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Book Reviews

EARLY ENGLISH LEGAL LITERATURE. By Theodore Frank Thomas Plucknett, F.B.A., Hon. Fellow of Emmanuel College, Cambridge, Professor of Legal History in the University of London.* Cambridge and New York: Cambridge University Press, 1958. Pp. viii, 120. 18 s. 6 d.; \$3.75.

Professor Plucknett is best known in this country for his studies of English legal history per se.¹ He deserves to be equally well known here for his valuable monographs in historical materials from which "the pure history of legal doctrine is significantly and properly absent."² These are intended for students of legal history who wish to go to the sources, designed to teach not so much the content of the old books as how to read, understand and evaluate them in the light of the setting in which and purpose for which they were written. They have dealt with mediaeval statutes,³ the Year Books,⁴ the earliest modern case reports⁵ and with old law books intended for the education of students and practitioners.⁶ The present work is a study of non-statutory books published in the twelfth through the fifteenth centuries. It is longer, more perfect, and designed for a more mature reader, than Sir William Holdsworth's treatment of this literature.⁷

To the law teacher who is struggling to establish or maintain a course in legal history against the apathy and utilitarian emphasis of students, administration and organized bar the first chapter⁸ seems at first to be a manifesto of class treason. It

*Professor Plucknett is Dean of the Faculty of Laws of the University of London and Literary Director of the Selden Society.

1. Notably, *A CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956); Professor Plucknett is the author of a monograph on *THE MEDIEVAL BAILIFF* (1954), editor of *TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY* (10th ed. 1946), and co-editor of *POUND AND PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW* (3d ed. 1927). He has published numerous articles and reviews on English legal history and biography.

2. Plucknett, Book Review, 26 *COLUM. L. REV.* 1052, 1053 (1926).

3. *STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY* (Cambridge 1922); *LEGISLATION OF EDWARD I* (Oxford 1949).

4. *E.g.*, Introduction to the *YEARBOOKS OF RICHARD II: 13 RICHARD II* (Ames Foundation 1929); Introductions to the *YEAR BOOKS OF EDWARD II*, vol. X (Selden Society vol. 63, 1947), vol. XXIII (Selden Society vol. 65, 1950), vol. XXIV (Selden Society vol. 70, 1953).

5. Plucknett, *The Genesis of Coke's Reports*, 27 *CORNELL L. Q.* 190 (1942).

6. *E.g.*, Plucknett, *The Harvard Manuscript of Thornton's Summa*, 51 *HARV. L. REV.* 1038 (1938); Plucknett, *Ellesmere on Statutes*, 60 *LAW Q. REV.* 242 (1944); Preface to *BREVIA PLACITATA* (Selden Society vol. 66, 1951).

7. *SOURCES AND LITERATURE OF ENGLISH LAW* 23-36, 78-89 (Oxford 1925). Much of this was based on 2 *HOLDSWORTH, HISTORY OF ENGLISH LAW* (1909; 4th ed. 1936). Cf. *WINFIELD, CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 145-83, 256-85 (1925).

8. "Maitland's View of Law and History," reprinted from 67 *LAW Q. REV.* 179 (1951).

declares that knowledge of legal history is unnecessary to success as a lawyer.⁹ The key to this initially astonishing depreciation of his own field is to be found in Professor Plucknett's remark of thirty years ago, "The common law has always been inclined to rely upon a conventionalised version of history which had among its many conveniences immunity from questioning, at least within the profession. . . ."¹⁰ He, in common with Professor Maitland, believes that what the practising lawyer needs to know is not what actually happened in history but what the authoritative pronouncements of the courts declare happened.¹¹ What Sir Edward Coke wrote about the meaning of a thirteenth century charter may be historically inaccurate but if his version has been accepted by the courts, it is, in this view, all a lawyer need know to win cases. Even if the dichotomy of actual history and authoritative dogma is understood and accepted the view that knowledge of the former is not needed by the practising lawyer is, to say the least, questionable. Knowledge of the actual historical development of legal doctrines may be a surer key to forecasting future development than knowledge of the official view of the past. Moreover, the authoritative view may be changed if its falsity is incontrovertibly established, as was brilliantly demonstrated by Horace Binney in the *Girard College Case*.¹² Professor Plucknett has enthusiasm for the cultural value of legal history to the lawyer;¹³ he places too low an estimate on its utility to him.

The next three chapters are devoted to writers, notably Glanvill and Bracton, who sought to lay down substantive English law in authoritative treatises, similar in form to Continental works, for a legal profession which was at home in Latin and familiar with civil and canon law. The earliest of these, in the effort to ground their works on authority like that which the Continental writers found in imperial legislation and papal decretals, unwisely relied upon codes of Anglo-Saxon kings. Glanvill and Bracton properly founded theirs upon the actual practise of the English royal courts and, in doing so, necessarily changed the organization of the subject matter from a basis of types of rights to one of types of remedies. The treatment of Bracton constitutes a warning, especially valuable to lawyers not trained in historical method, against assuming that the presently available form of an ancient work corresponds to the original. That Bracton in print suffers from omissions and interpolations has long been known. Certain errors, notably in Roman law, occur in the earliest manuscripts, which fact has led to inferences that (1) Bracton's knowledge of Roman law was deficient or, in the alternative, that (2) all the manuscripts derive from one made after Bracton's death by a redactor who garbled the text.

9. PLUCKNETT, *EARLY ENGLISH LEGAL LITERATURE* 13, 17, 18 (1958) [hereinafter cited as PLUCKNETT].

10. Plucknett, *Book Review*, 28 *COLUM. L. REV.* 676 (1928).

11. PLUCKNETT 11-12, 17.

12. In *The Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 17 U.S. (4 Wheat) 1 (1819), it was held, on the ground that charitable trusts were not enforceable in England prior to the Statute of Charitable Uses (1601), that a charitable trust could not be created in a state which had repealed that statute. By showing that this ground was historically false, Binney induced the Court to overrule that decision. *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127 (1844).

13. PLUCKNETT 18.

Professor Plucknett suggests a third theory, understandable to the modern man of affairs who stamps "dictated but not read" on his letters, that the author dictated his work to clerks over a period of years but never found time in which to check the accuracy of their transcriptions.

The final chapters deal with literature written for a new type of legal profession which developed in the latter part of the thirteenth century, French-speaking laymen, inept at Latin and unfamiliar with the civil and canon law, whose main interest was in oral pleading and whose knowledge of both substantive and procedural law was derived chiefly through oral transmission of tradition in the Inns of Court and the courts. This literature included form books for writs and pleadings, catechisms to be memorized by students, and the Year Books, all of which tended to neglect substantive law, the formulation of general legal principles and logical organization of the subject matter, in their concentration on original writs and oral pleading. Professor Plucknett thinks that the Year Books were not really reports of cases looked upon as precedents but primarily samples of oral pleading used by the law student or lawyer to improve his court-room technique. He points out that their form tends to be that of a dialogue, that they often omit mention of the decision, that the greatest demand was for those with the best examples of pleading rather than those with the newest cases, and that their popularity declined with the advent of written pleadings in the fifteenth century.

This book is not recommended for the lawyer whose interests are limited to winning cases and collecting fees. It will prove interesting but not essential to the lawyer who is content to learn legal history from the pages of Maitland and Holdsworth. It will be treasured by the lawyer who delights in puzzling his way through folios of blackletter text in Law French, the record of words which echoed against the walls of Westminster Hall half a millennium ago.

WILLIAM F. FRATCHER*

THE FRENCH LEGAL SYSTEM: An Introduction to Civil Law Systems. By Rene' David and Henry P. de Vries. New York: Oceana Publications for Parker School of Foreign and Comparative Law, Columbia University, 1958. Pp. 152. \$5.00.

This small but interesting book, jointly authored by two comparative law scholars, a Frenchman and an American, claims by its subtitle to serve as an introduction to civil law systems, but does not define what "civil law," if not used to refer to "private law," but to distinguish it from Anglo-American law, means. "Civil law" in this application of the term, does not mean Roman law, or Roman law as restated in Justinian's *Corpus Juris*, although an erroneous definition to this effect has been given by Blackstone¹ and from his *Commentaries* been taken over into certain current reference works.² Incidentally, the "Regius Professor of Civil Law" at the University of Oxford in England teaches Roman law, not civil law. The latter though

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1. BLACKSTONE, COMMENTARIES *80.

2. BLACK, LAW DICTIONARY 312 (4th ed. 1951); BALLENTINE, LAW DICTIONARY 219 (2d ed. 1948); 14 C.J.S. *Civil* 115 (1939).

to a great extent an intellectual child of the Roman law, received substantial graftings from Germanic, Canonic, and other non-Roman sources, so that there are some differences between Roman law and the modern civil law, although this has been overstated in an observation by two distinguished English authors that "there is more affinity between the Roman jurist and the common lawyer than there is between the Roman jurist and his modern civilian successor."³ For instance, the comparative negligence doctrine of the civil law, which has been adopted in England⁴ and certain other common law jurisdictions,⁵ is not of Roman law origin.⁶ The conception of civil law is difficult to define. This writer has on another occasion attempted to describe its meaning in an exact way.⁷ Among the countries which belong to the civil law family are, apart from numerous others, France, Germany, Italy, Switzerland, Spain, The Netherlands, the Union of South Africa, and the South American countries. There are also certain legal systems which in addition to a civil law basis contain substantial admixtures of common law features. Such hybrids are, for example, the law of Scotland⁸ and the law of Louisiana.⁹

The present book, despite its subtitle, does not purport to deal with the civil law system in the broad meaning of that term. It deals only with French law although the authors admit that there are essential differences between the legal system of France and those of other civil law countries.¹⁰ They believe, however, that "the French legal system, especially for the professional trained in the common law, serves as the nearest and most direct bridge to the civil law world."¹¹ They do not attempt to convey to their readers knowledge of the rules constituting in their aggregate the law of France; they merely undertake to give some information on the French "habits of legal thinking."¹² The book mostly consists of comparative law observations on a high level of generality, considering, however, not only the French private law, but all branches of the French law. While those observations are most interesting and thought-provoking, it would seem to the reviewer that they can be fully grasped only by a reader who has at least a fair knowledge of those concrete matters in the French law to which the authors allude in an abstract way. And, being purely textual, the book is completely different in approach from the

3. BUCKLAND & McNAIR, *ROMAN LAW AND COMMON LAW XIV* (2d ed. Lawson 1952).

4. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28.

5. PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 3 (1953).

6. BUCKLAND & McNAIR, *op. cit. supra* note 3, at 372.

7. Koessler, Book Review, 10 *STAN. L. REV.* 385, 388 (1958).

8. Gibb, *The Inter-Relation of the Legal Systems of Scotland and England*, 53 *L.Q. REV.* 61 (1937).

9. Tucker, *The Code and the Common Law in Louisiana*, in *THE CODE NAPOLEON AND THE COMMON LAW WORLD* 346, 371 (Schwartz ed. 1956).

10. DAVID & DE VRIES, *THE FRENCH LEGAL SYSTEM: An Introduction to Civil Law Systems* 6 (1958).

11. *Ibid.*

12. *Id.* at 5.

two compendious cases-and-materials books on the civil law system that have been published in this country.¹³ It is believed, however, that it may well serve as a supplementary aid in comparative law courses on the civil law system.

MAXIMILIAN KOESSLER^a

THE GOOD SOCIETY. By Hugh Evander Willis. New York: Vantage Press, 1958. Pp. 642. \$7.50.

The author of this book is a legal educator emeritus who by law review articles and books has made noteworthy contributions to the legal literature. His present interest seems, however, to be concentrated on divinity, ethics, sociology, politics, and similar non-legal matters. At any rate, what he offers in this book only incidentally deals with legal material, and only in so far as it surveys the principles espoused by the United States Supreme Court in its constitutional decisions. He believes that the Supreme Court has thus created, and not merely construed, our Constitution. And he is enthusiastically laudatory of those constitutional decisions, whereas he is an acrimonious and passionate critic of other parts of our society, especially of its educational system, its alleged control by big capital and the alleged evil effects thereof, its alleged failure to live up to what is ordained by our Constitution, and its allegedly disastrous cold war policy. While he seems to be a firm believer in God, thus approaching his subject from a completely different angle than does Julian Huxley in his most interesting *RELIGION WITHOUT REVELATION*,¹ he sharply attacks the established churches, claiming that they do not teach the religion "of Christ," but a religion "about Christ," and that this is due to an essential difference between what the founder of Christianity stood for and the transformation which his gospel received from St. Paul and those who followed St. Paul. He is not only critical, however, but develops also his partly realistic, partly over-theoretical ideas on how our system could be so changed as to become a "Good Society," which according to him, it has not been so far. His main assumption in this respect, not expressed but implied in his discussion, is substantially different from Dante's "Hell is paved with good intentions." He obviously assumes that enlightening the people about the righteous principles will have the effect of causing them to live up to those ideals, an assumption which at least borders on that, if it is not, utopian. Also in other respects the author does not always tread on solid ground, and he most conspicuously does not supply any documentation for his propositions, which thus rest on his own authority. Actually the book is written down to the reader, and sometimes sounds like a "return to Christ" sermon of a Billy Graham. One of his a priori

13. SCHLESINGER, *COMPARATIVE LAW* (1941); VON MEHREN, *THE CIVIL LAW SYSTEM* (1957).

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1. "I have called this book *Religion Without Revelation* to express at the outset my conviction that religion of the highest and fullest character can co-exist with a complete absence of belief in revelation in any straight forward sense of the word, and of belief in that kernel of revealed religion, a personal god." HUXLEY, *Religion Without Revelation*, 13 (Mentor Book ed. 1958).

assumptions is that the God of the Holy Scriptures predestined only the physical being of man, but left man unbridled freedom of choice and unlimited self-responsibility as to moral development. It is with this in mind that he sets forth what he believes is fundamentally wrong with us Americans.

By "Good Society" he actually means the ideal of a democracy which he believes could become a reality if we would live up to the principles announced in the Sermon on the Mount and those inherent in the constitutional decisions of our Supreme Court. In a festival speech delivered on February 12, 1959 before a joint session of both houses of Congress, our great poet and historian, Carl Sandburg, said with regard to Abraham Lincoln: "Democracy? We can't find words to say exactly what it is, but he had it. In his blood and bones he carried it. In the breath of his speeches and writings, it is there. He had the idea. It's there in the lights and shadows of his personality, a mystery that can be lived but never fully spoken in words."² That the author of this book has the courage of attempting to solve that "mystery" of democracy which according to Sandburg "can be lived but never fully spoken in words," and that he does this in a highly dogmatic way, he cannot be blamed for, as he cannot be blamed for the far from detached, rather strongly emotional manner in which he professes his political creeds. Nor, as he writes with the honest idealism of one believing that proper ideas about democracy are an efficacious means of establishing a good democracy, or a "Good Society," as he calls it,³ should he be branded as an "egghead" ignoring the reality of things. And his book is full of interesting and inspiring thoughts. But it would have been better than it is, and more effective, had he not indulged in a strongly longwinded and frequently repetitious manner of discussion, rather had made his propositions in a more condensed form.

MAXIMILIAN KOESSLER*

2. As reported by Russell Baker of New York Times Services, printed in San Francisco Chronicle, Feb. 13, 1959.

3. Compare the following words which a famous British writer of mystery stories puts into the mouth of the main character of one of them: "Mind you, I still believe in democracy. But you've got to force it on people with a strong hand—ram it down their throats. . . . You won't turn people into angels by appealing to their better natures just yet awhile, but by judicious force you can coerce them into behaving more or less decently to one another. . . . Evolution is a slow process." CHRISTIE, *The Secret of Chimneys* 218 (New Dell ed. 1959). *Quere*: Are the difficulties standing in the way of enforcement of the desegregation rulings of the United States Supreme Court an object lesson of the foregoing?

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