

## CHAPTER 15

### *Fictions, equity and legislation: Maine's three agencies of legal change*

*Alan Diamond*

Maine's great contribution to the study of legal change is his identification of fictions, equity and legislation as the mechanisms by which law is brought into harmony with changing social conditions, Maine was clearly not the first person to recognize the utility of these mechanisms, but his crisp formulation remains memorable, and the evolutionary twist which he gave to this scheme has proved to be fruitfully controversial.

The first three chapters of *Ancient Law* are concerned with the evolution of legal systems. According to Maine, all societies (or at any rate, what he referred to as the Indo-European societies) evolve from a stage at which there is virtually no rule of law at all, where men are subject only to the caprice of 'the patriarchal despotism' (*AL*: 8), to an 'epoch of Customary Law, and of its custody by a privileged order\*' (13). From there, 'We arrive at the era of Codes, those ancient codes of which the Twelve Tables of Rome were the most famous specimen' (14). With the adoption of a code, which according to Maine was simply the embodiment in words of the existing customs, the 'spontaneous development<sup>1</sup> of law comes to an end (21). It is with the coming of the epoch of codes that 'the distinction between stationary and progressive societies begins to make itself felt\*' (22). In part, the progressive societies are distinguished by the fact that their codes were obtained at an earlier stage of their social progress, a stage at which 'usage was still wholesome' (16, 20). Moreover, these codes were merely codifications of the existing customs of the people, whereas 'the codes obtained by Eastern societies [which] were obtained, relatively, much later than by Western ... wore a very different character\*' (17). For one thing, they were composed 'not so much of the rules actually observed as of the rules which the priestly order considered proper to be observed' (17). For another, they were compiled after the customary rules had

been subjected to 'a law of development which ever threatens to operate upon unwritten usage<sup>5</sup>, so 'that usage which is reasonable generates usage which is unreasonable' (19). More importantly, in time the codes, whether embodying wholesome or unwholesome usage, became rigid, and remote from contemporary life. In the progressive societies, there is a gradual amelioration of the rigidity of the codes; in the stationary societies, there is none (22-4). In the progressive societies, law is made to be responsive to 'social necessities and social opinion', but in the stationary societies, 'instead of the civilization expanding the law, the law has limited the civilization' (23). It is at this stage that we encounter Maine's famous generalization about the agencies of legal change:

A general proposition of some value may be advanced with respect to the agencies by which Law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity and Legislation. Their historical order is that in which I have placed them. (24-5)

Maine's scheme, however, has been found 'difficult to square with the English experience' (Baker, 1979: 170). There are two reasons for this, the first of which arises from the generalization itself: the English experience suggests an interplay among these instrumentalities, rather than an evolution from fictions to equity, and then to legislation. Second, Maine defines his terms 'in a broad sense rather than in the technical sense familiar to English lawyers' (Baker, 1979: 170). Thus, Maine defines fictions so as to include both statutory interpretation and judicial decision-making, and equity so as to emphasize not the procedural advantages offered by the Court of Chancery, which allowed that court to supplement, correct and aid the common law, but a view of equity as a superior kind of law, as a kind of natural justice, with an inherent claim to override the municipal law. Despite these shortcomings, if shortcomings they are, Maine's tripartite scheme has proved invaluable; indeed Baker himself presses it into service to describe the various ways in which law is made (1979: Chapter 12). Moreover, the very breadth of Maine's definitions and the ambitiousness of his claim that the instrumentalities of legal change can be placed in historical sequence make his generalization enormously suggestive. Most importantly, Maine's dictum served in its time, and continues to serve, to concentrate the minds of lawyers on law, 'not only [as it] exists *in*, but also *through* time' (Woodard, p. 228 above). And, to

borrow Professor Shils' term, it provides a useful set of 'categorical spectacles\* with which to view the history of widely disparate legal systems (see p. 173 above). In the end, Maine's definitions may call into question the validity of the tripartite scheme itself.

Maine admits to employing 'the word "fiction" in a sense considerably wider than that in which English lawyers are accustomed to use it, and with a meaning much more extensive than that which belonged to the Roman "fictiones" ' (*AL*: 25). In its strictest sense, in both Roman and English law, the term \*fiction\*

signifie[d] a false averment on the part of the plaintiff which the defendant was not allowed to traverse [the purpose of which was invariably to give the court jurisdiction]; such, for example, as an averment that the plaintiff was a Roman citizen, when in truth he was a foreigner ... [or] the allegations in the writs of the English Queen's Bench and Exchequer by which those courts contrived to usurp the jurisdiction of the Common Pleas. (*AL*: 25-6)

In fact, even as so strictly conceived, fictional allegations had a purpose beyond the merely jurisdictional:

Fictions were also used to extend substantive remedies, the most familiar examples being the false allegation of deceit in *assumpsit*, the false allegation of a loss and finding in *trover*, the false allegation of a lease and ouster in *ejectment*, and the collusive common recovery. (Baker, 1979: 175-6)

Maine, however, uses the term 'fiction' in a far broader sense, one which includes the classic fictions just mentioned, but which refers as well to 'any. assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified' (*AL*: 26). Each such fiction performs the 'two-fold office of transforming a system of laws and of concealing the transformation\* (30). This definition throws a revealing light on the very nature of the common-law system. For it is not only the most obvious fictions which transform the law while concealing the transformation; the case-law method, the very heart and soul of the common law, does so as well. Maine calls the process of judicial decision-making 'Virtual legislation', a procedure which 'is not so much insensible as unacknowledged\* (31). In this regard, he comments:

When a group of facts come before an English court for adjudication, the whole course of the discussion between the judge and the advocates assumes that no question is, or can be, raised which will call for the

application of any principles but old ones, or any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated ... Yet the moment the judgement has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision *has* modified the law. The rules applicable have ... become more elastic. In fact they have been changed ... (31-2)

Since the time that Maine wrote, we have come to recognize that many allegations which become fictional begin in situations of genuine uncertainty. For example, allegations of deceit in actions of *assumpsit* (essentially actions for breach of oral contracts) first appear in situations where there really is an element of sharp\* dealing. Similarly, the assertion that judges simply declare the already existing law but do not change it, or make new law, is, as applied to the Middle Ages, more a statement of actual fact than a fiction calculated to conceal judicial legislation. In the Middle Ages, the common-law courts 'made'<sup>1</sup> law infrequently; and, when they did, it was usually in the course of pleading, and it was often implicit, to be gathered from the fact that one counsel withdrew a point, rather than explicit, i.e. pronounced from the bench. Moreover, this law 'was not law laid down by the court so much as law which was accepted learning within the profession; "common erudition", as it is called in the old books' (Baker 1979:^72)^,

Thus, it could be said that the early common-law courts iessen\* daily did declare existing law, rather than creating new law|Biiit for the post-medieval legal world, Maine's insight is valuable<sup>1</sup>.<sup>1</sup>Even today, when a precedent is overruled, the courts usually 4ind that the original decision was wrongly decided; rarely do they own^up to the fact that a change in social conditions has necessitated a thahge in the law. Maine also perceived a fictional element in\*- die act of interpreting the written word, whether embodied in repbrts of case decisions, or in legislative enactments. Maine's view was that the act of interpretation was itself a kind of legal fiction which permitted the judges in effect to amend or ameliorate the written law without in fact being seen to do so; while the act of interpretation left the black letter of the code, the statute, and the case decision unchanged, it altered their scope and operation. The judges had made no overt amendment to the authoritative legal source, but had simply engaged in the inescapable act of interpreting its meaning. By

creative interpretation, troublesome precedents could be confined; or, to use Professor Allen's phrase, \*sterilise[d] by the semi-fictions of "distinguishing" them on tenuous grounds of fact or law' (1964: 357). Statutory terms could be expanded or contracted as the judges saw fit.

Maine illustrates this by reference to \*A body of law bearing a very close and very instructive resemblance to our case-law' - the *Responsa Prudentum* of the Roman law (*AL*: 33). The *Responsa* were the answers of the learned Roman jurists to questions of law, and largely 'consisted of explanatory glosses on authoritative written documents, and at first they were exclusively collections of opinions interpretative of the Twelve Tables' (33). These glosses proceeded on the assumption 'that the text of the old Code remained unchanged'; its express rules 'overrode all glosses and comments, and no one openly admitted that any interpretation of it, however eminent the interpreter, was safe from revision on appeal to the venerable texts' (33-4). Yet, the responses of the leading jurists 'obtained an authority at least equal to that of our reported cases, and constantly modified, extended, limited or practically overruled the provisions of the Decemviral law' (34). The jurists 'professed the most sedulous respect for the letter of the Code. They were merely explaining it, deciphering it, bringing out its full meaning' (34). By the art of interpretation, however, the jurists 'introduced nuance into the black letter of the monolithic code, and with it came the possibilities of adding new meaning and hence an unsuspected modicum of flexibility' (Woodard, p. 232 above). Indeed, by their efforts the jurists 'educated a vast variety of canons which had never been dreamed of by the compilers of the Twelve Tables and which were in truth rarely or never to be found there\*' (*AL*: 34).

The breadth of Maine's definition of fictions compels us to rethink the basis on which Maine distinguishes equity, 'The next instrumentality by which the adaptation of law to social wants is carried on' (*AL*: 28). Equity as defined by Maine is 'any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles' (28). Equity, 'whether of the Roman Praetors or of the English Chancellors, differs from the Fictions which in each case [i.e. Rome and England] preceded it, in that the interference with law is open and avowed' (28). In the English experience, there is some truth in this

distinction, but perhaps less than meets the eye. For it is the central boast of English equity that it acts in personam only; that it never interferes with the law, but only with the conscience of the defendant; that, indeed, it comes not to destroy the law, but to fulfil it. In fact, the interference is considerable and, as a result of the in personam distinction, as covert as in the case of fictions.

In the common law, for example, if a debtor paid his debt, but, failed to obtain back his bond, or otherwise to have it cancelled, he could be forced to pay the debt a second time, on account of the rule that the bond was conclusive evidence of the debt. Under these circumstances, the Chancellor took to relieving debtors, by enjoining creditors from proceeding at law, and ordering them to turn over the cancelled bonds to their debtors. Of course, the rule remained the same: in all cases, a bond was conclusive evidence of a debt, and the defendant at law could not raise a defence of payment. In practice, however, looking at the English legal system as a whole, the rule had been modified. Even more problematic was the equitable practice of enjoining a successful plaintiff at law from enforcing his judgement. Again, the party line of Chancery's defenders was that the injunction operated on the party, and did not purport to interfere with the legal rule, or the legal judgement. But, of course, in practice the judgement was useless, and the rule of law on which the judgement had been based had no practical value. In short, the claim by the Court of Chancery that it operated only on the person, not on the rule, seems simply to be a device<sup>^</sup>to use Maine's definition of a legal fiction, 'which conceals, of Effects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified\* (AL: 26). Indeed, there is the recent phenomenon of the *Anton Piller* order, by which a plaintiff, or his nominees, may obtain access to' a defendant's residence or business premises and search for and remove documents and physical property relevant to the claim. In defending the order against the charge that it constituted a civil search warrant issued to a private party, Lord Denning relied on a variation of the traditional Chancery distinction between declaring rights and ordering the performance of duties, between operating on or declaring the legal rule and acting in personam on the conscience of the party. On the one hand, he affirmed that if a 'constable or bailiff... knock [s] at the door and demand [s] entry so as to inspect papers or documents, the householder can shut the

door in his face and say "Get out." ' On the other hand, Lord Denning insisted:

the order sought in this case is not a search warrant. It does not authorise the plaintiffs\* solicitors or anyone else to enter the defendants\* premises against their will... The plaintiffs must get the defendants\* permission. But it does do this: it brings pressure on the defendants to give permission. It does more. It actually orders them to give permission - with, I suppose, the result that if they do not give permission, they are guilty of contempt of court. (*Anton Filler KG v. Manufacturing Processes*, [1976] 1 All ER 779 at 782-3)

In some sense, then, English equity, like English case law, can be seen as resting on a fiction. Indeed, even legislation, the most open and avowed form of legal change, may be seen as implicated with the notion of fictions. I am not here speaking of the kind of fiction which is suggested by Maine himself when he speaks of the legislature as 'the assumed organ of the entire society\* (*AL*: 29). For that is not a fiction which conceals the fact that a rule of law has undergone alteration. I am speaking once again of the art of statutory interpretation.. As Professor Allen has observed:

a very great, and perhaps the most important, part of the operation of statute is indissolubly dependent on the function of the judge. To ignore this intermediate stage between the 'will\* of the Sovereign and the 'obedience\* of the subject is to falsify completely the actual operation of statutory law and society. It is the unfortunate but inevitable consequence of this fact that interpretation sometimes results in the opposite of what the legislator seems to have intended ... (1964: 502)

May we not say of this result what Maine says of legal fictions: 'the *fact h* ... that the law has been wholly changed; *Okie fiction* is that it remains what it always was' (*AL*: 26)?

We have seen that Maine's insistence that his three agents of legal change appear in an invariable historical sequence has been criticized as inconsistent with the English experience. And it is certainly true that fictions continue to play a role in legal development after the establishment of the Court of Chancery, and that legislation plays a role in the legal development of the common law from the very outset, and an important role during the reigns of Edward I and Henry VIII. Still, Maine's sequence seems roughly right, particularly when we remember that he limits his proposition

'respecting their order of sequence to the periods at which they exercise a sustained and substantial influence in transforming the original law' (*AL*: 25). Surely, for example, we can recognize the nineteenth century as ushering in the age of legislation, in a way which was not true of the age of Edward I or even of Henry VIII. Beyond this, however, Maine's historical sequence, right or wrong, has proven to be fruitful.

As we have observed, after embodying customary law in a code, some societies, the progressive societies, go on to develop, in Professor Woodard's words, 'their own internal means of propagating innovation, flexibility and the capacity to respond to changing social circumstances' (p. 233 above). These are, in fact, the three instrumentalities of legal change identified by Maine: fictions, equity and legislation. If the movement from status to contract takes society to the apex of progress, can the same be said of the movement from fictions to legislation? Is legislation the final ameliorating instrumentality, or is there some agent of change that takes over after the era of legislation arrives? In answering these questions, we first may observe that Maine does not seem to see the coming of the era of legislation as a negative development in and of itself. It is simply the appropriate agent of change for the appropriate stage at which the legal system has arrived. Maine is not reactionary. Fictions, for example,

have had their day, but it is long since gone by. It is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction .v. If the English law is ever to assume an orderly distribution," it will be necessary to prune away the legal fictions which, in spite of some recent legislative improvements, are still abundant in it. (*AL*: 27-8) . : -

The same could be said of equity in that, as we have seen\* it also keeps alive legal rules which have been altered or voided by its operation. It is only when legislation is co-joined with popular government, when the levers of legislation are controlled not by legal experts but by the common man, that the movement from fictions to legislation can be seen as a movement in the direction of decline. In this volume, Woodard speaks of 'law itself becoming] increasingly less "legal" and more "political" in character as the major means of accomplishing legal change comes through the politically based legislature rather than the professionally controlled judiciary\* (p. 234 above). Viewed this way, Maine's description of the development of legal systems envisions a 'life-cycle of law: beginning

in the chaos of anarchistic no-law, it ends in the chaos of too much law, a Niagara of ill-advised legislation' (p. 234 above). Yet, even if the advent of popular government was, for Maine, the beginning of the end of a life-cycle, his tripartite scheme need not be interpreted so pessimistically. Essentially adopting Maine's own evolutionary scheme, one commentator has seen a stage beyond legislation, marked by judicial review of legislative enactments (White, 1973: 655). And perhaps Maine himself perceived this later stage in his description of the American constitutional process in *Popular Government*.

In identifying legal fictions and equity as primary instrumentalities of legal change, Maine focussed attention not only on the way in which law adapts itself to the changing conditions of the larger society but on the way in which legal systems reform themselves, develop 'their own *internal* means of propagating innovation, flexibility and the capacity to respond to changing social circumstances\* (see Woodard, p. 233 above). In this, Maine anticipates the work of modern legal historians like Professors Baker and Milsom. While I would not wish to try to pin-point the areas in which Maine may have directly influenced either man, it seems abundantly clear that their work is part of a tradition of legal history and jurisprudence of which Maine is a prominent ancestor.

In his Introduction to the reports of John Spelman, Professor Baker has demonstrated the way in which the common law, faced with a renaissance in legal ideas and fierce competition from newer jurisdictions, particularly the Court of Chancery, reformed itself from within, providing litigants with new remedies and streamlined procedures, while leaving the old forms of action in place and theoretically inviolate. Where once an action for breach of contract would have been brought by a writ of covenant or of debt, now the action of assumpsit was available, and with it the assurance that questions of fact would be tried by jury, rather than by wager of law. Where once title to land had to be tried in one of the slow, archaic real actions, now, through the use of perhaps the most blatant fictions ever practised in English legal history, title could be tried in the new action of ejectment, which provided a speedy remedy and a streamlined procedure. We cannot ignore Maine's scheme if we are to understand this change, for much of it is accomplished through the use of fictions and by an appeal to the Chancellor's equitable powers. On the other hand, we need to go further than Maine if we

are to understand fully the dynamics of the process by which the common law reformed itself.

Viewing the English legal system as a whole, there is no question that the remedies given by the Court of Chancery did much to ameliorate the rigidities of the common law, and to bring the legal system into the modern age. The common-law system was rooted in the feudal era, and was concerned primarily with questions of the possession and ownership of land; and its procedures, including trial by jury, were peculiarly appropriate to such questions, but were less satisfactory, indeed often inimical, to the kinds of disputes thrown up by the commercial society which England was rapidly becoming. Moreover, this commercial society required legal remedies beyond those which the common law was prepared to give: remedies like specific performance, accounting and injunctive relief were available exclusively from the Court of Chancery. It was, however, equity's enforcement of the use (what we today call the trust), by which the legal and beneficial ownership of land was separated, which most vividly illustrates the way in which equity relieved litigants from the strictures of outmoded legal rules. According to the rule of primogeniture, all of a man's real property descended upon his death to his eldest son. He might, during his lifetime, make *inter vivos* grants of such land to others, subject to certain constraints to preserve the eldest son's inheritance, but he could not leave real property by will; whatever had not been conveyed to others at his death passed automatically to his eldest son. By conveying property to third parties to hold to his own benefit during his lifetime, and to convey to other persons, younger sons or daughters, for example, upon his death, a landowner could in effect make a will. The common law, however, did not recognize, and to this day does not recognize, beneficial ownership in land. The persons to whom the land had been conveyed, to hold in trust for the benefit of the original landowner, had the sole legal title. In enforcing the use, the Chancellor did not meddle with this legal title. He did not allow men to make wills. He did not purport to repeal the rule of primogeniture. In reality, however, the common-law rules were completely circumvented whenever a man chose to place his property in trust, with instructions to the trustees to deliver the property in accordance with his instructions at death. In short, the distinction between operating only on the conscience of the party and meddling with the rule itself was so refined in practice as to amount to a fiction. None

the less, this is an important distinction, because the Chancellor's intervention was indeed open and avowed, despite the unreality of his assertion that the legal rule was never disturbed.

But the English legal system was not only reformed by recourse to the Chancellor's jurisdiction, since the greater part of the reform came from within the common-law system itself. Some of this was accomplished by fictions as strictly conceived; but much change was the result of a fourth agent of change, one which Professor Milsom has identified as reclassification. In order to understand this process, we must say something about classification in the law. At the most elementary level, the common law distinguished between claims to enforce a right and claims to obtain compensation for a wrong. Two families of writs grew up reflecting this elemental difference: the *praecipe* writs involved claims in which, at least in theory, the defendant could still put the matter right by performing his obligation: repaying the loan, building the house, delivering the goods, vacating the land from which the plaintiff had been ejected, and so on. The second family of writs, the *ostensurus quart* writs, involved situations where the defendant had done an irreparable wrong; there was nothing to put right, and the plaintiff's only remedy was in damages.<sup>1</sup> Within each family of writs, there were further classifications of claims, and these came to be known as the forms of action, legal boxes into which claims had to be fitted if they were to be cognizable at common law. A choice of a form of action was a choice as well of a particular procedure and even a particular substantive law (see, for example, Maitland, 1909: 298; Baker, 1979: 52).

The separation of various claims into different legal pigeon-holes created the conditions by which law could be reformed from within. The process of reclassification involves taking a set of facts, a claim for relief, which naturally falls within one class of writs, and reclassifying it so as to bring it within a different form of action in the other class of writs. So, in the classic common law, an action to recover for damages for breach of a promise to perform services would sound in covenant, i.e. the plaintiff would be required to purchase a writ of covenant, and would be bound by all the procedures associated with that particular writ or form of action, one of which was the require-

<sup>1</sup> In fact, at an early date, the common law limited itself to giving damages, whether the claim sought performance of an obligation or compensation for an irreparable wrong, except in real property actions, in which the common-law courts continued to award the return of the property.

ment that no action could be brought except on a written promise under seal. A plaintiff who had not obtained a written agreement under seal was thus left with the choice of suing in the local courts, where no such requirement obtained; but, in the event that his claim was in excess of forty shillings, he had to sue in the royal courts, and without a document under seal, he was in effect without a remedy. But if his claim could be seen not as one sounding in covenant but one sounding in trespass, i.e. not as a question of a performance of a right but of compensation for a wrong, he could avoid the requirement of a document under seal, and bring an action for damages in the royal courts. Thus legal change \*is largely brought about by re-classification, by transferring the matter from, say, contract to tort' (Milsom, 1981: 7). And this involves nothing less than 'the abuse of [the] elementary ideas' of the common law, so that:

If the rules of property give what now seems an unjust answer, try obligation ... If the rules of contract give what now seems an unjust answer, try tort ... if the rules of one tort, say deceit, give what now seems an unjust answer, try another, try negligence ...' (Milsom, 1981: 6)

As with the operation of legal fictions and equitable remedies, the legal rule, the requirement of a document under seal, -was not directly altered or repealed. But the consequence of the legal rule was avoided by reclassifying the claim as one of trespass. Legal change by reclassification thus 'has the appearance of a conjuring trick: out of the old hat there comes a new rabbit\*' (Milsom, 1985: 150). The sleight of hand is important, for the court cannot be seen to attack the legal rule directly, nor can anyone be explicitly granted an exemption from the operation of the rule. Rather, the case itself must be removed from the operation of the rule, and this is done by giving it a new name, a new classification. What was essential was the existence of different compartments, because 'the rabbit is really taken from a different hat' (Milsom, 1985: 15a). Thus,

The abolition of the forms of action may well have made major change more difficult for the courts, by making it harder to reverse the result without openly reversing the rule. The continued existence of a partially formal barrier between law and equity may be a condition of the continued potency of equity as a means of law reform; its *in personam* operation has always been the most artless means of making a change without actually saying so ... (Milsom, 1985: 153)

Whether expressly intended as such or not, Milsom's work, it seems to me, builds upon and modifies Maine's original scheme. Moreover, Maine in some ways anticipates Milsom's reclassification theory, or at least that part of the theory which recognizes the importance of legal classification as a means of facilitating legal change. To appreciate this, we need to turn to Maine's discussion of the distinction in Roman law between *res Mancipi* and *res nee Mancipi*, which he called 'the type of a class of distinctions to which civilization is much indebted' (*AL*: 279). The *res Mancipiwert* those things capable of being transferred only by the mode of transfer known as *mancipatio*, and included land, slaves and such animals as horses and oxen. The *res nee Mancipi* were things which could be conveyed by a mode other than *mancipatio*, primarily the informal mode of conveyance known as *traditio* or tradition.

The treatment in Roman law of the *res Mancipi* was, according to Maine, typical of 'the universally unchangeable character of the ancient forms of property'. Thus:

Sometimes the patrimony of the family is absolutely inalienable ... and still oftener, though alienations may not be entirely illegitimate, they are virtually impracticable ... from the necessity of having the consent of a large number of persons to the transfer ... [Or] ... the act of conveyance itself is generally burdened with a perfect load of ceremony, in which not one iota can be safely neglected. (*AL*: 271—2)

How then are 'These various obstacles to the free circulation of the objects of use and enjoyment' surmounted? (272). There are various 'expedients by which advancing communities endeavour to overcome' these obstacles, including legal fictions and equity (272). In England, as we have seen, a landowner is able to circumvent the rule of primogeniture by granting his property to trustees, who are obligated at his death to convey the property in accordance with his instructions. And Maine recognizes that fictions and equity played a role in reforming the Roman law of property as well, since these 'Two ... agents of legal amelioration ... were assiduously employed by the Roman lawyers to give the practical effects of a Mancipation to a Tradition' (278-9). But reform in the law of property was also brought about by the manipulation of legal classification, i.e. by an expedient 'which takes precedence of the rest from its antiquity and universality', the expedient of 'classifying] property into kinds', a higher order and a lower one (272). This is seen in the division between the higher order of *res Mancipi* and the lower one of *res nee*

*mancipi*, one requiring archaic ceremonies to effect its transfer, the other not; and also in English law, in the distinction between moveables and immovables. In time, objects originally classified among the lower order of property, and thus relieved from the obstacles placed on alienation, increased in value, or a new awareness grew that their value or prominence was equal to, if it did not surpass, the objects placed among the more dignified class of property. Yet, they were not reclassified, for *res Mancipi* 'never varied once the category had been established' (Thomas, 1976: 129); or, as Maine puts it, 'the list of the *Res Mancipi* was irrevocably closed\* (*AL*: 278). Thus, for Maine, 'the grand point of interest\* is

the continued degradation of these commodities when their importance had increased and their number had multiplied ... [the] disposition to keep these last at a lower grade in the arrangements of Jurisprudence, and to permit their transfer by simpler processes than those which in archaic conveyances, serve as stumbling-blocks to good faith and stepping-stones to fraud. (275-6)

Thus, the existence of two kinds of classifications allowed societies to reform the law by isolating the items subject to conveyancing restrictions, while extending the items included among the lower order of property. And as 'every fresh conquest of man over material nature\* added to the items included among the lower order. (278), it became increasingly difficult to maintain the distinction between higher and lower orders of property; in other words, the logic of the separate classifications itself became suspect. This is what occurred in Rome as the simple formality attached to the *res nee Mancipi* was, with the help of actions in equity, transferred to the *res Mancipi*. And, at the time of Justinian, 'the difference between *res Mancipi* and *res nee Mancipi* disappears, and tradition or delivery becomes the one great conveyance known to the law' (279). In short, 'The history of Roman Property Law is the history of the assimilation of *Res Mancipi* to *Res Nee Mancip*? (273). And the linchpin of this reform was the existence of 'The distinction between *res Mancipi* and *res nee Mancipi* ... the type of a class of distinctions to which civilization is much indebted'. (279).