CHAPTER II

The Common-law Mind: Custom and the Immemorial

I

As a key to their past the English knew of one law alone. It was possible for them to believe that, as far back as their history extended, the common law of the king’s courts was the only system of law which had grown up and been of force within the realm; for the records and histories of England did not reveal that any other law had been of comparable importance. The common law was and had been the only law by which land was held and criminals deprived of life by their country, and by which consequently the greater part of men’s secular rights and obligations were determined. Civil and canon law and law merchant could be regarded, especially after the Reformation, as systems borrowed from abroad and confined within limits by the common law; and, most significant of all, there were no pays de droit écrit in which civil law governed the main fabric of social life. Except in Ireland, Celtic law was forgotten, and local customs, like those of Kent, survived only because the king’s courts recognized them. The English need not think, as the French must, that a different system of law existed alongside their ancient native custom, one which had a different origin, had been introduced into the land at a different time and had grown up along different lines. Once the French began to think historically of their written law, they were bound to make some extension of this way of thinking to their customary law as well, and this acted as a check to any tendency they may have had to represent the whole of their law as immemorial custom. But in England it was precisely this tendency which ran riot. The English supposed that the common law was the only law their land had ever known, and this by itself encouraged them to interpret the past as if it had been governed by the law of their own day; but in addition the fact that the common law was a customary law, and that lawyers defined custom in a way which heavily emphasized its immemorial character, made even more radical the English tendency to read existing law into the remote past. An inclination to do this, to interpret the past according to the ideas and institutions of the present, is probably common to all societies aware of their history; it can never be absolutely expunged from historical thought, and there have been times in the history of historiography when it has been altogether dominant. But the historical thought of seventeenth-century England is not merely an example of a universal tendency; it acquired much of its special character and its power over the English mind from the presence and nature of that uniquely English institution, the common law.

The interpretation which the English of this period made of their legal, constitutional and, consequently, national history was accordingly one which arose within the schools of the common law, spreading from them to become the general belief of the gentry they did so much to educate. As we shall see, some of its assumptions are also the basic assumptions of the common law, and there is a sense in which it is as old as that law or older. But deeply rooted though it was in medieval thought, for its formulation in the version which was to dominate the seventeenth century we should no doubt look to that recurrence of inns-of-court and parliamentary activity, intellectual as well as practical, which marks the later Tudor period. It received its classic formulation soon after 1600 from Sir Edward Coke, who was born in 1552; but a common lawyer who was a mature man at the time of Coke’s birth would not have thought quite as Coke was to do half a century later. He would have been far more aware of the civil law as a part of the English fabric, and far more open to the medieval concept of law as a thing universal, more important in its universal characteristics than in its local and municipal manifestations. His mind would probably have been less insular than Coke’s, less massively convinced that English law was purely English and that the only purely English law was the common law; and his interpretation of English history would have differed accordingly. Between 1550 and 1600 there occurred a great hardening and consolidation of common-law thought,
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whether this arose as the common law sought to defend itself against aggressive conciliars rivals, or whether the effect of Tudor centralization was to deliver it from more rivals than it created and actually make it easier for it to regard itself as the sole and supreme system of law in England. Coke's thought does not read like that of a man on the defensive; he does not insist or argue that the common law is the only system that has ever prevailed in England, but takes it as much for granted as the air he breathes; and the assumption seems to be made less instinctively by the other lawyers of his generation and by most of the royalists and parliamentarians of the mid-century. It is hard to believe that the common-law interpretation of history was consciously and polemically constructed; it is much easier to see it as the result of deep-seated and unconscious habits of mind; but a detailed study of Tudor common-law thought would be necessary to show how and when it came into being. All that will be attempted here is an analysis of the assumptions on which it was founded and built up in the reign of James I.

In the first decade of the new century, then, English lawyers were prepared to define common law as custom and to defend custom against written law in language which recalls certain French ideas of an earlier generation. Whether this was done as a direct reaction to the humanist and civilian criticisms described by Maitland, neither he nor Holdsworth has perhaps made absolutely clear; but whatever the cause, Sir John Davies, then Attorney-General for Ireland, in dedicating his Irish Reports to Lord Chancellor Ellesmere in the year 1612, stated the case for common law and custom in prose of admirable clarity, which reveals some degree of unconscious kinship with the ideas of Anti-Tribonian.

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Charter, or by Parliament, which are Acts reduced to writing, and are always matter of Record; but being only matter of fact, and consisting in use and practice, it can be recorded and registered nowhere but in the memory of the people.

For a Custom doth become perfect and come to perfection in this manner: When a reasonable act once done is found to be good and beneficial to the people, and agreeable to their nature and disposition, then do they use it and practise it again and again, and by frequent repetition and multiplication of the act it becometh a Custom; and being continued without interruption time out of mind, it obtaineth the force of a Law.

And this Customary Law is the most perfect and most excellent, and without comparison the best, to make and preserve a Commonwealth. For the written Laws which are made either by the Edicts of Princes, or by Councils of Estates, are imposed upon the Subject before any Trial or Probation made, whether the same be fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or no. But a Custom doth never become a Law to bind the people, until it hath been tried and approved time out of mind, during which whole time there did thereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue and force of a Law.

Fortescue had long ago written that the laws of England must be the best in the world, because they were certainly the most ancient—older than those of Rome or Venice—and from the Romans to the Normans the rulers of the land had had ample opportunity to change them if they had not seen that they were good. But his words, important as they are in the English cult of the law's antiquity, do not of themselves imply Davies's elaborate argument from the nature of custom, which has much in common with the sixteenth-century revolt against written law. Hotman had laid it down that law must be appropriate to the nature and circumstances of the people, and had hinted that the essential character of custom was such that it must satisfy this requirement. Davies made this explicit and proceeded to praise English customary law:

so framed and fitted to the nature and disposition of this people, as we may properly say it is connatural to the Nation, so as it cannot possibly be ruled by any other Law. This Law therefore doth demonstrate the strength of wit and reason and self-sufficiency which hath been always in the People


4 All quotations from Davies in this chapter are from the unpaginated preface dedicated to Irish Reports (Les Reports des Cas & Matters en Ley, Resolves & Adjudges en les Courts del Roy en Ireland. Collect & digest per Sir John Davis Chivater, Attorney General del Roy en cest Realm), London edition of 1674. ‘Davies’ is the spelling favoured by D.N.B.
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of this Land, which have made their own Laws out of their wisdome and experience, (like a silk-worm that formeth all her web out of her self onely) not begging or borrowing a form of a Commonweal, either from Rome or from Greece, as all other Nations of Europe have done; but having sufficient provision of law & justice within the Land, have no need Justitiam & judicium ab alienigenis emendicare, as King John wrote most nobly to Pope Innocent the Third ....

And—just as Hotman had revealed his pleasure in the unclassical terminology of French customary law—Davies wrote a defence of law French, admitting that it was a wholly artificial language which had never been spoken outside the English courts, but arguing that centuries of use had invested its words with meanings so exactly appropriate to the legal terms and ideas they were expected to convey that it could not possibly be replaced by any other language without serious loss to the law's intelligibility. The implication was that usage had made it more perfect than any mode of expression which the individual intelligence could devise. An idealization of custom was developing which would exalt its wisdom above that of the individual. The laws enacted by prince or parliament may grow obsolete, but custom must always be perfectly up-to-date, since if it had proved inadequate to the problems of the present age the people would simply have abandoned it. On the other hand, the fact that they have retained it shows that it has confronted and solved more problems over the centuries than the present age can hope to imagine. Written laws contain no more than the wisdom of one man or one generation, whereas custom in its infinite complexity contains the wisdom of many generations, who have tested it by experience, submitting it to a multitude of demands, and by retaining it have shown that it has proved equal to them all. Custom therefore embodies a wisdom greater even than the wisdom of parliament, for, says Davies, it has often happened that a statute has altered some fundamental rule of the common law and bred thereby such a multitude of inconveniences that it has had to be repealed. Last of all, custom is purely native: that the people are ruled by customary law is proof that they have evolved their own law 'out of their wisdome and experience' and disdained foreign borrowings, which—as well as being open to the reproaches which

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may be directed against any merely enacted law—would be derogatory to the people's glory and self-sufficiency.

All these arguments, including the defence of law French, are to be met with in Coke; the preface to his Fourth Reports, for instance, lists many statutes which have injudiciously altered the common law and been repealed in consequence. Coke's emphasis is less upon custom, in the pure sense in which Davies uses the word, than upon the activity of the judges in constantly refining the law, declaring its principles with even greater precision and renewing it by application to the matter in hand. But the idea of judge-made law is only a sophistication and extension of the idea of custom. The law which the judges declare is unwritten and immemorial, and Coke praises it for precisely the same reasons as Davies. It embodies the wisdom of generations, as a result not of philosophical reflection but of the accumulations and refinements of experience. This is Coke's famous concept of 'artificial reason'; what speaks through the judge is the distilled knowledge of many generations of men, each decision based on the experience of those before and tested by the experience of those after, and it is wiser than any individual—even James I—can possibly be. In his much quoted burst of eloquence upon Calvin's Case, Coke declared:

we are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of light and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto. And therefore it is optima regula, qua nulla est verior aut firmissimae jure, neminem oportet esse sapientissimum legibus: no man ought to take it on himself to be wiser than the laws. 3

As will appear further when we study the thought of Sir Matthew Hale, this concept of law is essentially Burkean. 4 There is a process by which society constantly adapts its institutions to the dictates of

1 Coke, Seventh Reports, Calvin's Case; here from the edition of the Reports by Thomas and Fraser (London, 1826), vol. iv, p. 6. Subsequent references to the Reports (T.F.) are all to this edition.

2 Ch. vi, section m, below.
new situations. Institutions which have survived this process for a long time must be presumed to have solved innumerable more problems than the men of the present age can imagine, and experience indeed shows that the efforts of the living, even mustering their best wisdom for the purpose, to alter such institutions in the way that seems best to their own intelligence, have usually done more harm than good. The wisdom which they embody has accumulated to such a degree that no reflecting individual can in his lifetime come to the end of it, no matter how he calls philosophy and theoretical reason to his aid. These propositions may all be found in the writings of Coke, Davies and Hale, as well as in those of Burke. In the three former they depend unmistakably on the notion of custom, and if Burke owed any debt at all to preceding generations, the foundations of his thought were laid at the end of the sixteenth century, when the common lawyers learned to define their law as custom in opposition to written law.

But in saying this we come upon a paradox. If the idea that law is custom implies anything, it is that law is in constant change and adaptation, altered to meet each new experience in the life of the people; and it might seem that there was no theory more likely to lead to a historical conception of the nature of law. Yet the fact is that the common lawyers, holding that law was custom, came to believe that the common law, and with it the constitution, had always been exactly what they were now, that they were immemorial: not merely that they were very old, or that they were the work of remote and mythical legislators, but that they were immemorial in the precise legal sense of dating from time beyond memory—beyond, in this case, the earliest historical record that could be found. This is the doctrine or myth of the ancient constitution, which bulked so large in the political thought of the seventeenth century and furnishes this book with half its title. The present chapter and the next are devoted to studying the assumptions and the limitations of thought on which it was based.

The clue to the paradox lies in the fact that the concept of custom is ambiguous; Selden was never more suggestive than when he called the common law the English Janus. We may regard it as that which is in constant adaptation, and to do so will give rise to ideas that are unmistakably historical. But it is equally possible to regard it as that which has been retained throughout the centuries and derives its authority from its having survived unchanged all changes of circumstances; and once we begin to think of custom as unchanging, we must remember that it is also immemorial, for if it were known to be the work of some founder it would be written or statute law and not custom at all. The political thought of the age underlined this point heavily. The Middle Ages, often seeing no essential difference between written law and custom, had spoken quite happily of kings who ordained new customs and of the two or three lifetimes which qualified a law to be considered immemorial.¹ But by Coke’s time the increasing activity of a nearly sovereign monarchy had made it seem to most common lawyers that if a right was to be rooted in custom and rendered independent of the sovereign’s interference it must be shown to be immemorial in the full sense of ‘traceable to no original act of foundation’. The idea of the immemorial therefore took on an absolute colouring, which is one of the key facts in Stuart historico-political thought. It ceased to be a convenient fiction and was heathily asserted as literal historical truth; and the more that came to be known about remote ages, the more vigorously it was insisted that the law was before Abraham.

The common law was by definition immemorial custom. For hundreds of years before Coke and Davies it had been accepted, by an assumption common in medieval thought, that English law was *jus non scriptum* and that the function of the courts was to declare the ancient custom of the realm. Even statutes could be so interpreted, and Coke eagerly takes at least the earliest of them to be declaratory judgments. Innumerable decisions were consequently on record as declaring that everything which they contained, down to the most minute and complex technicality, had formed part of the custom of England from time out of mind; or at least so the common lawyers read them to mean, and this fact is at the root of their interpretation of history. They took everything in the records of the common law to be immemorial, and they treated every piece of evidence in those records as a declaration of what was already

¹ The classic discussion of the medieval ideas of custom and ancient law is in Kern, *Kingship and Law in the Middle Ages* (ed. Chrmes), Cambridge, 1939.
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immemorial; so that the beginning of the records of the king’s courts in the twelfth century was proof, not that those courts began at that time, but of their great antiquity, and it was usual and—given the presumptions—logical to add that if the earlier records had not been lost or stolen, they would prove the existence of the courts in times earlier still. But at however remote a date the series of records had begun, the common-law mind would still have taken their beginning as proof that at that time the laws were already immemorial; since jus non scriptum must by definition be older than the oldest written records.

The belief in the ancient constitution therefore rested on assumptions which were fundamental to the practice of the common law, and it had very great influence in a society whose political and social thinking were so largely dominated by this one law. It cannot therefore be regarded as the creation of any single mind. But Coke did more than any other man to summarize it and make it authoritative; at the same time he reveals the patterns of thought on which it was based with the clarity of truly representative genius. His historical thought could be described as founded on the presumption that any legal judgment declaring a right immemorial is perfectly valid as a statement of history. Thus in the preface to the Third Reports—his first published exposition of the view that the law was immemorial and the locus classicus of his methods of historical reconstruction—he selects a case from the books of assize of 26 Edw. III:

it appeareth that in a writ of assise the Abbot of B[ury] claimed to have coumsance of pleas and writs of assise, and other original writs out of the King’s courts by prescription, time out of mind of man, in the times of St Edmund, and St Edward the Confessor, Kings of this realm before the Conquest, and shewed divers allowances thereof; and that King H.H. confirmed their usages, and that they should have coumsance of pleas, so that the justices of the one bench, or the other should not intermeddle; out of which record (being now above three hundred years past) it appeareth that the predecessors of that Abbot had time out of mind of man in those Kings’ reigns, (that is whereas no man knew the contrary either out of his own memory, or by any record or other proof,) writs of assise, and other original writs out of the King’s Courts.¹


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The fact—often paralleled—that a fourteenth-century abbot had alleged that he had precedents from pre-Conquest times, should remind us of the extreme antiquity and universality of this way of pleading and thinking in English society. Coke and his contemporaries were indeed only continuing and developing a habit of mind as old as the common law itself; but now he goes on,¹ in a way too full of antiquarian learning to be simply a continuation of medieval thought, to argue that since writs of assise have been proved immemorial and older than the Conquest, so too must be sheriffs, because the writs are directed to them; trials by the oaths of twelve men, since the writs instruct the sheriff to conduct them; the king’s courts, since the writs are returnable into them; the court of chancery, since it issues the writs; and the entire science and practice of the common law, since, as Fitzherbert points out, the procedure to be followed when writs are issued provides the fundamental rules about which it is built up. Thus a judgment that one part of the law is immemorial is first taken with historical literalness that might have surprised some of the judges, and then made the basis of an argument that the whole of the law must be of equal antiquity. Coke uses a similar technique in the preface to the Ninth Reports, when, having proved to his satisfaction that there were parliaments before the Conquest, he proceeds to argue that there were representatives of the commons in them.

It is evident that there were tenants in ancient demesne before the Conquest; and for a certainty therein, and to know of what manors such tenants did hold, it appears by the book of Domesday, that all the tenants that did hold of any of those manors that were in the hands of King Edward, the son of King Ethelfred, or of King William the Conqueror, were tenants in ancient demesne. And these tenants then had, and yet have these privileges amongst others, for that they were bound by their tenure to plow and husband, etc. the King’s demesnes before and in the Conqueror’s time, and therefore they were not to be returned Burgesse to serve in Parliament, to the end they might attend the King’s husbandry the better.

2. They were not to be contributory to the fees to the Knights of Shires that served in Parliament: which privileges (though the cause ceased,) ¹ Third Reports (T.F. vol. ii), pp. x-xii.
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continue to this day: therefore there were Parliaments unto which the Knights and Burgesses were summoned both before and in the reign of the Conqueror.¹

Here it is matter of record, rather than an actual judgment, on which the case is built up; but the procedure is exactly the same. The presence of tenants in ancient demesne in Domesday Book is taken to mean that they existed before the Conquest (and therefore from time out of mind); and their exemption from parliamentary attendance at a later date is taken to prove the existence of a parliament with commons, both at the time of Domesday and before. The fact that Coke allows the unwary reader to assume that the parliamentary exemption is in Domesday is probably no proof of disingenuousness; he would simply take it for granted that what was mentioned at a later date must have been present at an earlier.

In the preface to the Third Reports Coke follows up the passage already cited with further proof of the law's antiquity, drawn from early British history as it was then understood.² Brutus of Troy, he said, the first king of Britain, was reputed to have drawn up a book of laws; so had King Dunwallo Molmutius, Mercia the queen of King Gwintelin, Sigebert of East Anglia, Alfred, Edward the Elder and reputedly many others, so that there had been at least seven books of the law (two of them Dunwallo's) before the Conquest. It is of importance to the understanding of this subject to note that it was not Coke's belief in fabulous kings out of Geoffrey of Monmouth which was primarily responsible for his belief in the antiquity of the law. He had his doubts about Brutus—'I will not examine these things in a quo warranto; the ground thereof I think was best known to the authors and writers of them'—and his interpretation of the past was soon to survive unscathed the disappearance of the legendary Trojan and British kings from the stage of serious history. His references to Brutus and Dunwallo occupy second place after the proof of the law's antiquity founded on legal, not historical sources. Coke not only accepts a legal judgment dating a law from time out of mind as historically valid,

but he regards such statements as better historical evidence than those made by chroniclers. Where the courts have adjudged an institution immemorial and a historian alleges that it was set up in such a king's reign, Coke leaves little doubt that we are to think the historian wrong, and he urges the historiographers of his own day to consult a lawyer before making any statement about the history of the law.³ He was not relying upon legendary histories, but using them to illustrate a proof that the law was immemorial which he drew from the thought of the law courts; and conversely, he was not seeking to derive the law from any mythical founder. When, with the aid of the Mirror of Justices, he had traced parliament back to the reign of King Arthur, he added: 'Not that this court and the rest were instituted then, but that the reach of his [Horn's] treatise extendeth no higher than to write of the laws and usages of this realm continued since the reign of that king.'⁴ In the same way Davies had written:

Neither could any one man ever vaunt, that, like Minos, Solon, or Lycurgus, he was the first Lawgiver to our Nation: for neither did the King make his own Prerogative, nor the Judges make the Rules or Maximes of the Law, nor the common subject prescribe and limit the Liberties which he injoyeth by the Law. But, as it is said of every Art or Science which is brought to perfection, Per varios usus Arten experientia facti; so may it properly be said of our Law, Per varios usus Legem experientia facti. Long experience, and many trials of what was best for the common good, did make the Common Law.⁵

The law was immemorial and there had been no legislator. In this respect at least common-law thought was independent of fashionable classical models. Its eyes were turned inward, upon the past of its own nation which it saw as making its own laws, untouched by foreign influences, in a process without a beginning.

¹ Preface to Ninth Reports (T.F. vol. v), pp. xxi-xxiii.
³ Davies, pref. to Irish Reports.
II

But if neither a putative Trojan nor a putative Arthurian origin was of much importance in this interpretation of legal history, there was one event in the English past over which the common lawyers expended floods of ink and burned much midnight oil. This was the Norman Conquest, the one great apparent breach in the continuity of the nation’s history. The motives which spurred them to their unending denials that this event had caused any change in the essential character of the law were various: sheer patriotism furnished one, and Polydore Vergil, that gadfly of the older English historiography, another with his gibe at a law derived from the semi-barbarous Normans and still uttered in their jargon; while, as we shall see, once the interpretation of history became involved in the struggle of king and parliament, a powerful political motive was added to the others. But from whatever point of view it was regarded, the idea that William I had carried out a systematic importation of new law cut right across the belief in custom and the immemorial that was coming to be an integral part of English political thought, and the common lawyers set out to deny it with all the resources of their learning and ingenuity. With Coke the argument that the courts, parliament or the law are immemorial often seems to be identical with the argument that they are pre-Conquest. Once over that stumbling-block, the rest may be taken for granted; and all the subtleties of the common-law technique of reading history backwards are called into play.

But Coke’s endeavours were powerfully abetted by the conduct of the Normans themselves. While the main features of common-law historiography must be deduced from habits of mind peculiar to that profession, it remains true that the feeling that all rule must be by ancient law was one of the deepest-seated preconceptions of the medieval mind. It had seemed of scarcely less importance to the Normans than it did to Coke himself to maintain that they governed England according to the lege Eadwardi, and throughout the twelfth and thirteenth centuries a succession of political programmes had been expressed, by claimants to the throne or dissident barons, in the form of promises or demands to restore the good old law of Edward the Confessor. The story that among the Conqueror’s first acts had been to codify and confirm the Confessor’s law had found its way into most of the chronicles; and not only this, but several ingenious and quite possibly sincere men had in and after the twelfth century sat down to supply the absence of any text of this law or the Conqueror’s by composing the apocryphal leges Edwardi Confessoris, Wilhelmi, Henrici Primi, the chronicle of ‘Ingulf of Croyland’ (supposed to be an eye-witness of the confirmation), and so on. The edifice had been completed by the insertion in the coronation oath—where it remained until 1688—of a promise to observe the laws of St Edward. When the common lawyers began to write their histories, therefore, the belief that the laws of the last Anglo-Saxon king had been confirmed by the Conqueror and his Norman and Angevin successors had long been orthodox history, though the reprehensible Polydore had as usual expressed some doubts. Furthermore, William Lambard had in his Archimomonia (1568)—one of the key books of the common-law interpretation—published the apocryphal leges in unbroken series with such genuine texts of Anglo-Saxon law as he had been able to collect. Coke, and nearly all other historians, accepted them at their own valuation; and as the authors of the leges Confessoris and the leges Wilhelmi (which were supposed to represent the Anglo-Saxon laws as amended by the Conqueror) had not unnaturally attributed to pre-Conquest times the feudal institutions, described in the Norman terminology of their own day and age, there was no sign in these apparently authoritative texts of any radical breach with the past at the Conquest. Coke indeed was able to make very extensive use of Lambard’s book to prove that institutions which had in fact been introduced by the Normans formed part of the immemorial law; and he employed with no less faith and frequency two other medieval apocrypha, the fourteenth-century Modus Tenendi Parliamentum and (with far less excuse) the lavishly fantastic Mirror of Justices, to attribute to the times of Alfred and Arthur the characteristic machinery of Angevin and Plantagenet monarchy. There are few pages of his First or Second Institutes on which one of these works is not cited.

The picture thus constructed of the early history of the law
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is summarized by Coke—speaking in this for nearly every Englishman of the seventeenth century—in the preface to the Eighth Reports. Explaining that he has been asked whether the chroniclers agree with him that the law is immemorial, and first carefully reminding us that the proofs drawn from the law itself stand in no need of their corroboration, Coke proceeds to narrate that William I swore to observe the ancient laws, ordered twelve men in each shire to state what they were, and summarized them, with a few emendations of his own, into a Magna Carta, the first of its kind, under the name of the 'laws of King Edward'. Henry I, promising at his accession to take away all evil customs, restored King Edward's laws in a purer form, and thereafter both Stephen and Henry II confirmed them anew in coronation charters. Matthew Paris says that John's charters contain little that is not in Henry II's charter or in those laws which are called King Edward's, not because the latter enacted them but because he reduced them to writing. All this, as Coke proudly points out, is extracted from medieval chroniclers; but to get its seventeenth-century flavour we have to read it in the belief that the whole apparatus of common law was immemorial. But the apocryphal leges and Lambard's Anglo-Saxon dooms are not of course the common law; Coke describes them as statutes, but succeeds in some peculiar way in regarding their existence as proof of the antiquity of the unwritten law which they do not contain:

...by all which it is manifest, that in effect, the very body of the common laws before the Conquest are omitted out of the fragments of such acts and ordinances as are published under the title of the Laws of King Alfred, Edward the First, Edward the Second, Ethelstane, Edward, Edgar, Ethelred, Canutus, Edward the Confessor, or of other Kings of England before the Conquest. And those few chapters of laws yet remaining, are for the most part certain acts and ordinances established by the said several Kings by assent of the Common Council of their kingdom.

The myth of the confirmations, as it may be called, culminates with Magna Carta (which Coke liked to say had been confirmed by more than thirty parliaments), and his treatment of it, both in the posthumously printed Second Institutes (1641) and in the Commons

1 T.F. vol. iv, pp. iii–xi.
2 Ibid. p. xi.
3 First Institutes, eds. 80b–81b; Second Institutes, pp. 1–78; Faith Thompson, Magna Carta: Its Role in the Making of the English Constitution, 1200–1290 (Minneapolis, 1948), part iii in general and ch. xii in particular; H. Butterfield, The Englishman and His History (Cambridge, 1944), pp. 54–68.
4 The first eleven books of the Reports were published between 1600 and 1613; the First Institutes in 1628 and revised in 1629. Coke died in 1634. The Second Institutes were published in 1642, the Third and Fourth in 1644 and the Twelfth and Thirteenth Reports in 1655 and 1658. But of those writings which reveal most of his historical mind only the Second Institutes are posthumous, and the writer's views on Magna Carta, which form perhaps their most
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ways in which historical thought was used in political argument, and a study of the ways in which historical and political theory were related in the minds of the men who wrote and thought in both modes. To the typical educated Englishman of this age, it seems certain, a vitally important characteristic of the constitution was its antiquity, and to trace it in a very remote past was essential in order to establish it securely in the present. We may therefore maintain that the historical thought which lay behind this belief helped to shape the mind of the century and will consequently help us to understand it.

It must be evident in the first place that historical thinking of the kind we have seen in Coke would make it possible to claim, with sincere and entire conviction, that many of the privileges or rights which parliament, or the courts of common law under a vigorous chief justice, desired to possess in the present had been theirs in the remote past. Thought of this kind encouraged the production, from legal or chronicle sources, of evidence of action taken in very distant times, which could then be identified with contemporary conditions and claimed as a precedent. This must very largely explain the intense interest taken in the production of remote precedents during every controversy of the period before the Civil War—as for instance during the Ship-money Case, when evidence from the reign of Egbert was produced and examined with perfect seriousness by both sides. But it would be insufficient to explain the seventeenth-century’s habit of recourse to the past merely as a search for precedents, as an eager legal antiquarianism; it was plainly much more. To claim that a precedent exists is to claim that a system of law as old as that precedent is still in force, and the arguments used in the Ship-money Case implied Coke’s principle that the law of England was of pre-Conquest antiquity. When it was claimed that a remote precedent existed for such a right, it might very well be claimed in addition that the right was of immemorial antiquity. When Elizabeth I’s parliaments began to claim rights that were in fact new, they indeed produced precedents, but they did much more. They made their claim in the form that what they desired was theirs by already existing law—the content of English law being undefined and unwritten—and it could always be claimed, in the

of his profession—seem to have been the main features of what may be termed the common-law interpretation of English history, the predecessor and to a large extent the parent of the more famous ‘Whig interpretation’. It arose essentially from latent assumptions governing historical thinking, which had been planted deep in the English mind by centuries of practice of a particular form of law; but it possessed also a political aspect, the need to make a case for an ‘ancient constitution’ against the king; and though this book is designed primarily as a study, not of the uses which were made of it in political argument, but of the historiographical conditions which made its existence possible, the former question is an inseparable part of the latter. Only a very detailed study of seventeenth-century thought could fully reveal the variety of uses to which it was put, or enable us to estimate accurately its importance as compared with other forms of political discussion. But the greatness of that importance cannot be denied. Put very briefly, what occurred was that belief in the antiquity of the common law encouraged belief in the existence of an ancient constitution, reference to which was constantly made, precedents, maxims and principles from which were constantly alleged, and which was constantly asserted to be in some way immune from the king’s prerogative action; and discussion in these terms formed one of the century’s chief modes of political argument. Parliamentary debates and pamphlet controversies involving the law or the constitution were almost invariably carried on either wholly or partially in terms of an appeal to the past made in this way; famous antiquaries were treated as authorities of recognized political wisdom; and nearly every thinker noted for his contribution to political theory in its usual sense—Hunton, Milton, Lillo, Hobbes, Harrington, Filmer, Nevile, Sidney: only Locke appears to be an exception among notable writers—devoted part of his pages to discussing the antiquity of the constitution. It would be possible to construct both a history of the

prominent feature, would already be well known from the parliamentary debates culminating in 1628. (See Thompson, *Magna Carta, pastim.*) These facts would suggest that all Coke’s historical opinions could have been well known while he lived, even if we do not suppose that he was giving voice to ideas already widely accepted.
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way that we have seen, that anything which was in the existing law was immemorial. The common lawyers began to rewrite English history on parliamentary lines in the Elizabethan House of Commons—Sir John Neale comments on the process—and by the time of the Apology of 1604 the Commons were already insisting that the whole body of their privileges should be recognized as theirs by right of time immemorial. The search for precedents resulted in the building-up of a body of alleged rights and privileges that were supposed to be immemorial, and this, coupled with the general and vigorous belief that England was ruled by law and that this law was itself immemorial, resulted in turn in that most important and elusive of seventeenth-century concepts, the fundamental law. Much has been written about fundamental law by modern scholars in the light of the contrary theories of judicial review and parliamentary sovereignty, but it does not seem to have been stated in so many words that if you had asked the representative seventeenth-century Englishman the question ‘What is it that makes the fundamental law fundamental?’ he might indeed have been embarrassed for an answer, but would probably in the


2 The latest study is that of J. W. Gough, Fundamental Law in English Constitutional History (Oxford, 1953). It does not appear that the seventeenth-century habit of appealing to the past gives us much help in deciding how far it was believed that parliament declared law, or how far that it made new law. Plainly, the whole weight of the appeal to ancient custom would tend to make parliament think it was declaring law; but that does not mean that parliament was incapable of knowing when it was making new law, only that it could believe itself to be declaring old whenever it chose to do so. The preamble to the Act in Restraint of Appeals reminds us that there were no limits to its power to believe this, and that in fact the distinction is often meaningless.

3 An interesting instance is that of 1641, when Edmund Waller asked what the fundamental laws might be, and was told by Maynard that if he did not know, he had no business to sit in the house. This incident reads as if Waller had succeeded in exploding the whole concept, but we should remember that Maynard probably identified the fundamental law with no single set of enactments, but with the entire body of unwritten customary law; to him, therefore, Waller’s question would practically amount to a demand to be told what the laws of England were, and his retort may have been more of a

The Common-law Mind: Custom and the Immemorial end have replied: ‘Its antiquity, its character as the immemorial custom of England.’ The adjective ‘ancient’ was used less often than ‘fundamental’, was frequently coupled with it and (it may be suggested) could in the majority of cases have been substituted for it without serious loss of meaning. The fundamental law or constitution was an ancient law or constitution; the concept had been built up by the search for precedents coupled with the common-law habit of mind that made it fatally easy to presume that anything which was in the common law, and which it was desired to emphasize, was immemorial.

The content of the concept differed from time to time (as also from man to man): as parliament laid claim to new powers these were represented as immemorial and included in the fundamental law, and close study would probably also reveal that as later controversies, particularly those of the mid-century, gave rise to new political ideas and principles, these also were included. It would certainly reveal that as the century progressed assertions that the law was immemorial tended to be replaced by assertions that parliament, and especially a house of commons representing the property-owners, was immemorial. One of the underlying themes in the history of seventeenth-century political thought is the trend from the claim that there is a fundamental law, with parliament as its guardian, to the claim that parliament is sovereign. Books are still being written in the attempt to decide how far this transition was carried and at what times; but it seems to be fairly well agreed that it was both incomplete and largely unrealized. Parliament claimed its increasing powers in virtue of the fundamental law; when in 1642 its claims reached such a height as to become a claim to arbitrary sovereignty, it still alleged that these were substantiated by fundamental law. The lower house’s claim to be sole sovereign often took the form of a claim that it was immemorial and therefore subject to no checks. The attempt at single-chamber despotism failed, and both the Restoration and the Revolution of 1688 could be represented as efforts to restore the fundamental law, rather than to sincerely explosion and less of a debater’s trick than one at first supposes. But the occasion was the attainer of Strafford, and what was said is not to be scrutinized too closely. Gardiner, History of England, 1603–1642, vol. ix, p. 336.
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establish the sovereignty of king in parliament. The concept of fundamental law therefore did much both to cloak and to delay the transition to a full assertion of parliamentary sovereignty. Granted the importance of fundamental law, and granted also that the concept rested on Coke’s concept of ancient law, we have here perhaps the true importance of common-law historical thought in the seventeenth century.

To what ultimate political principle were men appealing when they made the claim that their rights formed part of a pre-Conquest constitution? Why did they think a law’s antiquity made it binding in the present? Taking Coke as representative, we have analysed the assumptions and arguments on which that claim was based, and they have been shown to rest on the basic assumption that the law declared the immemorial custom of England. It was the idea of custom which convinced men that the law was ancient; the conclusion is a tempting one that it was as custom that they thought it was still binding. Coke and still more Davies do indeed seem to have thought at bottom in just this fashion; but does it follow that the average parliament man, barrister or pamphleteer, who made his appeal to ‘our ancient and fundamental laws, our ancient constitution’, was knowingly and deliberately appealing to the binding force of immemorial custom, and was clear in his mind what those words meant? It seems unlikely, yet it is hard to imagine what other ultimate basis his appeal could have had. No doubt for many it was enough to declare that the laws were ancient and fundamental, without troubling to inquire why that should make them binding. Some research, it seems, might profitably be done on the place which the concept of custom occupied in seventeenth-century thought. It appears to have been far less prominent and familiar in the scholastic and academic tradition of political discourse—the political theory of the text-books—even in the schools of natural law, than it was among common lawyers. If this impression is upheld, what are we to make of it? Was there some unifying body of assumptions, or were there more ways than one to approach political problems, arising in different intellectual milieus and stressing different basic concepts? and if this was so, which was the more representative and effective in seventeenth-century England?

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To ask such questions, or suggest that they might be asked, is to raise in a new form the problem of the relations between historical thought of Coke’s kind and academic political theory. Was the chief justice a political thinker and, if so, in what sense? But, however such a line of inquiry might turn out, it could probably be agreed that, even if a clearly thought-out concept of custom were proved to be not specially prevalent in the seventeenth-century mind, still the concept of an ancient constitution, very prevalent indeed, rested ultimately upon the idea of custom; and that, in this sense, common-law historical thought represented a most vigorous survival of the medieval concept of custom in English political thinking. As for the men who said ‘this is the ancient law’ without troubling to inquire on what juridical principle that law rested, they too were carrying on the tradition of many medieval minds, who lived so much surrounded by the notion of ‘law’ that they did not find it necessary to say very clearly from what authority—other than God or nature—the law in question derived. In the common-law interpretation of history, it seems, we have a powerful stream of medieval thought flowing into the seventeenth and eighteenth centuries, its strength surviving at least until the coming of philosophical radicalism.

But the attraction which the concept of the ancient constitution possessed for lawyers and parliamentarians probably resided less in whatever ultimate principle provided its base, than in its value as a purely negative argument. For a truly immemorial constitution could not be subject to a sovereign: since a king could not be known to have founded it originally, the king now reigning could not claim to revoke rights rooted in some ancestor’s will. In an age when people’s minds were becoming deeply, if dimly, imbued with the fear of some sort of sovereignty or absolutism, it must have satisfied many men’s minds to be able to argue that the laws of the land were so ancient as to be the product of no one’s will, and to appeal to the almost universally respected doctrine that law should be above will. A later generation, we shall see, having witnessed

1 This observation does not of course apply to most of the systematic political thinkers of the Middle Ages, but there must have been many who thought in the way here described.
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with alarm the spectacle of a revolutionary sovereignty styling itself that of the people, and by no means anxious in consequence to derive the laws from the act of some original popular assembly, found in the ancient constitution the perfect argument for pre-Lockean Whigs; as when the Lords were told in 1688 that 'the original contract between king and people' consisted in the king's undertaking to maintain laws which he certainly had not made.1 Once more we see how the concept of antiquity satisfied the need, still widely felt, for a rule of law which, like Magna Carta, 'would have no sovereign'. But it was an argument which fell far short of logical perfection. By the very vehemence with which they insisted that the laws were immemorial and not of the king's making, its champions tacitly conceded that if the laws were not immemorial they were of the king's making—since few were prepared to go to the quasi-republican length of asserting that the laws had preceded the kingly office and brought it into being—and that if they were of the king's making the reigning king was sovereign over them. These conditional propositions appear to have been accepted more or less on all sides; some few tried to find a way round them but hardly any succeeded. The notion of historical relativity—the suggestion that the law still in force might indeed have been made by a king in some high and far-off time, but in conditions so remote that neither 'king' nor 'law' meant what they meant at the present day, and that consequently no conclusions could be drawn as to current rights and liberties—was after all still virtually unknown. Consequently, to prove that the laws of England had originated at a time within the memory of man was to suggest the existence at that time of some human sovereign possessing the right to make law; and the heirs of that sovereign could not be denied the right to unmake all that he had made. Once men had appealed to the immemorial, the laws must be either absolutely immemorial or subject to an absolute sovereign—there seems to have been no idea of a middle way. A polemical situation could therefore arise, in which to put forward any theory as to the origin of English law at a time

1 See ch. xx, below.

2 For the most part this argument belongs to the Civil War period and after.

within recorded human history could be interpreted, and even intended, as an argument in favour of absolute monarchy. We shall see this happening in 1681.1 For their part, those who saw in the immemorial constitution a good argument for limiting the prerogative would sooner or later be compelled by the same logic to attribute to it an altogether fabulous antiquity, insisting that it could be traced in and before the remotest events known to contemporary historical thought, and denying, in essence, that its origins could ever be discovered by the historian.

The doctrine of antiquity was therefore most vulnerable to criticism, and some awareness of this must explain why those who believed in it were so tirelessly and monotonously insistent that the establishment of the Normans in England did not constitute a conquest. In theory, one can easily see why this should have been so. If the monarchy of England had ever been sovereign, it had been at that moment; and if Duke William, even for a single instant, had been an absolute ruler—if he had been king by *jus consuetudinis*—then it did not matter if he had maintained English law instead of introducing French, and it did not matter what charters and grants of liberties he had subsequently made to his new subjects; all that had been done—even to increase the sphere of freedom and law—had been done by virtue of his unfettered will, on which his grants depended and on which (transmitted to his descendants) the laws and liberties of England for ever afterwards must depend likewise. To admit a conquest was to admit an indelible stain of sovereignty upon the English constitution. A conquest was therefore not admitted in the age of Blackstone any more than in the age of Coke. William was no conqueror, said the lawyers and the antiquaries and the parliamentarians in chorus; he was a claimant to the crown under ancient law who had vindicated his claim by trial of battle with Harold, a victory which brought him no title whatever to change the laws of England. If he had done so, it was a lawless act without validity, put right within a few generations of his death by the coronation charters of his successors and by Magna Carta, which had restored and confirmed the immemorial law of the Confessor's time.
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But the remarkable fact is that the contrary argument was very seldom put forward—certainly with insufficient frequency to justify the incessant refutations which appeared. A writer of 1680, William Petyt, casting about for names with which to substantiate his allegation that a conspiracy existed to establish absolute monarchy on the theoretical basis of a conqueror's right, was able to name none who had argued in this sense except 'one Blackwood, a Scotchman'—and, he might have added, a good deal of a Frenchman as well—and Mr Christopher Hill, who believes that the conquest theory was a staple argument of pre-Civil War monachism, can add to the mention of Blackwood only some half-hearted remarks by James 1 and a few sentences of Laud's which appear to bear a rather different meaning. 2 The fact seems to be that the conquest theory was no more an essential part of pro-Stuart reasoning before the Civil Wars (or indeed after them) than was absolute sovereignty. 3 Those who supported what the Stuart kings were doing did not normally regard their ruler as a sovereign maker of law—however vigorously they might assert his prerogative—and consequently did not argue that the laws flowed from his will or that he ruled above the law as a conqueror—the two doctrines to which a theory based on historical criticism would have led. This conclusion makes it hard to explain why the opposition constantly thought it necessary to refute an argument which nobody was putting forward; but it reminds us that the belief in an immemorial law was not a party argument put forward by some clever lawyer as a means of limiting the king's prerogative: it was the nearly universal belief of Englishmen. The case for the crown was not that the king ruled as a

1 W. Petyt, Miscellanea Parliamentaria (1680) and The Ancient Right of the Commons of England Asserted (1680).
2 Mr Hill's essay 'The Norman Yoke' is to be found in a volume entitled Democracy and the Labour Movement (Lawrence and Wishart, 1954). The relevant passage is on pp. 19–20.
3 What Laud says, as quoted by Hill (ibid.), is that the Conqueror's following insisted on being governed by his will and would not accept the laws of St Edward; but in a generation or two 'they became English' and appealed to the ancient law to protect them against King John. This is hardly a claim to jus conquestus on behalf of the king.
4 It will be argued later (chs. vii and viii) that there is no serious attempt to derive the royal power from William's conquest until 1680–8.