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# A Concise History of the Common Law, by Theodore F.T. Plucknett

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## BOOK REVIEWS

*A Concise History of the Common Law.* By Theodore F. T. Plucknett. Rochester, New York. The Lawyers Coöperative Publishing-Co. 1929.

This is a book of very real importance. In the first place the author is a person of unusual competence. As a member of the faculty of Harvard Law School for the past few years he has carried on practically single handed the legal history work of that institution and has made it a leader in that branch of study. A text book by such an author can hardly fail to have both merit and importance.

Furthermore the book is significant in its relationship to other works on the same subject. It is consciously intended to supplement and be supplemented by Pound and Plucknett "Readings on the History and System of the Common Law," the third edition of which, largely revised by Professor Plucknett, appeared as recently as 1927. In the Readings will be found set forth at length primary material referred to in the Concise History, whereas the material in the Readings will often be explained and supplemented by the Concise History. The two books may therefore profitably be studied together.

Furthermore the Concise History has a considerable number of references to Holdsworth. Everyone knows that Holdsworth is the ultimate authority in English legal history. But no one who has attempted to use his work will have failed to find out that it consists of nine large volumes almost without arrangement and practically without indexing. Professor Plucknett's work is as well arranged and indexed as the older work is ill equipped with these essentials; and it may reasonably be expected that the smaller book will have as one of its important functions to serve as an introduction and guide to Holdsworth.

One definite characteristic of its author appears on nearly every page of the Concise History. Professor Plucknett is firmly convinced that the Middle Ages were quite superior to the present, at least so far as legal matters are concerned. Indeed he has comparatively little interest in modern times as is shown by the fact that he concludes the first part of the book "The Crown and the State," dealing with the relationship of political history to legal development, with the close of the 18th century. No connected references are made to the enormous legal developments of the 19th century although there are some indirect references to the procedural reforms of the '70s and some similar matters in other connections.

However, one need look no further than the book itself to realize that distance in time as well as space is likely to lend enchantment to the view. When one examines the actual conditions

in the Middle Ages, as they are here clearly set forth, one does not share the author's enthusiasm for that distant period. For example, we are told that legal procedure in the Middle Ages was far superior to that of the present because there was no oratory and no pedantry. The courts kept themselves in a strictly business attitude. "It is only after the Renaissance that we find the bad old classical tradition of Greece and Rome which turned law-suits into an oratorical contest appearing in England." (p. 152.)

This sounds well enough, but the author immediately goes on to say that the serjeants who conducted most of the court proceedings in England at this time were rarely informed by their own clients of the actual facts of the case which they were expected to argue. The result was that two or more serjeants might argue for hours before the court and then discover that their whole controversy had nothing to do with the actual case. In view of this example of medieval "practicality" one is inclined to feel that present day court procedure with all of its improper submission "to the bad old classical tradition" is not wholly an example of modern decadence.

The author furthermore has considerable sympathy with the feeling of medieval lawyers that the English language was not proper for legal reports. As is well known the language used in the *Year Books* and Abridgements was the so-called Law French, a mixture of the French and English languages with a sort of legal jargon belonging to no language. Fortescue is quoted (though it should be said without approval) as stating that the French of the *Year Books* was superior to that used in France itself—a statement which would certainly be tragic as exemplifying the intellectual ruin of medieval legalism, if it were not so gloriously funny. The truth of the matter is that the use of Law French was an exaggerated piece of legal pedantry and while unfortunately such pedantry did not die with the Middle Ages it is certainly much less prominent and vicious than it was then.

Professor Plucknett also admires the freedom with which the governing classes of medieval times dealt with statutes. A statute was simply a registration of royal will and needed no enacting body other than the King himself, with or without the advice of his Council as he chose. Besides, the judges while they clearly had no particular theory on the subject had felt entirely justified in interpreting statutes as they thought fit or even entirely disregarding them. The author thus sums up the situation (p. 291): "The great concern of the government was to govern, and if in the course of its duties legislation became necessary, then it was effected simply and quickly without any complications or formalities."

This too sounds very well until one reflects that it is only these "complications and formalities" which have insured any rights

to persons not belonging to the governing classes. The medieval scheme presupposes that the persons having such enormous power will use it for the benefit of the community in general rather than for their own; and unfortunately both the ordinary facts of human nature and the testimony of history (especially medieval history) prove that this supposition is almost entirely false. The fearful injustices which were perpetrated in connection with the purchase and sale of wardships over infant heirs, all of which is set forth in this book, is a sufficient proof that self-interest in the Middle Ages needed just as it does now some pretty carefully devised governmental machinery to keep it in check. Our more elaborate machinery which Professor Plucknett does not like has very many defects no doubt, but it does measurably succeed in performing this function.

A further rather amusing example of the same point of view is the author's account of the action of debt which he correctly states was regarded in the medieval period as based not upon a contract but upon a grant, "an ancient idea which is not easy to grasp at the present day when the intense realism of medieval thought and philosophy is no longer familiar." (pp. 408-9.) But only a little further down he apparently abandons his faith in this "intense realism" for he points out that by the beginning of the 16th century the idea was getting to look rather artificial. The fact of the matter is, and the book points it out, that this highly metaphysical cast of the medieval mind greatly checked the development of our law of contracts so that it was centuries behind that of any other law.

Much more might be cited to show the enthusiasm of the author for the medieval period, but paradoxical though it may seem, this has not in any way caused him to lose sight of the most recent developments of historical research. For example it is pointed out that the present view is that the action on the case was not based on the Statute of Westminster II. This is certainly quite different from what most law students were taught, at least until very recently.

Another distinct contribution is with respect to the *Year Books*. It is pointed out that they cannot be properly considered as a unit—that during their long period they constantly and quite fundamentally changed their scope and character. This new point of view is a long step in advance in the study of these puzzling but important works.

With respect to the history of real estate law there are several important contributions. The author spends much time in arguing that the origin of the entail must be sought in the *maritagium*, a much older institution, which also, it may be added, seems to have had considerable influence on curtesy. He is avowedly promulgating a hypothesis rather than an indisputable historical fact; nevertheless his argument seems quite convincing. He also outlines the somewhat revolutionary theory with respect to terms for years recently promulgated by Jouon

des Longrais, who explains the poor protection which the termor had in former times not by the fact that he was a person of small consequence but rather that he was usually a dishonest person or at least a usurer. We have also here a fairly adequate explanation of the history of the much controverted word "mortgage", which grew up in contradistinction to the "vifgage." Littleton, who lived after vifgage had disappeared, started the misconception as to the precise meaning of the word "mortgage", which still persists.

There are, however, certain points made as to which there may well be doubt. For instance Lord Holt is given the credit for urging the Statute of Anne making promissory notes negotiable. The truth seems to be that no such statute was needed except for the stupid conservatism of Lord Holt himself. The author also attempts to defend the courts for not permitting a use on a use immediately after the Statute of Uses; but was not this after all merely a hang-over of medieval metaphysics?

The book is divided into two main divisions, the general and the special part. Of these the general part is much the longer and, as its name suggests, of somewhat more general interest.

The first subdivision of this is entitled "The Crown and the State." It has already been pointed out that this subdivision ends before the close of the 18th century but with this limitation it is an admirable summary of the political and economic aspects of legal history.

The next subdivision is entitled "The Courts and the Profession." Particular attention is given to the development of the central courts and to their relation with the local and feudal courts. The book emphasizes that the royal courts developed not only from administrative institutions but often merely from offices in the royal household. The problem of fitting in the system of royal courts with the already existing local and feudal courts was for centuries a very difficult one and it is shown that even the jury developed from this interplay of local and central institutions. There is also contained in this part an excellent history of the development of the legal profession in England to which is appended a characterization of some of the more important common law judges. The final chapter in the subdivision deals with professional literature. It is emphasized that professional literature has had a no inconsiderable effect in moulding the law itself. For example, Bracton's use of cases, though this was very far from the modern idea of precedents, yet was the first and a definite step in that direction. American lawyers will be interested to note the high opinion of Blackstone and particularly of his influence on American law which is expressed by the author.

The next subdivision relates to "External Forces." These are the civil law, the canon law, the law merchant, and equity. No comment is necessary except to say that in each case we have an admirable brief summary of the development of these various

doctrines. The chapter on equity contains characterizations of a number of the more important Chancellors of England.

The general part closes with a subdivision entitled "The Methods of Progress." These are also four in number, as follows: custom, forms of action, legislation, and precedents. At first glance the characterization of this subdivision seems peculiar. One ordinarily thinks of legislation as a progressive element but custom is not generally so regarded and certainly the principle of precedents and the forms of action are normally considered among the most reactionary elements of our law. Nevertheless the author seems to sustain his point. It is shown that the word "custom" was used in the Middle Ages in a rather peculiar sense, which has almost a legislative significance. Thus we find certain municipalities adopting the "customs" of other municipalities. It is obvious therefore that custom was originally a very flexible thing and could and did represent a very progressive element in our law. That it no longer does so is not of great significance except as a rather sardonic commentary upon the ideas of those who still think that our modern law should be governed by ancient custom.

As to the forms of action it is only necessary to point out the well-known fact that they developed in the interplay of the royal central courts upon the older local and feudal courts. In that respect they are unquestionably an important method of developing the common law, though their usefulness in this respect is, of course, long since past. As already said, legislation started out as a rather informal matter not even needing the consideration of the Council, let alone Parliament. Such, for instance, was the important Statute of Mortmain (1279) which was merely an executive order to the justices. The author expresses surprise that royal licenses to violate this statute were so common but this would seem to be perfectly natural in view of the form of this statute. It would certainly arouse no comment that what the king had given he could also take away.

The other main subdivision of the book called the Special Part has only two subdivisions, one relating to real property and the other to contracts. The part relating to real property takes up in some detail the feudal system and its results in connection with real property law, entails, uses and trusts (with detailed discussion of the statute development of this subject in both its political and legal aspects), and conveyances. The history of our rather tardy development of our law of contracts is much more briefly covered. The author notes that our contract law grew out of torts; it may be that we are today witnessing the reverse of that process in that tort law seems to be extending over the entire field formerly covered by contracts.

The book concludes with an exhortation which is certainly of enormous significance coming from a person so wrapped up in past history as is our author. He suggests that the only practical function of the study of legal history is to enable us to

bring our own law up to date and in accordance with present day conditions. To this the reviewer feels like adding his hearty "Amen."

On the whole and despite certain criticisms which can properly be made against this book it must be considered to be an admirable piece of work; it is far more detailed and also more stimulating than could be reasonably expected from a work of its comparatively small bulk. To anyone interested in the historical development of our law from any aspect whatever, this book is more than useful—it is practically indispensable.

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