

## OPINIO PRUDENTUM IN ANGLO-AMERICAN LAW.

Throughout this article the word "opinio" will be used to denote oral opinion only. In its larger sense opinion would certainly include also views expressed in writing. Strict Romanists, we are aware, may take us to task for using the expression "opinio prudentum" in this limited meaning. Nevertheless, for the purposes of this article, we will discard the classic significance of the cited sentence and will adopt the mediæval use of the word following the footsteps of Sir Edward Coke.<sup>1</sup>

A further limitation on the scope of our subject is that it is confined to the opinion of native jurisprudentes on any doctrine of Anglo-American law. Therefore, opinions of experts, both domestic and foreign on the customs or the opinion of foreign lawyers as to the foreign law are excluded from our review. Of course, the opinion here considered is that of the persons skilled in law—*juris periti*. Under separate headings we will discuss consecutively general opinion of the Bar, legal academic opinion and individual professional opinion.

### GENERAL PROFESSIONAL OPINION.

There is not a slightest doubt that early, that is, about the reign of Edward I, the general or universal opinion of the Bar, *e. g.*, the persons forming the legal profession of the country, was often solicited by the judges and regarded, when obtained, as of authority. Unfortunately, we cannot go back earlier than 30 Ed. I or the beginning of the fourteenth century. In the year 1302 we have a report that: "*Pus per dirent lor bref par non sute pur se que par touz les serjaunzle bref ne fut pas meyn-tenable en le cas.*"<sup>2</sup> The next instance of such a reference to the opinions of the Bar we find in Edward II's time, eight years later: "And this was the opinion of Herle and, for the greater part, of all the Serjeants except Passeley, who told Hedon boldly to stick to his point. And so he did . . . Then (*et*

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<sup>1</sup> Co. Litt. 186a.

<sup>2</sup> Robert v. Jon, (1302) Y. B. 30 Ed. I. (R. S.) 105.

*tunc*) said Beresford, C. J.: 'I wish all of you to understand that no writ of entry is a writ of right, but it lies in the possession coloured by right, for that is a writ of right which takes issue in the right.'<sup>3</sup> We think that "*et tunc*" makes it sufficiently clear that the Chief Justice gave his opinion after he heard those of the Bar. Two other references stand under the same year, 1313-1314. In one instance the reporter says: "*Downt dit just par les seriantz et par les Justices que . . .*"<sup>4</sup> In the other: "*Nota qe justices et seriantz tindrent pour certeyn ley qil . . .*"<sup>5</sup>

These opinions seem to have been given on all questions that proved difficult for the judges to decide irrespectively of their place in the system of law then administered. They relate to the question of how a seisen is to be traced,<sup>6</sup> nature of the writ of entry,<sup>7</sup> validity of an exemption to a warranty,<sup>8</sup> when an assise of novel disseisen could be had.<sup>9</sup>

The view that general professional opinion was an authority on the matters of law continued to be still in force in the fifteenth century as evidenced by Littleton, J., in his "Tenures." Sir Edward Coke says: "For the Common law his (Littleton's) proofs and arguments are drawn from 20 several fountains or places: . . . Ninthly—*a communi opinione juris-prudentum.*"<sup>10</sup> At least in two instances, Coke's opinion is confirmed by Littleton who founded his argument on the words

<sup>3</sup> *Attecrouch v. Frost*, (1310) Y. B. 3 Ed. II (S. S.) 160.

<sup>4</sup> Anonymous, (1313-1314) Y. B. (S. S.), *Eyre of Kent*, Vol. 2, p. 93.

<sup>5</sup> *Stadebury's Case*, (1313-1314) Y. B. (S. S.), *Eyre of Kent*, Vol. 2, p. 172. It is worth noticing the order in which the reporter places *seriantz* and *justices*. In the first quotation serjeants are placed foremost undoubtedly because their opinion was delivered prior to that of the judges. In the second, which was only a reporter's note, the order is reversed probably because of the greater respect that was due naturally enough for the judges.

<sup>6</sup> *Robert v. Jon*, *supra* in Note 2.

<sup>7</sup> *Attecrouch v. Frost*, *supra* in Note 3.

<sup>8</sup> Anonymous, *supra* in Note 4.

<sup>9</sup> *Stadebury's Case*, *supra* in Note 5.

<sup>10</sup> *Co. Litt.* 11a.

"It is commonly said."<sup>11</sup> In the sixteenth century we have Sir Edward Coke's own observation upon Littleton: "'Also it is commonly said, etc.' That is, it is the common opinion and *communis opinio* is of good authority in law. *A communi ab-servantia non est recedendum*, which appeareth here by Littleton."<sup>12</sup> And again: "It is commonly said, 'Here by the opinion of Littleton *communis opinio* is of authoritie and stands with the rule of law. *Minime mutanda sunt quae certam habuerunt interpretationem.*'"<sup>13</sup>

We have no evidence during the seventeenth century, but in the eighteenth it is significant that Blackstone in his Chapter on the Nature of Laws does not mention the universal opinion at all.<sup>14</sup> And by the end of that century we get a definite *dictum* that the opinions of the Bar are of no avail against a definite judicial decision. Thus, per Keyon, *M. R.*: "And I thought the question had been settled by the decisions. If it is of any weight what the opinions of the Bar were, the case of *Norris v. Ruthwaite* was decided against those opinions."<sup>15</sup> Yet the doctrine has not become dead, for early in the nineteenth century we see Lord Mansfield enumerating for his authorities equally with books of authority and a decided case "the universally received opinion of the profession." In the same case Heath, *J.*, simply said that such was the opinion "on this side of Westminster Hall." These expressions, though not accompanied by the word "authority" show that universal professional opinion in that case was considered as a decisive proof of what was the law on the point in question. Given at length the *dicta* appear so: Per Mansfield, *C. J.*: "Chief Baron Comyns and all the books recognise Lord Coke's doctrine without a doubt. *Shakespear v. Peppin* recognizes the authority of *Fawcett v. Strickland* and that case throughout the whole argument takes

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<sup>11</sup> Co. Litt. 186a, 364b.

<sup>12</sup> Co. Litt. 186a.

<sup>13</sup> Co. Litt. 364b.

<sup>14</sup> Black. Comm., Vol. I, Sec. 2.

<sup>15</sup> *Benyon v. Maddison*, (1786) 2 B. C. C. 73 at p. 77.

it for granted that the law is so. The universally received opinion of the profession ever since I have been in the law has been that there can be no approver against common of turbary." Per Heath, *J.*: "On this side of Westminster Hall the law has always been so received; and during the time I was at the bar, I have given opinions to that effect."<sup>16</sup>

Ten years later Chief Justice Dallas referred to the "general understanding of the profession" in terms though of respect yet shorn of the word "authority": "And although during this period there have been many general elections, yet it never occurred to any one to raise the objection now before the Court till this action was brought. I do not mean to say that if the law be clear this circumstance would be of any avail; but it serves to shew the general understanding of the profession during so long a time; and, in general, the silence of Westminster Hall when considered with relation to questions of this importance has been considered as of some weight."<sup>17</sup>

As late as 1833 we find the echo of this doctrine when Park, *J.*, and Gurney, *B.*, speaking in *Garland v. Carlisle*,<sup>18</sup> said: "The same point has been so laid down in different text-books, and I may say for myself, that, since I became a member of the profession, and in the habit of advising others, I have considered that no question of bankrupt law was more completely settled than this; I never heard that any doubt was entertained upon it; and I certainly felt some surprise when the objection was taken on the first motion for a new trial in the case of *Balme v. Hutton*." This opinion of Park, *J.*, though not contradicted, was not followed. "The next question is; whether this act of Parliament has in all times received a contrary exposition? If an act of Parliament more than two centuries old has received one uniform construction, it would, perhaps, be more safe to yield to that construction (even though it should not be quite satisfactory) than, by making a change, to unsettle the op-

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<sup>16</sup> *Grant v. Gunner*, (1809) 1 Taunt. 435, at p. 448.

<sup>17</sup> *Thompson v. Pearce*, (1819) 1 Brod. & B. 25, at p. 33.

<sup>18</sup> 2 Crompt. & M. 31, at pp. 39, 66.

inions and the practice of the profession and of the public." During the next year Park, *B.*, recognized universal opinion as a source of law: "If the former supposition be correct it is some but not the most satisfactory evidence of the *communis opinio*, one of the sources from which we derive our knowledge of the common law."<sup>19</sup> Gurney, *B.'s*, words are vitiated by reference to "the practice of the profession," a subject here not considered, and secondly the reference on the same level to "the opinions of the public" which were never of any weight in an Anglo-American court. In the face of all these later cases we find it difficult to maintain that the general opinion of the profession is still of authority in the law of England and the United States on all questions of that law. Tompkins, *J.*, said in *Marquerite v. Chouteau*.<sup>20</sup> "It seems to be a wise rule to receive no lower evidence of the law than the treatises of the learned sages of the profession, or in the language of the civilians 'Responsa Prudentum.'" We come to the conclusion that the direct reference to general opinion of the profession on all questions of English law has become evidently disused.

But there is one branch of law, where the general opinion of the profession still remains an authority and that is conveyancing. The universal opinion of the profession as evidenced by the general practice of the conveyancers governs the decision of an Anglo-American court in matters affecting the titles to real and personal property.<sup>21</sup> But "modern methods of conveyancing are not to be construed to affect ancient notions of equity."<sup>22</sup> And similarly of law, of course. That it must be universal is clear from the following passage of Hardwicke, *L. C.*: "There is but one thing behind, which deserves to be taken notice of under this head: It was said to have been the general rule amongst conveyancers in making conveyances upon purchases. . . .

<sup>19</sup> *Gray v. Queen*, (1844) 11 Cl. & F. 427, at p. 468.

<sup>20</sup> 3 Mo. 375, 387 (1834).

<sup>21</sup> "What a howl would be set up (and not unjustly) if the Courts were to disregard the established practice of conveyancers." J. Austin, *Juris. Lect. XXXVIII*, (3d ed.) p. 667.

<sup>22</sup> *Senhouse v. Earle*, (1755) Amb. 285, at p. 288.

I have enquired of a very learned and eminent conveyancer, and cannot find that there has been any such general rule. If there had, I confess it would have been very material as in my Lady Radnor's case. It is true that Mr. John Ward of the Temple, who was considerable in that branch of business, has declared it to be his opinion, and he took it to be so. But how far he practiced so, *non constat*; and if he did, it would not make a general rule, which is the point to be inquired after. To reduce it to reason, it must be taken with a distinction [explains the proper use of both methods]. Such instances as these may account for the practice in many cases, but cannot constitute a general rule."<sup>23</sup>

Four years later the same Lord Chancellor laid down the rule that the opinion of conveyancers generally received ought to govern: "The opinion of conveyancers in all times, and their constant course, is of great weight. They are to advise, and if their opinion is not to prevail, must every case come to law? No; the received opinion ought to govern."<sup>24</sup> In the same case Lord Mansfield expressed a similar view and gave a reason for holding such opinion:<sup>25</sup> "Consider also the usage and transactions of mankind upon it; the object of all laws, with regard to real property, is quiet and repose. As to practice, there has almost been only one opinion. The greatest conveyancers; the whole profession of the law; Sir Orlando Bridgeman; Lord Nottingham; there was not a doubt at the bar in *Harvey v. Ashley*; Mr. Fazakerley always took it for granted that infants were bound." And Wilmot, *J.*, made it clear that practice is admitted as a proof of opinion, while the generality of the latter shows its correctness:<sup>26</sup> "I prove the opinion of Conveyancers for two centuries by this medium; it is now about two hundred years since the Statute of H. VIII was made. The practice proves the opinion; and the

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<sup>23</sup> *Willoughby v. Willoughby*, (1757) 1 Durn. & E. 763, at p. 771.

<sup>24</sup> *Buckinghamshire v. Drury*, (1761) 2 Eden 60, at p. 64.

<sup>25</sup> S. c. at p. 74, approved in *Meriam v. Harsen*, (1847) 2 Barb. Ch. 232, at p. 269, per Walworth, C.

<sup>26</sup> S. c. Wilmot's Notes 177, at p. 219.

uninterrupted acquiescence under the practice proves the rectitude of the opinion."<sup>27</sup>

This doctrine received its full recognition just about a hundred years ago in the case of *Smith v. Jersey*.<sup>28</sup> The opinions of Best, J., Lord Eldon and Lord Redesdale were most emphatic in their recognition of it. We proceed to give them *verbatim*. First is that of Best, J.:<sup>29</sup> "My Lords, I have heard the learned Judges say that they would never allow a practice to be set aside on which the titles to many estates depended, however much they might disapprove of such a practice." The most open of them was that of Lord Eldon:<sup>30</sup> "My Lords, we hear of the practice of conveyancers, and that amounts to a very considerable authority; and I am justified in that assertion by the opinions of the greatest men who have sat in Westminster Hall, who, I am persuaded, in many instances, if matters had been *res integræ*, would have pronounced decisions very different from those which they thought proper to adopt, if they had not taken notice of the practice of conveyancers as authority." We conclude this subject with a quotation from Lord Redesdale's judgment: "I do conceive, that the law has frequently been decided, even in the construction of acts of Parliament, upon what has been the general understanding of lawyers as to the true intention of those acts of Parliament: and I will instance such a case under the Statute of Jointure. Your Lordships' House determined, in the case of *Drury v. Drury* (3 B. P. C. 492), that a rent charge settled on an infant was, within the Statute of Jointure (27 H.

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<sup>27</sup> These opinions have been endorsed by Camden, L. C.: "Much property has been settled and conveyances have proceeded upon the ground of that determination. In the case of Vardebendy in the House of Lords the doctrine about dower prevailed because it had been practised in a course of conveyance." *Morecock v. Dickins*, (1768) Amb. 678, at p. 681. And they are shared by Mr. Justice Buller: "Some things are extremely clear. In the construction of agreements and covenants the intention of the parties is principally to be attended to. In conveyances of this sort the usage of the profession also deserves considerable attention." *Browning v. Wright*, (1799) 2 Bos. & P. 13, at p. 26. See also Chafer & Randall's Contracts, (1916) 2 Ch. 8, at pp. 16 and 24.

<sup>28</sup> (1821) 2 Brod. & B. 473.

<sup>29</sup> S. c. at p. 507.

<sup>30</sup> S. c. at p. 599.

8c. 10), a good bar to dower; not because such was the literal interpretation of the Statute, but because such had been the constant practice of conveyancers and others touching the subject; and it was expressly upon that ground, that your Lordships' decision at that time went; and I do conceive it is of the utmost importance that your Lordships should guide your judgment by that criterion, whenever it can be applied; for, otherwise, my Lords, all property must be in hazard." And on the next page: "And therefore, the practice of conveyancers upon subjects of this description is, I conceive, a most important consideration, and, wherever that has prevailed for a great length of time without impeachment in a Court of Justice, I take it, it ought to be considered as a true exposition of the law."<sup>31</sup>

The matter might have rested here as sufficiently clear and supported by opinions of judges whose views are of such great weight that it seems inappropriate to entertain even a shadow of doubt that what they have laid down as law is such. Yet we cannot pass without notice the opinion expressed upon the subject now under consideration by Lord Gifford, *M. R.*, in *Purdew v. Jackson*.<sup>32</sup> The question there raised was the validity of the husband's assignment of his wife's reversionary interest in a personal chattel—that is, a question of the validity of a title to a property. The view expressed with regard to the authority of professional opinion as evidenced by the practice of conveyancers was as follows: "It was stated in argument from the bar that the only decided case on the subject had not given satisfaction; that the voice of the profession was against it; that a contrary notion had long and generally prevailed and had been the foundation of opinions on which the titles of such property were founded; and that all those titles would be shaken if that case were now to be confirmed. These latter observations must, of course, be understood to apply to the state of authorities before the decision in *Hornsby v. Lee*. . . . Great attention is

<sup>31</sup> S. c. at p. 611. See also *Rawson v. Johnson*, (1801) 1 East 203, at p. 211; *Candler v. Candler*, (1821) Jacob 225, at p. 232; *Howard v. Ducane*, (1823) 1 Turn. & R. 81, at p. 86.

<sup>32</sup> (1824) 1 Russ. 1, at p. 62 *et seq.*

certainly due to the prevailing opinions of the profession on any point. If, however, the point has never been settled by express decision, it is the duty of the judge, before whom the question is brought, to exercise his own unbiased judgment upon it with all the deference and caution which ought to be expected from him before he relies upon his own opinion, when opposed to that of the generality of the profession; but with a sense of the responsibility which his functions impose upon him of tracing the subject to the principles and analogous authorities and of endeavouring to come to a correct conclusion. It is possible that opinions may occasionally be afloat founded on loose expressions and scattered *dicta*, sometimes uttered without mature consideration, sometimes inaccurately or imperfectly reported, which pass from one man to another and are gradually received and acted upon as forming the law, without sufficient authority for such a conclusion."

This taken as a whole, stands in direct and irreconcilable contradiction to the doctrine we have laid down above. It flatly refutes the opinion of Lords Mansfield, Hardwicke, Eldon and Redesdale, not mentioning lesser legal lights. As far as we are able to discern, it is not supported by later decisions. So long as it contradicts the general doctrine with regard to the authority of professional opinion evidenced by the general practice of conveyancers, we submit, this view of Lord Gifford is not law. But as a decision it can be supported. Contrary to the opinion of the profession as pressed upon the Court there had been a previous decision in *Hornsby v. Lee*. Lord Gifford, it is true, said that he considered the matter independently of *Hornsby v. Lee*, but as *res integra*. Yet he (at the top of page 63) referred to it at least as a warning to the profession in giving their advice and on drawing conveyances. The chief reason for following the general opinion of conveyancers is that a reversal of such opinions practiced for a considerable time would upset many titles to the contrary. Now, a persistence in such opinions in the face of a judicial decision to the contrary is merely a reckless obstinacy and those who practice it not only take the risk of doing so at their peril, but also deserve a punishment. Lord Redesdale has

also mentioned this qualification in *Smith v. Jersey*: "And whenever that practice of conveyancers has prevailed for a great length of time without impeachment in a Court of Justice it ought to be considered as a true exposition of law."<sup>33</sup>

But Lord Eldon evidently did not recognize this distinction in *Maundwell v. Maundwell*<sup>34</sup> where he declared that: "I should with much more reluctance at this day have sent to Law to be reconsidered the question whether such a power could be reserved to the owner of the fee knowing the practice and seeing what is in the books; though feeling great respect for the opinion of the Court of Common Pleas diminished only by former authorities. . . . Perhaps I should if it had been asked have permitted it, though contrary to my opinion; which I now declare."

On the whole, we are inclined to accept the qualification as hinted at by Lord Redesdale and as applied by Lord Gifford in *Purdeu v. Jackson*.<sup>35</sup> The opinion of conveyancers is accepted as a best exposition of law when it is universal and has been acted upon by the whole of the profession for a length of time. The time and universality show that there is no reason to impeach it, no sufficient foundation to set it aside. All this cannot be affirmed when we come face to face with the fact that the Court held on the similar point within this period of time a contrary opinion. It is impossible that the profession as a whole would disregard that decision—the practice then could hardly be said to be universal. The length of time can be taken only up to that decision; after its lapse of time is of no avail. On these grounds we think that the limitation must be upheld.

#### LEGAL ACADEMIC OPINION.

Such legal academic opinion as expressed in lectures only will be considered here. The opinion of readers and professors of the Anglo-American Law as expressed in books is considered

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<sup>33</sup> (1821) 2 Brod & B. 473.

<sup>34</sup> (1804) 10 Ves. 246, at p. 266.

<sup>35</sup> *Supra* in Note 32.

without a special reference to them under the works on law—common or otherwise as the case may be.

Sir Edward Coke in the early part of his "Commentary on Littleton," says this:

"For the common law his [Littleton's] proofs and arguments are drawn from 20 several foundations or places: . . . (w) *A lectionibus jurisprudentium.*"<sup>36</sup> In the body of the work he discusses the matter somewhat more fully, thus: "*Jeo aye sovent la lecture de l'estatute de Westminster second.*"<sup>37</sup> "Here it is to be observed of what authoritie antient lectures or readings upon Statutes were, for that they had five excellent qualities. First, they declared what the common law was before the making of the statute as here it appeareth. Secondly, they opened the true sense and meaning of the Statute. Thirdly, their cases were briefe, having at the most one point at the common law, and another upon the Statute. Fourthly, plain and perspicuous for then the honour of the reader was to excell others in authorities, arguments and reasons for proofs of his opinion, and for confutation of the objections against it. Fifthly, they read, to suppress subtile inventions to creepe out of the Statute. But now readings having lost the said former qualities, have lost also their former authorities; for now the cases are long, obscure and intricate full of new conceits, liken rather to riddles than lectures, which when they are opened they vanish away like smoke and the readers are like lapwings who seem to be nearest their nests when they are farthest from them, and all their study is to find nice evasions out of Statute. By the authority of Littleton antient readings may be cited for proofs of the law but new readings have not that honour for that they are so obscure and dark."<sup>38</sup>

Several questions arise for consideration. Sir Edward Coke no doubt referred only to the lectures read in the Inns of Court—but we may safely extend his opinion to cover the lectures

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<sup>36</sup> Co. Litt. 11a.

<sup>37</sup> Litt. Sec. 481.

<sup>38</sup> Co. Litt. 280b.

read academically in other high juridical teaching institutions of England and America, for nowhere else such lectures had been read at the time of Sir Edward Coke. It was not until 1758 that Sir William Blackstone, as he afterwards became, commenced his famous course of lectures on the law of England at Oxford—lectures, that have become an authority in the Anglo-American law.

Again, it may be said that Sir Edward Coke referred only to a particular kind of lecture—those on the statutes. Here also we need not labour long, for the matter is merely of form and not of substance. Coke himself says that they started with exposition of common law prior to the statute and one of the points in a case given was on common law, the other on the statute. In fact, the statute was only a skeleton to weave the common law around—the latter supplied the necessary flesh.

But far more important consideration should be given to the question as to what period Coke referred to when he said that “ancient reading may be cited for law, but new readings have not that honour.” When did the period of these ancient readings end and that of the modern commence?

We would suggest the middle of the fifteenth century as the end of this period for Coke’s comment concerns the word of Littleton: “*Jeo aye oye sovent*” (I have often heard). Now, Littleton relied on the lectures as authority and evidently they were so considered in his time. Sir Thomas Littleton’s activities were confined to Henry VI’s time (1421-1471) and he most likely heard these lectures in the earlier part of his life. Consequently up to the middle of the fifteenth century all lectures would be of authority in law *per se*, afterwards only those that would be adjudged by the Courts as such. The result need not astound an imaginative reader who might think that a new wealth of authority would be thus bestowed on English and American lawyers. We do not know whether, when Sir Edward Coke wrote, the position was the same as now, but so far as we are concerned, besides Sir Thomas Littleton’s own lec-

tures<sup>39</sup> we do not know of any others extant. R. R. Pearce, in his Guide to the Inns of Court mentions on pages 65-69 famous readings, but the earliest of them are of Littleton. Pearce published his book in 1855. We cannot find a reference anywhere to any other lecturer prior to Littleton whose lectures would be of authority independently of the rule we are now discussing. So that Coke's affirmation of authority of ancient readings probably, even in his own time, was merely a theoretical proposition.

Lectures or readings delivered in modern times would not be of authority *per se*. Lectures of Coke, Staundforde, Sir Francis Bacon would be of authority because of the personal authority enjoyed by their authors. On the other hand, we find the lectures of Sir Robert Brook, who was a reader of the Middle Temple *tempore* Edward VI (1537-1553), disallowed by Burrough, *J.*, who said: "But I object to Brook's readings, as authority. They were no more than lectures."<sup>40</sup> Now, if this learned judge thought, following Sir Edward Coke, that no lectures could become an authority after the period mentioned by the latter, we submit he was laying down something that certainly is not law. Callis's lectures and those of Blackstone are standing refutations. Again, if he thought that lectures as such should never be allowed as authority, we should like to know on what grounds then can be supported such occasional notes as marginal observations.<sup>41</sup> It can hardly be argued with plausibility that a lecturer bestows less care upon his lectures than a practitioner upon the marginal notes. Burrough, *J.*, may have thought the work too elementary. But equal objection would apply to Callis's and Blackstone's works. It is not an objection affecting the authority of a work, but rather limiting the extent of such authority. Moreover, we find great difficulty in maintaining the proposition that a work cannot be an authority because it is popular or elementary when popular exposition of the law of

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<sup>39</sup> Harl. M. S. S. 1691 ff. 188 and following.

<sup>40</sup> Tolson v. Kaye, (1822) 3 Brod. & B. 217, at p. 226.

<sup>41</sup> R. v. Millis, (1844) 10 Cl. & F. 534.

Marriage, attributed (but not with certainty) to Dodderidge, *J.*, is referred to by no less a reverent judge than Lyndhurst, *L. C.*, as "a learned work" and "authority."<sup>42</sup> It is also impossible to say that Burrough, *J.*, has simply said that Brook's readings are of no authority; he went further, continuing, as a reason for his objection: "They were no more than lectures." We submit that this reason is not a valid one. We further submit that what he said with regard to these readings is not law and unless later *dicta* will declare them to be of no authority on some other grounds, proper lectures should be deemed to be authoritative. Lectures of Sir Edward Littleton (1589-1645), afterwards Lord Littleton and Keeper of the Seal to Charles I, or part of them, are reported in Salkeld's Reports at page 45 as cited by Barker, *C. B.*, in 1744.<sup>43</sup> Whether as authority or illustration we do not know, but no word "authority" was applied to them. We are inclined to think that probably this portion has been quoted as an illustration of professional opinion of the period.

But one reading, at least, we know for certain has become an authority that cannot be classed under any of the above heads—that is Robert Callis's Readings on the Statutes of Sewers. He had been a Commissioner of Sewers for his native county, a serjeant at law, and, according to Pearce, read his lectures at the Gray's Inn in 1622. His ring bore an appropriate inscription: "*Regis oracula leges.*"<sup>44</sup> Buller, *J.*, referring to his lectures, said: "It (sewer) is common and public in its nature; it is so considered in Callis's Readings, one of the best performances on that subject, and which has always been admitted as good authority."<sup>45</sup>

#### INDIVIDUAL PROFESSIONAL OPINION.

Individual opinion written or expressed by a member of the bar not possessing personal authority has no authority in the Anglo-American law. Written opinion when the author is "no

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<sup>42</sup> S. c. at p. 848.

<sup>43</sup> *Omychund v. Barker*, 1 Atk. 21, at p. 42.

<sup>44</sup> *Cro. Car.* 71.

<sup>45</sup> *Dore v. Gray*, (1788) 2 Durn. & E. 358, at p. 365.

more" may be cited in a court in the manner in which the works of no authority are cited. For example, in *Forth v. Norfolk*,<sup>46</sup> an opinion of ancient Serjeant George Hill was cited, but this serjeant died as long ago as 1808.<sup>47</sup>

The opinions of individual members of the profession can come before the Court in four different manners: (1) as expressed in a book; (2) as a written view upon some question; (3) as an argument at the Bar; (4) as a deposition describing foreign law or judicial practice.

With an opinion expressed in a book or other written work and made public we have already dealt.<sup>48</sup> The only individual legal opinion that will be dealt with here will be that of the members of the Bar *qua* such members. The weight possessed in the Anglo-American law by the opinions given even by the eminent jurists when at the Bar was estimated per Buller, *J.*, thus: "Much was there<sup>49</sup> said of opinions given by eminent men at the Bar. Such opinions, however well considered, have no weight in the scale of justice."<sup>50</sup> The opinion there cited appears to have been given by Lord Mansfield.

The first instance when we meet with the question is the opinion of Lord Holt expressed in *Coggs v. Bernard*.<sup>51</sup>

"The case of 9 Ed. 4, 40b, was but a debate at bar. For Danby was but a counsel then, though he had been a Chief Justice in the beginning of Ed. 4, yet he was removed and restored again upon the restitution of Hen. 6, as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke for his client; and Genney for his client said the contrary." In the beginning of the eighteenth

<sup>46</sup> (1820) 4 Madd. 503. See also "The Santa Cruz," (1798) 1 C. Rob. 42, at p. 53.

<sup>48</sup> Woolrych's Lives of Eminent Serjeants, p. 180.

<sup>49</sup> We might add here that the legal academic opinion cannot come before the Court in any other form than a written work or lecture, notes taken by some student; under these heads it would fall into the line of general discussion as to the books of no authority or the lectures. These two subjects were discussed by us *supra*.

<sup>50</sup> Perrin v. Blake, (1770) 4 Burr. 2579; 1 Blackt. 672.

<sup>51</sup> Hodgson v. Ambrose, (1780) 1 Dougl. 336, at p. 341.

<sup>52</sup> (1703) 2 Ld. Raym. 909, at p. 914.

century the same opinion was again expressed by Cowper, *L. C.*: "But in answer to this I observe that this point was not adjudged in Shelley's case; it is only the argument of counsel which the Court in delivering their opinion took no notice of."<sup>52</sup> Chief Justice Best about a hundred years after used substantially the same language: "Undoubtedly that is the law; it is the grant of several persons; though what Plowden says is no authority; nor is it in this case the opinion of any Judges, but it is only the argument of Serjt. Catline."<sup>53</sup>

The doctrine has taken such strong root in the law of England that we hardly need to multiply authorities. It has never been, so far as we know, directly contradicted by any judge. One of the latest recognitions of it is that of Lord Justice Fry: "But the passage we have cited appears to have no real weight of authority. It is only part of the argument of the Attorney General."<sup>54</sup> Yet Macdonald, *C. B.*, at about the same time used some dubious language with regard to an opinion expressed by an attorney general when arguing a case. He said: "That proposition having slept from Gerard's time to this, we find no adoption of it in any text-book; we find the question raised whether the terre-tenants could be brought in, which was precisely the point in that case; but in no text-book has the great and extensive proposition of Gerard been adopted in words or in substance; although if that proposition had been understood in Westminster Hall to be law, we should so have had it. The authority, to be sure, is a respectable one, but it is the authority of a person arguing for the crown, and it is reasonable to infer that Gerard stated this proposition greatly beyond what was assented to by the Court in the case referred to."<sup>55</sup> We submit that the expression "the authority to be sure is a respectable one" is not law, for an expression at the bar by a counsel cannot be of any authority. This expression must be taken in the light of the following words, "but it is the authority of a person arguing

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<sup>52</sup> *Brown v. Barkham*, (1716) 1 Stra. 35, at p. 38.

<sup>53</sup> *Garland v. Genkyl*, (1824) 2 Bing. 273, at p. 299.

<sup>54</sup> *Cochrane v. Moore*, (1890) 25 Q. B. D. 57, at p. 70.

<sup>55</sup> *R. v. Smith*, (1810) Wight W. 34, at p. 49.

for the crown"; we know already that such authority is entitled to no weight at all. Very likely Macdonald, *C. B.*, was led to use this language because Sir Gilbert Gerard had subsequently been Master of the Rolls, but the opinion of Lord Holt given above shows that even such a fact cannot and does not in any way influence the general doctrine.

What might appear at the first sight an exception to the doctrine is that the arguments of the counsel as reported by Croke, *J.*, and Sir Edward Coke and a few others, are regarded as of authority. But the reason of this attitude is explained by Richards, *C. B.*: "In *Cro. Eliz.*, pp. 511, 512, we find a very material case (*Wright v. Wright*). Sir Edward Coke at that time, it is true, was only counsel; but we know that the author of these reports, as does Lord Coke himself in his own reports, states the arguments if they are not contradicted as having been considered to be founded upon the law of the land and therefore sanctioned by the Court."<sup>56</sup> So that it is not the arguments of the counsel that are allowed as authority, but owing to the peculiar manner which the reporter has adopted in taking down a case, part of the judgments is put in the mouth of the counsel at the bar. Therefore we do not get a complete opinion of the court without embodying the reported speeches of the counsel.

Finally we come to consider the opinions of individual members of the bar when given to the court in order to explain foreign law or judicial practice. But lest there be a misunderstanding we must make it clear that we are not considering here the depositions made as to what foreign law is when such question arises in an English or American court. We have limited this paper to a consideration of the works and opinions of jurists from a point of view of their ability of either directly being a source of English law, *e. g.*, shaping it by means of works and opinions of authority, or at least of influencing in however a small degree its formation by means of works or opinions of no authority. Under

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<sup>56</sup> *Att. Gen. v. Eardley*, (1820) 8 Price 39, at p. 59. See also *Fisher v. Wiggs*, (1700) 1 Ld. Raym. 622, at p. 631, and *Strader v. Heirs of Byrd*, (1835) 7 Oh. 184, at p. 187.

none of these two broad divisions will fall the opinion of jurists as to what the foreign law is. Such opinions are mere evidence tendered to prove a fact—the foreign law. Certainly, as a fact upon which a judge bases his opinion, a jurist's evidence influences the result of the judge's decision. But it, as any other fact, influences the material result of that decision and not the legal.<sup>56a</sup> But there is a branch of English law which in some degree depends on and is influenced directly by the individual professional opinion, especially when a question not settled or still more probably not even mooted out by English lawyers, arises in a court of law. Lord Mansfield, in the case of *Triquet v. Bath*,<sup>57</sup> said: "I remember in a case before Lord Talbot, of *Buvo v. Barbut*. . . . Lord Talbot declared a clear opinion, 'That the law of nations, in its full extent, was part of the law of England. That the law of nations was to be collected from the practice of different nations and the authority of writers.' . . . I was counsel in this case, and have a full note of it." "The first crime in the indictment is an infraction of the law of nations. This law in its full extent is part of the law of this state and is to be collected from the practice of different nations and the authority of writers."<sup>58</sup> In the same year Lord Mansfield had taken an opportunity to apply the principle here enunciated, namely, that the rules of international law are to be collected from the practice of foreign nations. In *Ricord v. Betterham*<sup>59</sup> a question arose concerning a payment of a ransom bill given to an alien enemy, though the hostage given to that enemy died in prison. Blackstone, counsel for the defendant, offered to make inquiry into the practice of Holland and France; to which Lord Mansfield answered: "Let it therefore stand over

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<sup>56a</sup> Such evidence does not and cannot form a rule binding upon another judge who may act upon another jurist's evidence probably deposing differently upon the same point. This kind of a deposition cannot influence any legal principle of law that a judge in England or America would apply to solve a problem composed by facts amongst which one shall be the law of a foreign country.

<sup>57</sup> (1764) 3 Burr. 1478, at p. 1481.

<sup>58</sup> *R. v. De Longchamps*, (1784) 1 Dallas 111, at p. 116, per M'Kean, C. J.

<sup>59</sup> (1764) 1 W. & Black. 563, at p. 568.

upon the single point of that inquiry." At the next term Blackstone acquainted the court with opinions of Meerman, of Rotterdam, and his colleagues communicated by the former and De Beaumont of Paris, who gave a similar opinion and said that a few years before such a case was decided in accord with his opinion in the Parliament of Normandy. Judgment went as suggested by these opinions. This illustration is given rather fully for it shows well that it is not the foreign practice as such that is taken into account but the opinion of foreign lawyers as to what that practice is or even would be, as in the case of the jurists above. The use of individual professional opinion, we may expect, must be similar to that of the works of law possessing no authority. And so it is. But, certainly, the use made by the judges of individual opinion of the Bar is more limited than that of written works. The limitation lies in the nature of the opinion. It cannot be, for one thing, a register or a compilation of authorities; when it is written it is customary to add only the most important authorities, and it is usually drawn in a short and concise form. Such opinion also cannot serve as an indication of how the profession regards certain decisions of a court—when expressed privately in what is technically known as "an opinion" it is a reflection of an individual's view, likely to be prejudiced by the interests of the client whose case the counsel is considering. When stated at the bar *arguendo* it is not only coloured by such interest, but also authoritatively either disposed of as irrelevant or allowed, and then will be in future referred to as an opinion of the court and not as that of counsel.

Apart from these two uses we find that individual legal opinions are used similarly to that of works of no authority. Thus, as a correct statement of several judicial decisions: "And though the passages cited from Bridgman<sup>60</sup> appear only to have been said by him in the argument of that case, it is well known that Bridgman was a counsel of considerable eminence and what he said seems warranted by other decisions."<sup>61</sup> Again, such

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<sup>60</sup> *Samborne v. Harilo*, (1621) J. Bridg. 9.

<sup>61</sup> *Sadgrove v. Kirby*, (1795) 6 Durn. & E. 483, at p. 486, per Kenyon, C. J.

opinions may be used as a correct statement of a judge's views upon some doctrine of law and the arguments that support it. To such use, for example, an opinion of an anonymous counsel was put by Hardwicke, *C. J.*: "And therefore the argument made use of in the case of *Matthews and Burdet*, 2 Salk. 673, though it be only the reasoning of counsel, is of great weight and such as I have heard no satisfactory answer given to."<sup>62</sup> Furthermore, such opinion can be and is used as a correct statement of law. Thus Lord Kenyon, *C. J.*, after reading the "reasons" stated by the counsel in support of his written case on appeal to the Privy Council in *Morris v. Ward*, said: "Though the above were only the reasons of the Counsel in that case, they contain as much good sense and sound law as if they had had the authority of all the judges of England."<sup>63</sup>

Finally, they may be used as showing the contemporary view of the profession on some legal rule or practice. Per Sir W. Scott: "In the discussion of the case much attention was paid to an opinion found amongst the manuscript collections of a very experienced practitioner in this profession (Sir E. Simson), which records the practice and the rule as it was understood to prevail in his time."<sup>64</sup>

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<sup>62</sup> *Middleton v. Crofts*, (1736) 2 Atk. 650, at p. 685.

<sup>63</sup> *Alpass v. Watkins*, (1800) 8 Durn. & E. 516, at p. 519.

<sup>64</sup> "The Santa Cruz," (1798) 1 C. Rob. 42, at p. 53.