

that it nullified the intent of the covenantor to perform or pay damages." The learned author's estimate that "that construction of the contract was not in accord with the purpose of the parties, nor the historic position of the common law," is in accord with the view recently expressed by Du Panca, J. in *British Homophone Co. v. Fury and Crystallate Gramophone Record Manufacturing Co.*¹²

The case-book is an extremely valuable one, and the selection made by the learned compiler is most judicious. A student who can master the contents of both books will not only be a formidable antagonist in the courts, but will have donned much of the panoply of an accomplished jurist. Professor McClintock is to be most heartily congratulated on his achievements.

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Handbook of Anglo-American Legal History. By Max Radin. St. Paul: West Publishing Co., 1936. Pp. xxii, 534. \$5.00.

Whatever Professor Radin does will be well done. Before we open this book we know that it will be the product of intellect and scholarship, couched in a clear, simple and graceful style.

Apart from the preface and the first two chapters, the book does not deal with the history of the law by periods. No attempt is made to study the development of the common law as a whole; that is, to study the interrelated development of substantive law, courts, and procedure, by periods. If the student who uses this book wishes to get an idea of the condition of some topic of substantive law, such as real property or contract, at any given stage of the development of the common law courts, or if he wishes to get an idea of the corresponding methods of trial, or of procedure, he must work it out himself. In doing this, he will be helped greatly by the tables at the beginning of the book.

Whether each separate topic should be developed as an entirety from beginning to the end, as is here done, or whether the whole law should be developed as an entirety, its development necessarily divided into suitable periods (if any such really exist), is a matter of opinion. Continuity in presenting each topic is undoubtedly secured by this arrangement: but unless the student makes diligent use of the tables, and of Chapter I on the political history of England, he cannot get a picture of any period of the development of Anglo-American law. He cannot see a living, working system of law develop, unfold, and broaden down. If law is a unity, that unity is cut through and through in many different places; and before us we find not a living body, not an entire dead body, but many different organs dissected neatly from the once living body; with a chart by which we can place most of the organs, and with information which makes it possible in most instances, to understand the effect of one upon the other. But it is a matter of opinion, of judgment, of sentiment to decide between these two methods of presenting the history of Anglo-American law. It is impracticable, and in a book of this size, impossible, to attempt to superimpose one on the other.

The inevitable result of this treatment, as the author points out,¹ is that the development of law in the United States is never considered as an entire subject. It is but

¹² 152 L.T.R. 589 (1935).

¹ Preface, p. vi.

"briefly adverted to," and it is shredded into what "seem only unimportant appendices to chapters complete without them." Only a passing allusion is made to the desperate attempt of the colonies to get away from the Common Law, to their final surrender to the Common Law and to their reception of the Common Law.² This is preceded by a brief reference³ to the "second 'reception' " of the Common Law in the United States.

A summary of each section at the outset (usually in black letter) is always a bad form of writing law; and here it would work its worst. In a book of this size, covering the material that it covers, the text is compressed enough to begin with. So many qualifications and explanations are necessarily omitted through lack of space, that truth is sacrificed to brevity. Further compression into a black letter heading would leave the black letter all brevity and no truth. Our author has cleverly evaded this danger in many sections by writing his text as narrative, really without a summary at the beginning; and then putting the first two or three sentences in each section in black letter; thus getting the effect of a black letter summary without its faults.

Few original documents are given. From the Anglo-Saxon period we have nothing. We have a charter of William I, a writ and an occasional extract from an early case. More original documents would give us a much clearer idea of primitive Germanic or early English law than much description; but, in the necessarily limited space, more original documents would, of necessity, reduce the amount of explanatory matter in the text; and, without explanation, who would understand the meaning of the original documents or their place in the evolution of the law? Here again it is a matter of judgment. How many original documents shall we use? How much explanatory matter shall we omit? Which method brings a more vivid picture of the law before the student?

In the history of the law, in all too many cases, vital facts are probably none too clear at the time they happen; and after centuries have gone by, many of them are even less clear than they were at the outset. All too frequently, more than one inference can, with equal probability, be deduced from the facts of which we can be reasonably sure. By putting stress and emphasis on one feature of the problem rather than on another, we may get very different pictures, even though we agree on the facts and the probable inferences. As a result, a student of the history of the law is likely to feel that he disagrees with a writer, when, after all, they are both saying about the same thing but in different language.

What is the relation between the primitive Germanic law, the law of tenures, which our author refers to throughout as "Feudal," and the Common Law? Our author tells us that Anglo-Saxon law was not an integral part of the law of England, any more than the Keltic law;⁴ and that, since there was no central court, and since the customs, even if the same everywhere, were always treated as customs which were local to the different shires or hundreds, there was no "English" law before the Conquest. It would seem that the same reasoning would prove that there is no Common Law of the United States and no Anglo-American law. The result would be that this book is a history of something that never existed. These extreme statements are later withdrawn to some extent in the text⁵ and we are told that a number of the Anglo-Saxon ideas and institutions were given effect by the national courts after the Conquest,

² This appears under a discussion of Codification in America, p. 340.

³ P. 274.

⁴ P. 26.

⁵ Pp. 27, 39.

and thus became a part of the English law. In contrast with this attitude toward the early Germanic law is the whole-souled recognition of the "Feudal law" as a part of the Common Law;⁶ although William I was lord of England before the "*Libri Feudorum*" took shape, or, at least, took the shape in which we know it. A liberal concession is also made, to the probability of the transfer of Norman rules into England.⁷ The net result is the statement that the Anglo-Saxon law, the Lombard feudal law, the Civil (Roman) law, and the law merchant were "received into the Common Law." Here again, the difference is probably one of words far more than of ideas. As far as we know, no court ever started out without any law which it could administer; and there is no reason to believe that the King's courts performed this miracle. Early Germanic customs modified by Danish practice and Norman ways, trial by ordeal, by oath-helpers and by battle, the law of tenures that had begun to develop in England, and the Norman law of tenures (the only system of land holding that the invaders understood), from all of which the strong kings tried to select those elements which were the most favorable to their own position and power, all formed the rather rough custom of king, nobles and people, out of which the King's courts built up a more scientific juristic custom; and if, in the progress of time, the earlier customs proved less adapted to existing conditions and were eliminated first, this is the way in which law generally develops. Old Germanic customs, old English tenures, and Norman tenures have gone the way of all the earth in the modern law of the United States; and yet there has never been a point at which there has been a definite and complete break with the past. There is no reason for assuming that any such break occurred when the King's courts separated from the Curia Regis.

The change in language which left even the English unable to read those parts of old law which were written in Anglo-Saxon, the introduction of the writ process which empowered the King's courts to hear the case, and the jury inquest, and, above all, the emergence of a distinct class of technically trained lawyers from which technically trained judges were selected, all were bound to work a revolution in a law which had been largely a matter of popular tradition, administered by popular courts and utterly lacking a class of technically trained experts; but the revolution was just beginning when the illustrious Ranulph de Glanville held the helm of justice.

To note an especially interesting point or so here and there (and this is all that space permits), *laga* is limited to the amount of compensation payable to the kindred of one who was killed, and, as a consequence, to one's legal status.⁸ Thus the charter of William I to London was only to assure the bishop and the port-reeve that their *wergild* and legal status remained unchanged. Is it not fairly clear that *laga* like the Norse *réttr* meant (1) amount of compensation, (2) rank in life, and (3) rights under the laws and the laws which defined the rights⁹ including legal rank and *wergild*?

Again, it depends on our definition of feudalism whether we say that William I introduced the feudal system into England or whether we say that he saved England from feudalism. Professor Radin insists on English feudalism, though the English insisted on calling it tenure: but he insists that the essence of the Feudal system was the mutual relationship between lord and man. If he thought of it as the merger of public law, of administration and government, in private law, in the law of property, he would no doubt use other terms. To prove that the "Feudal" law was the all-important factor in the development of the English system he cites Sir Henry Spelman

⁶ Pp. 119 ff.; 145 ff.; 152 ff.

⁷ P. 41.

⁸ Pp. 32, 37, 57.

⁹ See p. 120.

(born 1564, died 1641, a few years before tenure by Knight's service was abolished); Spelman who, as Maitland never tires of saying, was really the man who introduced the feudal system into England.

The ground of the forfeiture by Philip Augustus of John's holdings in France is said to be John's murder of his nephew Arthur.¹⁰ Apparently the decree of forfeiture of all but Normandy was entered some time before Arthur's death, the reason assigned being John's dishonor of his vassal, Hugh of Lusignan, by taking the latter's betrothed and marrying her.

King's Bench and Common Bench had agreed, before the middle of the 1500's at the latest, that if the debtor made an express promise to the creditor to pay a pre-existing debt, the creditor could bring *assumpsit*. This principle is recognized in Brooke's Grand Abridgment, *accion sur le Case*, 105; Brooke's New Cases, 4, *Action upon the case*, citing 33 Hen. VIII (1541-1542), where, however, the creditor lost because the debtor had waged his law successfully before he promised to pay the debt. This involved the real question of consideration. Was a debt sufficient consideration for a subsequent promise to pay it? Without much dispute between the two courts, it was agreed that it was consideration. If the debtor did not make an express promise to pay the debt, could the creditor, at his election, bring *assumpsit* instead of debt? This was not settled so easily. The King's Bench said, "Yes"; and the Common Bench said "No" for many years. As far as *Slade's Case* is important, it is because the Common Bench finally yielded on this point to the King's Bench, thus extending the jurisdiction of the latter court. That a debt was consideration for a subsequent promise to pay it had been settled long before. The discussion of this subject¹¹ gives no hint of the long contest on this point between the King's Bench and the Common Bench; and unless we keep this contest in mind, the cases seem to be hopelessly at variance.

But all these are, for the most part, matters of opinion, of stress, of emphasis. We have here another admirable book on Anglo-American law for the beginner; a handbook in the preparation of which the author avowedly leans heavily,¹² as every writer on this subject must lean, on Pollock, Maitland and Holdsworth; a book which is a valuable addition to our tools for teaching the history of our law; a book which will arouse interest, stimulate thought, and make the dead past live again.

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Handbook of the Law of Private Corporations. By Robert S. Stevens. St. Paul: West Publishing Company, 1936. Pp. xvi, 860. \$5.00.

In a field wherein there are numerous massive, not to say monstrous works covering every nook and cranny, besides numerous specialized books covering nearly every nook and cranny over again separately, and one good brief work suitable for students, there might have seemed little purpose except publishers' needs for a new book of the last named class. Particularly, is that true where, as in corporation law, the most striking developments over a decade have been from statutory changes, a thing to which Hornbooks and their like usually give scant attention and where, as here, no radical innovation in arrangement or theory is attempted.

¹⁰ P. 135.

¹¹ Pp. 456-57.

¹² Preface, p. v.