

BOOK REVIEWS

The Cheyenne Way. Conflict and Case Law in Primitive Jurisprudence. By Karl N. Llewellyn* and E. Adamson Hoebel.† Norman, Oklahoma: University of Oklahoma Press, 1941. Pp. ix, 360. \$3.00.

Among writings on primitive law this book is distinguished, first, by the fact that lawyer and anthropologist have worked together in studying that subject. Here is one discussion of the topic which has been guided by knowledge both of modern law and of primitive societies, embodied in the persons of Llewellyn and Hoebel, who worked together in the field as well as in the library.

In the second place, this work claims our respect because theory and concrete materials assembled from one society are presented in quantity and because there has been effort to bring the one into relation with the other.

The theory, or perhaps point of view, has been contributed chiefly, one may assume, by the lawyer of the collaborating pair. If it is to be classified, it may be attributed to the "realistic" or "sociological" branch of jurisprudential thought. Law is thought of as one of several interrelated kinds of ordering systems which enable a society to persist in spite of divisive and disorder-making tendencies. The concern here is not with the ideals of law or with the philosophic nature of justice. Nor is the concern with the logical analysis of abstract principles. The book is a study of certain collected cases that arose because there was trouble within the Cheyenne tribe. The writers chose to study law not through the norms of conduct, or through the actually prevailing conduct, but through cases of trouble or conflict in which the norms are defined. They are cases in which the interests of individual men, factors of personality, and the general interests of the whole group interacted with rules, both legal and non-legal, to result in some sort of settlement of the trouble and thus in a re-ordering of the society. The materials are considered with the view that they accomplish "the law-jobs with which any group is faced in the process of becoming and remaining a group," and juristic method is compared by these authors to craftsmanship in art.

In spite of the deliberate treatment of the legal as something that grows out of the non-legal and that must always be studied in relation to the closely bordering forms of control that are less than legal, the concept of law is not lost, as it has been in some recent attempts to clarify the nature of primitive law. Law, it is declared, is to be recognized wherever there is recognized authority in procedures and persons, *pro tanto* official in character, for clearing up cases of trouble. Law, in other words, is that kind of imperative regulation forming part of the generally approved order, which prevails over other kinds of rules if challenged and which is exercised by some officialdom representing the whole. It is added that law tends toward a systematic character. This definition enables the authors to compare Cheyenne law with modern law and with

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the law of some other primitive peoples while defining an area of control in the case of the Cheyenne which is distinguishably legal. It also enables them to recognize sub-law, or by-law, for special groups, to deal with legalism (in which the regular or systematic character of the legal rules "get ahead" of the regularities of life-experience), and to examine the beginnings of law in both procedure and official persons.

The materials consist of fifty-three cases reported *in extenso* somewhat in the manner of a modern casebook, and an unstated number of other cases not published here but present in the authors' notebooks. The cases read more convincingly than the circumstances of their collection would suggest. Partly eye-witness accounts and partly hearsay, they reached the authors through an interpreter and out of the far-reaching memories of old men and women. Most of the events reported occurred between 1820 and 1880. The authors admirably present the chief doubts as to the accuracy and completeness of what they were told: the tendency of verbal formalization to change an occurrence into a tale; the disposition of a narrator to seek dramatic effect; possible modification in translation. They recognize the importance of balancing cases dealing with Noted Personages with those involving more ordinary and less idealized individuals. On the whole this reviewer is impressed with the probable worth of the materials and thinks that persons not accustomed to collect such materials underestimate the reliability of the memories of non-literate men and women who are intelligent and who make responsible effort to recall the facts that bear on a problem they understand.

Nevertheless, only a part of the facts relevant to the interests of these modern investigators are reported, and no one can now go out and get many more of the relevant facts. So some very large questions about Cheyenne law go unanswered in these pages. The sixteen cases of murder enable the authors to write out a summary of Cheyenne law on the subject which might do for a Cheyenne *Corpus Juris*, but the two or three fragmentary cases of incest do not even allow of a conclusion as to whether there was any public legal sanction in connection with it. And the results of study of the cases in so far as they bear on property law are indeed small. The authors are quick to point out these shortcomings.

The twelve chapters of the book are grouped in three parts. The first part presents the conceptions with which the authors approach the materials. The second part includes most of the materials and their analysis. Two chapters of this part deal respectively with the two principal political and juridical institutions of the Cheyenne: the council of chiefs and the military societies. Three deal with conspicuous areas of Cheyenne law: "Homicide and the Supernatural"; "Marriage and Sex"; "Property and Inheritance." The last chapter of the group, "Informal Pressures and the Integration of the Individual," allows the authors to put before the readers some materials showing the manner of socialization of the Cheyenne child. Here, especially, does the present book make use of the well-known previous work on the Cheyenne by Grinnell. This chapter documents the assertion, implicit throughout the book, and here expressed, that "the law-ways" must be "reinforced at every point by other ways." The other ways are those elementary and largely informal modes of control upon which, in large part, every society rests. The last part of the book, in three chapters, resumes the exposition of a sort of functional theory of law, and summarizes the authors' conclusions as to the nature of the law of the Cheyenne.

Certain features of the book which have rhetorical effect deserve mention. The

writers warmed greatly to their subject, and they wanted the reader to warm too. The book begins with a presentation of five cases of unusual, intrinsic interest and with the posing of some questions there unanswered—a sort of intellectual hors d'œuvres. The style is characterized by rugged metaphor and loose sentences with color and warmth. Moreover, the writers certainly seek to communicate their own admiration for the Cheyenne, or at least for Cheyenne law. It is “lovely”; it is “juristic poetry”; it is compared with the “sweet flowering of the classical [Roman] juriconsult.” The handsome portrait photographs of Indian leaders harmonize with the mood of the book.

The value of the book lies not in the establishment of any single point of fact or theory, but in a number of related achievements which together should influence anthropology to some degree, and perhaps law. First to be stated is the already mentioned bringing-together of a good collection of reported cases of trouble in a primitive group, against a background of knowledge of the whole life of that group, and with some intelligible theory as to the nature of law. Second is the employment of a concept of law which seems to this reviewer workable, while recognizing the “shading-off of personal relations, good taste, public decency, into the near-legal or the legal.” Third is the assembly of some evidence on the roots of law, which strongly suggests them to be multiple and which adds to the implausibility of any scheme of single-line development for law. The Cheyenne, neither an extremely simple people (such as the Great Basin Shoshoneans or the Andaman Islanders) nor a group with a highly developed political structure, provide an instance of legal institutions just formed, so to speak. So the authors are able to contrast the “use” made by the Cheyenne of their soldier-societies, which became, probably in late times, an important arm of the state in civil as well as military affairs, with the failure of sorcery, or of the ritual of sealing an understanding by smoking a pipe, to develop into true legal institutions. The last two examples remained in non-legal custom, although no reason appears why they should not have become the basis for true legal forms. Other points of value cannot be enumerated here, such as the development of the (by no means new) idea that there is no sharp difference between tort and crime and that any delict for which redress is allowed, no matter how privately taken, is one which concerns the whole group in that it is regarded as wrong and, further, in that, in the worst cases of repetition of such delicts, the wrongdoer is checked or destroyed, following an accumulation of disapproval on the part of members of the society other than those immediately injured by his delicts.

Students of Durkheim's work on the division of labor in society will find a particular interest in the evident presence among the Cheyenne of that sort of law which Durkheim called “restitutive.” The military societies force a man who has injured another man's arm to pull out the arrow and make the arm well, if he can. One man runs off with the wife of another man, and the latter sends a chief to the wrongdoer to negotiate for the payment of horses which will compensate for the loss. A horse is borrowed from a man without his consent: the owner gets chiefs of a soldier society to recover the horse. It will be remembered that Durkheim held that restitutive law, depending upon development of the division of labor, would be slight in primitive societies, and that he concluded it played a small part, as compared with repressive law, among the ancient Hebrews. Whatever one may think of the relative primitiveness of the ancient Hebrews and the Cheyenne Indians, the present materials show

that among the latter (where the division of labor was not great) a very considerable part of the law was restitutive.

The least successful chapter, to this reviewer, is the last, in which Cheyenne law is appreciated rather than described. The authors, citing cases, intensify their expressions of almost aesthetic satisfaction with the "sure" and "nice" juristic sense of the Cheyennes. They regard these Indians as notably more able deciders of cases and makers of law than other comparable peoples. The authors will perhaps pardon this admirer of their work a confession that he cannot see this as they do. The materials presented here are better than we have from other such peoples, and the authors came to understand much of Cheyenne life. If other peoples were known as well, and as abundant materials were thoroughly studied, perhaps the Cheyenne would not seem quite so superior. Moreover, it seems that in this chapter the authors do depart to some extent from their definition of law. For the decisions made in these Cheyenne cases, which the authors so admire, are decisions in which the personal, the notions of decency and rightness, and, in general, all the sub-legal stuff of social control, played a part. Yet the authors hail the success, especially, of Cheyenne juristic sense. It is the effectiveness of a well-organized culture to deal with cases of conflict and difficulty that is basically to be recognized—and admired, if you like. What is shown by these materials is how particular cases are settled, partly to get those cases settled and partly to make effective the functioning of the society in the future. But the rules that are made and the settlement of the cases are only in part a matter of law. Law has an easier time of it in a primitive society than it has in a modern society, for in the former there is strong consensus, a common moral order, and consistency of custom and institution.

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The Mysterious Science of the Law. By Daniel J. Boorstin.* Cambridge: Harvard University Press, 1941. Pp. xviii, 257. \$3.00.

This review is based on the principle that "before estimating a book it is well to read its title with care" and also its subtitle.[†]

The subtitle of this book is "An essay on Blackstone's *Commentaries* showing how Blackstone, employing eighteenth-century ideas of science, religion, history, esthetics, and philosophy, made of the law at once a conservative and a mysterious science."

Mr. Boorstin's book begins with the statement that when Blackstone wrote his *Commentaries* the world of ideas of the mid-eighteenth century was disturbed by "a new science," which no thinker could ignore. Blackstone realized that this new science had a growing attraction for man's imagination. Therefore, "the vocabulary of his day required that he should somehow present the study of law as a science" for his gentlemen readers. But for such an audience the application to a legal system of scientific method, which created doubts rather than suppressed them, held greater dangers than in the field of physics or philosophy.

Blackstone, "who saw the law as the bulwark of existing society," could not be

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† Becker, *The Heavenly City of the Eighteenth-Century Philosophers* 115 (1932).