University of Chicago Law School
Chicago Unbound

Journal Articles | Faculty Scholarship

1928

Story of Law

Ernst W. Puttkammer

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

 Part of the Law Commons

Recommended Citation
Ernst W. Puttkammer, "Story of Law," 23 Illinois Law Review 413 (1928).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

BOOK REVIEWS

THE STORY OF LAW. By John M. Zane. New York: Washburn, 1927. Pp. xiii, 486.

The object of this book, according to its author is "to put the story of legal development in such a way that it may carry interest to the general reader." With this object kept strictly in mind it may be said that the book is successful, as undeniably it is informative, it is interesting, and it is full of evidences of that great fund of general information that is the principal charm of Mr. Zane's writing. It does tell the story of legal development in a manner suited to the needs of the intelligent layman.

Proceeding now to a general description of the book and the thesis around which it is built, the body of the law, he holds, is a development, but an almost entirely unconscious and largely uncontrolled development, of the human race. In its first dawn rules were few because the pastoral society of that day had few problems to vex it. With the rise of agriculture and, even more, of commerce human relations become more involved, and necessarily there came more complex rules to govern these relations. At this stage came the first great law system of which we have definite knowledge and which is the first link in the chain running down to today—the famous Babylonian Code of Hammurabi. This system, with detailed rules often strikingly like our own of today, was the parent of the Jewish law, which became its successor after the Assyrian conquest ended the great days of Babylon. To this state, says Mr. Zane, we owe "the emergence of the individual," that is, a recognition of individual, rather than family, responsibility, a step forward the importance of which was even greater than is its obviousness today. From the Jews the torch passed somehow—we are not told very clearly how—to the Greeks, who by their logical genius and keen analysis greatly developed substantive law but who failed entirely in the task of simultaneously advancing adjective law. Litigation with them never rose above a submittal of a case to the tender mercies of the Athenian mob, however imposing the name by which that mob might momentarily clothe itself. But the beauty and symmetry of the Greek, or rather Athenian, system were not wasted. They profoundly impressed that even more logical and far more practical people, the Romans, who proceeded to remake and recreate the old into an essentially new system, which has ever since been and for long will be the wonder and admiration of all law students. Then came the crash, seemingly permanent, of human knowledge, and only ages later the slow reawakening, thanks to the small spark of learning which had been preserved by the church to regulate its internal and exterior affairs. The canon law was the source from which civil law was recreated thoughout Europe, in England no less than on the continent, due partly to its manifest

superiority to the uncouth Anglo-Saxon law, and partly because, after the Norman Conquest, all the great judicial officers were uniformly church trained men.

The thread having now been followed to England, the remainder of the book, forming nearly one-half of it, traces the principal changes in the English law, such as the creation of the jury system and the rise of two entirely separate systems—common law and equity—and finally fits our own American law into the picture by describing its outgrowth from English law.

This then is the picture as Mr. Zane paints it. It remains to ask how well and convincingly he has done his work. And here almost from the very first page we are brought squarely face to face with the two shortcomings that so often, and so needlessly, mar much of Mr. Zane's writing. One of these is a propensity to make sweeping remarks that obviously will not bear close scrutiny. The other is the unfair comment, one might almost say abuse, with which he finds it necessary to heap all those with whom he disagrees. Nothing will more quickly and more surely alienate the sympathy of every fair reader. His opponents almost invariably have "childish minds;" they "think they prove something." Of a statement made by John Chipman Gray he says, "Could anything be more absurd? He was demonstrating merely that he did not know what law was." Heinrich Köhler and Rudolph Stammler, two of Germany's, and Europe's, recent great lights, are contemptuously described as "men considered jurists." Plato's only great characteristic, it seems, was his "rock-ribbed conceit." His venturing to believe that he could contribute anything to legal learning was "pathetic." In fact his book on the "Laws" has in it "nothing of value" "although many simple souls . . . have been impressed." And as for those modern reformers who believe that our criminal law is not yet in a state of absolute perfection in its treatment of insanity as a defense, they themselves are probably the ones who are insane. At any rate "the common sense of mankind should consistently refuse to listen to the confused stammerings of these maudlin phrenologists." But illustrations need not be multiplied. Enough has been said to make clear the unholy joy felt by the reader when Mr. Zane in some sweeping remark in turn lays himself open to attack. Nor are such occasions so rare. Sometimes they are so obvious as to raise merely a puzzled feeling how they are possible. For example he says that in primitive times "the making of a will was, of course, unknown, for it could not be conceived of until language came to be written." But what of the nuncupative will? What of the earliest Roman wills? Or of post obit gifts in early Anglo-Norman days? All these were transactions in which no writing was involved. Or again: He dismisses what he calls the metaphysical or philosophical justifications of private property by saying: "The real justification is a more prosaic matter. Private property in real and personal property exists because if not so owned, the property cannot be bought and sold and dis-

posed of in the ordinary course of trade." In other words, there has to be private property because if there were not, there would be nothing to buy or sell! One is sorely tempted to make use, hereabouts, of Mr. Zane's own adjective, "childish." Or again: With reference to the value of an oath as making testimony more likely to be truthful, on p. 96 he says, "there are countless people who do not hesitate to prevaricate, but if they are put under oath the old commandment has its effect," whereas on p. 235 belief in the value of an oath gets the usual label of "childish."

Some of his non-sequiturs are no less curious. For example this explanation of how the *lex talionis,* an eye for an eye and a tooth for a tooth, arose (p. 35): The primitive tribe had an instinct of self-preservation. When one of its members hurt another this instinct of self-preservation was hurt. The old equality was yearned for. Therefore the injured person was permitted to recreate such an equality between him and his assailant by mutilating him in the same manner in which he had been mutilated. Rather neat, to demonstrate that the instinct of self-preservation demanded that there be two injuries instead of one!

Even more curious is this specimen (pp. 43-44): An infant at primitive law only became a member of the family if the father formally acknowledged it; he might, if he chose, deny that it was his. (True enough.) *Therefore* it was at his disposal to kill or let live, hence the custom of infanticide. To say that a denial of ownership confers a right to destroy the object not owned is surprising, to put it mildly. And on the next page he adds that such destruction of *unwanted* babes was the origin of human sacrifice. But we all know that primitive sacrifice was the giving up of very much *wanted* things to a spirit which presumably also wanted them—never of unwanted objects.

Such errors, even though they are annoying, are largely innocuous because they are apparent. Others, being of a more technical nature, are more dangerous, as they will be noticed only by the lawyer-reader, whereas the book is meant at least equally for the layman. Of such a nature is the extended description of how a new law system came to arise at Rome. This, Mr. Zane says, was due to a feeling that it was unfair to subject the stranger within the gates to the technicalities of the system applied between citizens. A strange and surprising solicitude for the usually despised and harshly treated outsider! Anyone who has read Fustel de Coulange's great book, "La Cité Antique," will notice how falacious this is. The ancient mind conceived of law as an exclusively local possession, handed down by one's local gods, and a sacred heritage not to be shared with outsiders. From that idea came the need of a separate new system for the more and more numerous foreigners at Rome. That it turned out to be a better system was merely an unintended and unexpected result.

A final example of the author's not entire reliability bears on his effort to show to what a great extent even the English

law is merely a development of Roman law, a thesis which he carries much further than most writers do. To help bring this out he describes a certain royal edict of Charles the Bald, and the proceedings consequent on it, both of which, he triumphantly points out, were *pure Roman law.* No doubt, but what of it? It has no bearing on English law, as Charles the Bald was not a king of England but of France.

This review will no doubt be regarded as an unfavorable one. Yet it would be unfortunate to leave this impression too definitely. If the book is not a great one and if faults can readily be found in it, it nevertheless does picture clearly the great surge of the law, ever forward. It does so in a manner that is never boring and almost always interesting. And it is richly adorned with evidences of that ripe and wide-spread knowledge, with which Mr. Zane is so richly endowed. And these, be it said, are no mean merits.

E. W. PUTTKAMMER.

THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM. By Felix Frankfurter and James M. Landis. New York: The Macmillan Company, 1927. Pp. viii, 349.

"The little community of Euclid Village enacts a zoning ordinance; the Supreme Court has to pass on it. The United States makes a treaty with Germany concluding the Great War; not until the Supreme Court has spoken, in a law-suit nominally between two individuals, do we know the limits and meaning of the treaty. The Senate seeks to investigate the propriety of contributions in senatorial campaigns; the power to pursue such investigation turns on Supreme Court decisions. . . . Most of the problems of modern society, whether of industry, agriculture or finance, of racial interactions or the eternal conflict between liberty and authority, are sooner or later legal problems for solution by our courts, and, ultimately, by the Supreme Court of the United States" (pp. v-vi). In such graphic manner do the authors of this book introduce its theme, and thus lucidly portray the tremendous scope of the business of the federal courts. Indeed, the materials presented in the book are themselves so tremendous in scope that one is at first inclined to wonder at the principal title and to feel that the sub-title is much more apt. As one penetrates with the authors into the maze of procedure, practice, and business in the Supreme Court, one readily appreciates how closely knit is the whole system, after all; how "the efficacy of the Supreme Court was seen to depend upon the distribution of federal judicial power and the system of courts devised for its exercise" (p. 70). In other words, in order to examine into the business of the Supreme Court, Professors Frankfurter and Landis have been impelled to study the working of the entire federal judicial system. They have, for example, given us in considerable detail the legislative history of almost every act of Congress relating to the fed-