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THE CUSTOM OF ROMNEY MARSH AND THE STATUTE OF SEWERS OF 1427

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'Sewer: a fresh water trench compassed in on both sides with a bank, . . . a small current or little river'. (R. Callis, *Reading upon the Statute of Sewers*, 1622)¹

Writers on land drainage law and history were at one time agreed in regarding the Statute of Sewers of 1531 (23 Henry VIII c.5) as the foundation of all subsequent legislation affecting the powers and duties of commissioners of sewers (*de wallis et fossatis*).² This is hardly surprising, given the length and elaboration of that statute which, reprinted in Mary Kirkus's study of the south Lincolnshire commissioners, occupies nine pages as opposed to the two pages of the 1427 statute (6 Henry VI c.5).³ It is probable also that Callis's *Reading* upon the 1531 statute influenced later commentators concerned with that statute's legal rather than its historical significance. Yet, as Kirkus pointed out, the 1427 statute, while it 'appears to have done little more than give a statutory confirmation to what was already being done', and was elaborated and superseded by that of 1531, nevertheless contained 'the essentials of the law of sewers as it lasted until [the Land Drainage Act of] 1930'.⁴

One feature of the 1427 statute is its special regard for the custom of Romney Marsh as a model for land drainage administration throughout England, as Dugdale explains in his *History of Imbanking and Draining*.⁵

¹ R. Callis, *Reading . . . upon the Statute of Sewers*, 1622 (4th edn., 1810), 80.

² G.G. Kennedy and J.S. Sandars, *The Law of Land Drainage and Sewers* (1884), 2.

³ (Ed.) A.M. Kirkus, *The Records of the Commissioners of Sewers in the Parts of Holland 1547-1603*, I (Lincoln Rec. Soc. 54, 1959), 1-11.

⁴ *Ibid.*, xx.

⁵ W. Dugdale, *The History of Imbanking and Draining*, 2nd edn. (Ed.) C.N. Cole (1772), 34.

'Which said laws, with all others relating to this [Romney] Marsh, as also the customs thereof, were grown at length so famous, that the said King Henry the sixth, in the sixth year of his reign . . . in his parliament holden at Westminster, having considered the great damage and losses, which had often happened, by the excessive rising of waters in divers parts of the realm; and that much greater was like to ensue, if remedy were not hastily provided: and thereupon ordaining and granting, that for ten years then next ensuing, several commissions of sewers should be made . . . in all parts of this his realm, where should be needful . . . amongst other things gave unto the said commissioners special power and direction, by that act, 'to make and ordain necessary and convenable statutes and ordinances, for the salvation and conservation of the sea-banks and marshes, and the parts adjoining, according to the laws and customs of (this) Romney Marsh'.

As will be seen, this adoption of Romney custom as a model was no sudden innovation of 1427; and my purpose in what follows is to examine the process by which it gradually 'grew famous', as this is reflected in the pages of Dugdale.

In the course of his *History*, Dugdale included every example he could find of a commission of sewers, endorsed as these normally were on the Patent Rolls.⁶ Usually we learn from him no more about each commission than its date, the commissioners' names, and the area for which they were made responsible, but from time to time he quotes also the form of words indicating the law or custom, whether of Romney Marsh or some other, that should regulate the commissioners' activities. This is hardly ever mentioned in the published calendars of the Patent Rolls, and the sheer abundance of material is a discouragement to verifying every citation against the original enrolment. For the period 1351-1415 alone, Dugdale identified, in his chapter devoted primarily to east Kent, some forty commissions; in that on the Sussex-Kent borders a further twenty; thirty-five for the rest of Sussex; and many more for other counties. Without such verification we cannot tell how often, if at all, he may have omitted references to law or custom, but the number of those that do appear make it seem likely that we possess a quite sufficient sample on which to base any conclusions about the spread of Romney custom.

Until well into Edward III's reign it seems not to have been a regular practice to specify in commissions the law or custom to which com-

⁶ Dugdale's citations from the rolls are meticulous. After 350 years, his roll and membrane numbers are still valid and readily verifiable from the published calendars, and rarely found incorrect. He employs the regnal years of the original, but for ease of use I have substituted the appropriate years A.D. as supplied by the calendars. To avoid an excess of footnotes, page references to Dugdale in respect of individual commissions have been omitted save for corrections of date errors.

missioners of sewers should adhere. Exceptionally, a commission of 1295 for lands near the Yorkshire Ouse between Hook and Reedness required the commissioners 'to take such course . . . as should be consonant to the laws and customs of this realm'. A commission of 1319 for the Marshland district of west Norfolk contains no such formula, though the unusual survival of a series of documents covering the subsequent proceedings of the commissioners shows that at a later stage they were told to 'do full justice according to law and local custom', that custom being 'the custom of Marshland'.⁷ By the middle of the fourteenth century, however, the national and the local standard had, separately or together, found (if we may judge from Dugdale) a regular place in the instructions given to commissioners in all parts of England.

In Romney Marsh, as is well known, the details of local law and custom – the two concepts being usually bracketed together – had been codified by Henry de Bathe in 1258.⁸ Although designed for Romney Marsh proper, that custom was seen to have its value for neighbouring areas of Kent in the aftermath of the serious floods of the late 1280s. In a commission of 20 November, 1287, John de Lovetot and Henry de Apuldrefeld were appointed to view the banks and ditches 'upon the sea coast and parts adjacent' in Kent, 'in divers places then broken through the violence of the sea'. In the enquiry which followed, it was (*inter alia*) decided that on the west side of the Snargate–Romney water-course, i.e. the Rhee Wall, where hitherto 'there had not been any certain law of the marsh, ordained nor used', there should now be a bailiff and jurats as in Romney Marsh, to act under the supervision of the bailiffs of the latter, with the two bodies meeting together when necessary. A parallel enquiry by the same two commissioners concerning the banks, etc., in east Kent, similarly broken by the sea, in the hundreds of Eastry and Cornilo, found that it would be 'expedient for the whole commonalty to have one bailiff and twelve jurats within those marshes in such sort as they of Romney Marsh and the marshes towards Sussex then had'. Next, in 1308–09 the king's common bailiff in Romney Marsh was instructed to oversee the bailiffs and jurats of the marshes of Lydd and Oxney, and when necessary to summon them together with the Romney Marsh jurats 'to consult of ordinances and making laws for the defence of the lands in the said marshes'. The whole of Romney Marsh in its wider sense was thus embraced, at least nominally, within a common body of custom.

For the next half-century Romney custom seems to have made no

⁷ (Ed.) A.E.B. Owen, *The Records of a Commission of Sewers for Wiggshall 1319–1324* (Norfolk Rec. Soc. 48, [1984]), 38.

⁸ Dugdale, *op. cit.*, 18 foll.

inroads elsewhere. In 1363, the commissioners in Thanet and Sheppey and the vicinity were still being told to act 'according to the custom of the marsh lands formerly used in this county'; elsewhere in east Kent, as also in the marshes south of the Thames, conformity either to 'the law and custom of this realm' or 'the marsh law', remained the model throughout Edward III's reign. In East Sussex, 'the ancient law and custom of this realm' is specified in 1366 for the marshes around Rye. But following the accession of Richard II there come the first signs of change. In Sussex, in a commission of 1379 relating to Winchelsea, 'the law and custom of this realm, and the laws and customs of Romney Marsh' are for the first time specified outside Kent, though only just over its boundary. During the next few years there are further examples of the local extension of Romney custom. In 1382, commissioners for the marsh of Oare near Faversham were to act 'according to the custom of Romney Marsh to that time reasonably used'; in 1383, the custom is stipulated for the marshes of Lydd, Broomhill, Midley and Old Romney; in 1390, for 'the banks etc. between Fairfield and Appledore and Snar-gate'; and in the same year for those between Kent Bridge and Newenden along the Sussex border.

Throughout this time 'the law and custom of this realm', sometimes coupled with local marsh custom, had remained everywhere else the standard to which commissioners of sewers were required to adhere. In the north Kent marshes along the Thames 'the marsh law' with no mention of Romney was still being specified in 1388. On the Essex side of the river, commissioners for the marshes of Barking and Dagenham were in 1385 told to act 'according to the law and custom before that time exercised in those parts', and those for land between Stratford-at-Bow and the river in 1407 according to 'the law and custom of this realm';⁹ indeed, only after the passage of the 1427 statute, so it seems from Dugdale, was Romney custom invoked in this county. In more distant counties local custom often held the field well into the fifteenth century, so far as Dugdale's evidence allows us to judge. Thus, commissioners for the area between Norwich, Great Yarmouth and Beccles in 1403 had to act according to the law and custom of the realm 'and those parts of this country'; for the banks, etc., between Gloucester and Bristol in 1410, according to 'the customs used in those places'; while in Somerset 'the custom of the marsh' in 1417 can be assumed to have been the local one.

Despite the foregoing, there is suddenly in the 1390s evidence of an attempted 'great leap forward'. In May 1393, we find Romney custom

⁹ *Ibid.*, 80, col. 2: for '8 Henry V' read 8 Henry IV.

first stipulated for the north Kent marshes between Plumstead and Northfleet, and, in February 1394, we find it extended to fresh areas near to Romney Marsh: in one direction to the areas between Canterbury and Rochester, and Canterbury and Sandwich, and in the other to Pett, Brede and elsewhere in the East Sussex levels. There were more distant extensions in the latter year. Commissioners for the banks of the river Aire in the neighbourhood of Ferrybridge in Yorkshire were now required to act 'according to the law and custom of England, and the custom of Romney Marsh till that time used' where hitherto only the former had been specified. In the fens of south-east Lindsey in Lincolnshire, north of the river Witham, Romney custom was specified that year, and again the year following, and, in November 1396, for Holderness in east Yorkshire. In March 1397, it was specified for the coastal marsh of Lindsey between Grimsby and Wainfleet, though a new commission for this area in October of that year specified only 'the law and custom of the marsh'. To the south of it, on the coast between Boston and Friskney, the commissioners were, in 1402, told to act according to the law and custom of the realm and the custom of Romney Marsh; but, in 1410, another set of commissioners for the same coast were instead told to follow 'the custom anciently used in that place'.¹⁰ Similar apparent steps backward, which may in fact reflect no more than the conservatism of the clerks drafting the commissions, are to be found elsewhere: in Holderness, where in 1406 Romney custom has seemingly been abandoned for 'the custom of the East Riding of this county before that time used', and in the marshes of the West Riding where after 1394 Romney custom is not again mentioned in Dugdale's citations of seven further commissions prior to 1427, though 'the custom of the marsh', presumably the local one, occurs in two of them. In the Kesteven division of south Lincolnshire we find 'the law and custom of the marsh there before that time used' still specified in 1409, with Romney custom appearing only in 1416.

We may now attempt to reconstruct the dissemination of Romney custom. Originating in Romney marsh proper, it made no impact outside its immediate neighbourhood until the last quarter of the fourteenth century. From 1379 onwards, we see it gradually recommended a little more widely, though still confined to nearby areas of Kent and East Sussex. In the 1390s, it is suddenly extended not merely to more distant parts of Kent but to low-lying areas of Yorkshire and Lincolnshire. Within a few years, however, local marsh law is once again being specified as the standard to adhere to in those northern regions – if, that is to say, such was really the intention of whoever was responsible for issuing the com-

¹⁰ *Ibid.*, 161, col. 1: for '1 Henry IV' read 4 Henry IV.

missions, and was not mere clerical conservatism – and not until 1416 is Romney custom again mentioned by Dugdale before being embodied in the statute of 1427. Darby, commenting on the statute, questioned Dugdale's assumption that its object was to establish Romney custom as a model since this 'had already been applied to areas in the Fenland before 1427'; he cited the instances quoted above, though overlooking the apparent later retreat. He concluded that since the statute 'merely continued the existing machinery' and seemingly inaugurated no new policy, its purpose 'beyond making *de jure* what had been *de facto*' was obscure.¹¹ But since contemporary legislation was as much 'declaratory' as 'initiatory', this surely *was* its purpose: the same is probably true of the better-known statute of 1531.¹²

Several questions remain, to be answered – if answers there are – by someone more familiar than I am with the workings of late medieval government. What, or (perhaps more to the point) who, lies behind the extension of Romney custom to Lincolnshire and Yorkshire in the 1390s? Was there really a conscious retreat thereafter from this 'forward policy', or is this retreat an illusion due to the deficiencies of the evidence? And what, or once again, who, caused the custom to be ultimately made *de jure* in the 1427 statute?

Beyond this, what if anything did the attempt to spread Romney custom beyond the south-east of England actually achieve? I have long doubted whether, outside its native area, the custom was seriously advanced by that statute. Originating in a small compact region on the Kent-Sussex border, the custom of Romney Marsh was not necessarily well suited to the very different marshes of the West Riding where the great rivers of Yorkshire met and regularly overflowed, or to the long strip of coast between the Humber and the Wash in Lincolnshire. I have elsewhere described how in Lincolnshire, following serious floods in the winter of 1499/1500, the bailiff of Romney Marsh with four of its jurats and two 'levellers' (surveyors) were summoned to Boston in March 1500 to advise the commissioners of sewers on reshaping the local sewers administration upon the Romney pattern. A few months later, a bailiff and a deputy, two collectors and two expeditors, twenty-four jurats and a clerk, were appointed with instructions that the laws of Romney Marsh should be observed 'in all points where the sea hath flux and reflux within the county', their immediate task being to survey that part of the

¹¹ H.C. Darby, *The Medieval Fenland* (1940), 163–5.

¹² A.E.B. Owen, 'The Levy Book of the Sea': the ... Lindsey Sea Defences in 1500', *Lincs. Archit. & Archaeol. Soc. Reports & Papers* 9 pt. 1 (1961), 35–48. The statute of 23 Henry VIII is there misdated '1532'.

coast north of the Wash held to be especially 'in danger of the sea', and to update the method of rating it for sea defence. Significantly, the commissioners on this occasion included two having personal links with the Romney Marsh area. Sir John Fyneux, chief justice of the King's Bench, had already served on commissions of sewers there and was steward of the manors of Christ Church, Canterbury, which owned much land in the Marsh, while Sir Richard Guildford gave his name to the parish of East Guldeford near Rye, which he had very recently reclaimed from a tract of marshland.¹³ This is a noteworthy and perhaps unique instance of Romney officials being called on for advice so far from home, and says much for the continuing reputation of Romney custom. It says little, however, for the effectiveness of decades of recommendation and legislation in its favour which, here at least, had plainly failed in their purpose.¹⁴

¹³ *Ibid.*

¹⁴ The provisions of a series of statutes of sewers, the last in 1515, which had renewed and updated that of 1427, are summarised by Kirkus, *op. cit.*, xx-xxi.