Revista Portuguesa de História

História do Direito e das Instituições (1941)

The war, which has inevitably reduced the quantity of historical literature, has made little difference to its quality or to the direction of the work. Most of the books and articles described below continue or amplify work embarked on before the rupture of academic calm. Work has been produced in spite of, not because of, present events. One book, however, might be excepted from this rule. Dr. W. Ivor Jennings's «The British Constitution» (Cambridge University Press), though it contains no matter which would preclude its appearance in time of peace, has clearly been projected under the stimulus of war. For in this unpretentious volume, designed for «the ordinary citizen» and «our friends overseas», Dr. Jennings analyses the very heart of British democracy, the organ whose strength or weakness will decide whether this country — and more than this country — will develop and extend the tradition of constitutional government or whether its history will be broken off as abruptly as it was when the Roman legions withdrew from these shores and another invader sought *lebensraum*. Normally, one would not devote overmuch space in a journal such as this to a book of avowedlv popular intent, but Dr. Jennings's work is particularly worthy of attention at this time. For there is no aspect of our history about which even the most learned foreigner is so likely to err as our parliamentary system. To understand this, the most profitable method of approach is from the known to the unknown, from parliament to-day back to the middle ages, rather than to attempt to build up this complex institution from its debateable origins. Towards some comprehension of the present there could be no better guide than Dr. Jennings, who is no less prescient in assessing the historical factors which have contributed to the constitution than in considering reforms now in the air, such as proportional representation and the redistribution of seats. He has an excellent analysis of the parties — their programmes, supporters and party-machinery, describes and evaluates the working of the two-party system, and discusses cabinet government. While sharply critical of abuses and anachronisms, Dr. Jennings believes that the parliamentary system contains all that is neces-

sary for good and competent government, only granted the continued interest of the electorate. For «the foundation of our democratic system rests not so much on laws as on the intention of the British people to resist... attacks upon the liberties which it has won.» The influence of public opinion on parliament throughout its long history cannot be overrated. «It is not too much to say that, in Great Britain, government by opinion... arose because of the extension of political education rather than because of the extension of the franchise. A vocal opinion can mould policy even where it cannot be expressed... in the ballot box.» As Dr. Jennings has maintained elsewhere (4) «the future of our democracy is not so much a matter of measures as a matter of men and women.»

One of the earliest manifestations of this public opinion appears in the ancient coronation oath taken by English kings. The exact significance of the oath itself with its verbal variations and the attendant ceremony have been much debated and have accumulated a considerable literature. To this Mr. H. G. Richardson has made a further contribution in his «The English Coronation Oath» *{Transactions of the Royal Historical Society*, 4th series, xiii. 129-58).

The present ascendancy of parliament has coincided with the ascendancy of the House of Commons. Unimportant while they represented merely sectional interests and sought redress for merely local or personal grievances, the Commons attained their strength by sinking their provincial differences and uniting in a common loyalty. Miss Doris Rayner's «The Forms and Machinery of the 'Commune Petition' in the Fourteenth Century (*English Historical Review*, lvi. 198-233, 549-70) is a useful contribution to the history of the growth of that corporate spirit in its earliest stages. This study is a good example of the detailed analytical treatment of the mediaeval parliament which should enable some master-historian of the future to produce a new synthesis of the subject. The same can be said of Mr. Gaillard Lapsley's «The

(9 In his pamphlet «Parliament must be reformed: a programme for democratic Government». For another popular work of the year by a master of English prose and a brilliant historian, see G. M. Young's «Government of Britain.»

Interpretation of the Statute of York» (*English Historical Review*, lvi. 22-51, 411-46). Mr. Lapslsey surveys the various schools of opinion, from the one which considers that the statute was designed to protect the monarchy in perpetuity from all limitations imposed by subjects to that which will allow it no political significance whatever. He analyses the statute clause by clause and covers all the recent bibliography of the histories of parliament and the prerogative. This is a very useful article.

A work of a more old-fashioned type is Dr. James Mackinnon's «History of Modern Liberty», to which a fourth volume («The Struggle with the Stuarts») was added in 1941 after a lapse of over thirty years. This gives a detailed narrative of the events of that critical period and is chiefly founded on printed contemporary sources. Why neither side emerged wholly victorious from the clashes between the king and parliament in Stuart times was partly a matter of ways and mean but partly also a matter of ideas. Miss Betty Behrens maintains that «the 'mixed monarchy' survived the shocks of 1681 and 1688 because, in spite of the many reasons for abandoning it, all parties, the Whigs included, maintained an unshakeable devotion to it» («The Whig Theory of the Constitution in the Reign of Charles n», *Cambridge Historical Journal*, vii. 42-71). Parliamentary procedure has received considerable attention of late. In her «Division-lists of the House of Commons, 1715-1760» (*Bulletin of the Institute of Historical Research*, xix. 1-8) Miss Mary Ransome undertakes for the first two Georges what Mr. R. R. Walcott did for William in and Anne. This careful bibliography is another of those small detailed studies which are revitalising parliamentary history.

When parliament won the constitutional issue in the seventeenth century, legality, in an almost mediaeval sense, triumphed over the New Monarchy fostered, if not inaugurated, by the Tudors. An interesting little article by Mr. W. C. Richardson, «The Surveyor of the King's Prerogative» (*English Historical Review*, lvi. 52-75) throws * light on the vexed question of Henry vii's use of ultra-legal machinery. This is a study of Edward Belknap, a littleknown member of the official class, Henry's «new men», who owed their eminence to the king and, unlike the nobles whom they supplanted, had no class attachments to run counter to the royal will. Through Belknap, sur-

veyor of the King's Prerogative, Henry VII gathered into his hand, by machinery other than that of the Exchequer, all fines outstanding for breaches of his royal and feudal fiscal rights. This article, which quotes extensively from a class of manuscripts at the Pfciblic Record Office (Exchequer Accounts Various) hitherto little used, illuminates the financial aspect of Henry's reign, in which is most likely to be found an answer to the riddle why he could establish a stable government where his predecessors had failed.

Two studies of the conciliar courts have appeared during the year. Professor A. F. Pollard's «The Growth of the Court of Requests» *English Historical Review*, lvi. 300-3) is a fragment in which every sentence is pregnant with suggestion. Mr. R. Somerville's «The Duchy of Lancaster Council and Court of Duchy Chamber» (*Transactions of the Royal Historical Society*, 4th series, xxiii. 159-77) was awarded the Alexander Prize. After showing how the Duchy Court worked in the middle ages, Mr. Somerville reminds us that it later served as a model for the Courts of Wards and, as an administrative body, was imitated in the means employed by Henry vu^ to 'administer crown lands and vast possessions wrested from the Church; an interesting example of a local experiment which was to be repeated on a national scale.

The year has produced a number of legal studies. Miss Dorothy Whitelock's (cWulfstan and the so-called Laws of Edward and Guthrum» Í*English Historical Review*, lvi. 1-21) includes an appendix «on the supposed lost Manuscript used by Lambarde.» The author's opinion, based on textual criticism, is that this code», in its present form, dates from the early eleventh century, and. .. Wulfstan... had a hand in its compilation.» Miss Naomi D. Hurnard challenges the theory that the jury of presentment was introduced into England by the Assize of Clarendon in 1166 and adduces evidence of communal presentment both before and after the Conquest. She suggests ways in which the Assize represented innovation and tightened up procedure («The Jury of Presentment and the Assize of Clarendon», *(English Historical Review*, lvi. 374 410).

From legal fragments jotted on a copy of the Gospels now in the Walters Art Gallery, Baltimore, Mr. H. G. Richardson

deduces the sort of collection which might be expected from those who»sought to teach canon law in the Bologrlese manner in England in the early thirteenth century («The Oxford Law School under John», *(Law Quarterly Revieiv*, lvii. 31g-38). The student of the common law should not overlook Miss M. Dominica Legge's «Anglo-Norman and the Historian» (*History*, xxvi. 103-75), an article containing much of interest for the study of the Year Books, in which so much mediaeval English law is enshrined; nor Mr. Ralph V. Rogers's «A Source for Fitzherbert's 'La Graunde Abridgment'» (*English Historical Review*, lvi. 605-28), in which by careful collation the author brings together evidence to identify one manuscript (now in the Congressional Law Library, Washington, D. C.) as a source for the Derby reports of the «Abridgment». Mr. Rogers is also responsible for «Intervention at Common Law» (*Law Quarterly Review*, lvii. 400-8), a careful little study supplemented by long excerpts from the Year Books. In «The Partial Performance of Entire Contracts» (*Law Quarterly Review*, lvii. 373-99) Dr. Glanville L. Williams deals with the contracts between master and servant, for board and lodging, of affreightment, for work and materials, and for sale of goods, with a detailed examination of precedents from 143.1.

Mr. W. H. D. Winder makes two contributions to the study of equity. His «Precedent in Equity» *(Law Quarterly Review*, lvii. 245-79) shows the early growth of the notion that judicial consistency must be maintained even at the expense of abstract justice. «Before the opening of the eighteenth century precedent was rapidly superseding conscience as the foundation of practical equity». Where precedent was silent, the court was not afraid to find a remedy, but otherwise the two important factors in the making of decisions were the number of precedents cited, and their age. Mr. Winder's «Sir Joseph Jekyll, Master of the Rolls» *(Law Quarterly Review*, lvii. 512-55) deals with a judge who administered equity for a longer period in the eighteenth century than anyone else and appreciates his contribution to English law.

Since Lord Hewart denounced the encroachment of bureaucracy under the title of «The New Despotism», modern administrative law has received increasing attention. Sir Cecil Thomas Carr, Clerk of the Parliaments, begins his six lectures to American audiences «Concerning English Administrative Law» (Colum-

bia University Press) with what he calls «the New Deal of the eighteen-thirties» and discusses the new relationships set up and the resulting encroachment of the executive upon the functions of the legislature and judiciary.

Among texts published in 1941 are two Pipe Rolls, «The Great Roll of the Pipe for the seventh year of King John .. 120S» (Pipe Roll Society, no. 41), edited by Dr. Sidney Smith, and «The Irish Pipe Roll of 14 John, 1211-1212» *(Ulster Journal of Archaeology,* vol. 4, supplement) edited by Oliver Davies and David B. Quinn. «A Middlewich Chartulary» (Chetham Society) was compiled by William Vernon in the seventeenth century and is now edited by Joan Varley. This is a scholarly edition, with a useful introduction, of material which throws considerable light on English mediaeval institutions. Professor E. A. Lewis, editor of «A Schedule of the Quarter Sessions Records of the County of Montgomery at the National Library of Wales» (Powys-land Club), gives a full calendar in English of the clerk of the peace files for 1614-40 and particulars of estreat of fines and amercements 1659-1735. For a guide to this material see his introduction to the volume published in the same series in 1940. A volume published in 1940 but omitted from our last survey is «Quarter Sessions Records... for the County Palatine of Chester, 1559-1760» (Record Society of Lancashire and Cheshire), edited by J. H. E. Bennett and J. C Dewhurst. This supplies a calendar of all the records, with abstracts selected for their interest and variety.

Finally, tw[T]o items which defy classification yet remind the reader how much vitality still remains in these wellworked legal studies. An attempt to make capital of the vogue for detective fiction by publishing the more sensational trials from real life is often a failure, truth being frequently more complicated and less artistic than fiction. But Mr. Carleton Kemp Allen's account of «R. V Dean» *(Law Quarterly Review*, lvii. 85-m), though restrained and scholarly, compares with any entertainment provided by the detective novelist. Mr. Allen tells the story of an Australian poisoning trial of 1895, a fascinating tale, packed with incident and legal niceties, of which the most interesting is an unusual version of the problem how far defending counsel owes his duty to a client who confesses. Mr. Daniel J. Boorstin's «The Mysterious Science of the Law» (Harvard University Press) shows the fruitful

application of a new science, that of sociology, to an old body of material. «Addressed to the lawyer, to the student of history, and to people generally concerned with the problem of method in the social sciences», this book takes Blackstone's «Commentaries» as its text and analyses this classic study of English law to see how Blackstone employed the assumptions and ways of thought current in his day to rationalise the complex legal institutions which confronted him. Mr. Boorstin concludes that this reconciliation of what was with what should have been made of the law at once a science and mystery. As with so much scientific treatment of well-known themes, one is tempted to respond «Of course», and «What else would you expect?» Yet such work contains a germ of truth that historians do well to bear in mind, especially constitutional historians. We look at our authorities and persuade ourselves that they tell us what was, forgetting that in no sphere of human activity does make-believe play so large a part as in government. It is well for us to be reminded that our authorities tell us not the facts, but what they believed or what they hoped to be the facts — a vastly different matter.

MARJORIE BLATCHER

História Económica e Social (1940-1941)

Relatively little research into the economic and social history of England has been undertaken in England since the fall of France in the summer of 1940. Much of the work which has been published since then was really drafted, or at any rate prepared for drafting, before the end of 1939. It is becoming rather difficult to know which works should be included in this kind of survey, and which should be excluded for one reason or another. Many works which are not primarily about economic subjects nevertheless contain much that is interesting to the economic historian; when the survey is widened to include social as well as economic history, the difficulty of knowing what to put in and what to leave out is still further increased.