READINGS FROM MILSOM

I

‘Law and Fact in Legal Development’ (1967)

Lawyers inquire into the history of their rules and institutions to find out how things came to be as they are, and they generally assume that the facts behind each development are in themselves well known to historians. Historians search the legal sources for some trace of those same elusive facts, and their assumption is that the relevant law is well known to lawyers—or at any rate to legal historians, who are thus condemned to unanswerable questions from both sides ...

This essay is about the beginnings of the common law as an intellectual system, and its premiss is that legal development consists in the increasingly detailed consideration of facts. If so, the limit at any time is the extent to which the legal process presents the facts for legal handling. Academic or juristic speculation may go beyond the problems of daily life, but it cannot imagine the unimaginable or excogitate questions of a different order from those which actually arise.

II


If we view the common law on the eve of reform as a piece of social engineering, we see the spirit of Heath Robinson at his most extravagant. But the viewpoint is anachronistic and the question unreal. It is a real question why nobody before Bentham was provoked, and a part of the answer is that nobody before Blackstone described the system as a whole. Lawyers have always been preoccupied with today’s problems, and have worked with their eyes down. The historian, if he is lucky, can see why a rule came into existence, what change left it working injustice, how it came to be evaded, how the evasion produced a new rule ... But he misunderstands it all if he endows the lawyers who took part with vision on any comparable scale, or attributes to them any intention beyond getting today’s client out of his difficulty ...

... Legal history is not unlike the children’s game in which you draw lines between numbered dots, and suddenly from the jumble a picture emerges: but our dots are not numbered. We have unrivalled sources from an early period, but they are business documents, made by and for men who knew the business. They give us detail with certainty and precision. They do not show us the framework into which the detail fitted, the assumptions upon which it rested.
Maitland has ... been nominated the patron saint of historians; but he did not play by the rules of today’s history game, which has increasingly focussed on narrow topics in short periods ... His was still an age of truly original scholarship, before a craft system locking apprentices into the assumptions of their masters ... His grandfather wrote independently on church history. An independent have-a-go figure in natural history is a larger example and also more directly relevant. Maitland saw England as a legal Galapagos insulating native evolution from Roman contamination. We now know that he pressed the Darwinian analogy too far, seeing the whole development of English law in terms of monstrous species, the ‘forms of action ... living things ... The struggle for life is keen among them and only the fittest survive’. It is one way of picturing what was going on from the 16th century to the 19th ... But Maitland extended the vision to earlier times, and so hid what had really been rational argument about legal categories. His account of early property law also saw legal remedies competing for custom ... This did wider damage: he carried back into the 12th century basic ideas of property at home in the 19th, and therefore assumptions of 19th-century social and economic order ... Maitland’s magic is not confined to the immediacy with which his readers hear disputes. There is also the lawyer’s power to impose a simple and convincing pattern upon complex matters ... But now many details can be seen not to fit Maitland’s pattern. Of some he could not have known: others were missed by the spot-light of that concentrated vision. But there they are; and I believe another irony of this occasion is that historians of medieval England will have to let Maitland die and begin again with less static assumptions. They will mind, but he wouldn’t. He meant to open a subject up, not close it down. He will not die for lawyers. He founded the history of their subject, and it is not just part of social and economic history. To use uncomfortably large words it is the intellectual history of society.