

BOOK REVIEWS.

A HISTORY OF ENGLISH LAW. By W. S. Holdsworth, K. C., D. C. L. Volumes I to V, pp. 3432. Boston, Little, Brown and Company, 1922-1924.

With the exception of a few brief summaries the work of which these five volumes form part is the first attempt ever made to trace the whole development of the law of England. The nearest approach to it hitherto was Reeves's history written in the eighteenth century, which came down no further than the beginning of the Stuart period; and Maitland's brilliant two volumes reach only to the opening of the fourteenth century.

Dr. Holdsworth himself places two names and two only in the first rank of the legal historians of England, Sir Matthew Hale and F. W. Maitland; a judgment that will scarcely be questioned by any serious student of the subject. But there is a second rank that contains some very eminent names: Lambard, Selden, Sir Henry Spelman, Sir William Dugdale, and others. It is significant, however, that these lists—or any such lists—include no name but that of Maitland coming from this side of the seventeenth century. There is food for thought, but not for gratification, in the fact that the great generation of English legal historians, of Spelman, Selden, Sir Thomas Craig and Arthur Duck, belonged to the first half of the seventeenth century; and that in the two and a half centuries and more since that time our legal historians of importance can be numbered on the fingers of one hand. Whether we look at our law from the practical or the theoretical point of view, it stands as the only real rival of Roman law among the great legal systems of the world; yet how poor is the showing of our legal historians in the last hundred years compared with that of a single century in Germany! Against Eichhorn or Savigny, Brunner, Gierke or Stintzing, to mention no others, Maitland stands almost alone. And we have had absolutely no history of the important development of our law as a whole for the period since 1603.

It is these facts that make the appearance of Dr. Holdsworth's volumes so significant. More than twenty years ago he began his history of the law of England. Five volumes have now been published, covering the period from the beginning to the opening of the eighteenth century; and two more, already written and soon to be published, will complete the work. During the preparation of his later volumes Dr. Holdsworth has found time entirely to rewrite his first volume on the judicial system which originally appeared in 1903, and to submit volumes II and III, first published in 1909, to a thorough revision. Some comparison of the new with the old editions is unavoidable.

If Maitland could have lived to read this new edition of volume I he would have found here ample reward for his great efforts to revive an interest in legal history. The advance in these twenty years is immeasurably greater than in the whole half century that preceded, and in his new edition Dr. Holdsworth seems to have overlooked very little of the new material. The volume is no mere revision but in reality "a new book."

One of its most interesting features is the discussion of the King's

ecclesiastical authority, in which the author accepts without hesitation Professor Maitland's views on the canon law in England in preference to those of Bishop Stubbs or the Ecclesiastical Courts Commission of 1883. But Dr. Holdsworth still persists, as in 1903, in calling the Anglo-Saxon *calldorman*, the "*carldorman*," and the *fyrð*, the "*fryð*." There seems to be no justification in contemporary documents for these forms.

Volume II, devoted to the Anglo-Saxon and the mediaeval common law, shows almost as much revision as volume I, and takes account of practically the whole of the literature of the subject, English or American, periodical or other, published before 1923. The author has wisely avoided too insular a view of England's legal development in this period when internationalism in legal institutions was more marked than now, and an important feature of his work is his summarizing of the conclusions of Continental scholars, with constant comparisons between English and Continental legal conditions, institutions, and principles. In these valuable excursions into Continental law Dr. Holdsworth has relied on an admirably chosen, but rather restricted, list of authorities. In selecting as a guide—to take one notable example—the late Professor Esmein's *Histoire du Droit Francais*, he has shown the finest discrimination, but for points of German, Italian, or canon law, it is rather surprising to find Esmein quoted as authority instead of Brunner, Fitting, or Hinschius. These foreign parallels are welcome and valuable, but they would be better still if based on a more thorough study of Continental law than this volume seems to indicate.

The sections in this volume on Bracton and the Year Books are probably its most interesting and valuable parts, setting forth as they do all the important facts as well as the recent controversies on these subjects with admirable clearness and discrimination. Dr. Holdsworth's discussion of the beginnings of English legislation might have been modified somewhat if he had seen Mr. J. C. Davies's treatment of the statute of York of 1322, in his *Baronial Opposition to Edward II*.

The proofreading is occasionally faulty, as *Pancapalea* for *Paucapalea*, the author of the gloss on Gratian's *Decretum*. It is hardly accurate, either, to say, as on page 179, vol. II, that the *assize utrum* and the *assizes of mort d'ancestor* and *darrein presentment* are of "uncertain date"; and I think most students of the history of language would prefer the *Oxford Dictionary's* derivation of the "bill" from *bullā* through the French pronunciation of the *u* once so common in England, to a shortening of *libellus* as suggested originally by Mr. Boland and adopted by Dr. Holdsworth. Otherwise the author's discussion of Mr. Bolland's interesting but somewhat over-enthusiastic theories of the Bills in Eyre is the most judicious and discriminating yet made.

The chief interest of these first three volumes, to one already familiar with the old editions, is the really great advances of the last fifteen or twenty years in the study of our legal history, and the admirable way in which Dr. Holdsworth has taken advantage of them. But in volumes four and five, covering the period from 1485 to 1700, the period of the strug-

gle between "the common law and its rivals," he breaks ground that is entirely new. He discusses at length the economic and social as well as the political conditions that determine the lines of legal development at this time, and dwells on contemporary theories of the State, both at home and abroad. This knowledge of the latter seems to be based on a fuller acquaintance with modern monographs than with contemporary writers *in extenso*, but he everywhere shows admirable discrimination.

The "rivals of the common law" receive the first treatment, and there are exhaustive accounts, based on the latest researches, of the judicial activity of the Council and the Star Chamber, the Courts of Admiralty, the ecclesiastical courts, and the Chancery. The thesis of Maitland's *English Law and the Renaissance*, of England's narrow escape from a reception of Roman law, is accepted and fully developed, accompanied by a full account of the English civilians and their writings which unaccountably omits Sir Thomas Craig. An excellent summary is also given of the law merchant and international law in this period, and the development of legal institutions and legal doctrine is not slighted. There is also a good sketch of the history of the legal literature of the time. For the justices of the peace and the contemporary books about them, it is unfortunate that Miss Putnam's valuable study appeared too late to be used. Volume V closes with an account of the common law between 1485 and 1700, and this section is likely to prove the most interesting to the average lawyer. An account and criticism of the early reporters in general is followed by what seems to me the most satisfactory estimate of Sir Edward Coke and his writings thus far written. Exception might be taken to one or two small statements of fact. The second edition of Cowell's *Interpreter*, published in 1637, was not "expurgated" (vol. V, p. 21), and John Beaver's English translation of Arthur Duck's treatise on the use and authority of the Roman law, published in 1724, included only that part of the work dealing with England, not all of it, as implied on page 24, volume V.

Lawyers and historians alike will welcome these valuable volumes. Readers of Dr. Holdsworth's earlier editions will not expect the brilliance, the grace, the suggestiveness or the historical imagination, which made Maitland's contributions to the history of English law classic; but no one will be disappointed who turns here for a comprehensive, thorough, well-balanced and judicious account of the legal development of England in all its periods; and for the later periods he can turn to nothing else. These volumes are likely long to remain the standard history of English law as a whole.

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THE CONSTITUTION OF THE UNITED STATES, YESTERDAY, TODAY AND TOMORROW? By James M. Beck. New York, George H. Doran Company, 1924, pp. xiv, 352.

Mr. Beck's volume had its origin in a series of lectures delivered by him in the hall of Gray's Inn, London, in 1922 and 1923. The lectures were subsequently published, and the original volume now appears in revised

form, bearing the same title but enlarged by sufficient new material to enable the author to pronounce the book "a new one."

Mr. Beck writes as charmingly as he speaks, and those who have come under the spell of his eloquence will know what to expect in the volume before us. It is not the dry bones of the law; it is not a running commentary upon the clauses of the Constitution one by one. Rather it is a historical study of the making of the Constitution, followed by a very earnest appeal to the patriotic citizen to live up to the ideals of the Fathers. The subject-matter of the book falls thus into two parts. There is, first of all, the description of the conditions leading to the call of the Constitutional Convention, and of the personalities of the leading delegates. Then there are the details of the conflicting views of the delegates as the character of the new "union" and the story of the critical struggle between the large and the small states, followed by an analysis of the political philosophy and basic principles of the Constitution. In the second part, the author surveys the tendencies of the present generation and laments our departure from the path marked out for us. Citations from the poets and philosophers accompany the analysis of legal issues, and the volume begins and closes with a text from Holy Scripture. Mr. Beck gives us literally the law and the prophets.

It would be too much to expect that in such a method of treatment the author could escape making assertions which are open to criticism. Opinions may differ as to the justice of the gloomy outlook which Mr. Beck takes upon these degenerate times. Materialism has come upon us and our spiritual sense is dull; leadership is in decay and authority is being challenged; crime is on the increase and the sense of personal responsibility has been lost; we are abandoning our liberties and are become the creatures of a group morality. It may be. At any rate there is evidence enough to support such a view, if one does hold it.

But, in respect to historical and political issues, Mr. Beck is more vulnerable. He shows us that the Constitution was on certain important points a compromise between the conflicting views of the delegates; that it barely escaped defeat when submitted to the states for ratification; that men whose patriotism was unquestioned, vigorously denounced the document as dangerous to their liberties. Yet in the face of all this, we are bidden to worship the Constitution as a sacred document, as an expression of a higher law of unchanging value. "Remove not the ancient landmark, which thy fathers have set." It is conceded that the Constitution was "a revolutionary change in the form of government, adopted in clear contravention of the strict rules laid down for the amendment of the Articles of Confederation." But this permissible revolution being once accomplished, no other revolution is justifiable; and even the legal process of amendment must not be applied to those clauses of the Constitution which Mr. Beck regards as basic principles. Apparently the first ten amendments came under the original inspiration, but since then we have followed human counsels, at times to our undoing. The Sixteenth Amendment in particular is singled out as having opened the door to the confiscation of the

property of the rich and broken down the defense of the Constitution against Socialism.

Mr. Beck points out that the original Constitution was not a democratic document; but as he has not much faith in democracy, that fact does not trouble him. He laments our abandonment of the ideal of "representative government" in favor of a "direct democracy" which seeks to make representatives obedient to the will of their constituents; he warns against the centralizing tendency which would destroy our system of dual government; he sees the individualism of the Fathers giving way to Socialism, and he contemplates with horror the attacks being made upon the independence of the judiciary. So sacred is the function of the Supreme Court as the balance-wheel of the Constitution that even the requirement of the concurrence of seven justices out of nine before a statute can be nullified, would "impair" its power. To amend the Constitution so as to permit a two-thirds vote of Congress to overrule a decision of the court, although not mentioned specifically, is apparently what is intended; when responsible leaders are said to be "willing to tear down in a day what it had required a century to erect."

On the whole Mr. Beck does not seem to make out his case. He reads into the Constitution political and moral ideals which the text of that document simply will not support. In thus overloading the Constitution he seems to the reviewer to be hurting the authority of the Great Charter more than strengthening it. It is not necessary to put down as enemies of the Constitution all those who are seeking to adjust it to the changing conditions of the times. As Justice Holmes reminds us, the Constitution "is an experiment, as all life is an experiment." Unless the provisions of the Constitution can maintain themselves by their own inherent reasonableness, it is futile to invoke the authority of the Convention of 1787. The American people will always demand the right, which the Fathers themselves expected them to exercise, of learning by trial and failure. They may doubtless find it necessary to repeal at a future day amendments which they have adopted without foreseeing all their consequences. Only one who believes them incapable of learning from experience need fear for the final fall of the Constitution.

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HANDBOOK OF THE LAW AND PRACTICE IN BANKRUPTCY. By Henry Campbell Black, LL. D. St. Paul, West Publishing Company, 1924, pp. xv, 905 (In the Hornbook Series).

There is no dearth of books about the United States Bankruptcy Law of 1898 and its amendments. Practically all of them are, like the current works on Bankruptcy in other countries, *Kommentarlitteratur*. Yet there is a difference among them, a difference that is curiously illustrated in the three works on Bankruptcy that have come from the pen of this indefatigable author. The first treatments that greeted the statute were necessarily somewhat unlike the general run of Anglo-American law books in several

respects. Having no case law directly in point they had to argue, as foreign books do, about the probable meaning of the words of the statute in the light of the general idea of bankruptcy, its history, the analogy of decisions under similar but not identical statutes, legislative debates, and verbal deviations from older statutes. On these bases they raised more questions than they answered. One of the first and best of these books was our present author's "Handbook of Bankruptcy Law, embodying the full text of the Act of Congress of 1898 and annotated with reference to pertinent decisions under former statutes," 1898. Gradually, as decisions multiplied, first in the District Courts and eventually in the Supreme Court, all this was changed. In the transition period the new books became spotty, setting forth the decided points at length and dodging the real undecided difficulties. Throughout this period it was felt that a bankruptcy law was necessarily a temporary expedient, a sort of house-cleaning operation. All that could be carried along permanently from the days of one statute to the days of the next seemed to be a precipitate of constitutional law and legislative experience. The constitutional aspects were of course decided early. Thus it happened that the history of the interpretation of our Bankruptcy Law descended from discussion of the broadest and thinnest type, into a massing of intensely practical details of such an ephemeral nature that the legislature not only could but seemed destined to sweep them away some time over night. This was hardly a condition of the law that lent itself to the study of principles. In practice, Bankruptcy Law came to be looked upon as the specialty of a few offices in each city. In the schools there was a great deal of hesitancy about teaching it. It was in this stage of development that our author produced his "Treatise on the Law and Practice of Bankruptcy under the Act of Congress of 1898" (1914, 3d ed., 1922). In his preface to this work he expressed the belief "that the law and practice of bankruptcy in this country had at last crystallized into something like a definite system." Yet he was careful to found his work "upon an exhaustive and minute citation of the decisions of the courts."

Meanwhile the Bankruptcy Law remained on our books and decisions were ground out constantly. A quarter of a century of the common law's processes of assimilation have made it appear a regular part of our law. It is reasonable to expect a new type of treatment, one that will once more speak in terms of principles, but with this difference: The principles must be the result of induction from from judicial decisions as is customary in our jurisprudence, and not made *in vacuo* as they were in the first treatises. It is not too much to claim for the book before us, though wearing the modest guise of an elementary text-book, a "Hornbook," the credit of having taken an important step in the escape from the mass of glossation that has buried the Law of 1898, and in the discovery of principles. No attempt is made to index all of the decisions, yet the author expresses his belief "that no important principle has been omitted or inadequately treated." A rapid checking up with other treatises and digests and the new index to periodical literature seems to justify the author's belief.