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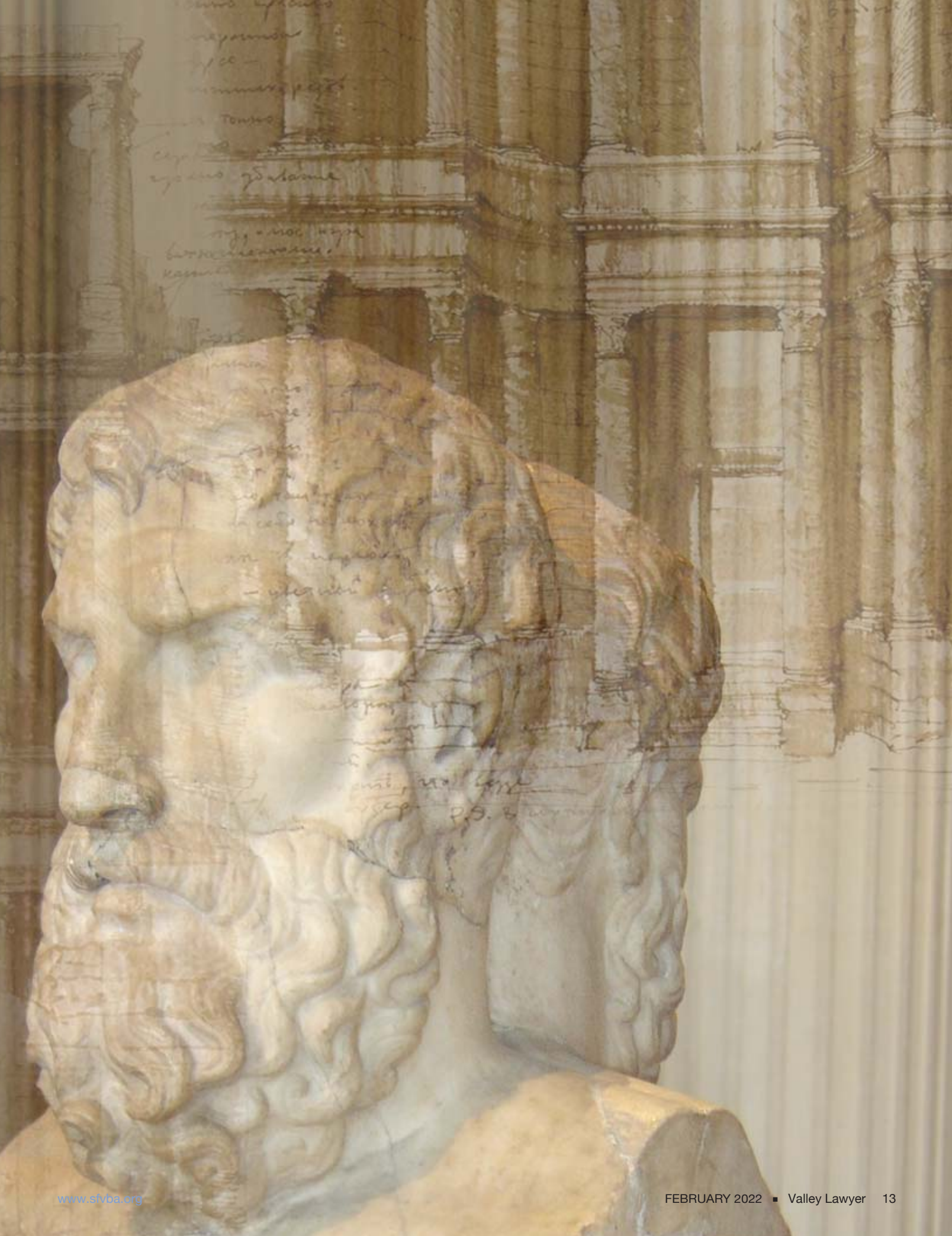
By David Gurnick

Ancient Legal Maxims: Still Alive and Still Useful

Maxims have their place and usefulness from the earliest common law through the present and can crisply summarize principles as a substantial aid to advocacy. These ancient maxims and countless more remain good law today.



CHANGE IS INEVITABLE. YET SOME THINGS never change.[1] [2]

Historically courts followed maxims that succinctly summarize a principal of law. Many ancient maxims continue to be good law, and this article discusses a few of them, not often cited but not overruled.

These are good law, citable in appropriate contexts today. Some examples…

• *Argumentum ab inconvenienti plurium valet in lege*—An argument from inconvenience avails much in law.

This maxim applies when the wording of a statute, agreement or another instrument can have multiple meanings. The construction applies that leads to the least inconvenience.[3]

The maxim has applied for the principal that a statute should not be construed to work public mischief, unless required by explicit, unequivocal language.[4]

If words of a statute leave room for construction, the *argumentum ab inconvenienti* might be entitled to great weight, but the maxim does not apply where the language of a statute is clear.[5]

One scholar said the *argumentum ab inconvenienti* is essential in a legal system where law impacts social ordering—bringing about good and useful effects in society.

The form of the argument is that "if you allow X the following bad things will happen." Another old maxim holds that "*plurinum valet in lege*," is powerful in law.[6]

The maxim, has been discussed in California decisions and, though not raised recently, appears to be good law in this state.[7]

> "Historically courts followed maxims that succinctly summarize a principal of law. Many ancient maxims continue to be good law, and this article discusses a few of them, not often cited but not overruled."

• *Communis error facit jus*—Common error repeated many times makes law.

Multiple wrongs can make a right. Under this ancient principle, a mistake or error that has occurred many times, can establish governing law.

There are cases in which a mistaken notion of the law has become generally accepted and acted on so that acceptance of the mistake becomes the law.[8]

Viewed another way, customs followed in a community, even if contrary to law, can be the law.

As one example, when a statute is ruled unconstitutional, actions taken earlier under the unconstitutional statute are invalid. Usually, rights cannot be built up under an unconstitutional statute.[9]

But courts sometimes recognize a need to uphold the validity of transactions or events that occurred before a statute was ruled unconstitutional.

The doctrine embodied in this maxim applied to uphold sales of property over ten years by probate courts even though probate courts were later ruled to lack subject matter jurisdiction to conduct the sales because the authorizing statute was unconstitutional.[10]

The California Supreme Court applied the maxim in 1849. Henry Johnson had died without a will in the Pueblo of San Francisco. California was not yet a state, and Johnson's wife petitioned the local Alcalde—a Spanish municipal magistrate, having both judicial and administrative functions—to appoint an administrator and sell all Johnson's property. The Alcalde did so, and the property was sold.

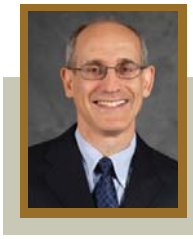
But the Alcalde had no authority to make that appointment.

In a quiet title dispute with a frustrated heir, the California Supreme Court seemed to agree. But it ruled that, given the rough and tumble of custom and practice in the Mexican territory, the appointment of an administrator and sale of property, though improper, would be upheld.

The Court colorfully described life in the territory, stating that to decide the case, "*it will be necessary for the Court to take into consideration the condition of California previous to the organization of the State Government*."[11]

Describing California at that time, the Court noted:

> "*It was sparsely populated; here and there a rancho; no ready or easy means of intercommunication with the Mexican Capital or National Government. The written laws of Mexico, though theoretically in force, were either*



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unknown, had fallen into disuse, or were annulled and supplanted by provincial customs. The law and its forms and administration were different in different districts. The people who were here were ignorant and destitute of learned lawyers and Judges. Under American rule, the discovery of gold-induced immigration was ten times as large as the original population of California and numerous enough to form a State…The American settlers could obtain no books containing Mexican laws. They found no established laws, no established institutions, and no Judges to administer the law. The necessities of trade and commerce, the urgency of their condition, and self-protection, justice, and humanity, demanded some law to regulate their transactions and intercourse and some Judge to dispense justice. They were compelled to adopt customs for their government…The Judges, being ignorant of the laws, were compelled to apply to the Governor of California for instructions, and he, being equally ignorant, could only say, 'You must, for the time being, be governed by the customs and laws of the country, as far as you can ascertain them, and by your own good sense and sound discretion.'"[12]

The Court's engaging description continues at greater length and is interesting reading.

It noted *communis error facit jus* was a maxim of Roman Law, adopted in Spanish law. "*The judicial acts of a person that exercises a jurisdiction which does not legally belong to him, but which is generally recognized and submitted to by the people are valid, and binding*."[13]

Applying this principle, the Court affirmed the administrator's sale of the property.

• ***De fide et officio judicis non recipitur quaestio; sed de scientia, sive error sit juris aut facti***—The good faith and office of a judge cannot be questioned, only the judge's knowledge of law or facts.

"*The law*," said Lord Bacon, "*has so much respect for the certainty of judgments and the credit and authority of judges that it will not permit any error to be assigned which impeaches them in their trust and office, and in wilful abuse of the same*."[14]

This maxim has renewed significance in today's era of seeming politicization of courts and questioning of judges' predilections and biases.

In 2021, the Court of Appeal applied this maxim.

An attorney appealed on behalf of a client. He petitioned for rehearing without citing "*a single statute or opinion and made no attempt to explain, distinguish, or otherwise reply to the cases and statutes relied upon by the trial court*."[15]

Counsel's petition stated, "Our society has been going down the tubes for a long time, but when you see it in so black and white as in the opinion in this case, it makes you wonder whether or not we have a fair and/or equitable legal system or whether the system is mirrored by [sic] ignored by the actions of people like Tom Girardi."

Counsel's brief insinuated that the adversary might have won because it had contracts with a third party who wielded "*legal and political clout in Orange County*." His brief suggested that the Court of Appeal, in its prior opinion in the case, did not follow the law and ignored the facts.

On its own motion, the Court issued an order to show cause for the attorney to explain why he should not be held in contempt for impugning the integrity of the Court.

The attorney's response claimed he merely "*mentioned the obvious things that go on in Orange County which has a lot to do with The Irvine Company, plain and simple.*"

The Court read this as a "*second insinuation that political clout accounted*" for the trial court's actions and found that this had impugned the integrity of the Court.

The Court, while not requiring lawyers to avoid vigorous advocacy, cautioned strongly against impugning the Court itself, stated:

> *"If you think the Court is wrong, don't hesitate to say so. Explain the error. Analyze the cases the Court relied upon and delineate its mistake. Do so forcefully. Do so con brio; do so with zeal, with passion. We in the appellate courts will respect your efforts and understand your ardor. Sometimes we will agree with you. That's why you file a petition for rehearing—because they are sometimes granted. But don't expect to get anywhere—except the reported decisions—with jeremiads about "society going down the tubes" and courts whose decisions are based not on a reading of the law but on their general corruption and openness to political influence. The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity, and it is his bounden duty to protect the integrity of his Court."*[16]

Citing the maxim, Court added, the "*timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn't who we are*."[17]

The Court found the attorney to be in direct contempt, ordered a monetary fine, and reported the lawyer to the State Bar.[18]

• *Necessitas inducit privilegium quod jura privata*—Necessity gives a privilege to private rights.

Sometimes called the 'necessity defense,' it comes from the common law of England and recognizes that sometimes, breaking the law may be justified to prevent or avoid greater harm.

The California Supreme Court recognized the defense in 1853, stating the common law adopts principles of natural law and justifies an act, otherwise tortious, on the ground of necessity.[19]

San Francisco suffered a great fire in 1849. John Geary, at the time the local Alcalde, destroyed a building owned by Pascal Surocco, and justified his action claiming need to stop the progress of the fire.

Geary claimed he was removing his property from the building at the time and won damages in the trial court.

But on appeal, the Supreme Court reversed, stating:

> "*The only question for our consideration is, whether the person who tears down or destroys the house of another, in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed.*"

The Court ruled that "*blowing up of the house was necessary, as it would have been consumed had it been left standing. The plaintiffs cannot recover for the value of the goods which they might have saved; they were as much subject to the necessities of the occasion as the house in which they were situate*."[20]

The Montana Supreme Court invoked reached a similar conclusion, citing the maxim *salus populi est suprema lex*, interpreting this to mean "*there exists an implied agreement of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community, and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good*."[21]

• *Sic utere tuo ut alienum non laedas*—One must so use his own rights as not to infringe upon the rights of another.

This principle first appeared in a California Supreme Court decision in 1857, referred to by counsel as a "*neighborly maxim*."[22]

The Supreme Court recognized the rule but also noted another maxim that no one "*can be deprived of the due enjoyment of his property and held answerable in damages for the reasonable exercise of a right*."[23]

Maxims have their place and usefulness from the earliest common law through the present."

Conclusion

Maxims have their place and usefulness from the earliest common law through the present and can crisply summarize principles as a substantial aid to advocacy.

These ancient maxims and countless more remain good law today.

However, they come with a problem "*with conducting jurisprudence by maxim is that there is often an equal and opposite one available in any particular case*."[24]

And they are not conclusive. A law review article written in 1950 by legal scholar Karl Llewellyn pointedly showed that for many maxims of statutory construction, an equal and opposite counterpart can be identified.[25]

Even that problem can be a tool for the lawyer. The equal and opposite may be cited and argued when an adversary cites a maxim.

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[1] Benjamin Disraeli, Speech on Reform Bill of 1867, Oct. 29, 1867, in *Selected Speeches of the Late Right Honourable the Earl of Beaconsfield*, (T. E. Kebbel, ed.) vol. 2, pt. 4, p. 487 (1882). *See also*, *McGaffee v. McGaffee*, (Iowa 1953) 58 N.W.2d 357, 360 ("Change is inevitable in all human affairs.").

[2] *Johnson v. Sawyer,* 120 F.3d 1307, 1337 (5th Cir. 1997) ("Some things never change; nor should they."); Peri v. State, (Fla. App. 1983) 426 So.2d 1021, 1028.

[3] George Frederick Wharton, *Legal Maxims* (Baker, Voorhis & Co., NY 1878) p.37.

[4] *Sawyer v. North Am. Life Ins. Co.,* (Vt. 1874) 46 Vt. 697, 702.

[5] *Gustin v. Nevada-Pacific Dev. Corp*, 125 F.Supp. 811, 814 (D.Nv. 1954).

[6] *Arthur Allen Leff, The Leff Dictionary of Law: A Fragment,* 94 Yale L.J. 1855, 2056 (1985).

[7] *See e.g., People v. Wismer* (1922) 58 Cal.App. 679, 688 (an argumentum ab inconvenienti can never be allowed except in cases where the law being construed is, due to ambiguity, of doubtful meaning, in which case it is permissible).

[8] *Wade v. Woodward,* (Miss. 1933) 145 So. 737, 738.

[9] *Bergstrom v. Palmetto Health Alliance,* (S.Car. 2004) 596 S.E.2d 42, 47.

[10] *Id.* (discussing *Herndon v. Moore* (S.Car. 1883) 18 S.C. 339, 351).

[11] *Ryder v. Cohn* (1869) 37 Cal. 69, 81.

[12] *Id.*

[13] *Id.*

[14] Quoted in *Rainey v. State* (1886) 20 Tex.App. 473, 484; *see also In Re Mahoney* (2021) 65 Cal.App.5th 376, 381(same).

[15] *In Re Mahoney, supra 65* Cal.App.5th at 378.

[16] *Id.* at 380.

[17] *Id.* at 381.

[18] *Id.* at 381-382.

[19] *Surocco v. Geary* (1853) 3 Cal. 69, 73.

[20] *Id. See also, Marty v. State*, (Id. 1989) 786 P.2d 524, 534 (discussing the defense). The necessity defense is discussed in some depth in Susan B. Apel, *Operation Rescue and The Necessity Defense: Beginning A Feminist Deconstruction*, 48 Wash. & Lee L. Rev. 41 (1991), https://scholarlycommons.law.wlu.edu/wlulr/vol48/iss1/4.

[21] *Stocking v. Johnson Flying Service* (Mon. 1963) 387 P.2d 312, 316–17.

[22] *Tenney v. Miners' Ditch Co.* (1857) 7 Cal. 335, 337.

[23] *Id.* at 340.

[24] *Miller v. Superior Court* (1990) 221 Cal.App.3d 1200, 1210.

[25] Karl Llewellyn, "*Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*," 3 Vand. L. Rev. 395 (1950).

Ancient Legal Maxims: Still Alive and Still Useful

Test No. 160

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Ancient maxims can remain good law in current times.
   ❑ True ❑ False

2. The maxim *Argumentum ab inconvenienti plurium valet in lege* means that an inconvenient truth must still be applied with the force of law.
   ❑ True ❑ False

3. The logic of the *argumentum ab inconvenienti* maxim is that "if you permit a certain event or rule, then other bad things will follow."
   ❑ True ❑ False

4. The maxim *Communis error facit jus* means that no matter how many times a thing is repeated, two wrongs do not make a right.
   ❑ True ❑ False

5. Customs followed in a community, even if against the law, can be the law.
   ❑ True ❑ False

6. Rights can never be built up under an unconstitutional statute.
   ❑ True ❑ False

7. Before California became a state, the population was well-versed in and assiduously followed Spanish law.
   ❑ True ❑ False

8. The maxim *De fide et officio judicis non recipitur quaestio; sed de scientia, sive error sit juris aut facti* means that no matter what, the good faith and office of a judge cannot be questioned.
   ❑ True ❑ False

9. A judge's knowledge of law or facts can be challenged vigorously.
   ❑ True ❑ False

10. The maxim that the judge's good faith cannot be questioned, must give way to the lawyer's First Amendment rights as a citizen.
    ❑ True ❑ False

11. A lawyer who thinks the court has erred must be extremely careful before saying so, and then only mildly, with utmost gentility and soft-spokenness.
    ❑ True ❑ False

12. The maxim *Necessitas inducit privilegium quod jura privata* means that sometimes necessity gives a privilege to break the law.
    ❑ True ❑ False

13. The necessity defense, being in conflict with the common law, must be construed narrowly and applied rarely.
    ❑ True ❑ False

14. The maxim *Sic utere tuo ut alienum non laedas* means that one acting to exercise an existing right has no obligation to affirmatively consider the interests of others.
    ❑ True ❑ False

15. For many maxims there is an equal and opposite maxim.
    ❑ True ❑ False

16. Maxims are less useful when originally in Latin.
    ❑ True ❑ False

17. In the 1849 San Francisco Fire the California Supreme Court allowed a property owner to recover damages for the value of goods that were destroyed, even though he could not recover for the damage to the real property.
    ❑ True ❑ False

18. The maxim that one must use his own rights without infringing the rights of others, has an opposite maxim that no one can be deprived of the due enjoyment of his property and held answerable in damages for the reasonable exercise of a right.
    ❑ True ❑ False

19. One benefit of maxims is that they are so time honored as to be recognized as largely axiomatic and conclusive thus eliminating or shortening a great deal of argument.
    ❑ True ❑ False

20. Due to the problem of opposing maxims there is no use responding to a lawyer's assertion of a maxim.
    ❑ True ❑ False

Ancient Legal Maxims MCLE Answer Sheet No. 160

INSTRUCTIONS:

1. **Accurately complete this form.**
2. **Study the MCLE article in this issue.**
3. **Answer the test questions by marking the appropriate boxes below.**
4. **Mail this form and the $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:**

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   20750 Ventura Blvd., Suite 140
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6. **Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0495.**

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ANSWERS:

Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ **True**	❑ **False**
2.	❑ **True**	❑ **False**
3.	❑ **True**	❑ **False**
4.	❑ **True**	❑ **False**
5.	❑ **True**	❑ **False**
6.	❑ **True**	❑ **False**
7.	❑ **True**	❑ **False**
8.	❑ **True**	❑ **False**
9.	❑ **True**	❑ **False**
10.	❑ **True**	❑ **False**
11.	❑ **True**	❑ **False**
12.	❑ **True**	❑ **False**
13.	❑ **True**	❑ **False**
14.	❑ **True**	❑ **False**
15.	❑ **True**	❑ **False**
16.	❑ **True**	❑ **False**
17.	❑ **True**	❑ **False**
18.	❑ **True**	❑ **False**
19.	❑ **True**	❑ **False**
20.	❑ **True**	❑ **False**