THE STUDY OF LEGAL HISTORY.*

Nearly every law school within the British Empire which is concerned with the teaching of English law, or with the teaching of systems of law based thereon, includes within its curriculum, usually in the first year, the subject of legal history. In every case we find an almost exactly similar syllabus. The typical course begins with the Norman conquest, and proceeds almost at once to deal with the growth of a strong central government, the rise of a highly centralised system of courts, and the emergence of the common law. The nature and functions of the *curia regis,* and its disintegration into the Magnum Concilium, the Privy Council and the Courts of Common Pleas, Exchequer, and King's Bench are outlined, and the jurisdiction of these courts is covered in detail. The rise of the Chancellor's equitable jurisdiction is described and a few lectures are usually given on the ecclesiastical courts, the court of the Admiral, and the law merchant. The remainder of the course is usually devoted to a history of the common law, covering the forms of action in general, with a more detailed study of the few actions—ejectment, trespass, case, trover, assumpsit—in which the law of property, torts, contract, and quasi-contract has been developed. The history of the criminal law is confined to an account of the establishment by Henry II of the machinery of presentment and indictment, and in some cases extended to include the definition, over the centuries, of the principal felonies and misdemeanours. The older methods of proof are touched lightly upon as a prelude to a lecture or lectures upon the origin of trial by jury in criminal and civil cases. The old local courts of the county and the hundred, the many and varied franchise courts—courts of the counties palatine, of the forest, of the stannaries, of feudal magnates—and the feudal jurisdictions in the strict sense are examined only from the standpoint of their decline, as institutions which became unimportant in our legal history almost from its beginning. The history of equity deals only with the settlement of the jurisdiction and the growth of a system of detailed rules of law, as fixed and certain almost as the common law. For good measure the teacher usually includes a few cliches about Glanvill, Bracton, Littleton, Coke, and Blackstone, and is satisfied if, on examination, the student has some idea in which century these worthies flourished

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and can list their principal works. The account is concluded by an account of the modern reforms—the reorganisation of the system of courts and the procedural changes which took place in the 19th century.

The justification for this—and there is a real justification—is that without a course of this sort it is impossible to teach the student modern English law. The reorganisation of the courts, however simple the modern pattern may be, is only a superficial alteration of an older order. The modern rules of the common law, of tort, of contract, of property, the relation between common law and equity, and the peculiar and complicated nature of the law of marriage, of the family, and of succession, in which common law, equity, the old ecclesiastical law, and statute all play their part, can only be understood in the light of a knowledge of the old system of courts and the very different procedures which those courts used. The English legal system is a structure which has been raised over the centuries, not in the light of any consistent, symmetrical or scientific plan, but in a sense haphazardly, the materials designed to meet the needs of one century being twisted and distorted to meet those of a later century until all sight is lost of the original pattern. If, therefore, the student is to understand his modern law it can only be by tracing the history of the most important modern legal institutions to their origin in the Normans' organisation of their conquered territory.

As I have said, I freely admit the necessity for a course of this sort, and any teacher of legal history knows that in it there is a full year's work for himself and his students. But it is necessary to realise that in giving such a course he has deliberately distorted the face of history. History is the reconstruction of the past, of past events and still more of earlier social organisation, and by selecting only certain features of our judicial and legal organisation for historical study an entirely false emphasis is placed upon their relative importance in earlier centuries, and a completely false picture is drawn of the institutions and ways of life of our forefathers. This is a sin, not merely against the past, but against the present, for much of the social and legal organisation which is so conveniently ignored survives, and colours our modern institutions. Again, this centralised system of courts and of law is studied as if from the reign of Edward I onwards it existed *in vacuo*—as though it did not form but a part only of a complex system of social and legal organisation, and was but one means by which a very complicated pattern of economic and social needs was met. To illustrate this, I will take several examples. We all know that feudalism is a

term used in many senses. But obviously there must be some connection between the various meanings of the term. To the social or economic historian feudalism denotes the complex political, social and economic structure of mediaeval Europe which attempted to strike a balance between the conflicting interests of suzerain, petty potentate, and burgher, and the rights of ancient agricultural communities. The economic aspects are no less important than the political aspects, and though our imagination is caught by the knight accompanied by his trusty followers, or by the dark deeds of bold bad barons, yet we forget that no matter how violent the times, the desire for order in the hearts of the more humble was in sum as potent a social force as the rapacity or violence of the great, and that always the earth had to be tilled for its fruits in order that man might continue to inhabit it. If one can but break through the veil which separates the living present from the past we find ourselves in a society at least as complex both socially and economically as the twentieth century. To the English lawyer, however, feudalism means something else—the evolution of a body of legal rules by a strong central authority the purpose of which was to strip the type of society which I have described of all its centrifugal political aspects, a process which inevitably involved fundamental economic and social change, so that in the end all that was left was the pattern of an ordered hierarchy based upon the notion of tenure, and a very peculiar system indeed of private land law. I have not time to elaborate this theme, but if any of you have read the Paston letters you will have at least a glimpse of what I am trying to tell you.

Again, the conventional legal historian's insistence upon the importance of the Norman conquerors and particularly upon the administrative work of Henry II creates the picture that with the Conquest the slate was wiped clean, and that our modern institutions were invented by the genius of these supermen. The actual picture is far otherwise. Before the Conquest, although there were considerable local differences, the general pattern of social organisation in England and France was broadly similar. The Norman kings, partly in order to maintain themselves against the conquered inhabitants and against the rivalry of their followers, and partly in order to reap the fullest pecuniary benefit from their conquests, were compelled, at first in spite of themselves, to create a strong central government which became different from any other mediaeval feudal suzerainty. Henry I reluctantly recognised that the maintenance of order and justice was the price not only of the financial exploitation of the realm but of his own survival, and was probably

consoled by the fact that the administration of justice could be made to pay. It is true that with the accession of Henry II and the increasing growth of a class of highly educated administrators —trained incidentally in continental University law schools—we move into a different atmosphere in which, although the furtherance of the royal interest is still the paramount objective, nevertheless we find both in the ruler and his advisers the love of administration and organisation for their own sake. Nevertheless the social and legal changes produced by the Conquest are vastly exaggerated in the mind of the ordinary lawyer. Largely as a result of the sagacity and strength of the Norman and Angevin kings changes were instituted which over the course of centuries were to alter the face of our legal organisation, but it took *centuries*. During the middle ages it was the bishop's court, the lord's court, the local court, or the franchise court which regulated the civil affairs of the ordinary man, not merely settling his disputes but regulating his whole economic life. The legal historian here, I think, is guilty of the same error, but with more excuse, as the older general historian who dealt with wars and revolution and ignored entirely the peaceful and ordinary pattern of life of the ordinary citizen.

Before discussing whether the generally accepted type of legal history course found in our law schools is necessary or justified, it should be realised that even in this limited field—the mere tracing of the stages in the development of legal institutions and of legal rules—our knowledge is still of the scantiest and that there are large gaps which in the absence of research are imperfectly bridged by speculation. We have the work of Stubbs and Maitland, who, as far as English scholarship is concerned, opened up new vistas, but their work has been carried on, not as would have been the case on the continent, by a whole host of scholars, but by the efforts of a few who might almost be counted on the fingers of one hand—Helen Cam, Putnam, Plucknett, and Sayles. The evolution of the action or actions on the case is still a matter of controversy. We still know little of the way in which felony, misdemeanour, and trespass became differentiated, and in the main it may be said that much of our knowledge of the historical basis of the rules both of the substantive law and of procedure is derived from 17th and 18th century reports and writers. This is a factor which must be given considerable weight in considering the value of present courses in legal history even if their purpose is solely the utilitarian one of

understanding the modern system, because error and misinterpretation of the past will contribute to error in the present.

The main criticisms which I would make of the present way of studying legal history are the following:

Firstly the selection of a few institutions and legal rules on the basis of their survival at the present day necessarily leads to an incomplete knowledge and an entirely false perspective of the nature of our legal organisation in the past. It might be argued that if our object is solely to train professional lawyers this does not matter, but when law is studied at a University it must rise to the height of a University discipline and this it will not do unless teacher and student search for truth as far as in them lies. Further the lawyer claims to be something more than a tradesman. He enjoys the prestige and the rewards, tangible and intangible, of one who practises a profession. Now surely what distinguishes a profession from a trade or lesser occupation are not the outward and visible signs but inward and spiritual grace in that he who professes it has not merely a knowledge of its technique but a realisation of its ultimate objects and a perception of its significance in the life of man and in the culture of the age in which he lives. Again, although the field of study may be deliberately restricted for a limited purpose, the intelligent will necessarily speculate on the wider issues, social, political, and economic, inevitably raised by any sort of inquiry into the past, and here indeed it may truly be said that a little learning is a dangerous thing. Nothing can be more dangerous than theories firmly based on a misinterpretation of past human experience.

My next criticism is that distortion is produced by the study of our legal institutions without any reference to the social and economic background which gave birth to them. The typical student's text-book simply lists a series of landmarks in their development, generally without any reference as to *why* they developed and as to *why* they developed in the particular way they did. A misrepresentation of the complicated economic life of the middle ages is found in many books on legal history to the effect that in the middle ages chattels were unimportant. Again, the decline of villeinage and the rise of the leasehold interest are treated as essays in legal ingenuity without any reference to the great social and economic changes which called for the exercise of such ingenuity. In dealing with the jurisdiction of the Privy Council, the student is usually told that it possessed an extraordinary jurisdiction to deal with cases falling outside the ordinary law, a jurisdiction which was finally abolished in 1641, but the real nature of this jurisdiction, administra-

tive law of the completest and most far-reaching sort, is seldom fully explained. He is not told, for instance, such significant facts as that the Council would restrain a litigant from embarrassing by a common law action a contractor doing work of national importance. All of us, although we may not speculate upon the past, necessarily form notions about present social organisation, and there is a general idea at the present time that an age of laissez-faire has been replaced by an age of collectivism, and that in this there has been a fundamental change in our national institutions. The middle ages were, of course, essentially collectivist, and any student of Tudor legislation and of the records of the Tudor Privy Council immediately realises that the ideology of the modern welfare state would have been perfectly comprehensible to our 16th century forefathers. Occasionally the mists of time lift a little—in dealing with the history of the tort of inducement of breach of contract it is usually pointed out that it had its inception in an action on the case created by the Statute of Labourers for inducing a labourer to break his contract of service, and that the reason for this was the shortage of agricultural labour after the Black Death had swept the country. In a system of law in which for centuries legal reasoning was ruthlessly twisted to meet the changing needs of successive centuries it is obviously desirable that for the proper understanding of such rules, even if only of the surviving rules, there should be a knowledge of the ends to achieve which the rules were framed.

My third criticism is that at present legal history finds no place for the history of ideas. It is a commonplace of sociology that the existence of ideas, or an ideology, to use modern jargon, is a prerequisite to any sort of human action. In the main the history of ideas has been confined to the philosopher, and even of him it is true to say that until recently he has not realised the true importance of mediaeval philosophy, which lies, not in a supposed slavish adherence to ancient texts, but in its application of ancient knowledge to give to vigorous, turbulent, and unlettered societies self-knowledge, ideals, and a knowledge of what can be achieved by human action inspired by human learning. No work on legal history shows any real grasp of the great moral principles current in the middle ages which produced a moral and legal order amongst ignorant barbarians. More specifically, little attention is paid to fundamental legal notions without which indigenous custom and the spate of early royal legislation could not have been welded into a system. Apart from Vinogradoff there is no legal historian who adequately represents the essential part played by Roman legal

conceptions—Ownership, Possession, Contract, Delict, and the like—in the development of the common law not only in its early formative period in the times of Glanvill and Bracton, but throughout its history. No matter how devious the course nor how twisted the rule, these notions, regarded as based in reason itself, remained throughout our legal history as basic concepts always present as background patterns. The insight of Maitland and the words of some writers on jurisprudence have drawn attention to the philosophic ideas which lie behind the development of English equity, but no careful examination has yet been made of the way in which these ideas were formulated by mediaeval lawyers and administrators. To take an example from another field, one is told that the constant aim of the common law courts was to prevent land from becoming inalienable, but the question is never asked: Why did the Courts take this attitude? Why did they believe that it was better that land should be freely alienable and not tied up in one family in perpetuity? And these questions are not merely of historical interest, for we still accept as well-founded the principle that property can only be tied up for a life or lives in being plus a period of twenty-one years. The courts from an early date established the rule that the King could not interfere with or set aside the rules of the common law, and that the common law defined the limits of the royal power—doctrines of fundamental importance at the present day, and amongst the outstanding English contribution to the sum total of political ideas. Legal history recounts these facts dogmatically and interprets them, if at all, in terms of the Whig tradition. From an equally early date the courts seem to have turned their attention to the protection of individual liberty. Was this done merely as incidental to the upholding of the royal power as against the feudal magnates, or was it a recognition of a moral principle? Again the answer is automatically given in the same terms. At a time when many institutions and legal rules embodying moral values which for centuries have been as well-founded are being questioned or abrogated, a re-examination of their historical basis in this speculative light would be timely.

My fourth criticism is that legal history, as at present studied in English and Dominion law schools, makes no provision for any inquiry into the philosophical questions raised by history. Admittedly this may be done in the Jurisprudence course, but all philosophical theory should be studied in the light of the facts it purports to explain. A student asked me the other day what the difference was between historical jurisprudence and legal history. My answer was, or perhaps

should have been, that there is no valid line of demarcation, but that it is rather a matter of emphasis, dictated by pedagogic convenience. Historical jurisprudence concerns itself with the question: Are there any laws which govern the development of legal institutions, and if so, what are they? Legal history places more emphasis upon the expository and descriptive side, and is usually regarded as dealing in detail with the history of legal institutions and legal rules. But surely no university expounds matters of detail for its own sake, and the truth is surely that the fundamental questions of historical jurisprudence are also properly within the sphere of legal history. I do not necessarily admit that there are laws which govern the development of legal institutions, but since the existence of such laws is widely assumed not only by scholars but by the ordinary layman, the questions are of fundamental importance. Much of the misery which human beings have inflicted upon their fellows has been in the belief, real or feigned, in some fundamental law governing legal or political institutions, and there is some evidence at the present day for suggesting that when beliefs in fundamental laws governing legal or political developments are strong and widespread, the restraints of moral law and of the individual ethical sense are at their weakest.

At this point you may well be wondering what solution I have to suggest. From the immediate practical point of view it is obvious that inquiries of the sort suggested cannot be undertaken in one year's course, and that at least one more year's study would be required of the student. There is, however, a further concealed difficulty. It is, to say the least of it, extremely doubtful whether studies in the history of law have reached a stage when such a course could be given. I have referred to the gaps in the purely mechanical account of the stages in the development of institutions and rules. Years of patient research upon existing records, of the sort which is being done by a few scholars and the members of the County Record Societies, will have to be undertaken by whole armies of workers. We need upon English institutions the light which has been thrown by German scholars upon early Teutonic society and custom. And if this sort of knowledge is lacking, still more lacking is the knowledge of the social and economic background which is necessary before the development of any institution or legal rule can be understood. This is not the fault of the legal historian. Here he is entitled to rely on the work of his fellow-historians in other branches, and largely as a result of the pre-occupation of the general historian, at least until recent years, with

political history, the published materials are still scanty. As for the economist, he in the main appears still to believe that economic life began with the industrial revolution. All this sounds very pessimistic, but at least two things can be done. Every student can be warned of the distorted picture given in the ordinary legal history course, and, even within the limits of the existing materials, some attempt can be made to relate the historical development of the rule to its social and economic background and to answer the fundamental questions of historical jurisprudence.

I said at the beginning of this talk that I had no methodology or philosophy of legal history. I have, however, some disconnected ideas which I propose to inflict on you for the purpose of stimulating discussion. Since, throughout the history of intellectual speculation, it has been a frequent charge that the philosopher starts with a complete set of conclusions and then proceeds to devise a proof for these conclusions, I will give you first my own notions about the philosophical problems of history before dealing with methodology. It is my belief that historical research cannot yield knowledge of any laws governing the development of human life, and that any so-called laws supposedly so derived are the product of *a priori* metaphysical speculation into which the facts of history are fitted by way of illustration. Applying this to legal history, I do not believe that there are any general laws which govern the development of legal institutions and legal rules. Still less do I believe in any unilineal pattern of legal development. Nor do I believe that history repeats itself. I use the word "believe" advisedly because these things are essentially a matter of belief, of value judgment, and cannot be proved. The acceptance of these beliefs, however, does not involve any pessimistic appraisal of the importance of the philosophical inquiry. On the contrary I believe such an inquiry to be profoundly important for two reasons. Firstly, there are and always have been theories as to law and society which have been widely accepted as natural or general laws of legal and social development, views held not only by scholars but by the ordinary citizen, even though he has never read a book or even if he is illiterate, and these theories have been the necessary prelude to and mainspring of legal and social changes, often fundamental, sometimes violent and cataclysmic. Doctrine may be formulated and refined in the philosopher's study, but its seeds are derived from the world of action, and after refinement it passes out again through the window

into the forum, the market, and the crowded street. Change there must always be while man must wring a livelihood, with the hope of something better, from his physical environment, and it is a very great boon indeed if there is engendered an attitude of criticism and scepticism towards ideologies, which are in final analysis but the haphazard mingling of philosophical theories. Not least of the many benefits flowing therefrom will be some appreciation of the element of continuity in human institutions, so necessary not only to the material but also to the psychological welfare of mankind. Critical appraisal of such supposed general laws will at least engender the attitude that they are merely tentative working hypotheses upon which only limited reliance can be placed. Secondly, man in society is constantly faced with the problem of action—of choosing between several possible lines of conduct. This he must solve, if he is not the slave of *a priori* theory, in the light of experience. And the actual first-hand experience of any human being is very small. By the study of legal history. The primary task for the scholar is the reconstruction, by adding to his own tiny store the recorded experience of his ancestors. Perhaps in denying the existence of general laws and in making this assertion I am making an unreal distinction, for by the objective reconstruction of the past I admit that the student intuitively learns certain lessons which enable him the better to interpret and understand the present. The lesson, however, is too vague and elusive to be formulated with the precision of scientific or metaphysical laws and is at most an enlargement of subjective experience.

Having stated these beliefs about the philosophy of legal history I can now conclude with my notions on the proper method of study of legal history. The primary task for the scholar is the reconstruction, by objective research, of the past—the past legal organisation of of society, the development of legal rules, the reconstruction of the legal ideas of past generations, and a critical appraisal of general philosophical notions about legal development. In this reconstruction and appraisal there should be no attempt at conscious interpretation. It is too much to expect and it is probably undesirable that there should be no interpretation by scholars of the facts of legal history, but I do suggest that the facts should be found before interpretation begins, and that it is desirable that the research worker who establishes the facts should be by temperament a person with the desire to discover but not to instruct, and that those feeling the divine urge to enlighten their fellows by the interpretation of history should be content to work from the results of the investigator.

When and only when the volume and quality of historical knowledge has been increased substantially by studies of this sort it will be possible to include in the curricula of our university law schools a course which is not a hackneyed introduction to the study of modern law but a university discipline in the real sense of the word.

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