



Notre Dame Law Review

Volume 15 | Issue 1

Article 4

11-1-1939

Real Natural Law: A Comparative Study

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Recommended Citation

Charles S. Lobingier, *Real Natural Law: A Comparative Study*, 15 Notre Dame L. Rev. 26 (1939).

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THE REAL "NATURAL LAW"

A Comparative Study *

"At different times, among the same people, law will be natural . . . or learned. . . . Law grows with the growth and strengthens with the strength, of the people." SAVIGNY.

"Law dwells not in a special system of decrees which foresee and define possible forms of non-fulfilment and provide appropriate barriers and remedies." MALINOWSKI.

I. INTRODUCTORY.

The phrase "natural law" which so long and so conspicuously figured in western legal terminology¹ is now quite generally discarded if not discredited.² Its association with what Maine³ terms "two legal superstitions" — the "social compact" and the "lost code of nature" — may never have been accepted by the philosophers⁴ but has contributed not a little to the result above noted.

Nevertheless I believe that we have had, and still have, a form of law which fully deserves the designation of "natural" and which modern legal anthropology shows to have been the earliest form. I refer to what is commonly called "customary

*Read before the Riccobono Seminar of Roman Law at Washington. Nov. 27, 1939.

¹ "The term 'Law of Nature' or 'Natural Law' has been in use, in various applications, ever since the . . . later Roman republic" and "has a perfectly continuous history down to the date of its greatest and most beneficent achievement . . . the foundation of modern Law of Nations by Grotius." POLLOCK, *ESSAYS IN THE LAW* (1922) 31 *sq.*

² Messrs. Wu and Liang, the brilliant young Chinese jurists, devote Book V of their collection, *ESSAYS IN JURISPRUDENCE AND LEGAL PHILOSOPHY*, to "The Problem of Natural Law," in which the six essayists (two British, three American and one German) all seem to agree that the phrase, if not the concept, has become obsolete. "It seems to have vanished from the sphere of politics as well as from positive law." BRYCE, *2 STUDIES IN HISTORY AND JURISPRUDENCE* (1901) 604. See Gurvitch, *Natural Law*, 11 *ENCYC. OF SOCIAL SCIENCES* 284.

³ *ANCIENT LAW* (Pollock's Ed.), 86.

⁴ POLLOCK, *ante* n. 1 at p. 34.

law."⁵ It deserves to be called "natural" because, like the forest, it grows without man's direct intervention.

The historical jurists⁶ were wont to compare the origin and growth of customary law with those of language, claiming for each a "natural" and parallel evolution. The comparison was criticized by Ihering;⁷ but it seems to be sound. No doubt various factors enter into the growth of each; but they are mostly "natural" factors; none is entirely a product of human will as is, for the most part, "positive" law.^{7a}

II. ORIGIN AND NATURE.

1. *In General.* To understand customary law we must first analyze custom; for, as I have elsewhere had occasion to say,⁸ "in its origin, customary law appears to be only a differentiated form of general custom." This is well illustrated by the fact that certain peoples use the same term for custom and for law,⁹ pointing backward to the time when the two were identical.

⁵ See my article on that subject in 4 ENCYC. OF THE SOCIAL SCIENCES, 662 sq.

⁶ "For law as for language, there is no moment of absolute cessation; it is subject to the same movement as every other popular tendency; and this very development remains under the same law of inward necessity as in its earliest stages." SAVIGNY, *UBER DEN BERUF UNSERER ZEIT ZUR GESETZGEBUNG UND RECHTSWISSENSCHAFT* (Berlin, 1814) Hayward's trans., 24, 27. "Through this common consciousness of *recht*, as by a common language and a common religion, people are bound together in a definite union." PUCHTA, (Hastie's trans., as) *OUTLINES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* (Edinburgh, 1887), 30.

⁷ *DER ZWECK IM RECHT* (Leipzig, 1877) translated by Lalor (Chicago, 1879).

^{7a} "*Jus positivum* was a title invented by mediaeval jurists to denote law made or established by human authority; as opposed to that *jus naturale* which was uncreated and immutable. . . . All is positive which is not natural." SALMOND, *JURISPRUDENCE* (9th., Parker's, ed., 1937) 45, citing AQUINAS, *SUMMA*, 2q., 57 (*DE JURE*), Art. 2. Austin calls positive, law "set by men to men." *JURISPRUDENCE*, 1. III. See also BROWN, *THE AUSTINIAN THEORY OF LAW* (London, 1912), 235. Bentham adopted the concept and Maine comments: ". . . the farther we penetrate into the primitive history of thought. the farther we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham determined. It is certain that, in the infancy of mankind, no sort of legislature, or even a distinct author of law is contemplated or conceived of. Law has scarcely reached the footing of custom; it is rather a habit . . . to use a French phrase, 'in the air'." *ANCIENT LAW* (Pollock's ed.) 7, 8.

⁸ *Ante* n. 5.

⁹ E. g. *zakon* among the Slavic nations; "*batason*" among the Manobos. GARVAN, *NATIONAL ACADEMY MEMOIRS*, XXIII.

According to Pollock ¹⁰

“Custom, except in distinctly technical applications which are really part of a developed legal system, seems to have no primary meaning beyond that of a rule or habit of action which is in fact used or observed (perhaps we may say consciously . . .) by some body or class of persons.”

Nor does the newest school of legal anthropologists dispute the relationship thus indicated — rather, in fact recognizes it in, justifiably, “demanding a new line of anthropological fieldwork: the study by direct observation of the rules of custom as they function in actual life.” ¹¹ The new school’s founder concedes that

“The Melanesian of the (Trobriand) region treated has unquestionably the greatest respect for his tribal custom, and tradition as such. . . . All the rules of his tribe, trivial or important, pleasant or irksome, moral or utilitarian, are regarded by him with reverence and felt to be obligatory.” ¹²

But Malinowski ¹³ protests the assumption “that all custom is law to the savage and that he has no law but his custom,” draws “a clear distinction of primitive law from other forms of custom,” ¹⁴ sets the former “apart from other types of customary rules” ¹⁵ and maintains “that the rules of law form but one well defined category within the body of custom.” ¹⁶ Thus he arrives at “a revised definition of law as a special class of customary rules,” *viz.*, those

¹⁰ FIRST BOOK OF JURISPRUDENCE (1929) 10.

¹¹ MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (London, 1926), 125. “To the old recorders what mattered really, was the queerness of the custom, not its reality. . . Many of the earlier accounts were written to startle, to amuse, to be facetious at the savage’s expense (illustrating); till the tables were turned and it is now easier to be facetious at the anthropologist’s expense.” (*Ib.* 126-7).

¹² *Ib.* 64-5, adding: “The natives . . . have to conform, *e. g.*, to a very exacting type of religious ritual, especially at burial and in mourning.”

¹³ *Ib.* 63.

¹⁴ *Ib.* 15.

¹⁵ *Ib.* 39 “The rules of law stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claims of another.” *Ib.* 55. Malinowski later expressed himself as “deeply convinced that there is one type of rules which differ, by nature, sanction, relations to human instincts and . . . to social structure, from all the other rules of conduct.” Introduction to HOGGIN, LAW AND ORDER IN POLYNESIA (1934), lxxii.

¹⁶ *Ante* n. 11 at p. 54. “They do not form this amorphous mass of tribal usage or ‘cake of custom’ of which we have been hearing so much.” *Ib.* 66.

"which curb human inclinations, passions or instinctive drives . . . which protect the rights of one citizen against the concupiscence, cupidity or malice of the other and which pertain to sex, property and safety." ¹⁸

Finally he seeks

"to show that in all social relations and in all the various domains of tribal life, exactly the same legal mechanism can be traced, that it places the *binding obligations* in a special category and sets them apart from other types of customary rules." ¹⁹

2. *Custom as Law.* Not infrequently, however, custom is termed a "source" of law. As well speak of law itself as a "source"; for custom, as thus limited above, is law — differing from other forms only in certain nonessential features.²⁰ Hence the popular notion of "savagery" as practically synonymous with anarchy, is wide of the mark.

"Our first impression, of these primitive people," writes Dr. Sollas,²¹ "is that of surprise at the extraordinary extent to which life is governed by rule. Law and order are . . . enforced as strictly as in some civilized lands. A moral code, different, no doubt, in many respects from our own, is universally recognized."

So Malinowski,²² emphasizes "the reality of law," hailing "the gradual but definite recognition that savagery is not ruled by moods, passions and accidents, but by tradition and order." ²³ To him

"The fundamental function of law is to curb certain natural propensities, to hem in and control human instincts, and to impose a non-spontaneous, compulsory behaviour — in other words to insure a type of co-operation based on mutual concessions for a common end." ²⁴

¹⁷ *Ib.* 124.

¹⁸ Introduction to HOGGIN, *ante* n. 15. Cf. *ante* n. 11 at p. 64.

¹⁹ *Ib.* 39.

²⁰ "The great bulk of the rules which determine the relations of individuals or groups to one another have, in most countries, until comparatively recent times, rested upon custom—that is to say, upon long settled practice which everybody understands and in which everybody acquiesces. In such countries customs were or are laws and need not be formally enounced in order to secure observance." BRYCE, *ante* n. 2 at II, 499.

²¹ ANCIENT HUNTERS AND THEIR MODERN REPRESENTATIVES (London, 1934), 283.

²² *Ante* n. 18 at lxi-lxvii.

²³ *Ante* n. 11 at p. 72. "Even the chief," he points out, "has to conform to strict norms and is bound by legal fetters." *Ib.* 46.

²⁴ *Ib.* 64.

This indeed, is one of the features which distinguishes man from the "lower" animals. Hence, Malinowski's definition of law, reduced to its lowest terms, is "effective social constraint."²⁵ Probably the earliest "law" consisted largely of *tabus* — prohibitions with a curse. For, according to Wundt,²⁶ "*tabu* has not merely the force of a police law; . . . it is a religious law whose transgression is eventually punished by death." Barton²⁷ tells us that "a small part of Ifugao law consists even yet of *tabus* that are arbitrary and, except in essence, unreasonable."

The effectiveness of this primitive law is further illustrated by the difficulties encountered in changing it. In Sumatra, "the chiefs have no right to repeal, alter or modify" custom; a new precedent is accepted as binding only after it has been submitted to the people of the *doosoon* (villages).²⁸ So in early Rome, any modification of *mos* (custom), such as adoption or change in the order of succession required sanction by the *comitia* (popular assembly).²⁹

The older writers on "jurisprudence" thought "judicial recognition" necessary in order that custom may become law;³⁰ but Malinowski³¹ found a people, apparently without courts, who nevertheless have an "extremely well developed" legal system — the result of a conflict between subsidiary systems, one of which ultimately became the prevailing law. It may be difficult to place one's finger upon the precise time when such triumph occurred and the prevailing system became recognized as such; but there must have been such a time. It is when

²⁵ *Ib.* 32.

²⁶ ELEMENTE DER VÖLKERPSYCHOLOGIE (Leipzig, 1912); Schnaub's trans. (London, 1916), 193, 204.

²⁷ IFUGAO LAW, University of California Pubs. in American Archaeology and Ethnology (1919) XV, No. 1, p. 13.

²⁸ FEATHERMAN, HISTORY OF THE RACES OF MANKIND (London, 1880 *sq.*) at II, 311.

²⁹ See my EVOLUTION OF ROMAN LAW (1923), 55.

³⁰ HOLLAND, JURISPRUDENCE (9th ed. 1900), 540; CLARK, ROMAN PRIVATE LAW; JURISPRUDENCE (Cambridge, 1914), I, 350-1.

³¹ *Ante n.* 11.

"there is . . . need to encroach on self-interest and inertia, to prod into unpleasant action, or thwart innate propensities" that there arise "other rules, dictates and imperatives, which require and possess their special type of sanction besides the mere glamour of tradition."³²

Other Requisites. "Canons or conditions . . . laid down by English writers³³ as to validity" (of custom), observes Clark,³⁴ "do not depend entirely on principles peculiar to English law, but on such as are fairly matter of general jurisprudence."

Naturally custom must be "established"³⁵ (accepted) before it acquires validity — *i. e.* becomes customary law. All of the customs mentioned by Malinowski are apparently of long standing; and while many of these will be discarded³⁶ as the group advances, others gain in prestige by the lapse of time. Thus antiquity comes to be regarded as a "requisite" of customary law.³⁷

³² *Ib.* 65.

³³ POLLOCK, *ante* n. 10 at pp. 281-3; SALMOND, JURISPRUDENCE (5th ed.) at pp. 140 *sq.*; 1 BLACKSTONE, COMMENTARIES, 76-78, referring to particular customs but "in part . . . also applicable to custom of the whole realm." CLARK, *ante* n. 30 at I, 403.

³⁴ *Ib.*

³⁵ "The conditions of *certainty* and *continuity* are little more than matter of definition—they are essential to any idea of custom." *Ib.* 404. "In the case of a widely-spread local custom, want of continuity would be evidence that it never had a legal existence; but it is difficult to imagine that such a custom, once thoroughly established, should come to a sudden end." MAYNE, HINDU LAW AND USAGE, (9th ed., 1922) 59.

³⁶ "There is good reason for classing together (as they are classed by Pollock) the somewhat indefinite condition of *reasonableness* and that of presumed recognition of an *obligatory character* in the custom, which is called *opinio necessitatis*." CLARK, *ante* n. 30 at pp. 404-5. *Cf.* MAYNE, *ante* n. 35 p. 61, citing *Manu Code*, VIII, 42.

³⁷ *Hindu Law*. "Nor can a family custom ever be binding where the family or estate to which it attaches is so modern as to preclude the very idea of immemorial usage." MAYNE, *ante* n. 35.

Canon Law. "The requirement of immemorial antiquity was introduced into the English law courts of the 12th or 13th century from the Canon law. . . The Canonists attempted to supply a defect of the Civil Law by laying down a fixed rule as to the necessary duration of customs. They determined that no *consuetudo* was to be held valid, as to derogate from the *jus commune*, unless it was *praescripta*, *i. e.* had endured for the legal period of prescription. *Consuetudo praescripta praejudicat juri communi*." SALMOND, *ante* n. 33 at pp. 146-7.

Anglican Law. "Very long or *immemorial* duration is an indefinite qualification which will necessarily be interpreted in different ways by different legal systems and under different historical conditions. It is generally spoken of as

III. PRECEDENT.

Précedent is the core of custom.³⁸ In most of our activities we do as others have done before, thus forming a "habit."³⁹ When a sufficient number have formed the same "habit" it becomes a "custom." Holland⁴⁰ illustrates the origin of custom by

"The mode in which a path is formed across a common. One man crosses . . . in the direction suggested either by the purpose he has in view or by mere accident. If others follow in the same track, which they are likely to do after it has once been trodden, a path is made."

So Pollock⁴¹ observes:

"It is notorious that young children will appeal to precedent in support of their requests almost as soon as they can frame a coherent sentence. They will allege, if they can, the leave of a competent authority as already had — as by offering such a plea as, 'Mamma lets me do it,' to a father's prohibition of sports threatening danger to the child or destruction to furniture. But if the authority referred to turns out (as generally happens) not to support the argument, the child's artless cunning falls back on the defence of bare precedent. 'One day I did it,' or words to that effect, are brought out with an air of perfect seriousness and confidence; and, though the plea is overruled, it is at least doubtful whether the pleader is intellectually satisfied. It may be sus-

confined, in its application, to *local* custom in England, but must surely have been, in fact, true of the general national customs recognized by the Anglo-Norman judges as prevailing throughout the realm, equally with those which prevailed only in certain parts of it." CLARK, *ante* n. 30 at p. 404.

Mohammedan Law. "It is not necessary that it should have had its origin in the time of the companions of the Prophet; but it does not appear what time must elapse before a custom will be accepted by the court." ABDER RAHIM, *MOHAMMEDAN JURISPRUDENCE* (London, 1911), 137.

³⁸ "The relationship between precedent and custom is a thorny question. . . Analytically I believe it right to distinguish the two . . . but it remains true that (they) have not always been distinguished." Jolowicz, *Precedent in Greek and Roman Law* (MS); read before the Riccobono Seminar of Roman Law, May 11, 1939. Prof. Evans, whose paper (Custom and Precedent in the Roman Lay Writers) was read on the same occasion, found it "difficult to distinguish, in many cases, between precedent and customs." But he pointed out that "the normal word for the former is *exemplum*. It seems that many *exempla* give rise to a *mos*." In other words, while one swallow doesn't make a summer, a sufficient number of precedents make a custom.

³⁹ "Custom is simply the result of the disposition to do again what has been done before. What habit is to the individual, custom is to the community." BRYCE, *ante* n. 2 at II, 499, 500.

⁴⁰ *Ante* n. 30 at p. 540.

⁴¹ *ESSAYS IN JURISPRUDENCE AND ETHICS* (London, 1882), 56.

pected that we have, in these involuntary revelations of infant logic, the true primitive form of the universal argument of archaic conservatism."

Probably no legal system has remained entirely uninfluenced by precedent; though in some it is more marked than in others.

"The force of habit, the awe of traditional command, and a sentimental attachment to it, the desire to satisfy public opinion — all combine to make custom . . . obeyed for its own sake. In this the 'savages' do not differ from the members of any self-contained community with a limited horizon, whether this be an Eastern European ghetto, an Oxford college, or a Fundamentalist, Middlewest community."⁴²

Semitic. Accordingly in the earliest legal system—the Babylonian — of which we have even fairly complete records,

"The laws of both peoples (Sumerian and Semite) are based upon a long history of case decisions and hence the Sumerian word for law means a judgment made known. . . . Long before tablets of Sumerian law codes were discovered,⁴³ a great many Sumerian legal decisions or rulings on disputes by Sumerian law courts, were known. We now possess about sixty well preserved documents of this kind, all from Lagash of the period of the Ur dynasty (B. C. 2474-2357)."⁴⁴

Speaking of the legal precedents in the Pentateuch, Sulzberger⁴⁵ observes

"In each the facts are narrated and the principle of the decision announced for guidance in the future. They constitute what we call case law as distinguished from statute law and what the Hebrews call *Talmud* in contradistinction to *Mishpatim*⁴⁶ or *Torah*."

Rabbi Jehuda (Judah, ca. 200 A. D.) is credited with the compilation, in its present form, of the Mishna, or "author-

⁴² MALINOWSKI, *ante* n. 11 at p. 52.

⁴³ "The newly discovered Sumerian law code is entitled, 'The Decisions of Nisaba (goddess of writing) and Hani' (lord of the seal)." EDWARDS, *THE WORLD'S EARLIEST LAWS* (London, 1904), 60.

⁴⁴ Langdon, *The Sumerian Law Code Compared with Hammurabi's*, *JOURNAL ROYAL ASIATIC SOC.* (1920), 490-1. Cf. JOENS, *BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS* (New York, 1904) 39, where he speaks of the "large number of legal decisions which recorded the ruling of some judicial functionary on points of law." See also his Ch. VI.

⁴⁵ *ANCIENT HEBREW LAW OF HOMICIDE* (Philadelphia, 1915), 9.

⁴⁶ See WALLIS, *GOD AND THE SOCIAL PROCESS* (Chicago, 1935), 17. Cf. 9, 12.

ized codification of the oral or unwritten law,"⁴⁷ which afforded the text of the Talmud, and is said to have

"arranged the heterogeneous mass of upwards of 4,000 traditional *Hulakoth* or *Mishniyoth* (precedents, doctrines) into six *Sedarim* (categories, orders), which he subdivided into sixty-three *Mesikthoth* (treatises) and then into 523 *Perakim* (fragments, chapters)."⁴⁸

Says Sulzberger,⁴⁹

"The memory and results of this steady accumulation of case law, during a period of perhaps fifteen hundred years, are preserved to a small degree and to a much greater degree in the Talmud."

For

"In Rabbinic teaching, precedent reigned supreme. . . . The predominant *formulae* of the Talmud are appeals to the assertions of Rabbis"⁵⁰

Again

"Among the Arabs to this day," says Robertson Smith,⁵¹ "traditional precedents are the essence of law and the *Cadi* is he who has inherited a knowledge of them."

Chinese. "From time immemorial," says a young lawyer^{51a} of that country, "China was known as a nation governed by rites and precepts." In fact, there, more than in any other country, custom rules; and, in consequence, precedent has played a preeminent part in Chinese law. Respect for it is already noticeable in Confucius, who, probably more than any other, may be called the Lawgiver of China.^{51b} And not only did he follow precedent; he made it. "A quotation from Confucius has settled many a quarrel, arbitrated many a dis-

⁴⁷ MIELZNER, INTRODUCTION TO THE TALMUD (3d. ed., 1925) 4, 5.

⁴⁸ MENDELSON, CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS (1891), 225.

⁴⁹ *Ante* n. 45, p. 9.

⁵⁰ FARRAR, HISTORY OF INTERPRETATION (London, 1886), 88.

⁵¹ THE OLD TESTAMENT IN THE JEWISH CHURCH (2nd. ed., 1902), 331.

^{51a} SHENG, (R. C. W.), Selected Cases From the Han Dynasty (B. C. 206-CHINA LAW REV. I, 437 (1924.)

^{51b} DISCOURSES AND SAYINGS OF CONFUCIUS (Ku Hung-Ming's trans., Shanghai, 1898), Ch. VII, § 34, p. 57: "On one occasion when Confucius was ill, a disciple asked that he allow prayers to be offered for his recovery. 'Is it the custom?' asked the Sage. 'Yes,' replied the disciple, 'in the Book of Rituals for the Dead it is written, 'Pray to the powers above and to the powers below.' 'Ah,' said Confucius, 'then my prayer has been a lifelong one.'"

pute."^{51c} Even today, according to the text of current Chinese Supreme Court Decisions, customs prevail "in the absence of express provisions" and "are applied to the exclusion of ordinary legal principles."

Greek. Professor Jolowicz, in his learned paper,⁵² finds, not that precedent and custom were wanting in Greek law but that when Hellas "emerges into the full light of history," the period of customary law has passed and few traces remain in the material which has come down to us. It was still found in Sparta and the orators⁵³ and philosophers⁵⁴ recognize it as a factor. Indeed Vinogradoff⁵⁵ tells us that ancestral custom formed an important part of Hellenic law. Perhaps the contrary notion has arisen from the prominence given to the Heliastic Courts of later Athens, which were like our juries and therefore unsuited for making precedents.⁵⁶

Roman. "Precedent was the very essence of Roman public life and . . . the Romans found a large place for what we may call 'precedent' in the wide sense in their legal system."⁵⁷ Throughout its existence its influence is noticeable, beginning with the interpretation by the pontiffs,⁵⁸ continuing in the praetor's edict,⁵⁹ and the *responsa prudentium* of the jurisconsults,⁶⁰ culminating in the imperial rescripts and

^{51c} HOLCOMBE, *THE REAL CHINAMAN*, (N. Y. 1895), 45.

⁵² *Ante* n. 38.

⁵³ "Demosthenes (LVI, § 48, p. 129) in the speech against Dionysiodorus, reminds his hearers that they will be legislating for the whole market and that there are numerous merchants waiting to hear the judgment." *Ib.* 3.

⁵⁴ PLATO *LAWS*, (VII, 793) "recognizes tradition as an important feature in laws." *Ib.* Cf. ARISTOTLE, *ETHICS*, NIC. 10, 9. 180a.

⁵⁵ *HISTORICAL JURISPRUDENCE* (1920), II, 75.

⁵⁶ See DORJAEN, *PHILOLOGICAL QUAR.* VII, 375.

⁵⁷ JOLOWICZ, *ante* n. 38 at pp. 12, 24.

⁵⁸ MOMMSEN, *HISTORY OF ROME* (Rev. ed. 1911) II, 213. Cf. SOHM, *ROMAN LAW* (Leslie's ed.), 62.

⁵⁹ JOLOWICZ, *ante* n. 38 at pp. 13 sq. Cf. my *EVOLUTION OF THE ROMAN LAW* (1923), 113.

⁶⁰ JOLOWICZ, *Ib.* pp. 14 sq.

other documents emanating from the emperor⁶¹ and even in actual court decisions.⁶²

Romanesque. The great dramatist makes Portia, functioning as the Duke's *delegata* in what must have been a Civil Law court at Venice, deprecate a certain course, because,

"T'will be recorded for a precedent
And many an error,
Through the same intending,
Will rush into the state."

But probably no modern, Civil Law court would accord such force to *judicial* precedent which, in that system, is termed "jurisprudence."⁶³ Indeed, the parent Civil Code even forbids judges "to lay down general rules or follow previous decisions."⁶⁴ On the other hand the force of Roman tradition is still so strong that "doctrine," consisting of the opinions of eminent commentators, and corresponding to the *responsa* of the *prudentes*, retains its authority and affords an accumulation of precedents of a different sort but highly respected.⁶⁵

Anglican. Here the Roman tradition never fully took root and that which Pollock⁶⁶ terms "an unreasoning tendency to do . . . again . . . what has been done once," is manifest at an early day. Bracton (13th Century) "collected 500 decisions from the mile long rolls of the (King's) Court and uses them as his authorities. For him, English law is already case law."⁶⁷ Later in the same century, the first of the earli-

⁶¹ *Ib.* 12 sq.; CLARK, ROMAN PRIVATE LAW (Jurisprudence), I, 352 sq.

⁶² JOLOWICZ, *Ib.* 16 sq.

⁶³ See my MODERN CIVIL LAW, Corpus Juris, XL, 1250. Cf. Gray, Judicial Precedents, 9 HARV. L. REV., 33-35.

⁶⁴ FRENCH CIVIL CODE, Art. 5 (2).

⁶⁵ *Ante* n. 63 at p. 1249.

⁶⁶ ESSAYS IN JURISPRUDENCE AND ETHICS (London, 1882), 54.

⁶⁷ MAITLAND, COLLECTED PAPERS (Cambridge, 1911) II, 444. But in another work, BRACTON'S NOTE BOOK (London, 1887) I, 40 sq. Maitland calls Bracton's *De Legibus* "a treatise on English law as administered by Pateshull and Raleigh"—two judges who sat in the courts whose decisions are the ones mainly cited. In Glanvill's book of the preceding century, "there seems to be but one reference to a decision." GRAY, *ante* n. 63 at p. 36.

est series of English law reports — the YEAR BOOKS⁶⁸ — appeared — forerunners of that enormous volume of this "case law" which already burdens our libraries but which continues to increase in every English speaking country, especially the United States, with its more than 50 "supreme" courts. Reversing the situation in the Civil Law, its "doctrine," which is all but disregarded in the Anglican, is applied⁶⁹ to a judgment or judicial opinion⁷⁰ to be followed in similar cases according to the rule of *stare decisis* (whose critics term it "precedent worship"). Thus, "in practice, if not in theory, the common law of England has been created by the decisions of English judges."⁷¹ Well did Tennyson call that country

"A land of old and sure renown;
A land of settled government
Where freedom broadens slowly down
From precedent to precedent."⁷²

⁶⁸ "In the first YEAR BOOK yet printed . . . (20 & 21 Edw. I, 1292-3) the references to decisions are few and brief. . . The last year which appears in the YEAR BOOKS is 27 Hen. VIII (1535) and of it only three terms are reported. Judicial decisions are more frequently cited. . . The practice of citation blossomed out in Lord Coke. Opening in the middle of his reports we find in the first 25 folios of the seventh volume, 228 references to cases—an average 20 times greater than that of Plowden . . . one of the most famous and accurate of reporters . . . a generation after the Year Books." Gray, *ante* n. 63 at pp. 36, 38.

⁶⁹ "Doctrine" in English law includes that part of an opinion which states and disposes of the question or questions presented by the case. Properly, no opinion should contain more; but the discursive tendency of the average judge often results in the injection of other observations and discussions. These are termed *obiter dicta* (sayings on the way) and bind no one—not even those who utter them. *Cohens v. Virginia*, 6 Wheat. (U. S.) 399 (1821). "Lawyers fully recognize that it is unsafe to rely on a general statement of law, however solemnly adopted by the court, which is not necessary to the decision." POLLOCK, *ante* n. 66 at p. 257.

⁷⁰ "We are to look farther in a case than to the judgment to find that which constitutes a precedent. It is found in the rules of law which are the foundation of a judgment. . . A case is to be regarded as a precedent when it furnishes rules that may be applied in settling the rights of parties. Those rules are to be discovered in the opinions of the judges and constitute the reason for the decision." *Dubuque v. R. Co.*, 39 Ia. 56, 79, 80 (1874).

"A decision creates a precedent whether there be an opinion or not; but unless there be an opinion there cannot be a very useful or weighty precedent." WAMBAUGH, *THE STUDY OF CASES* (2nd ed., 1894), 23.

⁷¹ SALMOND, *JURISPRUDENCE* (5th ed.), 159. But see *post note* 122.

⁷² "In the United States the general rule and practice as to the weight due a precedent in the court which made it, or in a court of coordinate jurisdiction, is substantially the same as in England. Naturally, considering the character of

It was once the theory ⁷³ that judicial decisions were merely declaratory of the law then existing. While rejecting this, Salmond,⁷⁴ along with other analytical jurists, classifies precedents into declaratory and original. But there would seem to be little use for a merely declaratory precedent (i. e., one which follows another) for, unless a decision announces new "doctrine," it can hardly be called a "precedent" at all. Nor have all precedents the same force. The decision of a court — even the highest — in another jurisdiction is no more than persuasive and even within a jurisdiction, only a decision of the court of last resort is binding on others.

IV. FORM.

By this I mean the law's medium of expression, whether by word of mouth or in writing. Of course the earliest "law" was unwritten; for law existed milleniums before invention of the graphic art. There must have been many instances of this; but one which was but recently brought to light will serve as an example. The "Iroquois Code," used by the five (later six) nations of what is now New York and Canada, was never reduced to writing by the Indians themselves but "for centuries . . . was handed down by word of mouth."⁷⁵ In Sparta, according to Prof. Jolowicz,⁷⁶ "the foundation of the state was the *retra* of Lycurgus, which was no less a statute because the Spartan lawgiver forbade the laws to be

the people, and of institutions, the weight attached to judicial precedent is somewhat less than in England; but the difference will hardly admit of any precise definition." GRAY, *ante* n. 63 at p. 40.

⁷³ WAMBAUGH, *ante* n. 70 at § 17, 18. Cf. SALMOND, *ante* n. 71 at Ch. VIII. "The theory was at first much more thoroughly believed . . . than . . . now; and, indeed it may have had a better foundation. The judges of the 13th century may have really had at their command a mine of law unrevealed to the bar and to the lay-public; for there is some reason for suspecting that in secret they borrowed freely, though not always wisely, from current compendia of the Roman and Canon laws. But that storehouse was closed as soon as the points decided at Westminster Hall became numerous enough to supply a basis for a substantive system of jurisprudence." MAINE, ANCIENT LAW, 32, 33.

⁷⁴ *Ante* n. 73.

⁷⁵ See Hewitt MSS, Smithsonian Institution.

⁷⁶ *Ante* n. 38.

written down; they were committed to memory, as indeed Justinian says."

As the rules of customary law become fixed and recognized, their expression takes the form of terse maxims which are easily committed to writing after that art is acquired. "The expression in clear and memorable sayings of the rules implied in the decisions . . . to primitive men seemed law making."⁷⁷

"The laws of the (XII) tables were of remarkable brevity, terseness and pregnancy, with something of a rhythmical cadence that must have greatly facilitated their retention in the memory."⁷⁸

"Their style is thoroughly rugged and archaic — short, pregnant sentences evidently intended for the comprehension of the vulgar and suitable for transmission from mouth to mouth, framed in the imperative mood."⁷⁹

Even so late as the youth of Cicero, he tells us,⁸⁰ they formed part of the Roman schoolboy's instruction.

According to Maine⁸¹

"The law book of Manu is in verse . . . one of the expedients for lessening the burden which the memory has to bear when writing is unknown or very little used. But there is another expedient . . . aphorism or proverb. Even now, in our own country, much of popular wisdom is preserved either in old rhymes or in old proverbs; and it is well ascertained that, during the Middle Ages, much of law and not a little of medicine was preserved among professions, not necessarily clerkly, by these two agencies. A great deal of old German law, compressed into maxims, has been preserved; and it is probable that the Latin legal maxims,⁸² well known to English lawyers, and sometimes spoken of as the quintessence of wisdom, were really aids to recollection."

Again

⁷⁷ MUNROE SMITH, *A GENERAL VIEW OF EUROPEAN LEGAL HISTORY* (New York, 1927), 290.

⁷⁸ GOUDY, 17 *JURIDICAL REV.* 100.

⁷⁹ MUIRHEAD, *ROMAN LAW*, (1916), 100.

⁸⁰ *DE LEGIBUS*, II, 28, § 59.

⁸¹ *EARLY LAW AND CUSTOM*, 9. 10.

⁸² See Smith (Jeremiah), *The Use of Maxims in Jurisprudence*, 9 *Harv. L. Rev.* 13. Cf. the present writer's "Equity," *AM. & ENG. ENCYC. OF LAW* (2nd. ed.), VI.

"In Sir William Jones's day an abridgment of Lord Coke's 'Reports' in verse⁸³ was in existence; and he gravely remarks that if the verse had been smoother and the law more accurate, every student might have been advised to use it. Now the Sanscrit law-books are sometimes in aphoristic prose, sometimes in verse, sometimes in a mixture of both; and the canon established by Max Muller is that, in India at all events, books of aphorisms are older than books of verse; and the clue being once found, many more proofs disclose themselves that Manu, which is wholly in verse, is much more recent than the Hindu law-books (such as Apastamba and Gautama which are wholly in aphoristic prose) and even more modern than books (like Vishnu and Vasishtha) which are partly in prose and partly in verse."⁸⁴

Probably all of these collections, as well as the original decalogues, existed in the form of poetry long before they were reduced to graphic form; and even when that occurred, it was not necessarily the form we know. "The Aztec law," says Featherman,⁸⁵ "was recorded in ideographic painting which served as guidance to the courts."

Maine⁸⁶ also tells us that "except this (customary) there is no . . . unwritten law;" and some have used the two terms as if synonymous,⁸⁷ but it must not be assumed that customary law ceases to be such merely by its reduction to writing. That involves a change in form only; source and sanction remain the same save in those few instances where customary law is "reenacted"—a process which adds little if anything to its validity. In three leading European countries — Spain, France and Germany — the reduction of customary law to written form was especially noteworthy.⁸⁸

In *Spain*, these compilations came to be known as *fueros*,⁸⁹ many of which appeared from the 10th to the 13th cen-

⁸³ Cf. Pollock's "Leading Cases Done Into Verse."

⁸⁴ *Ante* n. 81 at pp. 10, 11.

⁸⁵ *Ante* n. 28.

⁸⁶ ANCIENT LAW, 13.

⁸⁷ "Custom is unwritten law, peculiar to particular localities." 10 HALSBURY'S ENCYC. OF THE LAWS OF ENGLAND 218; *Lockwood v. Wood*, 6 Q. B. 50, Ex. Ch. (1844).

⁸⁸ See my CUSTOMARY LAW, *ante* n. 5; Reception of Roman Law, Nat. Univ. L. Rev., XI, No. 1 pp. 59 sq.

⁸⁹ From Latin *forum*. "Fuero is the custom reduced to writing. . . The fuero is called *jus* from use (*usus*), whence fuero is derived from forum because it is

turies. The most influential of those in France was probably the *COUTUME DE PARIS*⁹⁰ which ultimately became the basis of civilized law in *Nouvelle France and Louisiana*.⁹¹ "Of all productions of the German mind within the domain of law," wrote Henry Adams,⁹² "the *SACHENSPIEGEL*⁹³ was the purest and greatest;" and it was a compilation of *landrecht* (general customary law) and *lehnrecht* (feudal custom).

V. REPOSITORY.

By this I mean the place wherein, or the means whereby, law may be found. Among the contemporary Iboo people of Nigeria, the elders, after adopting a new rule, go home and "inform their kindred of the law."⁹⁴

"Before the invention of writing," says Maine,⁹⁵ "and during the infancy of the art, an aristocracy invested with judicial privileges formed the only expedient by which accurate preservation of the customs of the race or tribe, could be at all approximated. . . . Their genuineness was so far as possible, insured by confiding them to the recollection of a limited portion of the community."

It was Munroe Smith's view⁹⁶ "that customary law, as distinguished from mere usage, has always been developed by decisions" which "have always been determined by a relatively small number of persons." De la Grasserie⁹⁷ challenges that view. "Custom is custom," he insists. "It is neither an extension of theocracy nor anticipation of judge declared law." Still it is clear that, in its early stages, law did grow

public and manifest." MADDEN, *POLITICAL THEORY AND LAW IN MEDIEVAL SPAIN* (London, 1930), 66, 67, citing Gloss of Lopez.

⁹⁰ See Ferrierre's version (2d. ed. Paris, 1714); SCHMIDT, *HISTORY OF THE JURISPRUDENCE OF LOUISIANA*, 1 LA. L. JNL. 15, 16.

⁹¹ See my *Franco-American Codes*, 19 VA. L. REV. 351.

⁹² *ESSAYS IN ANGLO-SAXON LAW* (1876), 6.

⁹³ See Hofmeyer's 2d. ed. (1861).

⁹⁴ Meek, *Iboo Law* (In *Essays presented to Seligman*, 1934), 209.

⁹⁵ *ANCIENT LAW*, 12.

⁹⁶ *A GENERAL VIEW OF EUROPEAN LEGAL HISTORY* (1927), 296.

⁹⁷ *LES PRINCIPES SOCIOLOGIQUES DU DROIT CIVIL* (1906), reprinted in trans., *EVOLUTION OF LAW SER. III*, 577. Cf. SCHILLER, *CUSTOM IN CLASSICAL ROMAN LAW*, 24 VA. L. REV. 269.

by an accumulation of rules announced in particular cases. At first this appears to have been little more than a continuation of the function exercised by the priestly class. Thus, among the Hebrews, we behold the beginnings of *torah* (law) in decisions (*toroth*) which, according to Sulzberger,⁹⁸ "from the time when the oracle took jurisdiction of certain cases, down to the latest period when judges of ordinary law courts presided, constituted an ancillary body of oral, or common, law."

So in Rome, the pontiffs were "the repository of those primeval customs which formed the first Roman law" and threw "into the form of general rules, such applications of general custom and opinion as required declaration or penal enforcement."⁹⁹ But

"In the Roman republic the law finding power of the priests passed to secular jurists;¹⁰⁰ in the Germanic tribes, after their conversion to Christianity it passed to secular law-speakers. Neither Roman jurists nor secular law-speakers, rendered judgments . . . immediately capable of execution; but the Roman *judices* and the German folk-moots regularly took their law from these law finders."¹⁰¹

So

"in the Frankish empire the *Scabini*,¹⁰² and in Scandinavia¹⁰³ the later *lagmen* became official law-finders. The customary law of medieval

⁹⁸ *Ante* n. 45 at p. 8.

⁹⁹ CLARK, PRACTICAL JURISPRUDENCE (Cambridge, 1883), 284.

¹⁰⁰ "It was in fact, under the mixed system of customary and imperial law, that the Roman praetor effected his important evolution." DE LA GRASSERIE, *ante* n. 100 at p. 582.

¹⁰¹ SMITH, *ante* n. 96.

¹⁰² 4 ENCYC. OF THE SOCIAL SCIENCES, 664.

¹⁰³ The lagman or law-speaker was the earliest custodian of Scandinavian law. In Iceland he was "Bound, both here at the Al-Ting and at home, to say to anyone who asked him thereon, what the law commands; but he is not bound any further to give folk advice in their lawsuits. He shall also recite the Ting rules of procedure every summer and all the other law provisions he shall recite at every period of three summers, in case a majority of the law court men wish to hearken thereto; the first Friday of the Ting-session shall the Ting rules of procedure be recited, in case the law-court men have time to hearken thereto." *Gragas* (German *Graugas*) "earliest code of the Scandinavian north . . . one of the most important sources used by Wilda" (*Das Strafrecht Germanem*, 7-61). HOWARD, DEVELOPMENT OF THE KING'S PEACE AND THE ENGLISH PEACE MAGISTRACY, 1 Nebraska Univ. Studies, iii, 17.

In the final, Icelandic struggle between the native religion and Christianity "the Christian men chose as their speaker, Hall of the side; but Hall went to Thorgeir, the priest of Lightwater, the old speaker of the law, and gave him three

Germany¹⁰⁴ grew from the findings of the *schöffen*, or lay judges; doubtful cases were resolved by the adoption of a doom, *i. e.* a declaration as to the nature of the rule of customary law, after an official inquiry by the local law finders."

VI. CLASSES.

The same superficial thinking which led to the assumption that primitive man has no law, appears in the later notion that "with the description of crime and punishment the subject of jurisprudence is exhausted as far as a savage community is concerned."¹⁰⁵

But the new school points out that

"there exists a class of binding rules which control most aspects of tribal life, which regulate personal relations between kinsmen, clansmen and tribesmen, settle economic relations, the exercise of power and of magic, the status of husband and wife and of their respective families. These are the rules of a Melanesian community which correspond to our civil law," which "consists, then, of a body of binding obligations, regarded as a right by one party and acknowledged as a duty by the other."¹⁰⁶

Under the Mohammedan legal system, "custom which is recognized as having the force of law must be generally prevalent in a country."¹⁰⁷ But English writers recognize

marks of silver (the lawful fee) to utter what the law should be." (Njals Saga, reprinted in trans., 1 EVOLUTION OF LAW SER. 147).

In a later controversy, "Flosi said to Eyjolf, 'Can this be law?' Eyjolf said he had not wisdom enough to know that for a surety; and then they sent a man to Skapi, the speaker of the law, to ask whether it were good law; and he sent them back word that it was surely good law, though few knew it." *Ib.* 194.

¹⁰⁴ "In Germany, during the Middle Ages, the courts were composed of a judge (*Richter*) and *Schöffen*. The *Richter* presided, kept order and gave judgment, but on a doubtful point of law he took the opinion of the *Schöffen*. . . . They took a variety of forms . . . as general rules . . . as answers to hypothetical cases . . . as opinions in particular real cases. These last availed, it would seem not only in the cases in which they were delivered, but also as binding in future cases in the same court and, as having a weight beyond their intrinsic merits in other courts." SMITH, THE DEVELOPMENT OF EUROPEAN LAW (N. Y. 1928.)

¹⁰⁵ MALINOWSKI, *ante* n. 11 at p. 56.

¹⁰⁶ *Ib.* 58, 66.

¹⁰⁷ ABDER RAHIM, *ante* n. 37.

also "particular" customs, which include not only these local ones but also those "which obtain only within a class."¹⁰⁸

"Such," observes Blackstone,¹⁰⁹ "are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans and a variety of other matters. All these are contrary to the general law of the land and are good only by special usage; though the customs of London are also confirmed by act of Parliament."

So Salmond¹¹⁰ found that

"Much of the common law itself applies to particular classes of persons only. The law of solicitors, of auctioneers or of pawnbrokers, is of very restricted application; yet it is just as truly a part of the common law as is the law of theft, homicide or libel."

VII. SURVIVALS.

"Custom still exists in every country," said Holland.¹¹¹ Among the Ifugao, "the customary law embraces that which pertains to property, inheritance, water rights and, to a great extent, family law and procedure."¹¹² According to Maine,¹¹³

"Indian law may be . . . affirmed to consist of a very great number of local bodies of usage and of one set of customs, reduced to writing, pretending to a diviner authority than the rest, exercising, consequently, a greater influence over them. . . . The preservation, during a number of centuries, which it would be vain to calculate, of this great body of unwritten custom, differing locally in detail, but connected by common, general features, is a phenomenon which the jurist must not pass over."

According to Schiller,¹¹⁴ "all admit that in pre-classical times most of the (Roman) law was customary in origin . . .

¹⁰⁸ SALMOND, *ante* n. 33 at p. 43. *e. g.* Malinowski found "independent legal systems" for the tribal chieftain and the village headman." *Ante* n. 11 at p. 76. Cf. 46.

¹⁰⁹ 1 COMMENTARIES, 179.

¹¹⁰ *Ante* n. 33.

¹¹¹ *Ante* n. 30 at p. 57.

¹¹² BARTON, *ante* n. 27 at p. 14.

¹¹³ VILLAGE COMMUNITIES (7th ed., 1895), 52, 55.

¹¹⁴ Custom in Classical Roman Law, 24 VA. LAW REV. 275. He mentions "five situations in the (classical) private law which . . . are described as being of customary origin . . ." (1) prohibited degrees in matrimony, (2) substitution of minors as heirs, (3) "invalidity of gifts between spouses, (4) necessity of tutor's approval of pupil's undertakings, (5) solidarity of bankers in *expensilatio*." Says MUIRHEAD (*ante* n. 79, at p. 16): "We look in vain for any legislative enactment

and even in classical times some of the law was of this nature." Writing before the Soviet era, Kurkunov¹¹⁵ declared that "judicial usage, and above all, customs, play an exceedingly important part in Russia." In Scotland "we are ruled in the first place by our ancient and immemorial customs which may be called our common law."¹¹⁶

England is a country where customary law has had a unique development beyond the primitive stage. In the Saxon period law was largely customary (in fact the earliest written laws were mainly concerned with blood feud restriction) and each tribe kingdom had its own. But as the kingdom gradually merged into the general English realm, the former's legal system came to be regarded as local custom; and at least as early as the 12th century, there was no other custom than local. Glanvill¹¹⁷ mentions conflicting customs (VII, iii) and those of different localities (*ib.* v) but, apparently not the custom of England. Bracton¹¹⁸ remarks by way of introduction:

"There are also in England various and divers customs according to the diversity of places. For the English have much by custom which they have not by *lex*; as in divers counties, cities, boroughs and vills; where inquiry must always be made as to the custom of the place. . . . Custom is likewise at times, observed for law in parts where it has been sanctioned by habitual usage; and it takes the place of law; for the authority of long usage and custom is not slight."

Did this local custom ever become the custom of England? Only, it seems, when incorporated into the "Rules of the

establishing such an institution, *e. g.*, as the *patria potestas* or fixing the early rules of succession. . . . Statute (*lex*) may have regulated some of their details; but they had taken shape and consistency before Rome had its beginnings."

It can well be believed, however, that in the outset the customs in observance may have been far from uniform; that not only those of the different races but those of the different *gentes* may at first have varied in some respects, but undergoing a gradual approximation and in course of time consolidating into a general *jus quiritium*."

¹¹⁵ THEORY OF LAW (Hastings trans.), 435.

¹¹⁶ LORD STAIR, INSTITUTES, I, i, (xvi) Cf. For custom in Scots' law see LORD MACMILLAN'S INTRODUCTORY SURVEY (Edinburg, 1936) 163.

¹¹⁷ DE LEGIBUS ANGLIAE.

¹¹⁸ DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE, fol. I, 2; Woodbine's ed., II, 19, 22, following the Twiss trans.

King's Court." For "the most important of all customs," according to Pollock & Maitland,¹¹⁹ "is the custom of the King's Court . . . the custom of England," which "becomes the common law."¹²⁰ Holdsworth¹²¹ adds: "We must look to the rules of the King's Court for the foundations of the common law. "But, ask Monroe Smith,¹²² "If the English common law is not the general English custom, what is it?"

From all this we may at least conclude that "Natural Law," in considerable proportions, despite the attempts of legislatures, in various jurisdictions, to make it "Positive Law" by reenacting" it, is with us still.

Charles Sumner Lobingier.

Washington, D. C.

¹¹⁹ HISTORY OF ENGLISH LAW, (2d ed., 1923), I, 183.

¹²⁰ "Common law, which . . . comes into use in, or shortly after, Edward I," is (1) unenacted law (distinguished from statutes and ordinances); (2) common to the whole land (distinguished from local customs); (3) of the temporal courts (distinguished from ecclesiastical law). MAITLAND, CONSTITUTIONAL HISTORY, (Cambridge, 1902) 22.

"The term *jus commune* was employed by the canonists to describe the law common to the universal church, as opposed to the special laws governing the provincial churches. As adopted by the English lawyers of the 13th century, besides this implication of universality, it came to be especially opposed to that, then very scanty, species of law which is made by statute. (See Maitland in 11 ENGLISH HIST. REV. 448) Sir Frederick Pollock, in ENCYC. OF THE LAWS OF ENGLAND, s. v. 'Common Law,' cites the Dialogue of the Exchequer (ca. 1180) as opposing the *commune regni jus* to *vetus principium institutio*. The old *gemeines Deutsches recht* was Roman, as modified by the Canon law. (Cf. the use of Scots' Acts of Parliament of the 16th century) New 'common law' for the larger portion of Germany, is now provided by the codes." Holland, *ante* n. 30 at 59.

"*Leges et Consuetudinibus regni* has been a regular, collective name of English law since the latter half of the 12th century at the latest" and was an accepted name for the common law as a whole from an early time." POLLOCK, FIRST BOOK OF JURISPRUDENCE (1929), 253 sq., Cf. 1 BLACKSTONE, COMMENTARIES 67.

¹²¹ HISTORY OF ENGLISH LAW (3d ed., 1923), II, 192.

¹²² A GENERAL VIEW OF EUROPEAN LEGAL HISTORY, (New York, 1927) 282.