
BOOK REVIEWS

HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY. *Max Radin. Hornbook Series, West Publishing Company, St. Paul, Minnesota. 1936*

In these days, when we are coming more and more to see exceptional merit in the so-called "functional approach" to the study of law, it is not difficult to hear the queries, Why should anyone study legal history? Is not the law of today the only vital and real law? Who cares about outworn law and technicalities? Do we not suffer enough from the rough edges in our working institutional structure to spare ourselves the cares of the study of obsolete counterparts?

William S. Holdsworth, eminent English historian, answers these questions by distinguishing between "mere antiquarianism" and "effective legal history."¹ Quoting from the legal historian of an earlier year, Selden, Holdsworth urges that we avoid "the sterile part of antiquity." In effective legal history, however, we have a record of the beginnings of principles, rules, and institutions which have stood the test of centuries and are in force today. To know legal history is to commune with the judicial patriarch; but to respect the communion too credulously leads to unintelligent anti-liberalism. A critical acceptance of tradition adds a fourth dimension, time, to the particularized concepts of the functional approach. Reforms arise not from absolute but from relative considerations—because one means is, or is expected to be, better than another in accomplishing jural ends. Tradition is the instrumentality for explaining away the present in the expectation of experiencing a richer future.

The study of Anglo-American legal history is particularly important. Our law originated in England. Our language is English. Our ideology emergent from or coincidental with these common forces is constituted of fundamentally similar political and ethical standards. On points of similarity the legal and political institutions may improve from the study of common experience; on points of difference the trends of divergence may be traced to precipitate more clearly essential distinctions.

The most recent American contribution to this field has been made by Max Radin. His *Handbook of Anglo-American Legal History* is a brief, lucid, and scholarly summary of the subject to date.

Professor Radin says it is a common mistake to hold that the Com-

¹ Holdsworth, William Searle, *Some Lessons in Our Legal History*, p. 6.

mon Law (He capitalizes it rigorously) consists of Anglo-Saxon folkways carried into England from Germany and remolded by the course of events in England and America. This, unfortunately, was a postulate of Edward Coke, whose *Institutes* and *Reports* dominated the legal thinking from the seventeenth to the nineteenth century, when Blackstone published his *Commentaries* without correcting the myth. As a matter of fact, the Common Law grew casually and unobtrusively. Principles that are now part and parcel of it were originally simple expedients to accomplish an administrative end without the least purpose of displacing existing systems. The Common Law is basically "administrative law." The task of administration deals essentially with property rights established by custom. The early royal administrators relied on legal principle in developing a routine for collecting the king's dues. As their methods proliferated the "substantive law grew up 'in the interstices of procedure.'"² This is the Common Law *raison d'être*. It is this same haphazard, informal development that has given the law its flexibility, yet principles (canonized) within this evolution have been banners about which have rallied alternately or simultaneously the educated authoritarian in the highly civilized community and the pioneer whose chief right is personal liberty.

When one mentions the Common Law he must also state the time of which he speaks, to define it. Latin, French, and Italian cultures were injected into it in the Norman Conquest. It does not appear that a single man at Runnymede and the signing of the Magna Carta in 1215 was an Englishman. To be one was a sign of low social rank. It was not until 1400 that the king addressed Parliament in English. The language of the law was Law-French for two centuries more. Latin was the language of writs even after Law-French was abolished. The whole structure of feudalism with its complex obligations—fealty, subinfeudation, primogeniture, the "curtesy of England," and even the cogwheel of the English administrative system, the Exchequer, had Continental equivalents.

The spiritual and cultural light which set the Dark Ages to fading in the eleventh century was much the same on both sides of the English Channel. Roman Law was revived; Canon Law was reformed. How much of each has become our heritage no one can say definitely, since investigators of the Common Law have maintained an aloof ignorance of Roman and Canon Law. The expression in the English law of this influence is certainly substantial.

² Radin, *Anglo-American Legal History*, p. 75, quoting from Henry Sumner Maine's *Early History of Institutions*.

The Common Law began under Henry I with the establishment of the Exchequer in the twelfth century. Originally itinerant justices were sent out to render secure the position of the king in the feudal structure. The Exchequer grew to become a real court as well as an administrative agency.

At the beginning of the thirteenth century came Magna Carta and near the end of the same century the statutes, "Quia Emptores" and "De Donis." The former statute abolished subinfeudation, and the latter converted conditional gifts into a new estate, fee tail. These were radical modifications of the feudal structure. "De Donis" in combination with the rule of primogeniture created a "landed gentry" class in England which has played a major rôle in economic history down to the present day and which is even now simultaneously waving white flags at Fascism and its own labor class to maintain itself. America revolted against the fee tail as an emblem of aristocracy. Many states have expressly abolished it by statute; other have modified it beyond recognition.

For a hundred and fifty years after John's Great Charter became a part of the legal system the Common Law indulged in an adolescent introspection and self-appreciation. It had accumulated enough experience recorded in the Year Books and early private reports to afford the basis for decision in novel cases. In fact by the time of commentator Littleton, 1450, lawyers had begun to urge the authority of decided cases as such. Even this early, crystallization in the elaborate legal procedure gave cause for the supplementary jurisdiction of Chancery and the body of law which that court developed.

In the seventeenth century, the Dutch Grotius, the French Descartes, and the English Bacon cast the dies for a new mode of research. They fathered scientific method expressed in a spirit of critical analysis of substantiated facts. A number of legal historians adopted the Baconian method—accurate statement with due restraint. "The engrossment of lawyers in practical questions made such researches seem mere antiquarianism, but their books are fundamental in the history of the law." (Page 297). One must qualify the status of such inquiries, however, by the recollection that Edward Coke's expositions of the Common Law were the standard authority until the publication of Blackstone's *Commentaries* in 1761. Coke was an excellent lawyer, but an unreliable and unscrupulous historian. He was a strict constructionist, an opponent of Chancery, and against any substantial change in the Common Law.

Probably the most important substantive development during the seventeenth and eighteenth centuries came from the ingrafting of the

Law Merchant. It remained for the impulse of the French Revolution to set in motion major changes in the English legal structure. "Rapid liquidation took place of most of the vestiges of feudal law and feudal conditions. The penal law was radically changed, body execution in civil cases practically abolished and the courts completely reorganized. Property rights of married women were recognized and the commercial law summarized and restated in fragmentary codes. (Page 533).

This reform was further inspired by the utilitarian philosophy of Jeremy Bentham as given political application by Samuel Romilly and Henry Brougham, legal reformers, efficient and tenacious.

It must be remembered, however, that the influence of Bentham has always been less than that of John Austin (1790-1859), whose theory of law as a rigid logical structure has appealed to the legal technicians to this day.

It seems that in spite of these writers the study of legal theory and scientific history as a means of clarifying shifting legal concepts has been undertaken only within the last hundred years. In this regard Frederick William Maitland has done epoch-making work in constitutional history. Studies of his kind have laid the basis for Holmes, Pound, and others in America and for many writers on similar or divergent theories in France, Germany, and Italy, as well as England.

Reform in the last century in legal administration was particularly aided by Judge Blackburn, who, among others, put the commercial side of the Common Law in proper relation to mercantile practice. In Equity, Chancellors Jessel and Fry reinstated the humanitarian incidence of which the brilliant Lord Eldon had sought to deprive it. During the last hundred years modernization of the law has been especially patent in domestic relations, real property, corporations, and procedure. In anticipating prospective trends of the Common Law, one can not but predict an assimilation to the Continental systems. Even now, the Common Law devices, trusts and estoppel, have general European acceptance. On the other hand, there seems to be some likelihood that Common Law countries will obliterate the many pseudo-distinctions between real and personal property that do not hold in countries on the Continent.

Whatever Professor Radin's book lacks in completeness may be justified on the grounds that it does catch trends and that in the course of the brief discussion of hundreds of legal concepts, of legal literature, and of the legal profession there is abundant reference to more exhaustive discussion of the point in question. It is a book especially for the student who by the pressure of circumstance can not look more than

briefly at the subject—one volume, major points presented in outline form, and succinctly elaborated. It is a reminder, in the author's own words, "that this law [is] . . . more than the archeological museum it has often appeared to be and something less than a set of general rules abstracted from time, and space, and circumstance." (Preface, page v).

LEO STONE

LAW AS LIBERATOR — *Joseph C. Hutcheson, Jr. The Foundation Press, Chicago. 1937*

Law as Liberator consists of six lectures delivered by Judge Hutcheson before the University of Virginia Law School. They are written in oratorical style, and set forth in vigorous fashion the writer's faith in the democratic form of government.

The author deplores the prevalent attitude of indifference toward governmental problems. In contrast to the present period when the principles of democracy "have lost their dynamic power to stir," he points to the confidence which writers of the 18th century had in democracy. "Men learn but to forget, to learn and forget again. Because they do it has been difficult, until recently, for some of us to feel, or even to sympathetically understand, the dynamic, the shattering force of the politico-legal ideas which in the 17th and 18th centuries, came to dominate the thinking and the life of a great part of the Western world." Judge Hutcheson is more in sympathy with the writings of this era than with the developments of the present. He finds himself in accord with what he terms "the older value judgments" and views with alarm the modern trend toward a declining emphasis on moral and spiritual values and on political and civil liberty. He deplores the aims of the "social justice economists" who are attempting to remake the government into an institution designed to control the economic destiny of the nation. "They speak and act," he writes, "as though but for them and their ideas, the world would be lost. But the really, the deeply wise, know better. They have always known that the good life, social as well as individual, is rooted deep in proven, though changing ideals."

Despite the advocacy of a program which is essentially reactionary, the author characterizes himself as a liberal. By training as well as by practice he is, he says, a balancer of interests. He recognizes the need for change and is confident that change will come if we simply have the patience to follow the methods of the common law. Through advances in judge-made law, through legislative enactments, and, on rare occa-