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C h a p t e r 8
**Sources of English Law
in the Middle Ages**

The brief working definition of the common law in the opening chapter of this study called it simply that body of rules prescribing social conduct which was justiciable in the royal courts of England.¹ A fuller statement may provide a better understanding of common law in the Middle Ages and in later centuries as well. S. B. Chrimes, a modern British historian, has remarked on the unfortunate confusion in British historical studies emerging from a deeply ingrained reluctance to make definitions.² Definitions are particularly helpful for the history of common law. Certain terms, such as "trial by jury" or "judicial precedents," appear in thirteenth-century materials and also in twentieth-century materials, but with very different meanings. Judicial precedents were known in the Middle Ages. Bracton, the author of the most authoritative treatise on medieval English law, referred to more than five hundred cases in his *De legibus et consuetudinibus Angliae*,³ but his use of the

¹ See above, p. 5.

² S. B. Chrimes, Introduction to his translation of Fritz Kern, *Kingship and Law in the Middle Ages* (Oxford, 1956), p. xi.

³ F. W. Maitland, *Constitutional History of England*, (London: Cambridge Univ. Press, 1908), p. 17.

judicial decisions of his predecessors was not the same as the sophisticated twentieth-century doctrine of *stare decisis*, requiring a hierarchy of courts, certain conventions in the reporting of cases, and the printed publication of reports. As for trial by jury, it too was affected by its long history. In the Middle Ages the jurors told under oath what they knew about the facts of a case, but in the twentieth century the jury weighs evidence presented to it about the facts of a case in order to reach a verdict. These two terms sufficiently point up the value of definitions to a study of an institution which is at least eight hundred years old. Definitions may indicate the proper sources of the common law, put them in a clearer light, and uncover elements which have given the English legal system its distinctive character.

WHAT THE COMMON LAW IS NOT

The common law is not a written code. It is unlike the civil law of Rome as set forth in Justinian's *Corpus Juris Civilis*, which for the Middle Ages in western Europe was the great example of written law. The principles of common law have always eluded complete embodiment in any code or collection of writings. Judicial decisions recorded on the plea rolls of common-law courts, declaratory statutes, and learned treatises on the common law may all express the principles of the common law, but these writings never comprise its totality. The modern continental jurist, trained in a system of written law, is disappointed by the precarious "certainty" of statutes in Great Britain, especially those of the Middle Ages. Professor Henri Lévy-Ullmann, a specialist in comparative law at the University of Paris, has pointed with dismay at the calm admissions of the eminent English legal historians, Sir W. S. Holdsworth and Percy H. Winfield, that "English law has never known an officially authentic collection of the Statutes. . . ."⁴ Professor

Henri Lévy-Ullmann, *The English Legal Tradition*, trans. M. Mitchell, rev. and ed. Frederic M. Goadby (London, 1935), p. 269; see also Percy H. Winfield, *The Chief*

Lévy-Ullmann concludes his own discussion of the growth of English statutes by saying that never at any period in the development of her legal tradition has England been "a country of written law."⁵ Common-law principles can be expressed in various ways. The principle that no man ought to be illegally deprived of his liberty may be expressed in a judicial decision, in a parliamentary statute, or in a learned treatise on the writ of Habeas Corpus. Writings will merely reveal the principle. The principle can exist, without a writing, in the form of a generally accepted tradition.

Second, the common law is not the law of special groups or interests. Consequently, it is not to be identified with rules of canon law, particularly those which touch churchmen within the ecclesiastical hierarchy.

Third, the common law, properly so called, is not local custom. It is not ordinarily spoken of as the usage of a locality or territory such as the shire of Kent, the classic exemplum, which was permitted to enjoy until 1926 its own peculiar rules of inheritance by gavelkind.⁶ Moreover, the common law is not to be identified with rules of law administered by baronial, manorial, or borough courts. Common-law rules are general rules; whatever "smacks of a specialty" is not common law.

Fourth, the common law is not the body of rules enforced in Chancery courts; that is, common law is not to be identified with what is now called Equity. The distinction between common law and Equity is technical and has special meaning for jurists, but it could not arise until the late fourteenth century, when Chancery began to exercise an independent jurisdiction. In the thirteenth century the modern distinction between law and Equity would have been incomprehensible, because the Chancery of the thirteenth century was simply the royal secretariat, and the chancellor was its head. In the thirteenth cen-

Sources of English Legal History (Cambridge, Mass., 1925), p. 83; W. S. Holdsworth, *Sources and Literature of English Law* (Oxford, 1925), p. 57.

⁵ Lévy-Ullmann, p. 270.

⁶ Gavelkind is discussed below at pp. 195-96.

ture the chancellor's staff issued writs, legal orders initiating legal action, but Chancery did not then try issues between litigants. The common law was growing rapidly, and if Bracton represents the thinking of royal judges, the courts were then prepared to apply new remedies as they were needed. As Bracton remarked, it pertains to the king to apply a competent remedy for the curbing of any wrong.⁷ In the time of Bracton, the common law was equitable. So long as those who administered the common law were prepared to create and apply competent remedies, the common-law courts required no supplemental jurisdiction such as Chancery later supplied. The mysterious hardening of common-law procedures at the close of the thirteenth century, perhaps due to the lack of confident invention and initiative, forced the development of other means of rendering justice in new and difficult cases and ultimately created the division between common-law and Equity courts, which endured until the reorganization of English courts by the Judicature Acts of 1873 and 1875.

WHAT THE COMMON LAW IS

Negative statements have a value, but they fail here to suggest the full distinctive character of the common law; for that some positive elements are needed.

The common law is a body of general rules prescribing social conduct. It applies throughout the realm, save in those special jurisdictions where a recognized local custom or "liberty" is recognized by the royal courts. The residents of London, for example, kept alive for centuries their own body of peculiar law and custom, confirmed by William the Conqueror,⁸ and they

⁷ Bracton, fol. 414b.

⁸ For the charter of William I to London, see S & M, p. 61.

were imbued with "an acute sense of the personality of their city."⁹

Second, the general rules of common law are enforced and applied by royal courts. To speak of royal courts raises, of course, the whole question of the relation of the Crown to the administration of justice in any English court, and by the end of the thirteenth century the treatise called *Fleta* indicated that the Crown asserted a general responsibility for the judicial work of every secular court in the land.¹⁰ But the royal courts which are most intimately associated with the common law and which are, in fact, usually designated as common-law courts are seven: 1) General Eyres, 2) Common Pleas, 3) King's Bench, 4) Exchequer, 5) Commissions of Assize, 6) *Oyer and Terminer*, and 7) Gaol Delivery.¹¹ Indeed, one might safely shorten the list of common-law courts to three: Common Pleas, King's Bench, and Exchequer.¹²

Third, the common law develops its principles from the grounds of decision in actual legal controversies. We shall have more to say on this element when we take up the medieval use of judicial precedents.

Fourth, the common law is marked by its extensive use of the jury to provide the court with facts necessary for the decision of a case. In the twelfth century and later, the jurors were chosen for their knowledge of the facts of a case; presumably their unanimous collective statement, or verdict, would contain information available about the facts. It remained for the court to apply the proper rules of law to the facts as the jury had established them.

⁹ Gwyn A. Williams, *Medieval London: From Commune to Capital* (Oxford Univ. Press, 1963), p. 26.

¹⁰ *Fleta*, ed. with a trans. by H. G. Richardson and G. O. Sayles, Selden Society, Vol. 72 (1953), Book II, Chapters 2, 25, 34, 43, 52, 53.

¹¹ For excellent diagrams of the English system of courts past and present, see H. Potter, *Historical Introduction to English Law and Its Institutions*, 4th ed., by A.K.R. Kiralfy (London, 1958), pp. 644-47.

¹² Lévy-Ullmann, *The English Legal Tradition*, pp. 28-29.

Fifth, the common law is marked by a doctrine of the supremacy of law. Perhaps the ideal of the rule of law was more widely accepted in the medieval than in the modern world, but it still survives. The doctrine of the supremacy of law implies that all agencies of government must act upon established principles; even the highest bodies and officials are not permitted to act upon arbitrary will or caprice. The supremacy of law means that all the acts of government agencies are subject to examination in the courts, which are compelled in their turn to follow established procedures, "due process," and to reach decisions guided not by whim but by generally accepted principles and sound reason.

These five elements suggest a positive definition: the common law is a body of general rules prescribing social conduct, enforced by the ordinary royal courts, and characterized by the development of its own principles in actual legal controversies, by the procedure of trial by jury, and by the doctrine of the supremacy of law.

THE NATURE OF LEGAL CUSTOM

Treatise writers and historians of the common law have long given custom a prominent place among the sources of this body of general rules. More than half a century ago, Maitland noted a three-stage progression from customs originating in the "common wisdom and experience of society," through the stage of becoming "established customs," to the point at which they receive "judicial sanction in courts of last resort."¹³ Sir Frederick Pollock, Maitland's contemporary and collaborator, also pointed to the prominence of custom in the common law by remarking that for six centuries everybody who had occasion to consider the matter believed that "the Common Law is a

¹³ F. W. Maitland and F. C. Montagu, *Sketch of English Legal History*, ed. by J. F. Colby (New York, 1915), p. 213.

customary law. . . . To this day *coutume* is the nearest equivalent that learned Frenchmen can find for its English name."¹⁴

William Blackstone in the eighteenth century included within his *Commentaries on the Laws of England* a classic statement distinguishing between general and particular customs.

This unwritten, or common law, is properly distinguishable into three kinds: 1) General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2) Particular customs, which for the most part, affect only the inhabitants of particular districts. 3) Certain particular Laws; which, by custom, are adopted and used by some particular courts, of pretty general and extensive jurisdiction. . . . All these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.¹⁵

Blackstone wrote at a time when the legislative activity of Parliament was swelling the statute books with one enactment after another. Consequently it is not surprising to see him distinguishing between written statute and immemorial usage. But in the medieval treatises of the twelfth and thirteenth centuries, before Parliament was firmly established as a law-making institution, the element of custom stands out as the principal source of law. In fact, the word "customs" appears prominently in the titles of books of authority. Glanvill in the late twelfth century asserted in the first treatise on English law that English rules, although unwritten, equaled the dignity of Roman *leges*. Glanvill also stated that the multiplicity of English laws and rights could not be reduced to writing in every instance.¹⁶

¹⁴ F. Pollock, *First Book of Jurisprudence*, 6th ed. (London: Macmillan, 1929), p. 254.

¹⁵ W. Blackstone, *Commentaries on the Laws of England*, 9th ed., 4 vols. (London, 1783), Introduction, Section 3; Vol. I, pp. 45-46.

¹⁶ Ranulf Glanvill, *Tractatus de legibus et consuetudinibus regni Angliae*, ed.

In the middle of the thirteenth century Bracton described even more explicitly than Glanvill the place of custom in English law. Bracton bluntly maintained that "in England legal right is based on unwritten law which usage has approved. . . . For the English hold many things by customary law which they do not hold by *lex*."¹⁷

SOCIAL PRACTICE AND LEGAL CUSTOM

Although many learned and profound jurists have named custom as a source of law, there have been serious differences among them as they searched for the origins of legal customs and the processes by which social practices have obtained recognition in courts of law. In the present, as in the past, the incidents of daily life are hedged about with customary rules of etiquette. The man who insists on wearing a hat during a Christian church service may deeply offend other members of the congregation, who are accustomed to removing their hats on entering the building. But a hat-wearing church member is not punishable in a court of law.

On the basis of certain tests of custom laid down in later centuries, one can conjecture why the common-law courts of medieval England accepted some customs and refused others. In the Middle Ages, as in the present, large areas of life were controlled by custom, but not all social customs became legal customs enforceable in law courts as part of the common law.

Early in the seventeenth century, the *Tanistry Case* (1608) produced a definition of custom as the English courts then saw it:

A custom, in the intendment of law, is such a usage as hath obtained the force of a law, and is in truth a binding law to such

George Woodbine (New Haven, 1932). English trans. by John Beames and Introd. by J. H. Beale (Washington, D.C., 1900). See pp. xxxvii-xxxix.

¹⁷ Henry de Bracton, *De legibus et consuetudinibus Angliae*, ed. and trans. Sir Travers Twiss, 6 vols., Rolls Series (1878-83), fol. 1a.

particular places, persons, and things which it concerns. . . . But it is a *ius non scriptum*, and made by the people only of such place where the custom is.¹⁸

Although the *Tanistry Case* became a leading case with a great deal of learning on custom clustered about it, its definition of custom was later amplified. Perhaps Blackstone is the best guide on the subject of legal custom because he gives specific illustrations, some of which reveal the medieval foundations of the common law.¹⁹ He heads his list of general customs with examples from the law of Property—the law of inheritance; "the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of Parliament; the respective remedies of civil injuries; the several species of temporal offences with the manner and degree of punishment." Blackstone also attributes to general custom the system of courts in his day, mentioning Chancery, King's Bench, Common Pleas, and Exchequer as the four superior courts of record—by custom. He continues with examples of general customs by returning to the law of inheritance—"the eldest son alone is heir to his ancestor; property may be acquired and transferred by writing; a deed is of no validity unless sealed and delivered; wills shall be construed more favourably and deeds more strictly; money lent upon bond is recoverable by action of debt; breaking the public peace is an offence and punishable by fine and imprisonment."²⁰

¹⁸ Viner, *Abr.* VII, 164, citing *Tanistry Case (1608) Dav. 31b*. See C. K. Allen, *Law in the Making*, 6th ed. (1958), p. 67, n. 1. Tanistry is a species of tenure in Ireland. Under this immemorial usage, primogeniture gives way to inheritance by "the oldest and most worthy man" of the blood and surname of the deceased tenant. Although it was possible to determine who might be the oldest man (*senior*) with the proper relationship and name, the English courts would not accept responsibility for determining who was the "most worthy" (*dignissimus*), and the custom was not accepted as applicable in common law.

¹⁹ See W. Blackstone, *Commentaries*, I, 68–71, for his discussion of general and particular customs.

²⁰ *Ibid.*, I, 45–46.