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BOOK REVIEW

LEGAL BIBLIOGRAPHY AND THE USE OF LAW BOOKS.

By ARTHUR SIDNEY BEARDSLEY.* The Foundation Press, Inc., 1937.

In the welter of praise and criticism which clusters about the framework of the common law there is always discernible a sort of reverent admiration for the quality of suppleness which has enabled its spirit to survive the sclerosis of the logically impacted intellect. Exact definitions and the establishment of absolutes serve well in various scientific fields for the purposes of discussion, although at the best they are but estimates of probable action; but law encircles rather than explains every-day conduct, hence the "principles" of law are constantly undergoing laboratory tests of verity, that is, of their workability.

Only recently was it said of the common law: "Under the orthodox theory of the common law its principles were supposed to be universal, eternal and immutable".¹ The use of the past tense suggests that the orthodox theory is or has gone out of the window. But if ever there has been such a theory it is traceable to the influence of such great writers on the common law as Blackstone, Kent and Story; and, more importantly, to the predilection of American judges for generalizations as a substitute for exacting factual analysis. Oddly enough, the American reports even of the earliest date do not exhibit such cautious reasoning as is found in the English books, considering that the English reports down to the beginning of the nineteenth century are the sources of our common law.

It is no criticism of Kent and Story, or of any expounder of the common law, to reject as unreal any suggestion of the immutability of principle or to accept, with reservations only, the implications of rational exactitude incident to formal classifications. Blackstone must, at least, bear some of the blame for this form of indoctrination of "immutableness"; for Blackstone presented the profession with that systematic logical analysis of the common law which became classical in the American books. Yet Blackstone did not depart much from Bracton in method and it may be suspected that the civil law writers had much influence on the style of both of these men. Such successive influences, however, do not account for the differences in judicial attitude between English and American judges, for the former have had much the longer exposure and still adhere to their traditional caution.

The observable difference in attitudes must be laid to something else. Perhaps that something else is to be found in the puritan

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¹Hon. Arthur T. Vanderbilt, President of the American Bar Association, in an address on University Legal Education and the American Bar, *American Bar Association Journal*, vol. xxiv, No. 2, February, 1933, p. 105, at p. 107.

genius for moralizing; a genius not particularly characteristic of maturity in experience, yet not unfamiliar nor without its peculiar value when new institutions and new social conventions are in the making. The simplicity of the Declaration of Independence and the Constitution of the United States are outstanding in world history as examples of the thought and meaning which this kind of intellectual purity can produce.

A less esoteric explanation, however, suggests itself as the consequence of the state of society in this country during and for many years following the colonial period, when pioneering conditions prevailed and the methods of making and administering the law were not only subordinate to the working out of political formulae but also hampered by lack of precedent and the paucity of lawyers trained in the ever present discipline of the English courts; a discipline which apparently required more familiarity with the course of judicial decision as the basis for resolving new as well as old controversies, rather than appeals to "first" principles and the power of the syllogism.

In other words, American lawyers and American judges did not very generally, nor very early, have access to original sources, even of their contemporary period, when American common law was developing, and the style of argument and opinion taking shape. Under such conditions it is not at all surprising that the American legal mind became wedded to the notion of fixed and immutable principle as the foundation of all order and so readily accepted the syllogisms of Austin as to the meaning and content of the common law; the more so, perhaps, because the Austinian definition of law as "sovereign command"² jibed so well with the notion of a republican form of government under the aegis of strict constitutional declarations of power. The result was that, until lately, for the great mass of American lawyers the rules of the common law may have had the appearance of a "sort of natural law which, though evolved from the past, are to be applied as fixed rules to all cases arising in the future".³

Possibly it was a reaction from over-much principle that gave so much emphasis to the case system of teaching law; for the study of judicial action in relation to its factual setting reduces principle to its proper proportions in the judicial process as marking out the path from one exercise of the judicial function in adjusting individual controversies to another. By such study even the language of the law is brought to the severe test of comparing words with actions and the constant evaluation of principle in terms of result. It is an interesting subject of speculation as to what now might be the complexion of our legalism if more than possibly two generations of American lawyers had been universally and constantly in contact not alone with texts and encyclopedias but with reported cases dealing with almost the whole of the recorded common law.

The process of collecting, reporting and publishing judicial decisions has kept pace in efficiency with demands made upon the courts and the legal profession by the increase in the volume and

²AUSTIN, LECTURES ON JURISPRUDENCE.

³LEWIS, HISTORY OF AMERICAN POLITICAL THOUGHT (1937), p. 214.

complexity of legal business. Even the first trickles of judicial thought are being resuscitated and added to the armory of common law lawyers.⁴ Great collections of law books outside of private libraries are easily available to practicing lawyers as well as students and scholars. The day is long since past when a lawyer actively engaged in important litigation waited with longing and impatience for the publication of judicial records bearing directly upon the crucial problem in his case, as did Horace Binney one hundred years ago.⁵ Hardly any lawyer nowadays can plead that, for want of books, he is prevented from examining all the material which can throw light upon the legal aspects of his clients' immediate problems; and the important books, beyond doubt, are the reports of judicial decisions.

Books are of no value, however, if the people who need them do not know about them. The fairly late introduction into law school curricula of courses on legal bibliography and the use of books of the law has the very great value of starting the young lawyer with some sense of the meaning of authority in the law and the places where it can be found. The value of this knowledge is not restricted to the period of apprenticeship but follows the vocation of the scholar, practitioner or judge, at once facilitating and enlarging each one's understanding of the rational purposes of law and increasing his command over its methods. Yet, without some descriptive index to the accumulated legal material its content is lost in a conglomerate of ink, paper and leather, the very mass of which defies closer inspection.

Dr. Beard's recent book is an efficient tool with which lawyer and judge, no less than the student, can pry open the source-material of the common law, both in England and in the American jurisdictions; not merely of the past, but currently. Prepared primarily for the use of students, the book is the product of a long experience as librarian and a comprehensive knowledge of the material. It is meticulously and lucidly organized; the nature of the source books in the field of law, their relative importance, their history, and their uses are ably described; the collateral material of the digests, encyclopedias, commentaries, texts, annotations, and the citation devices are exhaustively dealt with; and resistance to the unfamiliar labels and official designations is completely broken down by bibliographies of state and territorial reports embodying the American decisions, and of the English, Irish, Scotch and Colonial reports.

Familiarity with the mere existence of this abundant legal material ought to encourage any lawyer to allow his search for reason

⁴Such, for example, as the publications of the Selden Society in England, and The Ames Foundation.

⁵In the case of *Vidal v. Girard's Ex.*, 2 How. (U. S.) 127 (1844). See reference of Justice Story to then recent publication of the records of Chancery cases prior to the Stat. 43 Eliz. and compare with Binney's argument. Justice Story said: "They (the records) establish in the most satisfactory and conclusive manner that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in the Court of Chancery". This was the crux of the case.

and authority to take a wide range. Dictation rather than elucidation is too often the tone of legal discussions. Persuasion, of course, requires an appeal to principles in the sense that they are believed to be sound and authoritative by general acceptance. Yet, even in the field of forensic discussion of law, familiarity with the materials available for the guidance of the courts can hardly fail to improve the skill of the practicing lawyer and raise the quality of judicial decisions. A strong conviction of the practical value to the lawyer of a knowledge of the materials of his profession may be enough justification for the suggestion that, if any lawyer is going to practice with only one book in his library, this book should be it. At least that lawyer will know where the law is recorded which is one step in finding out what some of it is.