Arthur R. Hogue, *The Origins of the Common Law*, Indianapolis: Liberty Press, $10.

By EDGAR BUCK

Magna Carta and all that

This is a well-researched book by an American professor on the origins of the Common Law of England. It makes an important contribution to the understanding of the civilizing influence of the Common Law, and does much to establish in the reader's mind the flavour of the times in which it originally developed.

The author begins with an assumption that "the Common Law has grown, now rapidly now reluctantly, to keep pace with the changes in the social order from which it is inseparable".

Although by some the Common Law is defined as a body of law based upon custom alone, it "had its roots in the soil of native feudalism, notably the land law and the law of succession".

The discussion on stability and change provokes a realization that life in the middle ages was necessarily very different from that of later centuries. For example, the population of England in the thirteenth century was about two millions, who lived for the most part in rural villages. London itself contained about 50,000 residents, but, whatever may be said on this score, it seems clear that in the context of the times, the Common Law grew up with the consent of the people as individuals, taking into account custom, interpreted and made permanent by recorded judicial decisions.

The book clothes these general inferences with illuminating details. For instance, comparatively soon after Magna Carta (1215) balances in the Royal treasury dropped as low as £2.8s.1d. (£2.40p) on 29th February, 1286.

The details concerning the king's borrowings speak of loans at 120% p.a. interest, and that much of the borrowing was from foreign lenders, because the king could not be sued for debt in English courts, and the charge of usury could not be brought against an alien creditor.

There is interesting detail as to how leaseholds came to be used in support of royal borrowings, and maybe this was the first appearance of leaseholds; although use for the purpose of estate management was a motive later on.

The chapter on "Free Tenures and their Obligations" enlightens

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by the statement that when land was more abundant than money, the vassal usually received a "fief" – a grant of land to be held by the tenure of military service or knight service.

The section on "Tenure by Sergeanty", being a grant of land in return for the performance of some special service, contributes to the "flavour" of understanding to which reference has already been made.

As I progressed through the book, I found myself leaving the role of mere reviewer to turn to broader considerations. Previously acquired knowledge and impressions intervened to widen the canvas. It became possible to gain still more enlightenment by considering the role played by statute law.

The book deals in the main with the Common Law and quotes Professor Plucknett as concluding "We are compelled however ... to bear constantly in mind the cardinal fact that our Common Law is custom ..."

Custom, I submit, is a set of rules which results from *personal* assent of the many – unwritten, it is true, but having the fundamental attribute of acceptance and establishment of what was acceptable and desirable, and seen so to be, at the time.

Under it, the much-maligned feudal system operated to ensure that the expenses of government – which, in those days in large part were represented by national defence and military expeditions – were provided by services of various kinds by land holders.

In short, it was the land of England which provided the expenses of government.

It is to the statute law that we must turn to see how that situation was changed. Understanding is sometimes aided by chronology. For this one should go back, not to Magna Carta but to the Domesday Book.

After the Norman Conquest, the two books called "Domesday" (1086) were compiled at the behest of William the Conquerer. These books gave quite precise detail concerning the land of many of the counties of England. What could be the purpose of this but to provide a record of all land belonging to the king for subsequent enforcement and taxation?

Magna Carta (which the author refers to as "The first Statute of the Realm") seems to have been the response of the landowning Barons and the landowning Church. No doubt many of the fine phrases of that measure record many highly desirable declarations, but I submit that the main purpose was to break the power of the king as supreme landowner.

THE FACT that the revolt was by those holding land of the king, is significant in itself. The Carta was in the form of a declaration of the King (a copy of it is set out in Vol X, Encyclopaedia Brittanica, page 1032) and gave enormous power to a committee of 25 Barons and Churchmen by its clause 61.

Such were the fine phrases

employed, that one hesitates to infer the main motive as an effort by landholders to avoid the obligations then current, and possibly in the future to be imposed through a completed Domesday Book.

But taking all this with the information in the book now under review, and in particular the details of the financial embarrassment of the Kings in 1286 and 1289, it is submitted that the motive is not misrepresented.

Indeed, this is supported by detail in pages 217 and 218 of the book, where there appears the following passage: "During the reign of Henry II" (1154-1188) "the Royal Courts had been concerned to protect seisin of freehold."

Feudalism was still very much alive, tenants by service still contributed heavily to the defense of the realm; the fief was still an economic base for the support of a man-at-arms and his family. But by the reign of Edward 1st much had altered; the outward formalities of tenures failed to conceal the fact that men invested in land as a means of accumulating wealth.

Although feudal forms of tenure persisted, tenures were bought and sold freely in an active market. If this traffic in land were not regulated, it would quickly spawn long chains of tenure and deprive great barons and magnates of the incidents of feudal tenures.

By statute Edward provided for the substitution of the buyer for the seller in any transfer of lands and prohibited further sub-infeudation of land. Thus the Statute of Quia Emptores regulated the buying and selling of land with the intention of preserving to the Barons – and the Crown – the wealth obtainable from wardships marriages and escheats".

From these beginnings the absolute private ownership of land progressed. Already the 1215 version of Magna Carta contained provisions to provide for inheritance for continuity of the family. Gradually the ownership of land became vested in fewer and fewer people. This process was accentuated by the Enclosure Acts later on (there were 4091 such Acts between 1700 and 1844).

The consequence was that by 1932 the land of our country was owned by 2% of its people. This was the situation which was recognised as a social evil from biblical times and the law given to Moses on Mount Sinai provided for a re-distribution every generation of 50 years (Jubilee). "Ye shall not therefore oppress one another" (Leviticus Chapter 25 V17).

By Section 1 of the Law of Property Act 1925 on legal estates and equitable interests it was declared: "(1) *The only interests or charges in or over land which are capable of subsisting or of being created at law are: (a) an estate in fee simple absolute in possession; (b) a term of years absolute.*"

The words still have legal connotations, but, they are "freehold" and "leasehold" respectively. However this declaration was substantially foreshadowed by the Conveyancing and Law of Property Act 1881 and that was only declaratory of the situation as to land tenure which had grown up over the centuries.

Land monopoly had serious social consequences of which there is monumental evidence still standing. On the one hand there are the huge houses of the landed aristocracy. One of them has 365 rooms. On the other hand there are the workhouses for paupers, some of which still exist.

I read as a child a chant as a pauper funeral passed. It ran:

"Rattle his bones over the stones,
He's only a pauper who nobody owns!"

Many of the paupers were able-bodied men who had to crack stones for a night's lodging. The welfare state and the industrial revolution have intervened but the social evil of land monopoly continues to deny to people their just economic inheritance.

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thing to lose and nothing to gain from the CAP, yet the losers are diffuse and ill-organised, while those who stand to profit by it constitute a powerful lobby which has the ear of politicians fearful of losing support. Thus the agricultural lobby is able to override everybody else.

There is another point involved. The main beneficiaries are not the poor, struggling European peasants; a striking recent article in *The Independent*[3] points out that CAP "heavily favours big and capital-intensive farms against smaller, more labour-intensive, ones".

How is it that these big farmers, a tiny minority of the agricultural interest itself, are able to override not only the consumers but also the more necessitous farmers too?

When I was a Parliamentary candidate in a largely rural English constituency, I found the only people who had time to staff the local NFU were the big farmers, so the "farmers' lobby" is not the lobby of all the farmers, but the lobby of the rich farmers, who succeed in deluding townspeople, including politicians, that they speak for the whole agricultural community.

To be fair, however, the big farmers are not *absolutely* alone. They have important allies: the fertiliser and agricultural poison ("pesticide") corporations who share both the blame and the profit.

So we return to the substance of the letter from the four organisations. Thanks to the CAP, the consumer is robbed, the taxpayer is plundered, the countryside is devastated of its wild life, the Third World is pushed ever deeper into poverty, and industrial unemployment is made even worse.

How much longer are we all going to put up with this?