Historical Foundations of the Common Law

S. F. C. Milsom

Butterworths

HISTORICAL FOUNDATIONS OF THE COMMON LAW

This page intentionally left blank

HISTORICAL FOUNDATIONS OF THE COMMON LAW

S. F. C. MILSOM, F.B.A.

Professor of Legal History in the University of London

LONDON

BUTTERWORTHS

1969

England: BUTTERWORTH & CO. (PUBLISHERS) LTD.
LONDON: 88 Kingsway, W.C.2

Australia: BUTTERWORTH & CO. (AUSTRALIA) LTD.
SYDNEY: 20 Loftus Street
MELBOURNE: 343 Little Collins Street
BRISBANE: 240 Queen Street

Canada: BUTTERWORTH & CO. (CANADA) LTD.
TORONTO: 14 Curity Avenue, 16

New Zealand: BUTTERWORTH & CO. (NEW ZEALAND) LTD.
WELLINGTON: 49/51 Ballance Street
AUCKLAND: 35 High Street

South Africa: BUTTERWORTH & CO. (SOUTH AFRICA) LTD.
DURBAN: 33/35 Beach Grove

Standard Book Number—Casebound: 406 62500 X
Limp: 406 62501 8

Made and printed in Great Britain by
Morrison & Gibb Ltd., London and Edinburgh

TABLE OF CONTENTS

II. *Property in Land*

III. *Obligations*

IV. *Crime*

INTRODUCTION

I

The aim of this book is to give a single picture of the development of the common law, to draw the main outlines of the subject. But which are the main outlines depends upon the viewpoint of the observer. Legal history means different things to different people. To historians it is usually a branch either of administrative or of social history; and legal thinking is not considered for its own sake. Lawyers are interested in legal thinking. But to them the subject usually appears as law read backwards, the inevitable unfolding of things as they came to be; and the thinking is seen as a fumbling for the result eventually reached. In this gulf between the disciplines there is lost the interest of a story and perhaps the measure of an achievement.

Societies largely invent their constitutions, their political and administrative systems, even in these days their economies; but their private law is nearly always taken from others. Twice only have the customs of European peoples been worked up into intellectual systems. The Roman system has served two separate civilisations. The common law, governing daily relationships in very various modern societies, has developed without a break from its beginnings in a society utterly different from any of them. What was it that made its practitioners think on so unusual a scale? What made the product of their thinking so versatile and so durable? It is from the stand-point of such questions that this book will seek to trace its history.

II

The first problem is what starts a legal system off, what causes customs to turn into reasoned law. One condition is no doubt the rise of a profession, or at least of a cohesive group of people whose business it is to think about the law and its administration. Another seems to be the rise of rational modes of trial. Early law-suits admit only a blank denial, and put the unanalysed dispute to supernatural decision. The blank result settles the dispute, but can make no law. Legal thinking begins with a legal process which brings out the facts and compels their analysis. In England the start was the introduction of jury processes. But the jury was first seen as a new ordeal, and gave an equally blank result. Only slowly and deviously could single facts be brought out for legal consideration; and then the aim was not to exploit a body which could ascertain the facts, but to avert the danger that they would misunderstand them. Even slower and more devious was the process by which law-suits were turned round, so that all the facts came out before their legal effect was decided. Not until that happened, not until a court was sat down to a problem like an examination candidate today, did we have a fully substantive system of law.

It is with these matters and their corollaries that the first section of this book deals. For a comprehensive account of the growth of the legal system, the reader is referred to the current edition of Radcliffe and Cross, *The English Legal System*, to the appropriate chapters of Plucknett, *Concise History of the Common Law*, or to Holdsworth, *History of English Law*, especially the first two volumes. The four chapters of "The Institutional Background" below aim only to give such a picture of the changing framework of litigation as will enable the development of the law itself to be understood.

III

The remainder of the book is concerned with the development of the law, and with the second great problem that it raises: how

has it been so versatile and so durable? How can a system of law, a system of ideas whose hypothesis it is that rules are constant, adapt itself to a changing world? It has not been the ordered development of the jurist or the legislator, of men thinking about law for its own sake. It has been the rough free enterprise in argument of practitioners thinking about nothing beyond the immediate interest of each client; and the strength of the system has been in the doggedness, always insensitive and often unscrupulous, with which ideas have been used as weapons.

But however disrespectfully one is prepared to use them, legal ideas have their own strength, and it shows itself in many ways. It shows itself first in the difficulty of change. Apart from the tiny extent to which, at any period of our history, the courts have felt themselves able to reverse an accepted rule, direct change can be made only by legislative act; and that too was rare until Bentham's work was done. Change has for the most part been indirect. All that the practitioner can do for one hit by a rule, whether yesterday's taxing statute or some entrenched result of circumstances long dead, is to look for a way round it. If he succeeds, the rule is formally unimpaired. If the route that the special facts of his client's case enabled him to take can be exploited and broadened by others, the result in the real world may be reversed, but the rule remains. Even when it is formally abolished or finally forgotten, its shape will be seen in the twisting route by which it was circumvented. And the ideas involved in the circumvention will prove their own strength. The first resort to them may have been artificial; but their natural properties will assert themselves, and consequences may follow as far-reaching as the ecological disturbances produced by alien animals or plants.

The life of the common law has been in the unceasing abuse of its elementary ideas. If the rules of property give what now seems an unjust answer, try obligation; and equity has proved that from the materials of obligation you can counterfeit almost all the phenomena of property. If the rules of contract give what now seems an unjust answer, try tort. Your counterfeit will look odd to one brought up on categories of Roman origin; but it will work. If

the rules of one tort, say deceit, give what now seems an unjust answer, try another, try negligence. And so the legal world goes round.

But it goes round slowly, too slowly for the violence with which the conceptual economy is transformed to be felt, too slowly, in periods of rapid social change, for the law to keep pace with life. In the sixteenth century the gap grew so wide that the system itself was perhaps in peril. In the twentieth we make use of legislation; and our familiarity with deliberate change makes it easy for us to misread history. How could our ancestors be so perverse in doing deviously what could be done directly? How could they be so clever in using mere tricks to reach desirable results? Certainly if we view the common law on the eve of reform as a piece of social engineering, we see the spirit of Heath Robinson at his most extravagant. But the viewpoint is anachronistic and the questions unreal. It is a real question why nobody before Bentham was provoked, and a part of the answer is that nobody before Blackstone described the system as a whole. Lawyers have always been preoccupied with today's details, and have worked with their eyes down. The historian, if he is lucky, can see why a rule came into existence, what social or economic change left it working injustice, how it came to be evaded, how the evasion produced a new rule, and sometimes how that new rule in its turn came to be overtaken by change. But he misunderstands it all if he endows the lawyers who took part with vision on any comparable scale, or attributes to them any intention beyond the winning of today's case.

IV

If change is largely brought about by re-classification, by transferring a matter from, say, contract to tort, it follows that the legal historian can avoid anachronism only by writing about a short period at a time. In the hope of giving a single picture of the growth of the common law, however flawed, I have committed the fundamental anachronism of a single classification to

cover its whole life: Property; Obligations; and Crime. This has two merits: in a general way it can be applied to any developed system of law; and in detail it has never been applicable in England. The pervasive anachronism is thus at least obvious. But the reader must always remember that these labels are a modern expository device, which tell him nothing about what was in the minds of the lawyers he is thinking about. If there was a "true" starting-point it was probably a simple division into rights and wrongs. Our concept of crime separated from tort for procedural reasons; and for that reason the criminal law and its institutions will be discussed together. Our concept of property appears to have grown from mere factual possession, and the right to get possession may have been indistinguishable from what we should call an obligation: the lender of a chattel started from the same legal position as a lender of money; and the heir's right to his ancestor's fee simple began as an obligation on the lord to admit him as tenant. "We must not", wrote Maitland, "be wise above what is written, or more precise than the lawyers of the age." We shall inevitably do these things: but something will be gained if we are always conscious of the danger.

That the three divisions are of very unequal size reflects the density of the learning generated in each field. Large though the Property section is, it still does not reflect how much of lawyers' lives was devoted to proprietary matters: it has here been kept down by the omission of whole topics, because there seemed no point in a degree of compression which would leave only unconnected assertions of fact. And small though the Crime section is, it still does not reflect how little lawyers thought about crime until modern times: since criminal trials with their blank Not Guilty have never departed from the ancient pattern of litigation, there was little opportunity for legal thought until such things as the direction of a jury could formally be questioned.

V

The attempt to give a single picture has posed a problem more

fundamental than that of arrangement. Legal history is not unlike that children's game in which you draw lines between numbered dots, and suddenly from the jumble a picture emerges: but our dots are not numbered. We have unrivalled sources from a very early period, but they are all business documents, made by and for men who knew the business. They tell us a tremendous amount of detail with certainty and precision. They do not show us the framework into which that detail fitted, the assumptions upon which it rested. It follows that a general outline of legal development, such as this, can be given with far less certainty than a detailed account of a single medieval action. I have tried in the text to indicate confidence or doubt, and in the notes to put readers in the way of finding different views. But it is right to say clearly at the outset that no major proposition in legal history is ever likely to be final, and that any single picture must be a personal one.

I. INSTITUTIONAL BACKGROUND

1 *The Centralisation of Justice*

LOCAL AND CUSTOMARY LAWS

The common law is the by-product of an administrative triumph, the way in which the government of England came to be centralised and specialised during the centuries after the Conquest. Our starting-point will therefore be a sketch of the local and unspecialised institutions from which that process began, and of their own history we shall say nothing; but of course we thereby miss the beginnings. The Conqueror took over a going concern, one to which he claimed lawful title; and he expressly confirmed the laws of his predecessors. Those laws had first come with earlier conquerors, not rulers seeking control of an existing society, but peoples seeking land and livelihood, largely destroying what was there before, and bringing with them their own ways. Those ways, refined and modified by Christian influence, by administrative needs, and by accident, had become the laws by which Englishmen were governed when the Normans came.

They were, however, by no means the same all over England. Laws as well as institutions were local, and the differences between one district and another sometimes reflected not different answers to the same problem but different ways of life; and these in turn may sometimes go back to the piecemeal nature of those earlier conquests and settlements. As recently as 1925, for example, when the rule of intestate succession assigning land to the eldest son was abolished, itself long an anomaly, there was abolished with it an anomalous exception: in Kent the sons shared equally. But

this began as something integral to the social arrangements of a people whose agrarian structure, whose whole civilisation indeed, differed from those obtaining in the central districts of England; and how much of all this they had brought with them from their first home we shall never know. To the north and east there were other ways again, the ways of more recent arrivals; and the Danelaw was to be a reality long after the Conquest, and perhaps to be the source of important institutions in the common law. But the common law, the acceptance for all England of a single rule on any matter, the suppression of contrary customs, leaving as something special those like the Kentish rule of inheritance deep-rooted enough to survive, all this lay in the future, the slow result of institutional centralisation.

The materials of the common law, therefore, were the customs of true communities whose geographical boundaries had in some cases divided peoples and cultures, and not just areas of governmental authority. But within each body of custom, what we think of as the law was not marked off from other aspects of society. Courts were the governing bodies of their communities, dealing with all their public business; and to us they would at first sight look more like public meetings than courts of law. But the way in which they performed their functions, even those which we should class as administrative, was largely judicial. The needs of society were diverse but constant, and they were for the most part supplied by customary obligations resting upon ordinary people. Thieves were caught because it was the duty of everybody to catch them. Bridges were mended, and stretches of highway kept clear, because each was the customary responsibility of a particular landowner or the inhabitants of a particular township. Such duties were enforced *ex post facto* by penalty; but we mean more than that when we say that most of government had a judicial aspect. It largely appeared as the application of pre-existing rules. There were few overt decisions to be made. Custom decided what should be done, and generally who should do it. And even when, as was often the case in the smaller local units, people had to be chosen for particular duties, to mind

hedges, for example, or to check on brewers or bakers, still the duties themselves were fixed. Early law does not have to cater much for choice. In the private sphere we shall find this reflected in the small part played by contract, and the large part played by enduring relationships of a proprietary nature. In public affairs, to use modern terms, there was no separation of powers but a strict and general rule of law.

The kingdom, then, may be pictured as a two-tier structure. It was to courts of this kind that ordinary people looked up and the king looked down; and neither would often look beyond them. To the king what mattered was the effectiveness of his control; and the methods used made the common law. But the courts themselves may in a sense be classified according to the king's relationship with the men actually in charge. Were they merely agents, or were they seen as grantees having some proprietary right in the government of their territory? Our modern terminology imposes a distinction to which many of the facts do not respond: government as well as property could be farmed out; and some kinds of property were not at first heritable, and some kinds of office became so. But it is central to English institutional history, and a necessary condition for the making of the common law, that the proprietary or feudal element in government took second place.

COUNTY COURTS

After the Conquest, as before it, the primary government of England was through counties and hundreds. The beginnings of the county courts raise questions our starting-point enables us to avoid. But if some were administrative creations, some look like the governing bodies of once independent kingdoms. And what mattered for the future was that their control, with partial exceptions in the great palatinates like Chester, remained in the hands of royal ministers. The earl's place may once have been that of under-king; but now he was at most entitled to a share of the profits of justice. Actual power was in the hands of one still called

in Latin the earl's deputy, *vicecomes;* but in English the sheriff was understood as the king's reeve in the shire, and was accountable to the king. The county boundaries long remained important in our law, but it was as the limits of an agent's authority and not an owner's rights. The sheriff, though not always without difficulty, was kept in his place as a servant of the king; and that is what made possible his own decline and that of his court. From presiding over what was, for all ordinary purposes, the most important kind of court in the land, he slowly became the executive addressee of commands from higher central bodies.

That the sheriff was always convener is almost the only general statement we can make about county courts, because the customs peculiar to each included the rules governing their own meetings. In the absence of communications, an invariable routine of times and places was essential. Even an unaccustomed adjournment could appear as a denial of justice; and, though some courts alternated by turns between one town and another, there was an outcry in Surrey when the appointed place was changed from the central Leatherhead to Guildford, which lies at one end of the county. The period was generally monthly, in some counties every six weeks, and in this matter a rule was imposed: the Great Charter prohibited meetings more frequent than from month to month. Attendance was evidently a burden. And although custom seems generally to have provided for a meeting of the great men of the county and representatives of the lesser, the great man would not often want to come, and if he held land in several counties he could not. He might make permanent provision by granting land to a tenant for the feudal service of performing the suit that he owed to the court, or he might each time send a representative, such as his steward. Stewards in particular, the businessmen of the countryside, to whose competence in affairs was added the weight of their masters' authority, seem often to have played a leading part: one writer likens them to bell-wethers of the flock. And similar influence might no doubt be gained by any suitor with the personal qualities to master both the business and his fellows. In some counties, indeed, it seems that there was more

to it than this, and that the suitors were of two classes, the ascendancy of a few being somehow institutionalised. And it is even possible that these few were at one time held specially responsible to the king; but any such responsibility was probably not for judgment in the ancient internal affairs of the community, but for answering questions about royal rights, part of the rise of the jury and of the process by which the king came to govern people directly and not through the agency of local institutions. By the thirteenth century, when this process was already well advanced and when concomitantly our evidence is fuller, the responsibility for judgment clearly rested upon the court, the community as a whole.

HUNDRED AND FRANCHISE COURTS

The geographical sub-divisions of counties, most often known as hundreds and obscure in origin, also had their courts. The hundred court was of the same nature as the county: a meeting, generally at intervals of three weeks, of the more important persons holding land in the area or their representatives, and of representatives of the communities of lesser persons; and it was presided over by a bailiff. But unlike the sheriff, the hundred bailiff often served two masters. By royal grant, by usage and usurpation, or by the continuance of a state of affairs sometimes older than the counties and hundreds themselves, many hundreds —at the accession of Edward I it was more than half of all those in England—were in private hands. The actual meaning of this in practice varied greatly. The lord of the hundred might be entitled merely to a share in the profits of justice, or he might exercise a substantial measure of control. But the bailiff, whether appointed by the sheriff in a royal hundred or by the lord in a private one, was a royal officer and sworn in as such, in many respects the everyday embodiment of government for ordinary people.

Just as a hundred might be in private hands, and yet be part of the king's machinery of government, so all over England there were all kinds of liberties and franchises, in which some or all of the jurisdiction of counties and hundreds, or in later days of the

jurisdiction which had in principle been withdrawn from them into central institutions, was exercised in courts of the feudal pattern. Here to a greater or lesser extent government was indeed in the hands of persons seen as the king's grantees rather than his agents. But many of these, at any rate, went back to a time when this distinction was by no means so clear as it is to us. If order was to be kept, the co-operation of the man with actual local power had to be enlisted. This could best be done by allowing him a financial interest; and if personal arrangements seem to have grown into heritable proprietary rights, the same thing happened with interests in land itself. To the institutional historian anxious to understand and evaluate the ways in which a medieval kingdom could be effectively governed, these franchises are important. But for those who want to understand the framework out of which the common law grew, what matters is that, numerous as they were, each was seen as something special and in some degree precarious. The right and duty to perform some governmental act might rest upon the officials of the liberty; but if they did not do it, the sheriff's men would.

In England, then, proprietary justice and feudal government were in general harnessed by the royal power rather than opposed to it, and we simplify social and political facts but do not distort the pattern of events if we think of law and order as fundamentally residing in the courts of counties and hundreds, and under the control of officials. It follows from what has already been said about the nature of these courts that to begin with they were in principle omnicompetent and had, in our language, jurisdiction over all kinds of legal dispute; and the making of the common law was largely a process of transfer to new central institutions. What happened in county and hundred courts is therefore of the first importance to us; and our means of knowledge are sadly inadequate.

RECORDS OF LOCAL COURTS

Accounts of law-suits may be written for various purposes. There is first the interest of the journalist or chronicler who will

immortalise the exceptional. In the middle ages, when a large proportion of all writing was done in ecclesiastical houses, the interest of the chronicler might merge into that of the diarist, the litigant who wished for his own purposes to record suits in which his house had been involved. Such unilateral accounts are our chief source of information about actual law-suits in the period before the Conquest and for a century and more after it; and what they tell us is mostly about great territorial disputes. The commonplace is only recorded when courts themselves come to keep records, minutes of their proceedings. But the earliest motive for doing this is financial, to ensure that the proper penalties are collected from the wrongdoer, from the unsuccessful litigant who claimed or denied unjustly, from the litigant or the man owing suit of court who did not come, and from all the others to whom the profits of justice were almost an inevitable tax. In the case of the county court, the state of the records reflects the two-tier structure of government. On the rolls of the king's exchequer, kept in the preservative air of officialdom, would be entered the mute totals for which the sheriff had accounted. Such records as were kept of county court proceedings were for his use and remained in his private keeping; and they have perished except for a few fragments from the fourteenth century, and one, probably untypical, from the thirteenth. Some owners of private hundreds, especially religious houses, preserved the rolls of their courts, and of these a few do survive from the later thirteenth century. From this century too there are some accounts of the same nature brought into the records of central courts by appellate processes; but at best they give capricious glimpses of regular institutions. Literature produced by lawyers for their own purposes also fails us. It was centralisation that created the profession, and central institutions with which professional writing came to be concerned. A few formularies gave precedents for use in local courts, but of course their doings were not professionally reported. They were, however, everyday doings; and when, from the late twelfth century, we can see a great deal of what was happening in the king's central institutions, we must remember

that what we have is a spotlight trained on the special. What has sunk into the dark is the business of the principal instruments of government and judicature for a century and more after the Conquest. And for most ordinary men and many ordinary causes, the county court was the highest regular forum for long after that, and therefore a principal source of things that will strike us as novelties when we first see them transacted on the lighted stage of the royal courts.

FEUDAL JURISDICTIONS

For the sake of putting first things first, feudal jurisdiction has so far been spoken of only as modifying what may be described as the national system of government and judicature. Special or franchise jurisdictions have been mentioned, but not the regular jurisdiction incident to lordship; and this constitutes a large exception to the principle that the courts of county and hundred were at the beginning the primary bodies for all kinds of governmental business and all kinds of dispute. What chiefly matters about feudal jurisdiction in England, however, is precisely that its regular scope was limited. This need not have been so. Feudalism was not a system, or even an ideal, having fixed properties. Such definite ideas as the word connotes are the creation of lawyers and historians seeking to systematise certain features which the facts of power might produce in medieval society. Of these facts, the most elementary is the coincidence that effective government was necessarily local, and wealth, since land was the only form of income-bearing capital, was territorial. Lordship and ownership, government and property, were not therefore clearly distinct as they seem to us; and whether we start at the bottom and think of the small man anxious to hold what he had in peace, or at the top and think of the king or great lord anxious to provide for his governmental and economic needs, there was a tendency toward the organisation of society by dependent tenures. From top to bottom one can imagine a series of bargains in which each superior allowed a measure of immediate control to his

inferior, whose holding he undertook to protect in return for a tribute in food or money or services or fighting men. At the top fighting men were commonly demanded. At the bottom agrarian facts tended to produce their own uniformity. The plough drawn by more oxen than most peasants could own, the waste involved in turning so long a team, the need to fallow and to rotate crops, these and many other factors produced co-operative units of one kind or another, notably the nucleated village community with its great open fields in which each peasant had his scattered strips. If we add a lord, with his own demesne land worked by the peasants in return for their holdings, we have the typical manor, the natural unit taken over, as it were, to be the base of the feudal pyramid.

These forces, operating together in a society without structure, could have pushed its entire organisation up into the pyramid, devolution of all aspects of government being by the simplest territorial division and sub-division. In England, many of the phenomena existed before the Normans came. Agrarian facts had produced many manors of the typical pattern, and many other kinds of unit to which the Norman administrators were to give the name of manor. Governmental facts had produced jurisdictional lordships. The desire for security was still producing the free man claiming to be able to betake himself and his land to what lord he chose. But, whatever pattern may have been latent in all this, its development was interrupted by the Conquest, which produced all at once the pyramid. It was, however, a pyramid in the economic dimension and not the governmental. The entrenched order of the counties and hundreds remained as the governmental framework; and when the Conqueror's men produced their great description of England, listing the fees of the tenants-in-chief and the holdings of the king himself, the information was arranged county by county, and had been collected through the county machinery. Domesday is a register of property and proprietors before and after the Norman takeover. But it assumes that the bearings of society are as they were in the time of King Edward the Confessor.

The new proprietors, of course, were mainly Frenchmen, participants in the gains of the adventure, who had either displaced one or more English owners or had been intruded over their heads to become their lords. The tenures of those who held in chief of the king, and some tenures at a lower level, were thus created instantly. More came into being as the king laid on his tenants-in-chief the obligation to furnish fighting men, and as the tenants-in-chief came to meet this obligation by means of the enfeoffed knight, not kept and paid like the household retainer but granted a living in land. The military tenures, ironically shown by modern research to have been of uncertain value as a provision for warfare, brought with them a logic which was to generate anachronisms throughout our history. These will be considered in connection with the development of property law; and what has mattered for the system as a whole is precisely that the feudal forces were so largely confined to the economic sphere. Had lordship regularly carried most of government with it, jurisdiction would have been defended as property against centralisation, customary law would not have been transformed by professional handling, and Roman law would perhaps have no rival in the western world today.

The regular scope of feudal jurisdiction is hard to discover, and clarity will be served by distinguishing between manorial courts and courts at higher levels of tenure. About the latter we know the less, though it is clear that in the century after the Conquest the courts of honours, the greater fees whose tenants might style themselves barons, were doing much important work. Franchise jurisdiction apart, and setting it apart is not always easy, their proper field was the business of the fee as such: the ownership, if that word is appropriate, of the various holdings; the dues proper to each; the dower of widows of dead tenants; and, perhaps most important of all, inheritance, or rather those decisions about whose homage to accept out of which grew together both heritability and the canons of descent. The courts of these communities of tenants, including of course the king's as the highest such court, created the customs of English feudalism, and so