Edited and with an Introduction by

CHARLES M. GRAY

Classics of British Historical Literature

JOHN CLIVE *Editor*

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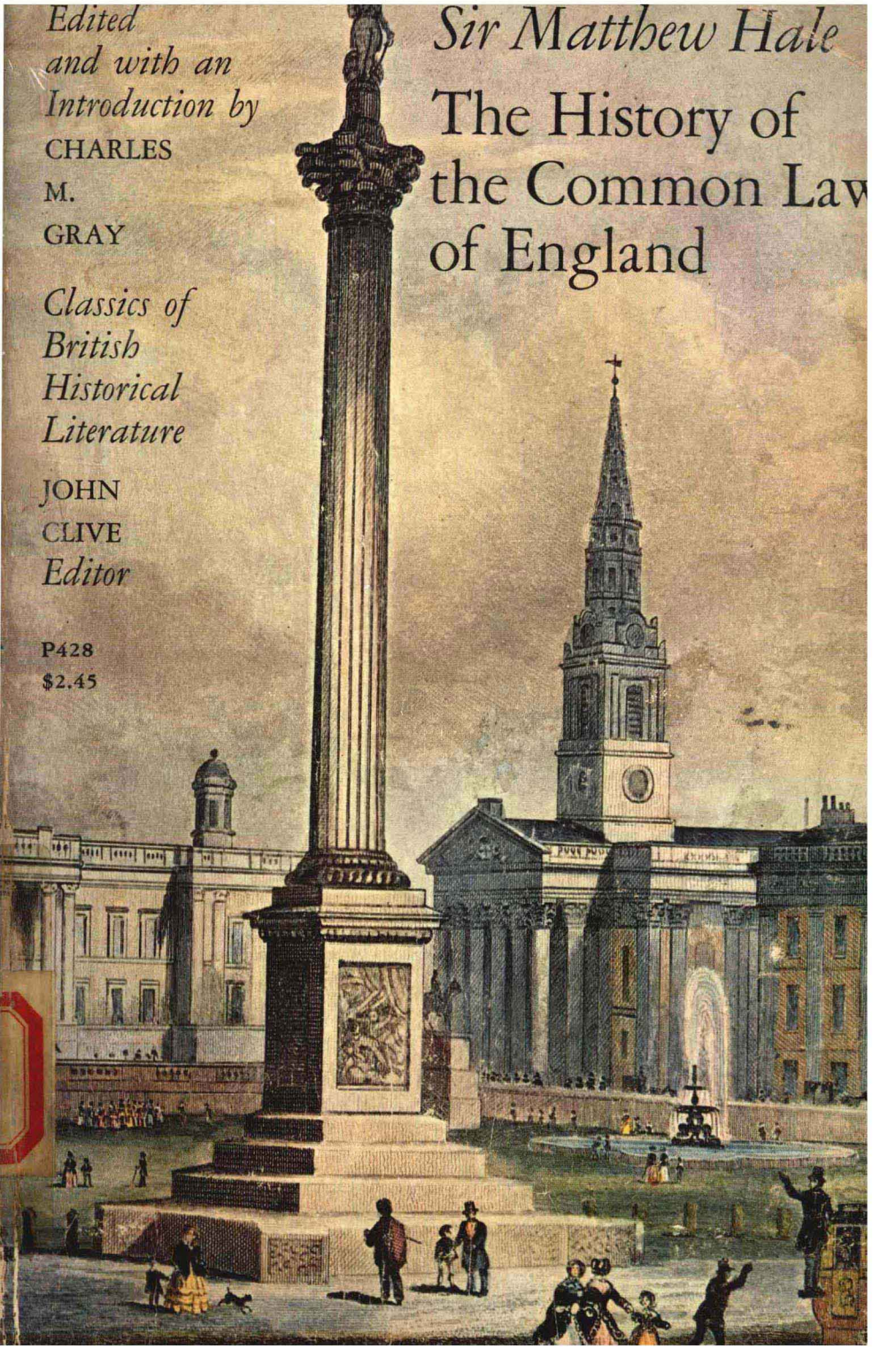
Sir Matthew Hale

The History of the Common Law of England



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Series Editor's Preface

This series of reprints has one major purpose: to put into the hands of students and other interested readers outstanding—and sometimes neglected—works dealing with British history which have either gone out of print or are obtainable only at a forbiddingly high price.

The phrase Classics of British Historical Literature requires some explanation, in view of the fact that the two companion series published by the University of Chicago Press are entitled, respectively, Classic European Historians and Classic American Historians. Why, then, introduce the word *literature* into the title of this series?

One reason lies close at hand. History, if it is to live beyond its own generation, must be memorably written. The greatest British historians—Clarendon, Gibbon, Hume, Carlyle, Macaulay—are still alive today, not merely because they contributed to the cumulative historical knowledge about their subjects, but because they were masters of style and literary artists as well. And even historians of the second rank, if they deserve to survive, are able to do so only because they can still be read with pleasure. To emphasize this truth at the present time, when much eminently solid and worthy academic history suffers from being almost totally unreadable, seems worth doing.

The other reason for including the word *literature* in the title of the series has to do with its scope. To read history is to learn about the past. But if, in trying to learn about the British past,

one were to restrict oneself to the reading of formal works of history, one would miss a great deal. Often a historical novel, a sociological inquiry, or an account of events and institutions couched in semifictional form teaches us just as much about the past as does the "history" that calls itself by that name. And, not infrequently, these "informal" historical works turn out to be less well known than their merit deserves. By calling this series Classics of British Historical Literature it will be possible to include such books without doing violence to the usual nomenclature.

When, in 1888, the great historian of English law, F. W. Maitland, delivered his inaugural lecture as Downing Professor of the Laws of England at Cambridge University, he included in it some very pessimistic remarks about the future of English legal history. Happily, time has not borne him out. Today the history of English law flourishes as never before, and by no means only as the domain of specialists. There exists an increasing awareness on the part of nearly all historians that a knowledge of legal history can often provide vital clues to the solution of historical problems which, on the surface, seem far removed from the sphere of law. Two examples come to mind. The first is the problem presented by Edmund Burke's view of the past. Here, thanks to the brilliant writings of Professor Pocock, it has become clear that in characterizing Burke's attitude to history one must refer, not merely to "romanticism" and "the revolt against reason," but also to the context of the "Ancient Constitution," guarantor of the immemorial laws of England, as the context within which Burke thought and wrote. The second example concerns the vexing question of the origin of the "Scottish Renaissance," that memorable period of cultural efflorescence in eighteenth-century Scotland. There can now be little doubt that the reason why the Scottish legal profession played such a prominent role during that renaissance is far from accidental; that it is, rather, intimately related to the fact that in eighteenth-century Scotland, in contrast to England, "civil" (that is, Roman) rather than common law prevailed.

In view of the revival of interest in British legal history, it is particularly important to make the classics in that field once again

easily available. One of those classics is undoubtedly Hale's *History of the Common Law,* which Sir William Holdsworth called "the ablest introductory sketch of a history of English law that appeared till the publication of Pollock and Maitland's volumes in 1895." Like Hume's *Dialogues* and Diderot's *Neveu de Rameau,* it is one of those masterpieces that did not appear during its author's lifetime. Why this was so is one of the questions subtly answered by Professor Gray in his introduction. It is from that introduction, as well as from reading Hale's work, that the reader will come away with admiration and respect for a seventeenth-century historian who, in the course of considering the crucial problem of how the common law retained its identity in spite of the many changes it underwent, contributed, in Professor Gray's words, to "the emergence of the modern historian's art out of antiquarianism and mythmaking."

JOHN CLIVE

Editor's Introduction

Sir Matthew Hale's *History of the Common Law* is the first book with any pretense to be a comprehensive account of the growth of English law. There is a gap between the pretense and the performance, but the book is nonetheless a landmark in a historiographic tradition. It stands out all the more because it was not rapidly succeeded and improved on by other works of the same sort. The tradition of English legal history, like other strands of historical thought, has an implicit and an explicit content. On the one hand, there is a set of attitudes, assumptions, and particular reasoned opinions about the past—the implicit tradition; on the other, there is the explicit perception that some segment of the past represents a coherent whole, whose story should be told as such. Hale was the first student of English law to have the latter perception and to attempt a piece of writing appropriate to it. He was also the last for a long time to come. Save for the work of the eighteenth-century writer John Reeves (to whom Hale is generally considered superior from a modern point of view), Hale's *History* is virtually the only precedent for the great late nineteenth- and twentieth-century body of explicit English legal history. What W. S. Holdsworth, standing on the shoulders of F. W. Maitland, achieved in the thirteen volumes of his *History of English Law* Hale first adumbrated.

As for the implicit tradition, Hale is part of the stream. He entered it at a crucial point, however. He contributed originally to the body of historical attitudes connected with the law that

were accumulating and changing in his time and went on doing so, despite the absence of much express interest in the totality of legal history. His book deserves attention as the pioneer of a genre, but it is even more important as a document of seventeenth-century intellectual history.

Hale was able to conceive a general history of English law partly because he lived at the end of a period during which thinking about the law in an historical dimension had flourished exceptionally. A penumbra of attitudes that can be called historical inevitably adheres to a legal system, especially a system such as that of the English, where precedent has been given conscious value and doctrine was transmitted orally and unofficially within the guild of practitioners. In that sense, the implicit tradition of English legal history has no beginning. But in another sense it can be said to have begun toward the end of the sixteenth century. The late Elizabethan generation, to which Sir Edward Coke, the greatest lawyer in English history, belonged, achieved an unanticipated consciousness of the legal past. Consciousness is not truth, historical awareness not the same as historical sensitivity. Coke and his contemporaries were mythmakers and practical men, antiquaries stronger on ancestor worship and patriotism than on realistic perspective, polemical and political users of the legal history they discovered or invented. Nevertheless, they knew about the past, talked about it, and exploited it, as earlier lawyers had not. They transformed the law from a craft to a liberal art—a focus for social thought, including historical thought.

Hale's *History* presupposes Coke and criticism of Coke. It builds on a half-century of high seriousness in the law, a seriousness of which Coke was the primary creator. It proceeds from an orientation toward history and particular historical opinions for which Coke was the great spokesman in an earlier generation. Hale was both a critic and a perpetuator of the Cokean tradition. On one side, his very attempt at a general history expresses a critical impulse—a striving for perspective and truth over against a tradition that was too "implicit," too disordered and engaged to practical ends. Ultimately, however, Hale's *History* is important, not for taking legal history out of the forum, but for giving expression to a new set of historico-jurisprudential attitudes. Implicitly, Hale was working out an alternative to Cokeanism reflec-

tive of the political and intellectual history he had lived through.

The *History of the Common Law* is worthy of attention, first of all, as a document of the complex intellectual transformation of the seventeenth century. The magnitude of that transformation in science and philosophy, religion and political theory, is well recognized. The historical background of jurisprudence has received increasing attention in recent years, especially owing to J. G. A. Pocock's seminal study, *The Ancient Constitution and the Feudal Law*. Hale's *History* is possibly the most important book to come to terms with, if the legal-historical aspect of "cultural revolution" is to be more deeply understood.

The *History of the Common Law* was published posthumously. It was printed three times (1713, 1716, and 1739) virtually as it stood in manuscript and numerous times thereafter with editorial additions. The text here is reproduced from the third edition.

Sir Matthew Hale (1609–76) is a largely unstudied major figure. He stands in no need of encomia and, indeed, hardly awaits his biographer, for the simple story of his outward life has been adequately told. Hale was educated for the common law in the late twenties and thirties of the seventeenth century, succeeded as a practitioner thereafter, and rose to the Bench in 1654. Except for a brief period under Richard Cromwell, he served as a judge for the rest of his life. His place in the legal establishment and his reputation as a jurist gave him some influence in the counsels of the realm, but he was hardly a politician. He served the Cromwellian regime, then made a smooth transition to the service of Charles II. The terms of Hale's acceptance of the Commonwealth are important for his intellectual history. His acceptability to both the Protector and the restored king is evidence of his neutrality in politics rather than of the maneuvers and changes of heart of a truly political figure. He was probably perceived from all quarters as a professional whose first allegiance went to the law itself, as a scholar by nature, and as a man of unexceptionable probity.

There is evidence that Hale so perceived himself, for he translated Cornelius Nepos's life of Pomponius Atticus and is said to have taken that worthy for his model. Atticus established him-

self as the archetype of political neutrality by living through the Roman revolution on terms of friendship with all the major antagonists. The main point of Cornelius Nepos's sketch is to remark with praise on his subject's success in staying above the storms of politics. Like Atticus, Hale lived through a tempest without material cost to himself. The moral accounting is trickier. Atticus paid no moral price for neutralism because his sensibility was Stoic. Political flux was an analogue of passion. (True to the ideal of *apatheia,* Atticus died by self-starvation, uttering not a syllable to his entreating kinsmen beyond a sickbed oration setting forth the reasonableness of his decision.) One suspects that Hale took comfort from the example of Pomponius Atticus because his own morality did not make such easy provision for riding out the storm.

"Hobbism," in one of its senses, was the pejorative seventeenth-century word for accepting *de facto* governments on principle. Though it is unfair to Hobbes to take him as a vulgar *de-factoist,* that implication was seen as part of the amoralism and egoism attributed to his philosophy. Hale was as far opposed as possible to a loosely conceived "Hobbism." He wrote against Hobbes in the arena of legal theory. Yet he could hardly have avoided a troubling aspersion: If a man of consequence arrives at terms with successive regimes in a revolutionary situation, must he not be convicted either of timeserving or, what is worse, of "Hobbism"? Hale's real escape from that dilemma was probably to invoke his allegiance to the law. Regimes come and go, the common law abides. The duty of men called to the law is to keep it running, to preserve its continuity and quality when, despite political vicissitude, that remains a possible endeavor. Though these propositions have their complexities, they probably define Hale's basic posture and self-justification. They make sense abstractly, and they made sense in context, for the antagonists in the English revolution largely shared an interest in maintaining the common law. Levellers who would have reformed it drastically and religious zealots to whom temporal tradition was of no consequence were exceptional. So was Hobbes, the original mind on the right with certain leftward affinities. Continuity of civic order as such mattered to Hobbes; the unbrokenness of positive legal tradition did not. For Hale, legal continuity was vital for

civic identity. Unlike Pomponius Atticus, whose plan of life was to remain a private man, Hale was a public figure, though not a fully political one. The English Christian lawyer may have looked on the Roman Stoic knight with a certain yearning.

It is Hale's inner history—the course and coherence of his thought as expressed in a large body of writings and in his judicial opinions—that is largely unwritten. This brief introduction to his *History of the Common Law* does not claim to supply the want. I shall only essay (in the most literal sense of the word) a sketch of Hale's intellectual character.

Hale was undoubtedly a great common-law judge, though it should be noted of him (as of most other seventeenth-century judges, including Sir Edward Coke himself) that we lack a judicial biography and hence a real basis for gauging the special quality and influence of his judicial work. He was also an indefatigable scholar and writer on law, jurisprudence, legal history, religion, and science. His public life was led on the Bench and to some extent in the affairs of the community; his private studies absorbed a large share of his energy. They were private studies in a specific sense. In his lifetime, Hale published two scientific tracts. Shortly after his death, and so presumably in accord with his intentions, four other works were published: a third scientific tract, the translation from Cornelius Nepos, a book of religious contemplations, and a brief abstract of criminal law. Save for the last of those, all of Hale's legal writings, as well as numerous further works on the other subjects he was interested in, were left in manuscript. He requested that none of these manuscripts be published. To the breach of his desires we owe the *History of the Common Law* and the other works (entirely legal) on which Hale's fame as an intellectual figure depends.

In a sense, then, Hale did not set up for an author. To the extent that he did, it was mostly as an amateur of natural philosophy and as a pious Christian, impelled, perhaps reluctantly, to share his meditations as a reasonable service to God. He did not burn to teach law outside the courtroom, to make known what he so extensively knew of legal history, or to communicate his thought about the law in dimensions more philosophical than those of cases and controversies. We cannot tell what accidents

or reticences explain Hale's silence. Perhaps he was simply a busy man with many interests who worked at this and that, failed to finish things or revise them to his satisfaction. At the end, he may simply have preferred that work which he regarded as imperfect should remain unpublished. Many of his writings, including the *History of the Common Law,* are fragmentary.

Alternatively, or additionally, there may be reason to imagine Hale as a man whose main literary impulse was to write for himself. Perhaps one should expect such a bent in a psychological Puritan, which Hale plainly was. (It is doubtful whether he was ever a programmatic Puritan, in any of several senses, as opposed to a tolerant son of the Church of England.) His austere, studious, self-driving, and self-critical temper was confirmed and given shape by a religious culture of high seriousness that transcended ecclesiastical and political party. In that culture, rendering an account of oneself to God could easily pass over into accounting intellectually to oneself. The public performance needed to be offset by an internal struggle for clarity and perspective.

To the Puritan sensibility, the world was a dubious enterprise, a scene of confusion. Yet it was not to be fled. A Christian man must do his work in the place to which he was called. The work was witness to the faith; and, within limits, the working of Christian men could impress a moral quality on the world's business. The dream that the saints could subdue the world and reshape nature was the excess and perversion of Puritanism. In more and less controlled forms, that disease had troubled Hale's times. The more orthodox and enduring thrust of Puritanism was to circumscribe the potentiality of works and to balance action with inwardness. Christian energies should go out, then flow back. To act on the world effectually, a man needed to pull back into critical consciousness of self. Part of that consciousness must be renewed awareness that only so much is possible within the structures provided by a working Christian's place and opportunity; that nature is only impressible, never transformable by grace; that our best, with which our consciences must learn to rest, is always questionable when the perspective within which it is examined is enlarged, and only improvable as its questionableness is opened and reopened.

The private life of the mind, even the professional mind, is implied in such double sensibility. Moral introspection and prayer were the heart of Puritan inwardness. Hale was much given to that kind of reflection. But the impulse to study and think can also be reinforced and shaped by a Puritan sense of life. Because of it, a man may need to understand more about the segment of worldly life he deals with than mere use requires, to ask more searching questions than must be asked in immediate situations, to criticize what must be assumed in action, and to seek justification for one's assumptions. He may perceive his intellectual life as part of that spiritual realm where conscience and faith hold sway and works are set at a distance. Perhaps Hale saw his life as a legal scholar and writer more as the background of his work as a judge than as a second legal career or additional way of putting his impress on the world.

If Hale's personality and religio-cultural tradition made for a certain privatization of intellectual life, so did the character of his intelligence and the state of his subject matter. Besides being a learned man, Hale was a clear-minded one. He valued, and was capable of, logical cogency and precision. With a mind of that quality, he confronted an enormous body of material—the sources of English legal history and, intermixed if not synonymous therewith, the authoritative sources of English law. He also confronted a contemporary awareness of worlds beyond the insular common law—the tradition of comparative law and institutional history with which the names of John Selden and Henry Spelman are associated. (To both of those scholars Hale was obligated in his work, and Selden was influential on him through personal friendship.) Finally, Hale faced a babble of tongues *about* the common law and the English polity—claims for the common law and criticisms of it, uses and abuses of legal learning, historical speculation and philosophical dissent from the relevance of history. To an environment over-full of knowledge and half-knowledge, widened perspectives and false perspectives, theories, resistance to theory, and partisanship dressed up as thought, Hale brought a powerful impulse to digest and control. His mind sought order and system, while recognizing at the same time the incompatibility of order and system. That is to say, Hale recognized that putting particular rooms in order

draws off the energy that might go into architecture. Yet those clear, prehensile minds that refuse to be fooled by the *esprit systématique* are likely to be just the minds that on another level surrender to its aspiration. The strength that can achieve clarification of particulars stretches for an integrating clarity, discovers new ranges of difficulty, settles for glimpses of the whole, yet never ceases to look upward. The almost-achieved monograph seems to crave some further perfection, and the projected general work is a fragmentary series of approaches to general questions.

Hale seems to fit the type. He wrote but did not publish several effectively finished works on particular legal subjects (most notably his treatises on the Pleas of the Crown and the jurisdiction of the House of Lords). He was the first man to attempt a general history of English law. His *History of the Common Law of England* bears the impress of the analytic mind, rather than of the instructorial or synoptic. Its mere incompleteness may be an accident. Its character as a series of discrete essays or problems would seem to point to the author's needs and non-needs, powers and incapacities. Some concrete problems Hale solved to his satisfaction, some abstract principles he articulated. Yet the philosophic history he was reaching for eluded him, and unphilosophic history failed to hold his interest. His impulse to find a jurisprudence in legal history and to write legal history through the categories of jurisprudence was focused on the *History of the Common Law,* but the focus did not hold. Other projects emerged as apter approaches to the issues Hale was trying to clarify. He undertook a tract on the principles of law reform and their application and a refutation of Hobbes' diatribe against the common-law mentality. Both of those works are fragmentary, both thrusts at system and achievements of partial order. Consummation of Hale's design did not come.

Perhaps it did not much matter to him. To speak of the privatizing tendency of Hale's intellectual character and situation is not to deny that he aspired, in time, to give the fruits of his study to the public. He was working on a body of *opera* through which a new understanding of the English legal tradition and a way to dispel misunderstandings would become available. Behind the *persona* of the judge, a second public *persona* was, no

doubt, in preparation. Yet, after allowance for self-abnegation and perfectionism as personal qualities, there is something to be said for the view that those who need to publish will publish. Perhaps Hale's drive to grasp general principles and clarify particulars was primarily a need to make sense to himself, to render a private accounting of the intellectual milieu of the law in which he passed his worldly life. Was confusion about the law something that could be or need be publicly dispelled? Were there dangers in setting forth historical facts and ideas about the law in less than wholly clear and wholly integrated form—dangers of adding to the contrary winds of doctrine that had blown hard during the revolutionary decades and perhaps only subsided with the Restoration? Was it perhaps the surer way to public benefit for the conscientious judge to struggle privately for as broad and lucid a professional intelligence as he could reach? One can only wonder whether these were explicit or semi-explicit questions for Hale. However that may be, the first general history of the common law was not intended for our eyes.

In the sense of "antiquarianism," legal history was massively available to Hale's generation. Hale himself was an extensive collector of legal manuscripts. He participated in the blend of passion and practicality that defines the seventeenth-century antiquarian spirit. The passion for having and handling monuments of the legal past was part of a wider phenomenon—a spectrum that includes the art collector and the almost indistinguishable curio collector; the traveler and the indefatigable travelologuist; Baconian–Royal Society data-gathering; the first wave of romantic appreciation for the half-consumed victims of time. The world was newly perceived as "a number of things," in temporal layers choked with dust as well as in the amplitude of places and products, information and inventions, available at the time to European experience. The hunger to gather and arrange interesting treasures became an intellectual appetite—a cousin to more fundamental accumulative instincts, but one who kept her distance from vulgar relatives. Toward material acquisitiveness, Hale took an attitude of careless austerity. He was uncomfortable with the rewards of his profession, gave his money away, made do with old black suits worn threadbare. His only monumental benefaction was a clock donated to his native village

church. To Lincoln's Inn he bequeathed a valuable collection of manuscripts, another emblem of time. Time's power to corrupt Hale recognized, but the evidences of legal history were worth the gathering.

On the other side, English antiquarianism was often practical in its motives and application. The interest in legal antiquities, in particular, served professional and political purposes. From the last two decades of the sixteenth century, lawyers greatly extended the use of documents from the relatively remote past in their practices. They took a major step toward the modern assumption that legal argument is centrally based on research. At another level, extended knowledge of the legal past served an increasingly important legitimating purpose and was the more pursued for that reason. Historical awareness was put to the ahistorical use of establishing the immemorial character of the common law and hence its title to represent the ultimate in achievable social wisdom. The test of time was exalted as against the claim of the living to evaluate laws and institutions wisely, and the English past was studied to show that infinite ages had validated and revalidated the normative structure of English society. The prevailing jurisprudence and the historical information and misinformation that sustained it played, in turn, into the political conflicts of forty years that led to the Great Rebellion. The parties contended on the common ground of loyalty to the ancient constitution. The arsenal of records furnished both sides with live ammunition, though propensities to doubt the prescriptive standard of right were occasionally woven into the texture of debate.

Hale's participation in the antiquarian spirit was qualified by the perspective of his generation and the frame of his mind. By the time he wrote, restraints had been imposed on mythmaking in legal history. Scholarship had extended the range of information and scrutinized uncritical conclusions. Civil war had called attention to the danger of polemical history. The prescriptive standard of right had been challenged openly. Hale's instinct was to defend that standard from a tenable base in history and theory. Such a defense was the need and opportunity of his generation of common lawyers, but it was equally the tendency of his mind. Hale was an analyst. He was not, like a true antiquarian, awed by

the mere presence of monuments, nor, like a mythmaker, apt to shape the fragments of the past into figments of self-justification. Sentimentally, no doubt, he approached the English past with patriotic reverence and conservative piety. Intellectually, he sought to get on top of his material. He took documents and asked precisely what could be said on the basis of them. He framed historical questions and deployed the evidence and inferences that would support an answer. There is no better example of a firstly-secondly-thirdly mind than Hale's, and the logical appropriateness of his enumerated points is always clear. On a higher plane of abstraction, his capacity to evolve satisfactory categories was limited by the difficulty of the attempt, but his impulse was philosophical. He wanted to say what the process of law formation over the continuum of history is like. He sought to use a grasp of process to justify the institutions of English government and the characteristic attitudes and activities of common lawyers. Hale's theoretical and normative interests took him outside the antiquarian sphere and, in a way, beyond the historical. He was devoted to reading records and to reasoning and imagining from them to projections of past situations. The accuracy and restraint with which he did so associate him with the emergence of the modern historian's art out of antiquarianism and mythmaking. But he was in the end too involved in the drift of seventeenth-century intellectual life into the light of general principles to be headed into the chiaroscuro of historical consciousness.

One of Hale's metaphors to embrace the history of English law was the Ship of the Argonauts. The ship went so long a voyage that eventually every part of it decayed and was replaced; yet (says the paradox of identity in spite of change) it remained in a meaningful sense the same ship. The metaphor might be applied to Hale himself in relation to Sir Edward Coke, for they were predecessor and successor in one tradition, though sundered by differences of character and generational experience. Both were guardians of the common law's claim to legitimacy based on immemorial continuity and of usage's title to personate reason. Speaking from a common platform of training, professional pride, and legal-historical learning, they were in many ways saying the same thing. Some of the superficial ways of contrasting