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## The Reason of the Common Law

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# The Reason of the Common Law

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*Although the present meaning of reason has been reduced to discrete definitions, precise interpretations did not exist in medieval England. Rather, reason was defined by its role in the adjudicatory process. During the late medieval period, reason came to embody the very essence of the common law as courts recognized that it could be used to prevent procedural rules from infringing upon substantive rights. Relying upon Year Book cases and jurisprudential works, the author describes how the chameleon-like character of reason helped to shape the medieval English common law.*

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## I. INTRODUCTION

"For nothing in the world speaks so reasonably as the Law." - Chief Justice Fyneux, commenting upon the English common law.<sup>1</sup>

The word "reason" means many things to many people.<sup>2</sup> It can mean a simple cause,<sup>3</sup> the process by which an argument is devel-

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1. Y.B. Pasch. 13 Hen. 7, f. 22, pl. 19 (1498).

2. The OXFORD ENGLISH DICTIONARY (1933 ed.) devotes nearly five pages to "reason" and derivative words such as reasoning and reasonable.

3. 8 OXFORD ENGLISH DICTIONARY 212 (J. Murray ed. 1933) (sixth definition of reason). That reason can mean a simple cause is evident in this passage from a mid-fifteenth-century English case:

John of Gaunt and Alice, his wife, were seised of the Duchy of Lancaster in Alice's right and of the honor of Bolingbroke in the county of Lincoln, which was parcel of said Duchy, of which honor the manor of Spalding (by reason of which the plaintiff claims this stray) was held in pure and perpetual aims.

Y.B. Trin. 7 Edw. 4, f. 10, pl. 2 (1467); see, e.g., Y.B. Mich. 22 Hen. 6, f. 33, pl. 51 (1443);

Y.B. Mich. 22 Hen. 6, f. 28, pl. 47 [listed as 42] (1443).

oped,<sup>4</sup> or even a fully developed argument that is used as proof.<sup>5</sup> Although reason conveyed these and other meanings to the lawyers of the medieval common law,<sup>6</sup> it also assumed a broader significance for these men. As Chief Justice Fortescue explained, "common reason is the common law."<sup>7</sup>

Unfortunately, as with so many of the complex conceptions that populate the Year Books, the lawyers who so often used "reason" never defined it. Jurisprudential works of the period, however, can provide guidance to the meaning of "reason." But one always must remember that these works concern themselves with what the law (and the role of reason in it) *should* be, and not with what it actually *was*, as practiced in the courts of the common law. Therefore, one must look to the legal dialogues recorded in the Year Books to ascertain the contours of medieval common-law reason.

When Henry Tudor ascended the English throne in 1485, three centuries of constant refinement had brought the common law of the central courts to a highly polished—and as yet unchallenged—eminence. The common law, however, was not destined to retain its medieval form for much longer. The War of Roses,<sup>8</sup> which directly preceded the rise of Henry Bolingbroke, already had prompted one of its victims, Sir John Fortescue,<sup>9</sup> to ponder in exile the bases of the English political and legal orders. With the dawn of the English Reformation several decades later came a serious challenge to the very legitimacy of the common-law system. Thus, the years of Henry VI, Edward IV, Richard III, and Henry VII offer a final glimpse of the culmination of the medieval common

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4. 8 OXFORD ENGLISH DICTIONARY, *supra* note 3, at 213 (nineteenth definition of reason). Reason can also mean an argument: "And before [Yelverton] had finished his reason, the justices got up." Y.B. Mich. 8 Edw. 4, f. 9, pl. 9 at f. 13 (1468).

5. 8 OXFORD ENGLISH DICTIONARY, *supra* note 3, at 211 (first definition of reason). Reason can constitute proof: "And divers good reasons and cases were put by the justices and serjeants." Y.B. Mich. 3 Edw. 4, f. 19, pl. 13 (1463).

6. For further uses, see, e.g., Y.B. Pasch. 5 Edw. 4, f. 26, pl. 24 at f. 27 (Long Quinto) (1465) ("The parker is bound to guard [the wild animals in a park] reasonably."); Y.B. Hil. 22 Hen. 6, f. 42, pl. 21 (1444) ("Rose, who was the wife of J.W. brought a writ of dower against W.D. and demanded her reasonable dower.").

7. Y.B. Hil. 35 Hen. 6, f. 52, pl. 17 at f. 53 (1457); *see also* Y.B. Mich. 14 Hen. 8, f. 4, pl. 5 at f. 8 (1521) (per Brooke).

8. The War of Roses (1455-1485) is the name given to a series of struggles between the Houses of Lancaster (the white rose) and York (the red rose) for possession of the English throne. Lancaster ultimately triumphed when Henry Tudor defeated Richard III on the Field of Bosworth and claimed the throne as Henry VII.

9. Fortescue was one-time Chief Justice of the King's Bench and Chancellor of England.

law. Using late medieval Year Book cases and English jurisprudential works of the same period,<sup>10</sup> this article will attempt to paint a portrait of the role of reason in the medieval English common law.

## II. THE THEORY OF NATURAL LAW

### A. *The English View of Natural Law*

Medieval western religion taught that the Christian God created the world and everything in it. The human race was of special importance to God because He had endowed it with the ability to think. This rational faculty, which St. Thomas Aquinas (c.1225-1274) alternately labeled natural law or natural reason, was "nothing other than the sharing in the Eternal Law by intelligent creatures."<sup>11</sup> Human laws, it followed, were the dictate of this reason, or natural law,<sup>12</sup> promulgated to preserve God's universal order.<sup>13</sup>

Medieval English jurists incorporated Aquinas's equation of reason with natural law into their own theoretical schemes. For example, Christopher St. German (c.1469-1539) entitled the second chapter of the first Dialogue in his *Doctor and Student*, "of the lawe of reason, the whyche by Doctoris is called the lawe of nature of reasonable creature."<sup>14</sup> Sir John Fortescue (c.1385-1479) also paid homage to both St. Thomas Aquinas and his natural-law views in both his *De Laudibus Legum Anglie*<sup>15</sup> and *De Natura Legis Naturae*,<sup>16</sup> calling the law of nature a universal rule of divine

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10. Along with Sir Thomas Littleton, Sir John Fortescue, and Christopher St. German, who are legitimately of the period under examination, consideration also will be given to other English jurists such as Richard Hooker and Sir Edward Coke, who, though writing at a later time, nevertheless shed valuable light on the medieval English mode of thought.

The views of non-English jurists such as St. Thomas Aquinas, however, will receive little overt attention. While the impact of St. Thomas Aquinas upon the works of all the afore-mentioned Englishmen was substantial, he developed his ideas in the context of a civil law, not a common law system. Therefore, his works do not have the same direct bearing on the actual practice of the English courts as do the common-law theorists.

For a comprehensive survey of Western philosophical and jurisprudential thought during the Middle Ages, see C. McLWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* (1932).

11. 28 ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* 23 (T. Gilby ed. 1966) (quest. 91, art. 2).

12. *Id.* at 25 (quest. 91, art. 3).

13. *Id.* at 13 (quest. 90, art. 3).

14. 91 SELDEN SOCIETY, *DOCTOR AND STUDENT* 13 (T. Plucknett & J. Barton eds. 1974).

15. J. FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* 39 (S. Chrimes ed. 1942) [hereinafter cited as J. FORTESCUE, *DE LAUDIBUS*].

16. J. FORTESCUE, *DE NATURA LEGIS NATURAE* 200 (Garland series 1980) [hereinafter cited as J. FORTESCUE, *DE NATURA*].

and perpetual quality, which is "the mother of all human laws."<sup>17</sup> Although Sir Thomas Littleton (d. 1481) did not choose to address the subject of natural law in his *Tenures*, Sir Edward Coke (1552-1634), commenting upon Littleton's treatise, identified "nature, or the course of nature" as one of the fountains from which Littleton drew his ideas.<sup>18</sup>

But as medieval scholars were well aware, the common-law courts "paid even less attention"<sup>19</sup> to natural law than did their civilian counterparts. The same Fortescue who praised the divine quality of the natural law, never once invoked the law of nature in any of his recorded Year Book remarks. Neither did Littleton, the other legal giant of mid-fifteenth-century England, call upon the law of nature in any of his countless court appearances. Natural law did, however, make an occasional—and thereby noteworthy—appearance in the Year Books of the late medieval period. Perhaps the most famous of these occasions is a 1468 comment by Sir William Yelverton:<sup>20</sup> "We ought to do now in this case as the canonists and civilians do when a new case occurs for which they have previously had no law: they resort to the law of nature, which is the basis of all laws. . . ."<sup>21</sup>

Taken by itself, Yelverton's remark forcefully argues for the natural-law proponents. But when viewed in the context in which it was made, this declaration assumes a new meaning. Yelverton proffers these comments nearly two-thirds of the way into a lengthy report,<sup>22</sup> and only after a protracted argument in classic common-law fashion had failed to resolve the question in dispute: Whether a defendant, in debt on an obligation conditioned to secure performance of an arbitration award, could plead supervening

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17. *Id.*

18. 1 E. COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND* (London 1628) (rev. ed. 1979).

19. 8 SELDEN SOCIETY, *SELECT PASSAGES FROM THE WORKS OF BRACTON AND AZO* 125 (F. Maitland ed. 1895).

20. Sir William Yelverton served as parliamentary representative, sergeant at law, and finally, judge on the King's Bench.

21. Y.B. Mich. 8 Edw. 4, f. 9, pl. 9 at f. 12 (1468). See also Y.B. Trin. 12 Hen. 8, f. 2, pl. 2 (1520), in which Pollard declared that "our law is founded on the law of God"; Y.B. Mich. 20 Hen. 7, f. 10, pl. 20 at f. 11 (1504), in which the court claimed that "the elder brother is bound by the law of nature to aid and comfort his younger brother"; Y.B. Pasch. 34 Hen. 6, f. 38, pl. 9 at f. 40 (1456), in which Prisot explained that "We must give credence to such laws of the church as are in ancient scripture, for this is a common law upon which all manner of laws are founded."

22. The entire report spans three separate entries—Y.B. Mich. 8 Edw. 4, f. 20, pl. 35 (1468); Y.B. Mich. 8 Edw. 4, f. 9, pl. 9 (1468); Y.B. Pasch. 8 Edw. 4, f. 1, pl. 1 (1468)—and nearly seven full folios.

impossibility as a defense to nonperformance of the condition. Because the normal method of resolution had proved thus far ineffective, Yelverton suggested that they try a new and different approach, one followed by the men of the civil law. Thus, even in Yelverton's mind, a direct appeal to the law of nature was not the normal course of the common-law courts.

That common-law lawyers were familiar with natural law, but saw it primarily as operating in some other legal system, is illustrated further by a 1473 case heard by the King's Council sitting in the Star Chamber.<sup>23</sup> In that case, a bailor sued an alien merchant, charging him with feloniously taking and converting to his own goods he held as a bailee. The Chancellor, in considering how aliens should be tried, remarked that "even though they have entered the realm, and the King thereby has jurisdiction over them to make them keep the law, it will be according to the law of nature, which is called by some the law merchant [and] which is a universal law throughout the world."<sup>24</sup> The law of nature, or the "old law," as the Chancellor called it, did make its presence directly known in England, but through the mechanism of the law merchant as practiced in the Admiralty and the fair courts, not by means of the common law as practiced in the King's Bench and the Common Pleas.

The law of nature also touched Englishmen whenever the Chancellor exercised his equity powers. Chancellor Moreton, for example, believed that regardless of what the law might be in the common-law courts, in his court the law "is, or of right ought to be, according to the law of God."<sup>25</sup> Indeed, Chancery was acutely aware that not all English law partook of the qualities of the law of nature.<sup>26</sup> According to Chancellor Stillington, "there are two man-

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23. Y.B. Pasch. 13 Edw. 4, f. 9, pl. 5 (1473). The case probably was heard while Robert Stillington, Bishop of Bath and Wells, was Chancellor. His tenure stretched from June 20, 1467 to June 8, 1473. Stillington was a doctor of civil and canon law and reputedly, one of the leading civilians of his period. See N. PRONAY, *The Chancellor, the Chancery, and the Council*, in *BRITISH GOVERNMENT AND ADMINISTRATION* 91 (H. Mearder & H. Loyn eds. 1974) (essays presented to S. B. Chrimes).

24. Y.B. Pasch. 13 Edw. 4, f. 9, pl. 5 (1473).

25. Y.B. Hil. 4 Hen. 7, f. 4, pl. 8 at f. 5 (1489). See also Y.B. Pasch. 8 Edw. 4, f. 4, pl. 11 (1468), in which the Chancellor declared, "He will have a remedy in this court, for God is the procurator of the future." Dr. Paul Brand suggests that this may be a misquotation. The Latin actually may have been "*protector fatuorum*," which translates as "protector of fools."

26. Natural law may not have even governed the entire jurisdiction of Chancery. In a 1468 case concerning a subpoena issued against three executors, the Chancellor remarked, "In an attachment I have two powers, one as a temporal judge and the other as a judge of

ners of powers and processes: namely, ordinate power and absolute power. Ordinate is where a certain order is observed, as in positive law. But the law of nature does not have a certain order; rather, [it operates] by whatever means that the truth can be known."<sup>27</sup> Mispleading and defect of form were not prejudicial in Chancery because the Chancellor could exercise absolute power.<sup>28</sup> This made it possible for no one to leave the Chancellor's court without a remedy.<sup>29</sup>

The law of nature, then, was no stranger to English common lawyers. As Christians they no doubt believed in the omnipotence of God. Furthermore, they saw that natural law operated regularly in the civil law, the law merchant, and the court of Chancery. But these lawyers did not view natural law as an essential element of their own common law. A law that had no certain order had no place in a system in which "formality is the chiefest thing."<sup>30</sup>

### B. *The Omnipotence of Natural Law*

In a system where natural law reigns supreme, men cannot "make" law. They can only declare the laws that God has already established.<sup>31</sup> Nevertheless, a certain amount of positive law-making did occur in the late medieval common-law courts. In 1468 Yelverton declared that "if we are to make a positive law on this point, we ought to see what is the most necessary to the common weal and make our law accordingly."<sup>32</sup>

At the close of the sixteenth century, Richard Hooker (1554-1600) also maintained that Englishmen were capable of making a certain type of positive law.<sup>33</sup> Although Hooker undoubtedly for-

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conscience." Y.B. Trin. 8 Edw. 4, f. 5, pl. 1 at f. 6 (1468).

27. Y.B. Pasch. 9 Edw. 4, f. 14, pl. 9 (1469).

28. *Id.*

29. Y.B. Hil. 4 Hen. 7, f. 4, pl. 8 at f. 5 (1489).

30. Y.B. Pasch. 14 Hen. 8, f. 25, pl. 7 at f. 27 (1522) (per Brooke).

31. See J. GOUGH, *FUNDAMENTAL LAW IN THE ENGLISH CONSTITUTION* (1955); C. McILWAIN, *THE HIGH COURT OF PARLIAMENT* (1922). But see Arnold, *Statutes as Judgments: The Natural Law Theory of Parliamentary Activity in Medieval England*, 126 U. PA. L. REV. 329 (1977).

32. St. German also believed that positive laws must be for the good of the common weal. 91 SELDEN SOCIETY, *DOCTOR AND STUDENT*, *supra* note 14, at 27. Fortescue agreed, saying that positive laws command what is honest and forbid the contrary. J. FORTESCUE, *DE LAUDIBUS*, *supra* note 15, at 9.

33. R. HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY* (1907). St. German also recognized that man was capable of making positive law as long as it did not conflict with the law of nature. But St. German maintained that those human laws had to be legislative, rather than judicial in nature. 91 SELDEN SOCIETY, *DOCTOR AND STUDENT*, *supra* note 14, at 29. The lawyers of the common-law courts held differing opinions on this latter point. For example,

mulated his argument in response to the expansive legislative powers exercised by post-Reformation parliaments,<sup>34</sup> his explanation of the lawmaking power nevertheless can provide a useful guide toward understanding the medieval view on lawmaking. Hooker saw two types of human laws: "mixedly" or universal, which affirm a duty that man always has been bound in conscience to obey, and "merely" human or local, which create a new duty that is "fit and convenient."<sup>35</sup> "Mixedly" laws are thus declarative of rights guaranteed by natural law; "merely" human laws create limited duties appropriate to a given time and situation.

Hooker's bifurcated scheme reflected the very essence of the common-law system. Matters of substance were always left to God through the mechanism of divinity-invoking modes of proof.<sup>36</sup> Yet matters of procedure were rightly within the authority of the justices who controlled the central courts.<sup>37</sup>

Yelverton's comment now falls into place. He knew that as a justice of the common pleas, he did not have the power to "create" substantive laws or substantive rights. He did, however, have the power to decide precise points before the court. As a corollary to this latter power, Yelverton had the authority to "make" certain laws or rules that ensured that the issues before his court were decided according to a smooth-running, fair procedure.

Rules of procedure (or "merely" human laws), then, were made for convenience's sake, as Moile explained in a 1459 action of debt on an obligation.<sup>38</sup> When faced with the defendant's request for a reading of the deed (so that the conditions indorsed on the back could be made known), Moile declared that "this case often comes before us, and it is a common case that can touch us all. Therefore, it is reason that we make a good rule for the mischief of

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Ashton believed that positive law could be made either by statute or by usage. Prisot, however, opined that while judgment and statute could make positive law, usage could not. See Y.B. Hil. 33 Hen. 6, f. 7, pl. 23 at f. 9 (1455).

34. 94 SELDEN SOCIETY, SPELMAN REPORTS II 43-46 (J. Baker ed. 1978).

35. R. HOOKER, *supra* note 33, at 193, 196-97.

36. Jurors were charged to decide according to God and conscience. Y.B. Mich. 5 Edw. 4, f. 58, pl. 50 at f. 61 (Long Quinto) (1465). A similar oath bound the defendant who waged his law.

37. This basic common-law distinction can be traced back at least as far as thirteenth-century Normandy. According to the Grand Coutumier de Normandie, customs (*consuetudines*) determine "whose anything is, or to what it pertains," while laws (*leges*) are the mechanism "by which particular cases are decided." C. McILWAIN, *supra* note 10, at 186 (quoting Grand Coutumier).

38. Y.B. Mich. 38 Hen. 6, f. 2, pl. 5 (1459).



it."<sup>39</sup>

Because rules of procedure were easy to manipulate, some medieval lawyers were tempted to create substantive laws under the guise of procedure. To prevent this from happening, common-law lawyers measured their procedural rules, both established and proposed, by a tool they called "reason." Oftentimes courts relied on reason to judge the full range of common-law processes, from opening summons to final execution—and every point in between.<sup>40</sup>

St. German explained how the courts applied the measuring stick of reason to shape common-law rules. Reason, noted the Student, is the first of six grounds of the law of England.<sup>41</sup> This reason is divided into two degrees; the law of reason primary, and the law of reason secondary.<sup>42</sup> The law of reason primary takes effect "without the addition . . . of any other law,"<sup>43</sup> and consists of commands and prohibitions, such as "that men ought to live peacefully, and that he who disturbs the peace shall be punished."<sup>44</sup>

The law of reason primary is akin to natural law; the law of reason secondary, however, is of a somewhat different character. It is "founded not only upon reason but also upon the . . . law or custom of property, and upon the reason derived from the law of property"<sup>45</sup> and is either general—diffused throughout the

39. *Id.*

40. See, e.g., Y.B. Trin. 14 Hen. 7, f. 28, pl. 3 at f. 29 (1499) (execution); Y.B. Mich. 13 Edw. 4, f. 5, pl. 14 (1473) (attaint); Y.B. Pasch. 7 Edw. 4, f. 4, pl. 10 (1467) (sufficiency of plea); Y.B. Trin. 5 Edw. 4, f. 55, pl. 47 (Long Quinto) (1465) (venue); Y.B. Hil. 33 Hen. 6, f. 7, pl. 23 at f. 8 (1455) (summons); Y.B. Mich. 33 Hen. 6, f. 38, pl. 17 at f. 39 (1454) (pleading); Y.B. Mich. 22 Hen. 6, f. 28, pl. 47 [listed as pl. 42] (1443) (demurrer).

41. 91 SELDEN SOCIETY, DOCTOR AND STUDENT, *supra* note 14, at 31. The five other bases for the law of England include: (1) The law of God, which St. German equated with "the trewe catholycall faythe," *id.* at 39-41; (2) Divers general customs, such as coverture, which are enforced throughout the realm, *id.* at 45; (3) Maxims, which differ from customs only in that customs are known throughout the realm, while maxims are known only in the King's courts by students of the law, *id.* at 57; (4) Particular customs, such as Gavelkind and Borough English, which are used only locally, *id.* at 57; and (5) Statutes, which are made by our soveraygne lorde the Kinge & hys progenytours/and by the lordes spyrytuell and temporall/and the commons of the whole realm in dyuers Parlyament is in suche cases where the lawe of reason/the lawe of God/custom/maxymes/ne other groundes of the laws of England semyd not to be suffycient.

*Id.* at 73.

42. *Id.* at 33.

43. *Id.* (italics deleted).

44. *Id.* (italics deleted).

45. *Id.* at 35 (italics deleted).

world—or particular—peculiar to one country.<sup>46</sup> To demonstrate how the law of reason secondary particular operated in the courts of the common law, the Student posed a question to the Doctor concerning liability for beasts that starve while impounded as distress:<sup>47</sup>

STUDENT: There is [a lawe] in Englande/ [which is] a [lawe of] custome y<sup>t</sup> yf a man take a dystres *for rent service or rent charge* lawfully that he shall put it in a ponde ouerte there to remayne tyll he be satysfied of *the rent in arrears* [that he dystreyned for.] And then therupon may be asked this questyon that yf the [12b] beestes dye in ponde for lacke of meate/ at whose peryll dye they/ whether dye they at the peryll of hym that dystreyned or of hym that oweth the beestes. *So I should like to hear your opinion as it seems to you.*

DOCTOR: Yf the lawe be as thou sayste *that one may lawfully take a distress and put it in open pound*, and then a man for a iuste cause takyth a dystres and putteth it in ponde ouerte *according to law* [and no lawe compellyth hym that dystreyneth to giue them meate/] then it semyth of reason that yf the dystres dye [in ponde for lacke of meate/] that it dyeth at the peryll of hym that oweth the beestes & not of hym that dystreyned/ for in hym that dystreyned there can be assynged noo defaute/ but in the other may be assynged a defaute bycause the rente was vnpayde.

STUDENT: [T]hou haste gyuen a trewe Iugement and who hath taughte the to do so/ but reason dryuyed of the sayd general custome.<sup>48</sup>

46. *Id.*

47. Although the Student posed the question here in substantive terms, had he raised it in the Common Pleas, it probably would have been in the form of a challenge to the sufficiency of a plea in justification. See *infra* text accompanying note 48.

48. 91 SELDEN SOCIETY, DOCTOR AND STUDENT, *supra* note 14, at 35-37. The Student also posed the following question to the Doctor:

STUDENT: . . . [I]t has been ordained by statute that one who has abjured the land is under the king's peace while he is on the highway, and is to be in no wise molested, while according to the custom of the realm one who has thus abjured shall be conducted from vill to vill by the village constables until he reaches the sea-port assigned to him by the king's coroner; whence may arise the question whether if such an abjured person escaped on the way and fled from the constables, whether they ought to be charged to the king for that escape.

DOCTOR: It seems to be that since the constables under the statute cannot keep him securely nor employ force or imprisonment for his safe custody, it would not be reasonable to charge them with the escape.

STUDENT: . . . [T]hou hast judged rightly; and it is clear enough that the reason founded on the said statute taught thee.

*Id.* at 37 (italics deleted).

The "reason" spoken of here is ordinary, inductive logic: the Doctor begins with the premise (the facts), applies the rule (custom), and "reasons" to an acceptable conclusion.

A 1506 action of replevin reveals a definite parallel between the Doctor's reasoning and basic common-law reasoning. The defendant avowed the taking by reason of a custom requiring all of the tenants of his manor of T who took beasts *damage feasant* to impound them in the lord's pound. Should they fail to do so, they would be subject to amercement at the next manor court. The plaintiff distrained, but put the animals in his own pound. The court fined him 12d.; the lord then distrained for the amercement. Kingsmill and Fisher considered whether, on these facts, the plaintiff could plead custom. They decided in the negative because the custom

is against common right and common law. For whenever anyone finds animals damage feasant on his land, with law and common reason he can distrain them and impound them wherever he will on his land. And the lord is not injured by this, nor does he suffer any loss. Thus, it follows by reason that the distrainer cannot be compelled to take his distress to the lord's pound.<sup>49</sup>

Once again, the medieval common-law jurists had established a classic syllogism: facts are described, a rule is set down, and through the application of reason to both of them, a logical result is achieved.

Of final consideration is the precise nature of this mediator called reason. St. German described reason as "the participation or knowledge of eternal law in a rational creature";<sup>50</sup> Fortescue pictured it as "a force of the mind partaking of divine light" by which the "Truth of Justice" is revealed.<sup>51</sup>

Although God initially bestowed reason upon man, this natural faculty could be improved by human education and instruction.<sup>52</sup> Through this process of improvement, common-law lawyers acquired what Coke called "the life of the Law . . . which is to be understood of an artificiale perfection of reason gotten by long studie, observation and experience and not of every mans naturale reason, for *nemo nascitur artifex*."<sup>53</sup> Thus, while common-law rea-

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49. Y.B. Pasch. 21 Hen. 7, f. 20, pl. 2 (1506).

50. 91 SELDEN SOCIETY, DOCTOR AND STUDENT, *supra* note 14, at 13 (italics deleted).

51. J. FORTESCUE, DE NATURA, *supra* note 16, at 224-25.

52. R. HOOKER, *supra* note 33, at 168; *see also* J. FORTESCUE, DE NATURA, *supra* note 16, at 243; 91 SELDEN SOCIETY, DOCTOR AND STUDENT, *supra* note 14, at 27.

53. 1 E. COKE, *supra* note 18, § 138, at 97b.

son may have had its roots in divine inspiration, its finished state was very much the product of man's own skilled craft.<sup>54</sup>

Only an elite few were capable of using this carefully honed tool. As the Chancellor explained to the Prince in *De Laudibus*,

[I]t will not be expedient for you to investigate precise points of the law by the exertion of *your own reason*, but these should be left to your judges and advocates who in the kingdom of England are called serjeants-at-law, and also to others skilled in the law who are commonly called apprentices.<sup>55</sup>

In those essential causes that concerned the life, inheritance, goods, or fortunes of Englishmen, it was the artificial reason of the Justices and Serjeants of the royal courts, not the natural reason possessed by every man, that dictated the outcome of a case.<sup>56</sup>

The whole of the common-law system is thus complete; through extended study, lawyers learned to reason in the highly technical fashion unique to the central courts. They called this artificial reason into play whenever a procedural rule of these courts threatened to infringe upon basic substantive rights. The continued practice of this discipline "by an infinite number of grave and learned men"<sup>57</sup> gave birth to the common law of England.

### III. THE APPLICATION OF NATURAL LAW

In the epilogue to his *Tenures*, Littleton admonished his son not to accept his treatise as law. Rather, he should use it as a tool for understanding the arguments of the law, "[f]or by the Arguments and Reasons in the Law, a man more sooner shall come to the certaintie and knowledge of the Law."<sup>58</sup> Littleton and his con-

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54. Coke's decision to describe reason as "artificially" perfected by human effort was not fortuitous. In 1 OXFORD ENGLISH DICTIONARY, *supra* note 3, at 473 (definition I(1)) "artificial" is defined as "not natural." "Artificial" is further defined as "[d]isplaying much skill," *id.* (definition II(6)); "education or training; scholarly," *id.* (definition II(7)); and "technical skill," *id.* (definition II(8)). The author wishes to thank Ms. Shirley Guthrie for bringing this point to her attention.

55. J. FORTESCUE, *DE LAUDIBUS*, *supra* note 15, at 23. Similarly, Hooker argued that because human laws are of the utmost importance to the preservation of society, only wise men should be allowed to make them, for "men of common capacity and but ordinary judgment are not capable . . . to discern what things are fittest for each kind and state of regiment." R. HOOKER, *supra* note 33, at 193.

56. Prohibitions Del Roy, 12 Co. 64, 77 Eng. Rep. 1342 (K.B. 1607).

57. 1 E. COKE, *supra* note 18, § 138, at 976.

58. 2 *id.* at 394b-95. Coke approved of this statement and remarked, "And well doth our author [Littleton] couple arguments and reasons together, Quia argumenta ignota & obscura ad lucem rationis proferunt & reddunt splendida: and therefore argumentari & ratiocinari are many times taken for one." He went on to cite Y.B. Mich. 11 Hen. 4, f. 34, pl. 66

temporaries were able to observe these arguments firsthand in court; however, modern lawyers must be content to view them through the reports of others. Nevertheless, the Year Book cases can provide us with valuable insights into this reason that Coke called the "soul of the common law."<sup>59</sup>

### A. *Due Process*

In keeping with the procedural theme of the Year Books in general, and the Year Book cases that specifically invoked reason in particular, the most popular concern of common-law reason was due process: "[F]or when a man is charged in the course of the law, he will not be charged without notice by due process against him according to the order of the law."<sup>60</sup>

The threshold question in any case involving due process of law is whether the court hearing the cause has proper jurisdiction. Thus, when the Chancellor issued a subpoena in 1460 regarding goods forfeited to the King for high treason, Jenny claimed that it was not reasonable to allow Chancery to issue a subpoena when an adequate remedy, detinue, existed in the common-law courts.<sup>61</sup>

A 1460 case argued in the Informal Exchequer Chamber voiced a similar concern for the sanctity of common-law jurisdiction. Maintaining that a prohibition should lie against spiritual court suits of *laesio fidei* for a money debt or land conveyance, Fortescue argued:

[T]his suit is in a way to compel the party to perform an act that touches the King's court, and the consuance of this belongs to the King's court, and not to the other. Thus, to punish a party for *laesio fidei* for a thing within the consuance of the King's court . . . would be against reason.<sup>62</sup>

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(1409), in which Chief Judge Hankford remarked, "Home ne scavera de quel mettal un compaigne est, si ne soit bien bate, ne le ley bien conus sans disputation." See also Y.B. Trin. 11 Hen. 7, f. 24, pl. 2 (1496) (per Vavisour) ("the common law is argued by reason").

59. 2 E. COKE, *supra* note 18, at 395.

60. Y.B. Mich. 8 Edw. 4, f. 9, pl. 9 at f. 11 (1468).

61. Y.B. Mich. 39 Hen. 6, f. 26, pl. 36 (1460). The court eventually held the subpoena good, probably because of the King's interest in the outcome.

62. Y.B. Pasch. 38 Hen. 6, f. 29, pl. 11 (1460). Littleton expressed similar jealousy in a case of trespass for wheat taken. The defendant claimed that the taking was for tithes and, therefore, within the jurisdiction of the spiritual court. Littleton, however, argued that the common-law court had jurisdiction by reason of an additional claim for assault and battery. Otherwise, "the court can be ousted of jurisdiction if an action is brought by the plaintiff's servant against the defendant's because the debate was over tithes, which would be against reason." Y.B. Mich. 35 Hen. 6, f. 39, pl. 47 (1456).

The common-law courts jealously guarded their exclusive jurisdiction under the rubric of reason. But even the justices of the common law courts sometimes had to relinquish jurisdiction. As reason surely would dictate, it was not wise to cross the King—or so the justices thought when faced with the King's privy seal in 1464.<sup>63</sup> Thomas Sherwood was charged and convicted of trespass. The court awarded the plaintiff *capias pro fine* judgment and an exigent. After Sherwood had been exacted in two or three counties and previously convicted of redisseisin, the King sent his privy seal to the justices, instructing them to issue a supersedeas to the sheriff ordering him to cease process. Croxton, the clerk of the King's Bench, recited to the court an example from the reign of Henry VI, in which Fortescue as Chief Justice told his brothers he did not wish to obey a similar privy seal. His brothers answered, "[W]e ought to do as reason and conscience counsel us."<sup>64</sup> Croxton agreed that reason and conscience were the correct guides in this situation, but to him that meant rendering judgment according to precedent. Because Chief Justice Markham, who was more familiar with these matters, was not present in court, Croxton asked to have the matter deferred until Markham could come and express his "reason and conscience."<sup>65</sup> Markham was present the following term, and after applying his superior reason, awarded the supersedeas to Thomas Sherwood.<sup>66</sup>

Once the court establishes proper jurisdiction, basic due process requires that a man not be deprived of life, liberty, or property without a fair trial, in which he is provided with adequate opportunity to present his side of the case. Reason clearly protected life, as a 1482 appeal of robbery in the King's Bench illustrates.<sup>67</sup> After the defendant pleaded not guilty, the plaintiff's counsel, Lovell, attempted to oust the defendant of battle by producing an indictment. The defendant challenged the indictment as void, thereby admitting the appeal to be good. Lovell then asked to imparl. Fairfax refused to allow the plaintiff's request, claiming it would be against reason to allow the plaintiff to imparl when the defendant by his plea had put his very life in jeopardy.<sup>68</sup>

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63. Y.B. Pasch. 4 Edw. 4, f. 19, pl. 36 (1464).

64. *Id.*

65. *Id.*

66. Y.B. Trin. 4 Edw. 4, f. 21, pl. 4 (1464).

67. Y.B. Trin. 22 Edw. 4, f. 19, pl. 46 (1482) (plaintiff accused defendant of stealing a leather purse worth 4d).

68. Y.B. Trin. 22 Edw. 4, f. 19, pl. 46 (1482).

A 1467 action of replevin that reached the Exchequer Chamber demonstrated that reason also favored a man's personal liberty.<sup>69</sup> The parties had originally joined issue on whether the defendant, the Prior of Dunstable, was seised of certain lands. On the day of *venire facias*, however, the defendant claimed that the plaintiff had been outlawed at the suit of one J. atte Stile by the name of W.D. of the county of H, husbandman. The plaintiff denied the outlawry and claimed to be a yeoman. Issue was joined on the latter point; during the pendency of that plea, however, the plaintiff was taken by *capias utlagatum* by force of the same outlawry. He again denied that he was a husbandman, and *scire facias* issued to J. atte Stile, who defaulted. The King's attorney came and disputed whether W.D. was a husbandman. Upon a jury finding that W.D. was a yeoman, the court discharged him of the outlawry charge.

The question of whether the defendant could ask to have the question of yeoman or husbandman tried was put to the Exchequer Chamber. Although Jenny was of the opinion that the defendant should not be estopped by a matter to which he was not a party (a legitimate due process concern), Catesby forcefully argued against the defendant's request. The issue should not now be tried, Catesby reasoned, because it might be found to the contrary of the previous judgment, thereby leaving the plaintiff open to new charges of outlawry. According to Catesby, reason dictated that once discharged of outlawry, a man should not be subject to retrial on the same issue; that is, his freedom should not be put in jeopardy twice.

Consistent with the property orientation of the medieval English system,<sup>70</sup> the courts often invoked reason to protect property rights. In a 1482 case, Rotheram, then Archbishop of York and Chancellor of England, asked the assembled members of the Informal Exchequer Chamber whether he should grant a subpoena to a man bound by a statute merchant who had paid the debt due, but had not obtained a release from the recognizee.<sup>71</sup> Hussey, Chief Justice of the King's Bench, maintained that the subpoena should

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69. Y.B. Pasch. 7 Edw. 4, f. 1, pl. 3 (1467). The court voiced a similar concern for double recovery in Y.B. Hil. 3 Edw. 4, f. 28, pl. 3 (1464), in which several of the justices maintained that it would be "inconvenient and impertinent" to demand the same thing twice in divers counties.

70. St. German went so far as to equate his law of reason secondary general with the law or general custom of property. 91 SELDEN SOCIETY, DOCTOR AND STUDENT, *supra* note 14, at 33.

71. Y.B. Pasch. 22 Edw. 4, f. 6, pl. 18 (1482).

not issue and offered as proof a case heard before the whole court some thirty years earlier. In that case the court agreed that a subpoena would not lie if a man had enfeoffed another in trust and had then died seised, so that his (the feoffor's) heir was in by descent. This was great reason, Hussey argued, for if one descent could be disproved in Chancery by only two witnesses, then so too could twenty descents, "which is against reason and conscience."<sup>72</sup>

The English courts also invoked reason to protect the property rights of petty jurors faced with a writ of attain. In one action a petty juror attempted to raise an accord made between the plaintiff and the defendant in regard to the original writ of trespass.<sup>73</sup> Although the plaintiff's counsel argued that the accord was not a matter of record and, therefore, could not be pleaded against a judgment of record, the counsel for the petty juror declared that "the law is not so unreasonable as to punish the petty jury . . . . Thus, it is reason that they have such pleas as proven the plaintiff did not have a cause of action."<sup>74</sup> Of foremost concern to both this petty juror and his counsel was the stiff penalty of forfeiture of property that accompanied a conviction of attain.

Reason similarly protected personal property rights. In a 1455 action of trespass *de bonis asportatis*, the defendant pleaded that he had purchased the goods in market overt.<sup>75</sup> Laicon considered the scope of the market overt rule and determined that the bona-fide purchaser should be protected. But a purchaser with notice should not be so favored, "for otherwise men could rob one another, and by agreement with an incontinent stranger sell them in the same market, thus divesting the property from the rightful owner forever, which would be against reason."<sup>76</sup> Reason, then, governed the rules of the central courts, ensuring that they did not unduly infringe upon man's most precious rights—life, liberty, and property.

Reason also protected the second half of the due process equa-

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72. *Id.* The rights of tenants in common to partition or sever their holdings, either by deed or on the land, is also protected by reason because they hold both jointly and severally and, therefore, have separate, identifiable interests. Joint tenants are not similarly protected because they hold jointly but not severally. Y.B. Mich. 3 Edw. 4, f. 8, pl. 1 (1463).

73. Y.B. Mich. 13 Edw. 4, f. 5, pl. 14 (1473).

74. *Id.*

75. Y.B. Hil. 33 Hen. 6, f. 5, pl. 15 (1455).

76. *Id.* See, e.g., Y.B. Mich. 34 Hen. 6, f. 22, pl. 42 at f. 24 (1455), in which Prisot maintained that it would be against reason to subject the executor's goods to execution in debt where the testator's goods were insufficient. *But see* cases cited *infra* note 95 (recovery extended to executors' goods).



tion: the right to a fair trial. Essential to the preservation of a fair trial is adequate notice throughout the proceedings. As Fairfax argued in a 1468 arbitration case, to charge a man without notice would be to subject him to "great mischief," and that would be against reason.<sup>77</sup> The mischiefs that would ensue are several. First, without notice a defendant could not plead properly. Thus, according to Moile, it was reason that the conditions indorsed on the back of an obligation be read in court.<sup>78</sup> Second, the plaintiff, because he instituted the action, was already at an advantage, especially when he had a written obligation as proof of his claim. Consequently, Markham believed that reason and conscience<sup>79</sup> compelled the obligee to give notice to the obligor if the former wished to bind the latter to performance.<sup>80</sup> Third, the defendant stood to suffer serious loss in the form of amercements or fines if the action went against him. It was not reason, then, that the plaintiff be allowed to recover if the defendant did not have notice of the suit.<sup>81</sup>

Equally crucial to a fair trial is a proper mode of proof. Reason controlled the choice between wager and jury for "by reason all that lies within the notice of the country will be tried by the country if the party wishes."<sup>82</sup> Reason also regulated the place from which a jury panel was drawn, as a 1465 action demonstrates.<sup>83</sup> The plaintiff sued a London executor on an obligation made in Cornwall; "common right and reason"<sup>84</sup> dictated that the cause

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77. Y.B. Mich. 8 Edw. 4, f. 9, pl. 9 at f. 11 (1468). The Year Books often recognized mischief as the antithesis of reason. *See, e.g.*, Y.B. Mich. 5 Edw. 4, f. 109, pl. 83 (Long Quinto) (1465); Y.B. Mich. 38 Hen. 6, f. 2, pl. 15 (1459); Y.B. Hil. 33 Hen. 6, f. 5, pl. 15 (1455).

78. Y.B. Mich. 38 Hen. 6, f. 2, pl. 5 (1459).

79. The Year Books often coupled conscience and reason. *See, e.g.*, Y.B. Pasch. 22 Edw. 4, f. 6, pl. 18 (1482); Y.B. Pasch. 21 Edw. 4, f. 24, pl. 10 (1481); Y.B. Pasch. 4 Edw. 4, f. 19, pl. 36 (1464).

80. Y.B. Pasch. 8 Edw. 4, f. 1, pl. 1 at f. 2 (1468). Catesby and Pigot (and later Choke) maintained in this case that although notice is required to bind a man in law, he can by contract (e.g., through agency agreement) bind himself to perform without notice. Note also that Danby believed that arbitors, as distinguished from plaintiffs, did not need to give notice because arbitors have only a charge and no advantage. *Id.*

81. *Id.*

82. Y.B. Hil. 33 Hen. 6, f. 7, pl. 23 at f. 8 (1455). In this challenge to a summons in a praecipe quod reddat, Danvers also favored the jury, though for different reasons. It would be against reason, Danvers argued, to compel a man to wage his law, which must be done in person, at a place (Westminster) to which he could not come.

83. Y.B. Trin. 5 Edw. 4, f. 55, pl. 47 (Long Quinto) (1465).

84. "Common right" and "reason" often complimented each other. *See, e.g.*, Y.B. Pasch. 21 Hen. 7, f. 20, pl. 2 (1506) (per Kingsmill and Fisher); Y.B. Hil. 14 Hen. 7, f. 17, pl. 7 at f. 19 (1499) (per Davers); Y.B. Mich. 2 Rich. 3, f. 15, pl. 42 at f. 16 (1484) (per

should be tried wherever the court found the best knowledge of and familiarity with the matter.<sup>85</sup>

The word "fair" also conjures up notions of good faith reliance and mitigating factors. Good faith reliance upon matters of record figured into several Year Book cases from the mid-fifteenth century. One such case involved a writ of annuity brought against a parson.<sup>86</sup> After the plaintiff claimed title by prescription, the defendant prayed aid of the patron and the ordinary, both of whom defaulted. Title was found for the plaintiff. The parson then died, and the plaintiff sought execution against his successor, who again prayed aid of the patron and the ordinary. The patron once again defaulted, but this time the ordinary came, claiming that all the original jurors were dead and traversing the plaintiff's title. The plaintiff demurred. Fortescue favored the plea, claiming that, because the death of the jurors rendered attaint impossible, it would be reason to reopen the record. Yelverton strongly disagreed, arguing:

By this reason a right recovered in an action can never take effect; for by this reason where a recovery is tailed against my ancestor by an action tried perhaps one hundred years ago, and the jurors are now dead, I will be allowed to challenge the record on the point that was tried, which is not law or reason.<sup>87</sup>

The self-evident nature of written matter clearly impressed the lawyers of the central courts. But even the most conservative of these lawyers must have been aware of the need to mitigate the unnecessary harm that sometimes arose when the plain words of a writing collided with impossible or absurd performance. Markham addressed this question during the course of a lengthy arbitration case.<sup>88</sup> According to Markham it was common course to allow mainpernors to allege the defendant's death to escape liability: "for the bond will not be taken so strictly; rather, in each bond is a reason."<sup>89</sup> Further, Markham argued, if a man agrees in writing to

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Vavisour); Y.B. Mich. 34 Hen. 6, f. 15, pl. 28 (1457) (per Littleton).

85. Y.B. Trin. 5 Edw. 4, f. 55, pl. 47 (Long Quinto) (1465).

86. Y.B. Mich. 22 Hen. 6, f. 28, pl. 47 [listed as pl. 42] (1443).

87. *Id.* See also Y.B. Mich. 13 Edw. 4, f. 5, pl. 14 (1473), in which counsel for the plaintiff argued that because an accord is not a matter of record, it could not be pleaded against a judgment of record; Y.B. Pasch. 7 Edw. 4, f. 1, pl. 3 (1467), in which Catesby also considered a request to retry an issue. "It seems to me," Catesby declared, "that the prior . . . will be bound by the matter found between the King and the plaintiff, for otherwise great inconvenience would ensue." *Id.*

88. See *supra* text accompanying notes 77-81.

89. Y.B. Mich. 8 Edw. 4, f. 20, pl. 35 at f. 21 (1468). In an earlier portion of the report,

deliver twenty quarters of wheat, he need not carry it around everywhere. Rather, it is sufficient that he inform the buyer that the wheat will be delivered wherever he designates, "and so in each bond reason will aid."<sup>90</sup> By incorporating concepts of notice and mitigating circumstances, reason thereby ensured a fair and just trial for all.

Inextricably intertwined with the process of the central courts was the medieval version of precedent.<sup>91</sup> While some medieval English lawyers did go so far as to argue that "precedents in a court make a law,"<sup>92</sup> the majority tended to recognize precedent only when it suited their needs. By invoking reason, these lawyers were able to square their genuine respect for the past with their seemingly casual disregard for cases decided in their very own court.

At the outset, if no precedent either existed or was cited by counsel, the court would adjudge according to law and reason,<sup>93</sup> and thereby make its own precedent.<sup>94</sup> When a party did proffer precedent in court, the Justices felt a certain compulsion to follow it. As Croxton explained,

It is not honorable for us or for this court or any other court to vary our judgments, as to give judgment in a matter in one term, and later in another term in another matter, or even in the same matter, different judgment. Therefore we wish to give judgment now as we have given before in like matters. And that is what I believe reason and conscience to be.<sup>95</sup>

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Starkey also argued against taking deeds too strictly. Y.B. Mich. 8 Edw. 4, f. 9, pl. 9 at f. 12 (1468). See also Y.B. Mich. 27 Hen. 8, f. 14, pl. 6 at f. 18 (1535), in which Chancellor Audley maintained that "the law in its reasonableness will expound the parties' intent by their words."

90. Y.B. Mich. 8 Edw. 4, f. 20, pl. 35 at f. 21 (1468). See also Y.B. Pasch. 7 Edw. 4, f. 4, pl. 10 (1467), in which Littleton advanced a similar situation:

I pose that if I were obligated to you for £20 on condition that I pay £10 on St. John Baptist's feast (24 June), and I come to you on Pentecost (seventh Sunday after Easter) and tender the said £10 and you refuse, now if the penalty is not saved by this tender, I will be forced to go to you every day until St. John Baptist's day, which would be against reason.

*Id.*

91. For a comprehensive treatment of the role of precedent in the medieval common law, see C. ALLEN, *LAW IN THE MAKING* 236-382 (7th ed. 1964); Lewis, *The History of Judicial Precedent* (pts. 1 & 2), 46 L.Q. REV. 207, 341 (1930), (pt. 3), 47 L.Q. REV. 411 (1931).

92. Y.B. Mich. 5 Edw. 4, f. 109, pl. 83 (Long Quinto) (1465). But in the same case the court also claimed that "two or three precedents are neither custom nor law," and that "in divers cases precedents do not make law." *Id.* at f. 110.

93. Y.B. Mich. 5 Edw. 4, f. 109, pl. 83 at f. 110 (Long Quinto) (1465); see also Y.B. Pasch. 38 Hen. 6, f. 30, pl. 12 (1460) (Fortescue makes a similar comment).

94. Y.B. Mich. 5 Edw. 4, f. 137, pl. 107 (Long Quinto) (1465).

95. Y.B. Pasch. 4 Edw. 4, f. 19, pl. 36 (1464). See also Y.B. Trin. 14 Hen. 7, f. 28, pl. 3 at

According to Prisot, adherence to precedent made for certainty in the courts:

If this is now adjudged no plea . . . this will be a bad example for the young apprentices who are studying in terms, for they will no longer give credence to their books if such a judgment that has often times been adjudged in our books is now adjudged to the contrary.<sup>96</sup>

The importance of predictability notwithstanding, most justices refused to follow precedent that they thought clearly wrong.<sup>97</sup> Rather, if a precedent appeared to be against reason, then the court would amend it, "for perhaps this [precedent] had been suffered before but never challenged or debated."<sup>98</sup> Furthermore, the demands imposed upon the law changed with the times. Reason helped the court to recognize precisely when precedent needed to be modified. In a plea of deceit heard in the Exchequer Chamber,<sup>99</sup> Moile considered whether damages were recoverable against a sheriff for a false return. Although certain precedent dictated a negative answer, Moile nevertheless believed that he and his brothers could change the rule. With a perfunctory bow to precedent, he cited several examples in which similar changes had been wrought,<sup>100</sup> and then declared that "since Justices before today have changed by cause of better reason, why cannot we, too?"<sup>101</sup>

The justices also called upon reason when faced with conflict-

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f. 29 (1499), in which Vavisour declared that "such a judgment has often been in our books and [was] adjudged in the time of Henry 6. Therefore it is not good reason—nor do we wish—to change it." Fortescue exhibited a similar sentiment in a case concerning the scope of recovery against executors. Had this been a case of first impression, he explained, he would have favored limiting recovery to the testator's goods. But because there were so many judgments extending recovery to the executor's goods, he felt bound without any other reason to follow them. Y.B. Mich. 34 Hen. 6, f. 22, pl. 42 at f. 24 (1455).

96. Y.B. Mich. 33 Hen. 6, f. 38, pl. 17 at f. 41 (1454). See also Y.B. Trin. 27 Hen. 8, f. 23, pl. 21 (1535), in which Fitzherbert exclaimed, "put that case out of your books, for without a doubt it is not law."

97. See, e.g., Y.B. Trin. 22 Edw. 4, f. 19, pl. 46 (1482) (per Fairfax); Y.B. Pasch. 5 Edw. 4, f. 6, pl. 9 at f. 8 (Long Quinto) (1465) (per Littleton).

98. Y.B. Mich. 5 Edw. 4, f. 109, pl. 83 (Long Quinto) (1465); see Y.B. Mich. 34 Hen. 6, f. 22, pl. 42 at f. 24 (1455) (similar comment by Fortescue).

99. Y.B. Mich. 5 Edw. 4, f. 93, pl. 71 (Long Quinto) (1465).

100. He gave as examples the Statute of Westminster II, 13 Edw. 1, ch. 14 (1285), which reformed the writ of waste used by the remainderman, and the fact that while formerly heirs could bring debt, at the time he spoke the law no longer recognized their action. Y.B. Mich. 5 Edw. 4, f. 93, pl. 71 at f. 99 (1465).

101. *Id.* But see Y.B. Hil. 4 Edw. 4, f. 43, pl. 4 (1465), in which Markham reluctantly declared that "if that is the form, then this course becomes law even though reason may not dictate to the contrary."

ing precedents. In a 1443 action of *praecipe quod reddat*, Markham, acting for the tenant, demanded the view.<sup>102</sup> Port, however, claimed that the view previously had been awarded to this tenant in a similar writ brought against the tenant and his wife, which had been abated when the wife died. After both counsel cited numerous cases for their sides, Port finally declared that "since there are divers judgments given in this matter before this time, it is best to determine of reason what should be done."<sup>103</sup>

Unfortunately, submitting divers precedents to reason could create even more problems than it solved, for common-law reason was a chameleon, changing colors according to the viewpoint of the lawyer who currently invoked it. In a 1493 appeal of death,<sup>104</sup> the question was whether the defendant, who had been outlawed but subsequently had obtained the King's pardon, could bar the appellant from execution without showing a written release of some sort. Vavisour tangled with Hussey, who claimed to have the support of the Chief Justice of the Common Pleas for his position that the pardon did not require a writing. Vavisour retorted that, as far as he could determine, the reason of his books, which held to the contrary, was far superior to their opinion.<sup>105</sup>

In the end, it is not surprising to find reason so malleable. Common-law reason was not an eternal constant; rather, it depended primarily upon the activity of the human mind, no two of which are ever alike.<sup>106</sup>

### B. Custom

Medieval justices often used reasons to determine the force of local customs in the central courts.<sup>107</sup> Customs draw their force from the mutual consent of all those bound,<sup>108</sup> and consent can be proven by long, unchallenged usage.<sup>109</sup> To Littleton, this undisturbed usage from time immemorial was the very essence of the common law, for "by prescription, we have all our law, except for

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102. Y.B. Pasch. 21 Hen. 6, f. 42, pl. 19 (1443).

103. *Id.* The court eventually granted the view.

104. Y.B. Mich. 9 Hen. 7, f. 5, pl. 1 (1493).

105. *Id.* at f. 6.

106. See *supra* text accompanying notes 40-57.

107. For contemporary scholarship on the subject, see C. ALLEN, *supra* note 91, at 67-160; P. VINOGRADOFF, *CUSTOM AND RIGHT* (1925).

108. According to St. German, general customs must "haue ben acceptyd and approuyd by our soueraygne lorde the Kynge and his progenytours and all theyr subgettes." 91 SELDEN SOCIETY, DOCTOR AND STUDENT, *supra* note 14, at 45.

109. P. VINOGRADOFF, *supra* note 107, at 34.

things done by special laws such as statutes."<sup>110</sup>

St. German divided customs into two sorts: First, general customs, including primogeniture and coverture, which are used throughout the realm and are determined by the judge rather than by the jury;<sup>111</sup> second, particular customs, such as Gavelkind and Borough English, which are used only locally and are proved by jury rather than by judge.<sup>112</sup> Littleton also divided customs into two kinds, though he used slightly different criteria: those that were part of the common law (and therefore, binding in all courts) and those that were not (and thus, binding only locally).<sup>113</sup> Littleton explained that Gavelkind and Borough English would be enforced in all courts,

because they are customs and usages in the country between people outside the court, but customs and usages that take effect in the court where the custom or usage is and that gain force there . . . are not allowable except in the same court, city or borough where such customs are used.<sup>114</sup>

Although St. German and Littleton managed to place Gavelkind on opposite sides of the boundary separating local from general custom, in the final analysis they drew the same distinction. The "general" customs of which they spoke corresponded to the common-law rules of the central courts. These rules could be considered customary or prescriptive because they were unwritten<sup>115</sup> and of time-honored usage.<sup>116</sup>

110. Y.B. Mich. 33 Hen. 6, f. 45, pl. 28 at f. 46 (1454). Coke saw three grounds of the law of England: the common law, statutes, and particular customs (*vis-à-vis* general customs, which are the common law). 1 E. COKE, *supra* note 18, at 115b. As noted above, St. German saw six such grounds, including both general and particular customs. See *supra* note 41 and accompanying text.

111. 91 SELDEN SOCIETY, DOCTOR AND STUDENT, *supra* note 14, at 45.

112. *Id.* at 71. Chancellor Rotheram confirmed that a jury was the proper method of proof for local customs. Y.B. Pasch. 21 Edw. 4, f. 24, pl. 10 (1481) (scope of Kentish custom allowing a minor to sell his lands at the age of fifteen to be determined by men of Kent).

113. Y.B. Mich. 1 Edw. 4, f. 5, pl. 13 at f. 6 (1461).

114. *Id.*

115. J. FORTESCUE, *DE NATURA*, *supra* note 16, at 222; 91 SELDEN SOCIETY, DOCTOR AND STUDENT, *supra* note 14, at 57.

116. Catesby thought the common law had existed since the beginning of the world. Y.B. Pasch. 10 Edw. 4, f. 4, pl. 9 (1470). Fortescue placed its conception slightly later, with the appearance of the Britons in England. J. FORTESCUE, *DE LAUDIBUS*, *supra* note 15, at 39. Coke merely saw it as being "the most antient" of laws. 1 E. COKE, *supra* note 18, at 97b. These lawyers trumpeted the extreme antiquity of the common law to prove that the English law was the oldest, most established, and therefore, the best system of law. Yet even Coke was quick to admit that the common law was not entirely static, but instead underwent a constant process of refinement. *Id.*

The nature of royal court rules differed greatly from particular customs, which were conventions that arose in the context of discreet local communities, rather than the central courts. Yet, a custom like Gavelkind, which began on a local level, actually could be drawn up into the central courts whenever the common-law lawyers thought it expedient. Once there, the particular custom became common law.<sup>117</sup>

Custom could not become part of the common law, however, unless and until it stood with reason.<sup>118</sup> Customs such as Borough English, which contradicted basic common-law rules, could thus be recognized as long as the dictates of reason were met.<sup>119</sup> But customs that could not satisfy reason fell to the level of "bad usage,"<sup>120</sup> and not even confirmation by Parliament in statutory form could save them in the eyes of common-law lawyers.<sup>121</sup>

Reason, then, controlled the fate of many a customary claim that managed to work its way up from the countryside to the central courts. When brought to bear upon these local customs, reason exhibited its characteristic concern for reasonable property expectations.<sup>122</sup> A 1468 action of trespass for digging in the plaintiff's land proves the point.<sup>123</sup> In that case the defendant justified his activities by relying upon a Kentish custom that allowed persons fishing on the seashore to dig in adjoining lands and pitch stakes to enable them to suspend their nets for drying. Littleton argued that the custom was against reason, "for if a man has a meadow adjoining the sea, they can by this custom destroy the whole meadow."<sup>124</sup>

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117. Y.B. Mich. 8 Edw. 4, f. 18, pl. 30 at f. 19 (1468) (per Littleton). But see Y.B. Mich. 22 Hen. 6, f. 21, pl. 38 (1443), in which Prisot curiously remarked, "it appears that the said matter [action of trespass based upon the innkeeper's rule] lies in custom, which will not be understood to be common law." Newton, however, quickly put Prisot in his place by retorting, "What is [more] custom of the land than the law of the land?" *Id.*

118. See, e.g., Y.B. Mich. 2 Rich. 3, f. 15, pl. 42 at f. 16 (1484); Y.B. Mich. 21 Edw. 4, f. 67, pl. 50 (1481); Y.B. Mich. 8 Edw. 4, f. 18, pl. 30 (1468); Y.B. Mich. 35 Hen. 6, f. 25, pl. 33 (1456); Y.B. Mich. 34 Hen. 6, f. 15, pl. 28 (1455). St. German also believed that custom always must accord with reason. 91 SELDEN SOCIETY, DOCTOR AND STUDENT, *supra* note 14, at 45, 71.

119. Y.B. Pasch. 12 Hen. 7, f. 15, pl. 1 at f. 16 (1497) (Yaxley commenting on Borough English); see also Y.B. Mich. 34 Hen. 6, f. 25, pl. 33 (1455) (per Needham).

120. Y.B. Mich. 21 Edw. 4, f. 67, pl. 50 (1481) (per Brian).

121. *Id.* Yet Fortescue believed that reduction to writing by the monarch's power and assent would change custom into statute, thereby giving it at least some added measure of authority. J. FORTESCUE, DE LAUDIBUS, *supra* note 15, at 37; J. FORTESCUE, DE NATURA, *supra* note 16, at 222-23.

122. See *supra* text accompanying notes 73-76.

123. Y.B. Mich. 8 Edw. 4, f. 18, pl. 30 (1468).

124. *Id.* at f. 19. Danby justified the Kentish custom because the fishing was for the sustenance of the whole realm and thus, the good of the common weal. Nevertheless, Fairfax

Reason also condemned pleas based on local customs that created new property-related rights, unless there was some overriding justification for the new rights. For example, in a 1506 case involving a tenant who had distrained animals *damage feasant*, the court refused to allow the lord's avowry, which was based on the lord's customary right to have all such animals imparked in his own pond.<sup>125</sup> The court denied the lord this additional manorial incident because the tenant's use of his own park did not injure the lord, and because the tenant might have been hampered in the protection of his tenure if he could not distrain trespassing animals.<sup>126</sup> Reason, however, saw the custom of Borough English in a different light. Because it was designed to protect the youngest son, who is less able to care for himself, this custom was consistent with reason—even though it clearly interfered with the eldest son's common-law right of primogeniture.<sup>127</sup>

The English courts also protected personal property from unreasonable customs. In 1455 the justices of both Benches and the Barons of the Exchequer sitting in the Informal Exchequer Chamber heard information concerning the possession of certain royal jewels.<sup>128</sup> The defendant justified his possession on the basis of a London custom that permitted the receiver of pledged goods to keep them until his debt was satisfied. Choke argued that the custom was not consistent with reason because, as pleaded, it allowed a man to pledge someone else's goods even though they were not in his (the pledgor's) possession. Because the custom prejudiced the owner of the goods, it could not be good.<sup>129</sup>

Local custom that created a conflict between real and personal property rights also came under the scrutiny of reason. In a 1484 action of trespass for swans taken, the defendant-property owner justified the taking in part on the basis of a Buckinghamshire cus-

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maintained that the common weal must not be allowed to destroy a man's inheritance.

125. Y.B. Pasch. 21 Hen. 7, f. 20, pl. 2 (1506).

126. *Id.*

127. Y.B. Pasch. 12 Hen. 7, f. 15, pl. 1 at f. 16 (1497) (per Yaxley); Y.B. Mich. 8 Edw. 4, f. 18, pl. 30 at f. 19 (1468) (per Littleton); Y.B. Mich. 35 Hen. 6, f. 25, pl. 33 at f. 26 (1455) (per Littleton).

128. Y.B. Mich. 35 Hen. 6, f. 25, pl. 33 (1455).

129. *Id.* Billing also believed a custom that allowed a man to pledge the goods of a stranger to be against reason. Wangford, however, contended that the custom accorded with reason, "for when a man possesses certain goods, how can a man know in whom the property is if not in he who possesses them?" *Id.* at f. 27.

Hengston labeled unreasonable the London custom allowing a villein who lived peacefully in London for one year to go free since it prejudiced the owner, to whom the villein was an inheritance. *Id.*



tom: for each swan that came ashore to nest from Buckinghamshire waters flowing into the Thames, the swan's owner was to have the first two of the offspring and the adjoining property owner the third.<sup>130</sup> Vavisour thought the custom unreasonable because it allowed the landowner to take and to occupy someone else's animals. But Fairfax saw the custom as reasonable, because it took into account "the trouble" that the landowner suffered by allowing the swans to nest on his free tenement.<sup>131</sup> Although resolution of the case was not reported, one can speculate that in medieval England, reason would favor the free tenement argument over the chattel.

### C. Statutory Interpretation

On occasion, courts used reason to interpret statutes. Although Coke's famous dictum in *Dr. Bonham's Case*<sup>132</sup> (that when an act of Parliament is against common right and reason, it will be adjudged void) lay in the future, medieval English judges did engage in statutory interpretation by applying the doctrine of the equity of a statute.<sup>133</sup> In a 1457 Exchequer Chamber discussion<sup>134</sup> of the scope of the statute Westminster I,<sup>135</sup> the court summoned reason to construe whether the King should have wardship and marriage of a fifteen-year-old female heir of a tenant in chief. Fortescue declared that common reason, always protective of real property rights, favored wardship until the age of twenty-one for a male heir of a tenant by knight's service. This rule was necessary because during his nonage, the heir does not have proper discretion to deal with his inheritance, cannot perform the services due on the land, and is not able to carry arms in war. Wardship of a married woman, however, should end at the age of fourteen because her husband, who may be an adult (that in a given case he

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130. Y.B. Mich. 2 Rich. 3, f. 15, pl. 42 (1484).

131. *Id.* at f. 16.

132. 8 Co. 113b, 118a, 77 Eng. Rep. 646, 652 (C.P. 1610).

133. Y.B. Hil. 14 Hen. 7, f. 17, pl. 7 (1499). For Coke's classic explanation of the doctrine, see *Heydon's Case*, 3 Co. 7a, 76 Eng. Rep. 637 (Ex. Ch. 1584). See also Thorne, *The Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202 (1936).

134. Y.B. Hil. 35 Hen. 6, f. 52, pl. 17 (1457); Y.B. Hil. 35 Hen. 6, f. 40, pl. 2 (1457).

135. The statute provides in pertinent part:

... And of Heirs Female, after they have accomplished the Age of Fourteen Years, and the Lord (to whom the Marriage belongeth) will not marry them, but for Covetise of the land will keep them unmarried; it is provided that the Lord shall not have nor keep, by Reason of Marriage, the Lands of such Heirs Female more than Two Years after the Term of the said Fourteen Years.

Statute of Westminster I, 3 Edw. 1, ch. 22 (1275).

was a minor was of no consequence), was capable of performing the services during their coverture. But Fortescue then argued,

By common reason an unmarried woman will not be adjudged better in discretion, or wiser, or better able to do the services due on her land than will a man at fourteen, for by common presumption a man will be adjudged wiser at fourteen than a woman of the same age.<sup>136</sup>

In Fortescue's opinion, Magna Carta, the Provisions of Merton, and Westminster I, coupled with common reason, proved that at common law the age for a man and an unmarried woman should be the same. Thus, the *feme sole* had to remain in wardship until sixteen years of age.<sup>137</sup>

Courts also cast the light of reason upon procedural questions raised by statutorily based claims. In a *cessavit per biennium* for land and rent,<sup>138</sup> the tenant defaulted, and another came and said that he was seised in fee and had leased the land and rent to the tenant for life. The demandant pleaded no lease; the parties joined issue thereupon, and subsequently the court found for the demandant at *nisi prius*. The question then was raised as to whether the demandant's plea was founded on, or permitted by, the Statute of Westminster II.<sup>139</sup> Hengston argued that although the statute authorized the receipt of the reversioner to protect his tenure, it did not express the manner in which the reversioner should plead. Therefore, the pleading should be "according to the course of the common law, as can be understood by reason."<sup>140</sup>

Perhaps the most significant statutory-related question to which reason was applied was the validity of uses. Common-law lawyers had to consider uses carefully after the Feoffments to Uses Act of 1483<sup>141</sup> thrust uses into the central courts by giving the ces-

136. Y.B. Hil. 35 Hen. 6, f. 52, pl. 17 at f. 53 (1457). The author seriously questions the wisdom of Fortescue's logic here.

137. *Id.*

138. Y.B. Mich. 33 Hen. 6, f. 38, pl. 17 (1454).

139. The statute provides in pertinent part:

[I]t is agreed that if any with-hold from his Lord his due and accustomed Services by Two Years, the Lord shall have an Action to demand the land in demean by such a writ: Praeipie A. quod juste &c. reddat B. tale tenementum quod A. de eo tenuit per tale servitium, & quod ad praedictum B. reverti debet, eo quod predictus A. in faciendo praedictum servitium, per biennium cessavit, ut dicitur.

Statute of Westminster II, 13 Edw. 1, ch. 21 (1285).

140. Y.B. Mich. 33 Hen. 6, f. 38, pl. 17 at f. 39 (1454).

141. [B]e it ordained . . . that every estate feoffment, gift, release, grant, leases and confirmations of lands, tenements, rents, services, or hereditaments, made

tui que use the right to convey the legal estate. The question was debated thoroughly in a 1521 case of replevin<sup>142</sup> brought by one J.S. The defendant avowed the taking on the grounds that J.D. and J.B. had been seised of one carucate of land to the use of R.N., and so seised, they granted an annual rent charge issuing therefrom to Alice, R's wife, for life. Alice then married the defendant and he distrained for rent in arrears. The plaintiff answered that J.D. and J.B. had been seised to the use of W.N. and had granted the rent to Alice as alleged, with Alice having notice of the use. After J.D. and J.B. had enfeoffed Halpenny in fee, W.N. released all his right to Halpenny. Willoughby demurred for the defendant, claiming, among other things, that the plaintiff's plea did not show how the use arose.

The court next considered the nature of uses, with reason once again coming to the aid of real property interests. Brown contended that the Feoffments of Uses Act of 1483 was immaterial in making a use; rather, "it will be according to reason, which is in the common law."<sup>143</sup> Brooke agreed, adding that conscience (that is, the court of Chancery) also did not make a use. Pollard then explained that by reason, feoffees to sue are bound to act according to the trust, for otherwise they would deceive their feoffor, which would not be reason.<sup>144</sup>

Curiously, some thirty years later, the first argument heard in *Lord Dacre's Will*<sup>145</sup> enthusiastically repeated these same arguments in favor of the reasonableness of uses. York echoed Pollard's contention that a use was a trust and, therefore, must exist at common law, because "a trust or a confidence is a thing that is very necessary between two men."<sup>146</sup> Common reason, Montague confirmed, wills that a man may put his trust in another. In any event, Montague continued, even if uses truly did not exist at common law, many inheritances had come to depend upon those trusts, so that there would be great mischief and confusion (which was surely

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or had, or hereafter to be made or had by any person or persons being of full age . . . shall be good and effectual to him to whom it is so made, had or given. . . .

Feoffments to Uses Act, 1483, 1 Rich. 3, ch. 1.

142. Y.B. Mich. 14 Hen. 8, f. 4, p. 5 (1521).

143. *Id.* at f. 5.

144. On several occasions, the court justified the related concept of a devise as reasonable because, as Choke explained, a man should be able to do in death with his realty what he could do in life. Y.B. Mich. 35 Hen. 6, f. 25, pl. 33 (1455); see also Y.B. Pasch. 21 Edw. 4, f. 24, pl. 10 (1481) (per Digas, apprentice); Y.B. Mich. 35 Hen. 6, f. 25, pl. 33 at f. 26 (1455) (per Littleton).

145. Y.B. Pasch. 27 Hen. 8, f. 7, pl. 22 (1535).

146. *Id.* at f. 8.

against reason) should the law now be changed.<sup>147</sup> The entire discussion eventually went for naught when, on second hearing, the justices suddenly declared uses to be against common law.<sup>148</sup> The final lesson is obvious: whatever else reason might say, when the King spoke, reason dictated that the justices listen.

#### IV. CONCLUSION

Reason truly was the very soul of the common law.<sup>149</sup> It watched over the rights most precious to Englishmen and ensured that the royal courts that enforced those rights ran smoothly. Through it, the lawyers of common law were able both to preserve time-honored local custom and to move forward with statutory innovation. Finally, and most importantly, while it sprang from a common seed implanted in all legal-minded Englishmen, reason bloomed in as many different shades as there were Englishmen.

*Lex plus laudatur quando ratione probatur.*<sup>150</sup>

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147. *Id.* at f. 10.

148. 93 SELDEN SOCIETY, SPELMAN'S REPORTS 228, 230 (J. Baker ed. 1977).

149. 2 E. COKE, *supra* note 18, at 394b.

150. *Id.* at 395a. (The law is more praiseworthy when supported by reason.).