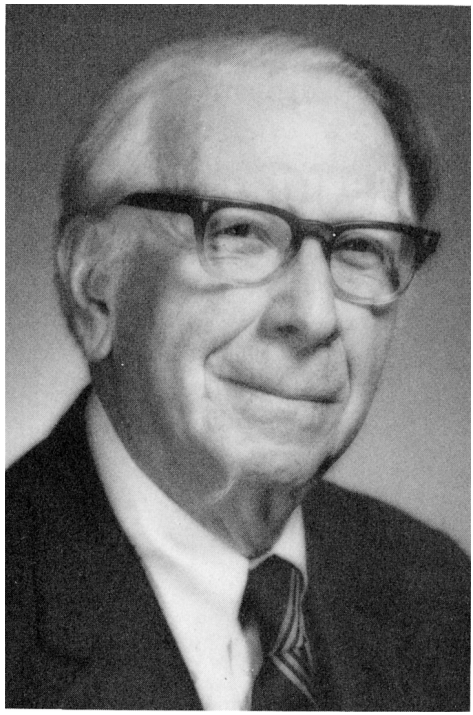
ORIGINS OF THE COMMON LAW



ARTHUR REED HOGUE (1906–86) was born in Pittsburgh, the son of the distinguished Presbyterian minister, Walter Jenkins Hogue. He received his A.B. magna cum laude from Oberlin College in 1928. At Harvard, he studied under the medievalist, Charles Homer Haskins, and the historian of political thought, Charles H. McIlwain, receiving his M.A. in 1929 and his Ph.D. in 1937. At Hanover College from 1935 until 1948, he rose from Assistant Professor to Professor of History, Chairman of the Department, and Academic Dean. After two years at the University of Illinois, he moved in 1950 to Indiana University, where he remained until his retirement in 1974, as Professor Emeritus of History. His publications and his service to the American Society for Legal History attest to his professional interest in the study of legal history. His books, articles, and papers have illuminated two primary components of the American tradition of freedom: the development of the English Common Law and the influence of continental Liberalism in the person of Carl Schurz. *Origins of the Common Law* was first published in 1966 by Indiana University Press.

ARTHUR R. HOGUE

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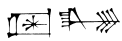

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for **E. S. H.** *and* **D. B. H.**

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Preface

The common law of England may confront students and scholars in many fields. Information about this legal system and its history can be found in court cases, treatises old and new, monographs, law journals, law encyclopedias, and law dictionaries. The investigator untrained in law finds materials which easily carry him beyond his depth into technicalities set forth in an unfamiliar terminology. Literature about the common law is usually written by trained lawyers for trained lawyers. There is a place, I believe, for a book which does not assume professional legal training. There is a place for a book which anticipates the difficulties one encounters when approaching the common law—possibly for the first time. To accomplish this object I have chosen the early period of the common law between 1154, when Henry II became king, and 1307, when Edward I died, when it was a relatively simple body of rules enforced in the English royal courts. An understanding of the formation of the common law during these years provides excellent grounding for the history of later developments.

The English monarchy encouraged the spectacular growth of the legal system by enforcing with formidable authority the decisions of royal courts. But royal policies occasionally met serious resistance on the part of English subjects. These controversies between Crown and subject led to important decla-

rations of English law, most notably at the time of Magna Carta. So I have briefly traced the events of English history during several reigns which are linked inseparably with the precocious development of early common law.

I have attempted to show the relation between early rules of common law and the social order which they served, because I am certain that laws should not be treated as though they float in air, timeless and apart from circumstance. Laws bear directly on the incidents of daily life. The medieval society in which early rules of common law took form was feudal and agricultural and rapidly changing. I have described it in some detail for the modern reader, who is usually better acquainted with industrial, urban communities than with agricultural, village communities dominated by a landed aristocracy.

To remove all doubt of the relevance of earlier common law to the modern Anglo-American legal system, I call attention throughout the book, but particularly in the last two chapters, to legal and political institutions destined to flourish in later centuries.

This book, then, does not hurl the narrative at the reader. By means of definitions, examples, and illustrations, I have tried to give clarity to each of its parts. But one short book cannot be expected to encompass a legal system which has evolved over a period of eight centuries; to understand the common law requires more than the leisure of a summer day. In the notes I have pointed occasionally to literature amplifying many of the main outlines of the common law. No serious investigator should ignore the important works of the British historians, Frederic W. Maitland and W. S. Holdsworth, nor should he fail to consult the stately series of volumes published since 1887 by the Selden Society, which has steadily provided sources useful for the study of English legal history.

There are excellent bibliographies of the subject of English legal history. The most valuable and comprehensive is the annotated *Legal Bibliography of the British Commonwealth of*

Nations, compiled by W. Harold Maxwell and Leslie F. Maxwell; the second edition, in seven volumes, was published in London by Sweet and Maxwell, Ltd., in 1955. Volume 1 lists materials on English law to 1800, including books dealing with the period from 1480 to 1954; Volume 2 continues from 1801 to 1954. There are also many excellent law dictionaries and glossaries listed by the Maxwells in Volume 1 (pp. 6–14). For most purposes *Bouvier's Law Dictionary,* edited by William E. Baldwin, is quite adequate, and so is W. J. Byrne, *Dictionary of English Law.* These can be used to supplement the glossary of terms which I have appended.

Here I wish to acknowledge gratefully the help many people have given me with this book. By their questions and comments over the years students have called attention to numerous points, which I have tried to present clearly for the layman. Several lawyers have been kind enough to talk with me about legal matters and, in the course of pleasant conversations, have improved my understanding of materials touched on in the text. Among these I am particularly obligated to Austin V. Clifford, F. Reed Dickerson, W. Howard Mann, and Leon H. Wallace. If I have failed at places to grasp their instruction, the fault is, of course, entirely my own. Also I wish to thank Robert H. Ferrell for his expert assistance in improving the arrangement of three chapters. I am indebted to the editorial staff of the Indiana University Press, particularly to Miriam S. Farley and Susan D. Fernandez, for their patience and care in preparing the book for the printer. Nancy E. MacClintock made the index. Again, I am grateful to my wife for her assistance and encouragement at every stage in the writing.

A.R.H.

The following abbreviations for frequently cited sources have been used throughout the notes:

P & M Frederick Pollock and Frederic W. Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed., 2 vols. (Cambridge Univ. Press, 1898).

S & M *Sources of English Constitutional History.* Carl Stephenson and Frederick George Marcham, eds. and trans. (New York: Harper, 1937).

S.C. *Select Charters and Other Illustrations of English Constitutional History,* edited by William Stubbs, 9th ed., revised by H.W.C. Davis (Oxford, 1921).

Y.B. *Year Books*

ORIGINS OF THE COMMON LAW

Chapter 1

Introduction: Social Change and the Growth of the Common Law

LAW AS THE BOND OF CIVIL SOCIETY

Throughout its long history the English common law has borne directly on the raw facts of daily life in English society. The rules of common law are social rules; never remote from life, they serve the needs of a society once feudal and agricultural but now industrial and urban. Gradually, as social changes have occurred, the law has been adapted by judicial interpretation to meet new conditions. It continues as always to reflect the character of the social order.

Englishmen in the Middle Ages accepted, as they do now, the need for rules governing such recurring relations as those between buyer and seller, landlord and tenant, guardian and ward, creditor and debtor. Rules of common law touch a farmer's property rights in a crop of wheat planted in a rented field or the right to use a public roadway. Nor is the common law a stranger in the market place; the fishmonger as well as the banker may invoke its protection. The bond, then, between law and society is close and intimate; the history of the common law is matter-of-fact and rests ultimately on the relationships of people who have taken their differences before a court for

settlement. And it will be assumed in all of the discussion which follows that the common law has grown, now rapidly, now reluctantly, to keep pace with changes in the social order, from which, again, it is inseparable.

Social change and legal change are more easily discerned than accounted for, and the process by which legal changes are made is often far from clear. The mystery surrounding many legal changes may be particularly baffling when we deal with a system of judge-made law. For who can determine with precision the thought of medieval royal judges as they built up a body of principles in case after case, decision after decision? It is difficult enough to grasp the nature of the judicial process in the present, when we have full reports of trials and the opinions as well as the decisions of judges. Even so, there is value in an account of the common law during its foundation years, when its principles were not overlaid by a vast burden of statutory legislation designed for the complexity of modern life.

An account of the common law in medieval England will bring us close to many, if not all, of the elements which must be considered in dealing with the law in any period. Here we shall touch on substantive rules and rules of procedure as well as on courts of justice and agencies of enforcement. Moreover, in the medieval period we shall find excellent examples of legal change accompanying social change. Men of the twelfth century and the thirteenth knew both the vigor and the decline of feudalism. In these centuries population increased rapidly, and agriculture flourished in an epoch of good markets and rising prices. English merchants traded with Lombards from Italy, Hansards from Germany, and wool merchants who supplied the looms of Flanders. Oxford and Cambridge universities trace their histories back to the thirteenth century, when builders were at work on such English Gothic cathedrals as those at Salisbury and Wells. England in the thirteenth century was a society of rapid change.

A DEFINITION OF COMMON LAW IN THE MIDDLE AGES

The greater a man's knowledge of the law, the more hesitant he will be in answering the question: What is common law? But we need a working definition here, and perhaps we can distinguish the common law in the twelfth and thirteenth centuries from other legal systems by calling it simply the body of rules prescribing social conduct and justiciable in the royal courts of England. Although this definition is admittedly general, it is difficult to be more precise.[1] We should remember that the law enforced in royal courts, and common to all the realm of England, was in competition with concurrent rules enforced in other courts. Save when a matter of freehold was at issue, Englishmen were not compelled to present their causes before the king's courts. Men were free to take their cases into the local courts of the counties, which administered local, customary law; men might seek justice from the church courts administering rules of canon law, which touched many matters, especially those related to wills and testaments, marriage and divorce, and contracts involving a pledge of faith; feudal barons might accept jurisdiction of a baronial overlord whose court applied rules of feudal custom; townsmen might bring their causes before the court of a borough, which would judge them by rules of the law merchant. All these courts and systems of law deserve mention in an account of growth of the common law, for by the end of the thirteenth century the common law had absorbed much, if not all, of the judicial business of its competitors and may have borrowed heavily from them in the process of aggrandizement.

The medieval common law, then, was not local or particular. We should distinguish it from whatever smacks of a specialty. It

[1] Hermann Kantorowicz, *The Definition of Law,* ed. A. H. Campbell (Cambridge Univ. Press, 1958), p. 79; see also Sir William Blackstone, *Commentaries on the Laws of England,* 9th ed. (1783), I, 68–71; and P & M, I, 156, where the authors contrast common law with "whatever is particular, extraordinary, special. . . ."

is not to be identified with rules of law administered by local, baronial, or manorial courts, or by ecclesiastical courts, or by borough courts. Some of the difficulties confronting the uninitiated in understanding medieval common law undoubtedly stem from insistence on applying modern definitions to medieval materials. For example, modern usage tends to distinguish common law from "written law," or statutory legislation. Again, the modern lawyer, as well as the layman, may think of the common law as a body of principles embodied in or derived from precedents—the decisions of certain courts in England and other common-law countries. To add to the misunderstanding of medieval common law there is the occasional modern effort at defining the common law as a body of rules based upon custom alone.

Walter Ullmann has recently provided a statement clarifying the medieval concept of the common law; while discussing *lex terrae,* a much debated phrase appearing in Chapter 39 of Magna Carta, he observes:

> We may justifiably call the *lex terrae* the early thirteenth century expression for the common law. Taken in this sense the concept loses a good deal of its vagueness and refers to ordinances, rules, decisions of the courts, in short to that body of legal rules which had its roots deep in the soil of native feudalism, notably the land law—hence the land law and the law of succession, personal property and tenure were the earliest developed laws—and which derived its binding character from the (explicit or implicit) consent of the feudal tenants-in-chief. . . . Precisely because no distinction was as yet possible between legislation . . . and judicial actions, any rule, which was considered binding, derived its force—in the contemporary feudal environs—from the . . . consent of the barons and the king in his feudal capacity.[2]

THE LANGUAGE OF COMMON LAW

The language of the common law today and the terminology, "the words of art," used by the legal profession reveal the great

[2] Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (New York, 1961), pp. 166–67.

antiquity of the system. Much of the terminology used in the twentieth century can be explained only by a description of medieval society. Such a phrase as "the seisin of a freehold" immediately takes one back seven or eight hundred years to a time when a very sharp division between "free" and "unfree" property interests characterized feudal society.

If the modern layman is bewildered by the language of the legal profession, he can blame William the Conqueror for his confusion, for the Norman Conquest made French the language of the royal household and the language of the royal courts. Anglo-French, or "law French," was used in pleading in the English courts, and the lawyer was forced to learn it as a second language.[3] He had to learn Latin as well, for Latin was the language employed in the Middle Ages for formal written records. Anglo-French was a dialect from which the English legal profession first developed a precise vocabulary for the expression of legal concepts. Words such as *plaintiff* and *defendant* are of French origin. As the English language evolved, it moved away from the Anglo-French, once the "king's English," but we will have occasion to use some of the medieval terminology which the common law retained. Those who are now impatient with this terminology may find some comfort in the knowledge that in the early history of the common law, at least, the language of oral arguments in court was close to the conversational language of the people.

We are concerned here with much more than the growth of professional jargon and definition of legal terms; we are concerned with the expanding jurisdiction of the royal courts and a dramatic increase in the number of legal rights they were prepared to recognize and to protect. For example, as feudalism declined during the thirteenth century, property interests not clearly related to feudalism were given protection.

[3] A. K. R. Kiralfy and Gareth Jones, compilers, *General Guide to the Society's Publications: Volumes 1–79*, The Selden Society (London, 1960), pp. 35–36; for a full discussion of Anglo-French, see F. W. Maitland's introduction to his edition of *Year Books 1 & 2 Edward II (1307–9)*, Selden Society, Vol. 17 (1903).

Leasehold and other so-called "chattel interests" in land eventually secured as much protection from the common law as freehold, a property interest of the highest dignity and quite suitable for a feudal class. More about this follows in Chapters 8 and 9.

STABILITY AND CHANGE: A PARADOX CONSIDERED

In every generation both lawyers and laymen seem to have been drawn toward two desirable but widely separated and contradictory goals. The first of these is the goal of permanence, stability, certainty in legal doctrines. The second is the goal of flexibility or adaptability, permitting adjustment of the law to social necessities. The result of the pull in these two directions has been an unresolved tension between the search for stability and the desire to make the law serve its own age. The tension here is not necessarily a conflict between factions, parties, or groups of men; not always a tug-of-war between conservatives and radicals. The dual objectives can exist in the legal thought of a single jurist.

The pull toward permanence in the law is particularly strong whenever real property interests are involved, whenever land, buildings, or real estate are at stake; for these interests often span long periods of time and may affect two or three generations. A long-term lease for a period of ninety-nine years ordinarily touches the use of land. Such a lease, properly drafted and clearly designed to endure into a distant future, will not be disturbed by a common-law court save for exceptionally good reasons. What was just and right in one generation—so argument may run—should not be disturbed in another generation; otherwise, men will not plan their affairs for the future with confidence that arrangements will hold up in court.

Another force contributing to permanence and stability in the law emerges from the doctrine of *stare decisis,* or the

practice of looking to precedents while formulating a legal principle. The doctrine of *stare decisis* assumes that court decisions have been reasonable, that what was reasonable in one century may be reasonable in another—even though in the meantime the most revolutionary social and political changes may have occurred. The important word here is *reasonable.* Ever since the Roman law spread through the Mediterranean world, European legal systems have made much of the reasonableness of law and have been influenced by the ideal of creating a body of legal principles which would be simple, stable, and consistent. Among jurists there have always been those who take delight in the strict logic of a closely reasoned argument and who wish to treat law as a science, not as abstract as mathematics perhaps, but similar to mathematics in the timeless certainty of its conclusions.

We need not examine all of the assumptions involved in the doctrine that the law is written reason, *ratio scripta,* but we can note that they approach a belief in an absolute justice or equity which the human mind can apprehend by reason. Faith in the eternal reasonableness of law is thus not far from the ancient Stoic view eloquently stated by Cicero:

> True law is right reason, consonant with nature, diffused among all men, constant, eternal. . . . It needs no interpreter or expounder but itself, nor will there be one law in Rome and another in Athens, one in the present and another in time to come, but one law and that eternal and immutable shall embrace all peoples and for all time and there shall be as it were one common master and ruler, the god of all, the author and judge and proposer of this law.[4]

In the Middle Ages there was the notion of a permanence in the law imparted by its connection with immemorial custom. Law was not "made," according to this medieval view; it was

[4] C. H. McIlwain, *The Growth of Political Thought in the West* (New York: Macmillan, 1932), pp. 111–12, quoting from the *De republica.*