE VON NIEDEROSTERREICH* 261 (1917).

⁹² Sources in Fitzneal's *Dialogue of the Exchequer*, Bracton's *De Legibus*, and others can be found in J. GOEBEL, JR., *supra* note 20, at 140-47.

⁹³ Langbridge's Case, Y.B. 18 & 19 Edw. III (Rolls Series) 379, in J. GOEBEL, JR., *supra* note 20, at 150 (emphasis added).

⁹⁴ 2 POLLOCK & MAITLAND, *supra* note 37, at 561.

Weaker kings followed Edward III, and the structure of medieval society began to break down. The succeeding century and a half was an age of uncertainty, of conflicting ideals and sentiments, characterized everywhere by deterioration in fundamental values. The central judicature began to lose its independence, as officials became corrupted and judgments were frequently falsified.⁹⁵ For a society in which grazing had supplanted the agriculture of the feudal state, and where the awesome consequences of the Black Death were still felt, the ancient writs were cumbersome and their procedures lengthy. Some remedies for growth were provided by the courts through the use of fictions, as in contracts made enforceable in an action of trespass by allegations of consideration where none existed,⁹⁶ and in the barring of entails by use of the common recovery.⁹⁷ But those changes had come slowly and, on the whole, were inadequate. The situation boded ill for the old conception of courts which defined the rule of law in the face of emerging theories of royal sovereignty. To Henry VIII (1509-1547) and later to his daughter, Elizabeth I (1558-1603), fell the task of restoring civil order and resuscitating the economy after years of disastrous internal strife. This they achieved with extraordinary success by ignoring the medieval constitution represented by the common law and fostering ideals of absolutism which surpassed anything yet witnessed in English history.⁹⁸

Throughout England, a deep-rooted conviction had developed that a strong executive was needed and that the sovereign must therefore have very broad powers. Not only did Henry VIII, and then Elizabeth, pursue their ends with a blizzard of statutes affecting the poor, the laboring classes and uniformity in Church discipline, they sought new courts for prompt action in the direction of "social" liberty.⁹⁹ Slowly, what may be called executive justice, administered in newly established prerogative courts, such as the Star Chamber and the High Commission, began to take over large areas previously reserved to the common law courts. The Tudor sovereigns were seen at first to be the benevolent guardians of social as well as individual interests, and, with their new courts, were likewise seen as guardians who had power to do freely whatever in their judgment they or their delegated officers deemed proper or expedient.¹⁰⁰ The common law courts were not annihilated but were systematically side-stepped, as the day-by-day settlement of countless disputes came into the hands of a newly strengthened Council and its progeny in the royal prerogative courts. The development of what was later to become arbi-

⁹⁵ J. JOLLIFFE, *supra* note 29, at 422; G. HASKINS, *supra* note 59, at 113.

⁹⁶ R. POUND, *supra* note 5, at 168-69 (contract out of trespass and alleged breach of the peace).

⁹⁷ A conveyance by use of a common recovery was a fictitious law suit to convert a fee tail into a fee simple. There are other examples of fictions, e.g., in ejectment, conversion — all "collusive" law suits.

⁹⁸ For a brief summary, see J. GOEBEL, JR., *supra* note 20, at 183-84.

⁹⁹ See *id.* at 187-89.

¹⁰⁰ R. POUND, *supra* note 5, at 71-73.

trary power under the Stuarts was regarded complacently at first, for the newly established courts offered an alternative to, even a means of escape from, the confining bounds of the conformity inherent in the old procedures.

The story of the ultimate clash under the Stuarts between the common law and law as decreed by the king is a familiar one, with Lord Coke battling for the rule of law, and King James for the absolutist personal rule that he envisaged for the monarchy. A significant aspect of the battle thus became one between the ancient common law and the law of the royal prerogative — the rule of law in the common law courts versus executive justice applied by the king personally or by officials in his new courts.¹⁰¹ The common law judges' objections to the prerogative courts were not to the prerogative as such, for within their proper sphere the king's prerogative rights were not challenged, and there still remained in the king — *qua* king — a residuum of royal power which no one argued could be taken from him.¹⁰² Their complaint was against the *procedures* in the new courts, which ignored ancient principles that had been built into the structure of the common law.¹⁰³

However, James I, the first Stuart king, insisted that "kings were the authors and makers of the Lawes, and not the Lawes of the kings."¹⁰⁴ Since the rule of law had come to stand for protection of the rights of individuals, that concept was now brought to the fore in order to curb the pretensions of unbridled royal sovereignty and to protect ancient and established procedures in which ideas of due process — notice, hearing and written record — were deeply entrenched.¹⁰⁵ In short, judges like Sir Edward Coke were not only bent on preventing, or at least diminishing, incursions into their established positions as guardians of the common law, its certainty and stability, but on restricting the exaggerated claims of new prerogative rights by the crown. Had not the judges' views ultimately prevailed, and had not they and numerous lawyers joined to support parliament which had turned against the King,¹⁰⁶ the common law would have lost much of its pre-eminence to the claims of the prerogative courts in their efforts to carry out the evolving political theory of royal absolutism.

In order to counter the theory of the growing absolutist monarchy, resort was had to the existence of the "ancient constitution," which was a logical extension of the antiquity of the common law, for, so the argument went, the precedents and principles of that law were safeguarded both from the king's arbitrary acts and from the reach of the royal prerogative.¹⁰⁷ The

¹⁰¹ The initial stages are to be found in the Tudor period. K. PICKTHORN, *EARLY TUDOR GOVERNMENT—HENRY VII* 43 (1967). On the general problem in English history, see G. Haskins, *Executive Justice and the Rule of Law*, 30 *SPECULUM* 529 (1955).

¹⁰² *Jentleman's Case*, 6 Co. Rep. 11a, 77 Eng. Rep. 269 (K.B. 16—).

¹⁰³ See K. PICKTHORN, *supra* note 101, at 43.

¹⁰⁴ *THE POLITICAL WORKS OF JAMES I* 62 (C. McIlwain ed. 1965).

¹⁰⁵ *Prohibitions Del Roy*, 12 Co. Rep. 63, 77 Eng. Rep. 1342 (K.B. 1610).

¹⁰⁶ *Bates' Case*, 2 *Howell's State Trials* 371 (1606).

¹⁰⁷ *Case of Proclamations*, 12 Co. Rep. 74, 77 Eng. Rep. 1352 (K.B. 1611).

search for the antiquity of the constitution in the common law, as proof that the legacy of the past still existed and belonged to the present, was not merely an antiquarian search on the part of lawyers, judges and respected public men in parliament.¹⁰⁸ It was believed that if an ancient precedent could be found, it was not merely authority in itself but that the law of which it was a part was equally as old and still in force. Thus it was believed that a remote precedent connoted immemorial antiquity for an assured and established constitution.¹⁰⁹

That the common law, though antagonized politically by the crown, did not lose its inherent dominance was in large measure the result of the career and especially the written works of Coke. Of him Sir William Holdsworth has written:

His literary work gave a form to its doctrines which was at once positive, intelligible, and modern. His political career gave it a political theory, by identifying its doctrines upon matters of public law with the views of the [anti-royal] parliamentary opposition. Thus to him it is chiefly due that the victory of the Parliament meant the victory of a modernized common law, competent to guide the activities of a modern state.¹¹⁰

When Lord Coke died in 1634, it appeared for a time that his efforts had been of no avail, but after the long Civil War and the Restoration in 1660, the common law system returned, invigorated by his now highly praised works.¹¹¹

In another direction, one of Coke's most important contributions was the respect, and almost reverence, in which his writings were held by English colonists who emigrated beyond the seas. To them his works portrayed ancient concepts of fundamental law and constitutionalism in terms of property rights and associated guarantees which were not only congenial to their thinking but which would be vital in pressing the crown to recognize the colonists as having rights equal to those of Englishmen.¹¹² That influence was not only vital to pre-Revolutionary thought, exhibited in political tracts in the colonies, but helped to establish the English common law and its conveniences in America.¹¹³

¹⁰⁸ See the summary in J. GOEBEL, JR., *supra* note 20, at 241-42.

¹⁰⁹ This position is implicit in the arguments and citations in the decisions referred to in notes 105-107, *supra*.

¹¹⁰ 5 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 422-23 (2d ed. 1945).

¹¹¹ *Id.* at 493; G. Haskins, *The English Puritan Revolution and its Effects on the Rule of Law in the American Colonies*, 54 *TJDSCHRIFT VOOR RECHTSGESCHIEDENIS* (1986).

¹¹² See J. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 276 (1987).

¹¹³ See the draft list of common law rights prepared for presentation to the Continental Congress in 1774 and the final Resolution, printed in J. GOEBEL, JR., *supra* note 20 at 297-98.