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Second edition

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Preface to the Second Edition

I hesitated when the publishers suggested a second edition of this book. The first edition had often been found difficult for the purpose which they had in mind, a short account of what seemed important about the growth of the common law. And if it had served its other purpose of suggesting a framework for the subject different from the established framework, then for better or worse its work was done.

But one's mind moves on; and though the force of freshness would be lost, it seemed worth attempting a description of the view as it appears ten years later. Much of that time has been spent on the early land law; and the discipline of standing back to retrace the outline of a detailed study has predictably taken me a little beyond the study itself. The parts of this book which deal with the early land law have in consequence been rewritten; and so, since there are implications for the nature of early law itself, has the introduction.

Other rewriting has been to accommodate changes of mind or substance, or in the hope of greater clarity. A single decision may have caused difficulty at various points in the first edition. The outline being propounded was altogether different from that assumed in all the literature; and it seemed to me that signalling of individual differences would only get in the way. It would obtrude upon one line of thought the premises of another. But, as I should have foreseen, serious readers then met the difficulty without warning, when they tried to reconcile this with the ubiquitous classical account. On many matters it cannot be done, in the sense that you cannot identify detailed questions which require different answers to fit into this account or that. As a childish analogy which remains at the end of the introduction tried to suggest, it is not the details that change: it is the way you put them together. In this

edition I have pointed out the largest differences, but only by way of warning. One cannot follow two interpretations at once.

How can the same evidence be interpreted so differently, and is there a common factor in the differences? It is in the nature of law that what is done in the present must be congruous with the immediate past; and it is therefore in the nature of legal history that the evidence is systematically deceptive. The largest changes cannot be obvious to historians because they could not be obvious at the time. In the thirteenth century, for example, the changes most obvious on the surface of the law are legislative provisions dealing with scattered and seemingly unrelated points of irritation. These were small symptoms of a structural change too large to be knowingly borne, but too piecemeal to be seen; and in the legal records it is hidden behind the changed meaning of some words, the changed operation of some rules. What has really changed is not so much 'the law' as the context; and it is the earlier context that may be lost to historians, overlaid by the later. Perhaps more than in any other kind of history, the historian of law is enticed into carrying concepts and even social frameworks back into periods to which they do not belong.

One of the main things that we have carried back is our vision of the law as a system of substantive rules having some existence separate from society and requiring separate adjustment. The legal historian scans his sources looking for change as he would look for new or altered passages in a modern legal textbook, and the social historian is consequentially misled. In this misapprehension an accident played its part. The classical account has largely been built upon the foundations laid by Maitland in the incomparable *History of English Law* known as 'Pollock and Maitland' which ends with the accession of Edward I. Maitland came to it fresh from his first big task in legal history, his edition of *Bracton's Note Book*. For that he had immersed himself in the treatise known by Bracton's name, which displays familiarity with substantive rules and abstract concepts. Who could suspect that this intangible sophistication had got into the thirteenth-century source, like some of its tangible detail, from Roman learning and not because it was already characteristic of the English law of the time?

Near the end of his life Maitland turned to editing year books of the early fourteenth century. These unadulterated native discus-

sions begin decades after *Bracton* in time, but are centuries earlier in spirit. 'A stage in the history of jurisprudence is here pictured for us, photographed for us, in minute detail. The parallel stage in the history of Roman law is represented, and can only be represented, by ingenious guesswork: acute and cautious it may be, but it is guesswork still.' Perhaps these words from Maitland's first year book introduction show a sudden sense that the common law began from something more primitive than he had supposed. But his first picture had taken its compelling hold; and its assumption of continuity was given substance by another accident. In a course of seven undergraduate lectures he had thrown a bridge between the law as he saw it in 'Pollock and Maitland' and the law as it was still remembered when he himself went to the bar. After his death, though he would have disapproved of the authority thereby lent to them, those lectures were published as *The Forms of Action at Common Law*. The classical account has been erected partly upon his thirteenth-century foundation and partly upon that single span across the centuries. Only lately has work begun on intermediate piers, and it will have to be a different bridge.

This book was an enterprise of the same nature, undertaken in the hope that a new framework would help to provide a new start. The theme which may be of most interest to lawyers is precisely the changing nature of the law itself; and perhaps I should explicitly refer, as possible sources of bias, to those differences in background of which I am conscious. This account grew from early work not on Bracton but on the kind of formulary which lies behind the year books, our earliest representation of a law-suit. And the kind of law which it sees as the starting-point is more accessible to the imagination now than it would have been when Maitland wrote. The legal realists for example have told us something about the relationship between rules and decisions. The complexity of our own society is turning law into something like a code of management, with procedural rather than substantive protection for the individual. And developments in public law are reducing abstract rights of property to visible dependence upon authority. But these last changes are still too large to be integrated into our books on property law, in parts of which the reader can sometimes wonder what century he is in. It illustrates another theme, this time for historians, the tricky nature of legal sources as evidence for social

and economic facts. But for many medieval facts the legal sources form the largest body of surviving evidence; and in this edition I have tried to show what kinds of trick they play.

S.F.C.M

St. John's College, Cambridge
May, 1980

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Introduction: A General View

I

It has happened twice only that the customs of European peoples were worked up into intellectual systems of law; and much of the world today is governed by laws derived from the one or the other. The two developments may have passed through similar stages, but separated in time by something like a millennium and a half; and the early stages of the Roman development were earlier than surviving evidence. The English development lies almost entirely within the reach of records; and though large questions are unfashionable and large answers suspect, it would be mean to describe it without recognising that large questions arise. Why these two societies and no others? How does it happen? A series of accidents, of course, not really a human achievement: but still something was created.

II

The starting-point is in customs, not the customs of individuals but the customs of courts governing communities. Those courts, in England essentially community meetings, had to make all kinds of decision. What shall we do now? What do we usually do? Factually the human and sometimes supernatural pressures to do the same thing again may be strong. But if the body is sovereign in the matter and its decisions final, legal analysis can get no more out of this kind of customary law than those two questions. What matters is the present decision, the choice made now. That is guided or not by the past, but cannot be 'wrong' because of it. It is the past that must give way, and then the present will have refined or modified the custom. Explicit 'legislation' may indeed be embodied in a

particular decision; and early records show this sometimes happening at all levels in England, even the king's courts being first seen as applying customs of the community of the realm.

Two kinds of decision were important for the legal future, those concerning the allocation of resources and those concerning the settlement of disputes. In any society the facts of land use and the needs of family provision make for complicated arrangements over resources; and in England the feudal structure of the economy was to complicate matters further. But to begin with 'legal' questions were simple, because cast in the present tense equally appropriate to management. This tenant is dead; tenements vacant by death customarily go to the dead tenant's eldest son; this eldest son is feeble-minded, so shall we let his brother have it? What we did last time is just a factor in our decision: we do not have to do the same thing again; nor, if we decide not to do the same thing again, do we thereby reopen last time's decision. And, looking to the future of this tenement, we do not contemplate that the present decision will be in any way relevant when our present beneficiary in turn dies. He has become the tenant to whose eldest son we shall by custom look; and it will not then occur to us to consider the son of the present loser. Of course we may project arrangements for the future. We might, for example, resolve our present difficulty with a compromise, arranging now that the younger son should have the tenement for his life, but that after his death it should go to the son of the incapable elder son. That would be a declaration of intention; and when the younger son came to die, the son of the incapable elder son would get the tenement only because we should carry out our intention and give it to him. There is just the present decision, just the water flowing under the bridge.

It is easy to see how such customs can become more 'binding'. They must be formed by economic needs: when people generally die young, eldest sons are most likely to be fit to take over. But equally it is the economic need that makes for flexibility: the feeble-minded eldest son will never be fit. If the managerial requirement recedes, the custom is more likely to be seen as a somehow binding rule. In England this may have happened as the superior tenures ceased to be seen as having much to do with the provision of fighting men, so that except at the lowest levels the feudal structure lost touch with the economic reality that had once

shaped it. But more is needed before abstract rights of property could come into being. So long as the allocations made by authority cannot be questioned, the customs can only be criteria for a present decision. However confident he can be, the eldest son can have no property right until he is given the property. And however certain it is that today's arrangement will be carried out, it cannot make a gift tomorrow. The agreement that the land should go to one person for his life, then to another, cannot give anything to the second person: like the eldest son, he can just be confident that he will be given it.

It is a simple starting-point; but the English law did not move from it by a process of evolution. A structural change had magical effects. Largely meaning only to enforce regularisation of these customs, the king's court brought to an end the feudal jurisdictions which had applied them, and had to apply the customs itself. But the change of habitat changed their nature. The king's court looking from outside the unit could not think in terms of management, only of rules and some abstract right. And what is more, since its first interference had been on the basis that the management might have done wrong, the rules had to reach back into the past. It is not only that the eldest son must now never be passed over, however incapable. It is that a choice made generations ago may be tested against the inflexible rule, and undone as wrong; and it follows that the person then passed over must have had a sort of ownership which has been transmitted in some abstract world to the present heir of that line. Similarly the arrangement made for the future can no longer be just a matter of intention which in due course will be carried out: there will be no management to carry it out, and it must somehow work now by conferring a property right to take future effect. Even more obviously managerial arrangements like the allocation of pasture were astonishingly absorbed as abstract rights of property. And the entire change was in a sense invisible. The canons of inheritance, for example, could be stated in the same words after as before. It is just that they did quite different things.

The change of jurisdiction therefore produced instant law, a system of substantive rules and abstract concepts. For the concepts, perhaps partly because Latin words were used, Roman analogies were seen; and this has confused historians, and may have affected the law itself. As for the substantive statement, it is worth observing that Littleton could write his *Tenures*, which can properly be

regarded as a text-book of land law, nearly four centuries before text-books were written on other branches of the law. It is not meaningful to wonder what 'natural' evolution might have done: but Littleton's title reminds us of the nature of the arrangements which that jurisdictional happening fixed in conceptualisation. The bizarre qualities of the law of future interests in particular stem from an initial confusion between the proprietary rights of an owner and the governmental powers of a lord.

These events pose a difficulty in arrangement which this book does not tidily meet. The institutional and the substantive changes are so intimately connected that it seemed better to discuss them together in the second section on Property in Land. Feudal courts are no more than mentioned in the first section on Institutional Background, which, as a matter of comprehension, is therefore largely introductory to the third section on Obligations. To transpose the section on Land seemed historically too perverse; but it is almost self-contained, and the reader interested mainly in the intellectual development may prefer to transpose it for himself.

III

The other early customs important for the future were those governing the settlement of disputes; and with these the sequence of events followed a pattern perhaps less peculiar to England. In any community there would be a canon of acceptable claims, which might come to be written down in a formulary. And that canon comprised what substantive law there was about transactions and wrongs. You must not beat your neighbour, must pay your debts and so on, because there are claims for these things. But there is nothing beyond the claims except customs about procedure and, most important, about proof. Proof was not a matter of establishing the facts so that rules could be applied. The claim is made and denied in equally formal terms, and the unanalysed dispute is put to supernatural decision by ordeal or the like. A blank result settles the dispute but can make no law. What if the beating was accidental or the debt forgiven? The questions cannot be asked as legal questions until the supernatural is replaced by a rational deciding mechanism.