

## Five Guys Who Went Down to Colchester in 1180 And Why We Have a Thousand F.2ds Lying About

Program F-6: Glanville's World: The Rise of English Common Law (Navigating the Law Through the Ages)

by John Hoffmon

Picture if you would a day, any day, in England in the year 1180. It's cold, dark, medieval. Mist hangs in the morning air. Hoofbeats—five men on horseback enter the city of Colchester. Four are soldiers, the two ahead more heavily armored. The others exchange gossip with the fifth member, a cleric. They shoulder their way through the crowd assembled in front of the Wool Merchant's Guild then seat themselves behind a trestle table. They hear a succession of crimes and accusations, quickly pronounce sentence, move to the next case. The elements of law in the United States spring from this first simple gathering of circuit court.

The program "Glanville's World: The Rise of English Common Law," coordinated by **Katherine Topulos** of Duke University School of Law, examined the development of Roman and Medieval continental law, and its influence on the growth of the common law of England.

**Marylin Raisch** (Columbia University School of Law), discussed the continental antecedents of English common law. A century after the western half of the Roman Empire fell, Justinian, the Byzantine Emperor in Constantinople, set loose a commission of jurists to collect what law was around and, of highest significance, to add what Justinian felt appropriate. The result was what was later called the *Corpus Juris Civilis*, known more commonly as the Code of Justinian. It was composed of the *Digest* (statements of jurisprudence), the *Code* (imperial rulings), the *Novellae* (the new laws, i.e., Justinian's laws), and the *Institutes* (a textbook). The important aspect was this was a written, fixed, carved-in-stone transmission of law from the Emperor to the citizens.

In the west, the Germanic tribes, now Germanic states, blended Roman law with their own justice. Germanic law was based on the authority of the leader, was personal, and customary. This fusion of law was not necessarily for Germanic self governance—they had their own laws—but to give something tangible to the conquered Romans, so they could be controlled. The Visigoths had their *Leges Visigothorum* (476); the Lombards, the *Leges Langobardorum* (643); the Franks, the *Lex Salica* (500?). The Burgundians, the *Legnum Gundobadi* (500?). Raisch showed overheads of pages from a number of early printings of these and later laws. They are amazingly detailed works of art. Some of the collections had illustrations (in that primitive, often fanciful, Medieval style) clarifying some part of the commentary. I can't help but think this would be a good way to spice up say, the *Restatements*.

About those five guys who went to the Wool Merchant's Guild ... Distinguished legal scholar and historian **Nicholas Cantor** (who incidentally had no projected visual aids, claiming: "I'm an old man. I want nothing to do with anything overhead.") told the story of those five gentlemen of the circuit court, and in the next half hour explained how they began common law. Circuit court existed in Britain until 1971. It was prevalent in the U.S. in the 19th century. It still exists in Canada. In 1180 justice at court was certainly weird, but it was rapid: civil cases (usually property) were heard in five minutes; criminal cases, in 15 minutes. Twenty percent of cases were decided by compurgation, better described as "organized lying." The defendant, after swearing an oath, brought friends to court in order to swear with him. Only certain groups were allowed this type of trial: the wealthy, young women, children, and the old (those 50 and above). The other 80% of cases were decided by an entirely logical process called the Ordeal. Litigants could fight it out, literally. Or the guilt-suspected party was tied securely and thrown into a pond. Water, being a holy element, would reject the guilty. The accused who sank for a specified amount of time without drowning was pronounced innocent. The judges knew this was silly but it was the law. In 1220, ordeals were replaced by something even more terrifying—juries.

Disagreement exists about the extent of influence of Roman law in the rise of English common law. Just about the time our buddies were dunking miscreants in Colchester, a revival in the study of Roman law occurred, mainly in the universities of Bologna and Ravenna. Harold Berman (in *Law and Revolution*, described by Cantor as a "masterpiece") theorizes the adaptation of Roman law occurred under the centralizing aegis of the Crown. A somewhat garbled transfer to England gave the law its distinctive form. Cantor disagrees with this "Romanist" conclusion. Roman law was a written scholastic enterprise. The intricacies of the *Corpus Juris Civilis* needed to be learned in the university, whereas common law is based on oral litigation. The law was not taught in a practical sense in England until the 13th century, with the founding of the four Inns of Court. Roman law in Britain was most clearly identified with ecclesiastics, not secular practice.

If one assumes an indigenous English development with small continental influence, what were the prevailing theses to explain this evolution? Blackstone's theory, in the *Commentaries on the Law of England* (1765), went something like this: Before 1066 and those blasted Normans, England was a liberal (what would now be described as a "democratic") country with free institutions.

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The King didn't decree like Caesar; law resided in the community in, for instance, juries. This free society was then subverted by inexorable monarchic and aristocratic tendencies toward centralization. The result was Little Rome on the Thames, before the conflict was sorted out by the 15th century.

Frederic Maitland (1900s) advised us to forget about the Anglo-Saxons, that the origin of common law began with the Norman Conquest. Though they lacked real power against the nobles, the gentry (the middle class) needed law to protect their interests and property. The royal preoccupation was keeping down the aristocracy; therefore, sensing commonality, the crown and the gentry formed common law in the period 1160 to 1270.

A more modern theory comes from Baker and Milsom of Cambridge. Common law was formed from the legal profession serving the needs of the wealthy. After the disputed succession to the crown of the 1140s and 1150s, the aristocracy recruited the legal profession to settle title to land. On a similar line, Michael

Clanchy (*From Memory to Written Record*) places the rise of common law on the dividing line between oral and written society of the 12th to 13th centuries. The need to show clear title to land pushed the need for literacy in England; literacy pushed the development of universities and the scholastic study of law. The discipline of common law developed out of this documentary study in combination with the pre-literate adversarial tradition. It seems the rise of English common law still has ample room for theory.

### Those five guys at Colchester...

Occasionally, I'll give tours to foreign associates from other Baker & McKenzie offices who are working for a few months here in the District of Columbia. Particularly, if they hail from civil law countries, they are often amazed, sometimes appalled, at the rows of cases, the *Federal Reporters* and *Supplements* that stretch seemingly into the next building. I blame it on the British, but even that doesn't assuage them. All they want is a nice tidy code. Five guys stopped at the Wool Merchant's Guild in 1180 and presided at court. It was their fault.

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at Baker & McKenzie in  
Washington, D.C.

## Letter to the President

Dear Frank:

Thank you and AALL for your friendship and support. All of you are very special. The honorary membership is also very special. It was a great surprise. Frankly, it was a marvelous surprise. Even so, it is I who should be grateful. It is reward enough just to have the opportunity to work with you and the members of AALL. Brenda and I enjoyed both the meeting and Baltimore. We hope to see you and AALL in Anaheim.



Most cordially,  
Nick

**George W. Nicholson**  
Associate Justice  
California Court of Appeal  
Third Appellate District  
Sacramento, California

At the Association Business Meeting on Monday, July 21, 1997, President Frank Houdek (left) presented to Justice George Nicholson a Certificate of Honorary Membership in AALL. The members of the Association recognized Justice Nicholson "for his writings, his ongoing advocacy of the special role played by law librarians in today's legal information environment, and his role as a trustee of the Sacramento County Law Library. Justice Nicholson has demonstrated a lasting commitment to law libraries and law librarians." [from the text of the Certificate] Justice Nicholson joins Judith Genesen and Agnes Reid as the Honorary Members of AALL.