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TOMO I



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### História do Direito e das Instituições

(1939-1940)

The dictum that «all true history is contemporary history» is nowhere better illustrated than in the study of English law and institutions. The historians of the late nineteenth and early twentieth centuries, accepting the Common Law and British Constitution, parliament in particular, as the chief contribution of the Anglo-Saxon communities to that human progress towards perfection in which they believed, sought to explain the stages by which these bodies of principles and practice were evolved. The result was a golden age in the study of British constitutional history. Post-war generations, less certain of the universality of British political principles and more conscious of the bureaucratic element in government, have turned away from constitutional and legal history in the grand manner and sought the answer to what their predecessors left unexplained in the day-to-day administration of individual institutions. They have exchanged the study of general principles and main developments for an exact knowledge of how business was transacted by a particular body on a certain day by ascertained persons. This method, of which the pioneer in this country was Professor T. F. Tout of Manchester University (4), has uncovered a great mass of new historical data concerning the exact processes of the clerical work of government departments and the officers responsible for it. The new methods, while greatly increasing the scope of constitutional history, are also of value in providing a new approach to aspects already familiar, such as the study of parliament. Less readable than the general histories, these monographs contain, nevertheless, information which it will be impossible to ignore when the main developments of legal and constitutional history come once again to be evaluated.

So much for the general tendency of modern studies. The (\*)

(\*) See *The Place of The Reign of Edward II In English History*, 2nd ed., p. 36, and *Chapters in Mediaeval Administrative History*, 6 vols., 1920-1933.

years 1939-40 have been richer in the publication of legal sources than in the production of histories and have nothing to compare with Sir William Holdsworth's last three volumes (vols. 10-12) which he added to his monumental «History of English Law» in the preceding year. Professor T. F. T. Plucknett's useful one-volume «Concise History of the Common Law» appeared in a third edition in 1940. Mr. Plucknett brings to this compact work the qualities and training of both lawyer and historian and embodies in it material not usually to be found in text books. A volume which, though primarily concerned with contemporary history, cannot be ignored by historians, is Mr. W. Ivor Jennings's «Parliament» (Cambridge University Press, 1939), which embodies «an attempt to describe and analyse the working of the parliamentary section of the machinery of government». In studying an institution in which development has been singularly continuous, the parliamentary historian cannot dispense with the clear knowledge of present practice set out, with full evidence from the passage of actual legislation, in this work. «Parliament» is a complementary study to the same author's «Cabinet Government», published in 1936.

The Cabinet has found a new historian in Professor A. Berriedale Keith <sup>(2)</sup>. This subject, which has received considerable attention of late, is still only very partially explored, and Mr. Keith has confined himself to its later history. His chief purpose is to show how the cabinet system works today, but in order to explain the present, he finds it necessary to describe the chief legacies of the past. He deals with the development of cabinet government, the formation and dissolution of the cabinet, the relations between the Prime Minister and his colleagues, the cabinet and parliament, and the cabinet and crown, the working of the cabinet system, the ministry, Privy Council, and departments of state, and the King's influence on public affairs.

Mr. Keith shows how undefined are the Prime Minister and Cabinet in the British Constitution, and how the system, which lacks both the authority and the limitation of statute, rests on the observation of certain practices and unwritten conventions. He concludes with an analysis of the relations of Parliament,

<sup>(2)</sup> *The British Cabinet System, 1830-1938*, published in 1939.

cabinet, and Prime Minister in the international crisis of September 1938, finding the excursion of the Premier into foreign affairs not «compatible with the democratic principle of the constitution».

Mr. Keith's treatment of this complex subject, is a model of clarity. His book should prove of the utmost use to all who wish to understand how the British constitution works today and are interested in the factors which have shaped it. It serves also to remind us that the constitution is still in process of evolution, the direction of which needs to be watched and controlled. Mr. Keith's two-volume «Constitution of England from Queen Victoria to George vi», which appeared during 1940, offers further material for the same period.

Dr. J. Otway-Ruthven's «The King's Secretary and the Signet Office in the xv Century», (Cambridge University Press, 1939) is a useful monograph for a neglected period. The office of the King's secretary, only lightly touched on by Miss F. M. G. Evans in her «Principal Secretary of State» (1923), is now explored very fully. The signet, the secretary's duties, qualifications and position, the French secretaries, the Signet Office, and clerks of the signet all pass under review. The work, which is based on an impressive list of manuscript and printed material sifted, also contains in appendices lists of King's Secretaries, 1377-1485, French secretaries, 1422-1485, and clerks of the signet; summaries of the careers of the King's secretaries and of the clerks of the signet ; and a note on the Latin secretary.

Recent work on English manorial history has done much to dissipate the view that one can envisage for the sake of argument a «typical manor», and many are inclined to postulate almost as many «manorial systems» as there were mediaeval manors. Every piece of specific work is obviously of great value in this connection. In a small monograph entitled «The Court Rolls of the Rectory Manor of Walthamstow», (Walthamstow Antiquarian Society Official Publications N.º 37, 1939), Dr. P. H. Reaney brings together from scattered sources, including charters, leases, and the court rolls themselves, evidence which enables him to describe the customs of the manor. His work should be read in conjunction with a calendar of the court rolls which appears in an earlier publication in the same series (n.º 4).

A monograph of incidental interest for mediaeval legal history is F. Ashe Lincoln's «The Starra : Their effect on Early English Law and Administration» (Oxford University Press, 1939). The *Starra*, which are documents concerning sales, rents, quit-claims, deeds of betrothal, and marriage settlements, illustrate not only the legal relations between Jews but also the relations between the Norman Kings, Church, and Barons, and are therefore of interest for general studies of the period (1066-1290). It had already been accepted as likely by authorities that the writ *eligit*, introduced into English law in 1285, was an adaptation from Jewish practice. The author claims three other cases of individual influence which critics have been more dubious of accepting.

Several useful articles have appeared in the Royal Historical Society's *Transactions* and in periodicals during the two years. Mr. J. E. A. Jolliffe deals with the legal origins of parliament in « Some factors in the beginnings of Parliament » ( *Transactions of the Royal Historical Society*, 4th series, xxii. 101-39), published in 1940. Mr. H. G. Richardson's «The Elections to the October Parliament of 1399» appeared in the *Bulletin of the Institute of Historical Research* (xvi. 137-43) in 1939. This writer, in collaboration with Dr. G. O. Sayles, has devoted many years to the study of parliamentary government from the administrative angle described above. So far, he and his partner have only published the results of particular investigations. Their general conclusions are awaited with interest and not only are certain greatly to elaborate our knowledge of mediaeval parliament but may modify considerably the outline previously accepted.

Dr. A. F. Pollard, whose «Evolution of Parliament», which first appeared in 1920, was a study of the emergence of general principles and practice, has since produced many particular studies of parliamentary personnel and practice. Two valuable articles which appeared during 1939 conclude a series treating the clerks of parliament and their records. They are «The Under-Clerks and the Commons' Journals (1509-1558)» ( *Bulletin of the Institute of Historical Research*, xvi. 144-67) and «Queen Elizabeth's Under-Clerks and their Commons' Journals» (*ibid.*, xvii. 1-12).

Mr. R. Sommerville has made a valuable contribution towards the elucidation of the work of conciliar bodies under the Tudors. In «Henry VIII's 'Council Learned in the Law'» (*English Histo-*

*rical Review*, liv. 427-42) he considers two entry-books of memoranda, proceedings, and orders which, preserved at the Public Record Office with the Duchy of Lancaster records, have been regarded for at least two hundred years as emanating from the Duchy court. By careful analysis of the books themselves and reference to many other sources, Mr. Sommerville discovers these records to reflect the labours of «a committee of the council specifically occupied with judicial matters, with the procedure and jurisdiction of the council». This stimulating article ends with a suggestion that connects the activities for which Empson and Dudley were execrated with the proceedings, in which both played a prominent part, before the «council learned in the law».

Of late years the administrative approach has been most profitably extended to the study of legal history. The records of the courts of common law and of equity, and of justices of the peace and of Gaol Delivery, have been investigated in great detail to discover, for limited periods, how just, effective, and expeditious was the working of the legal machinery. Mr. H. E. I. Phillips published in 1939 the results of one such investigation in his «Last Years of the Court of Star Chamber, 1630-41» (*Royal Historical Society Transactions*, 4th series, xxi, 103-31). Setting out to discover why the court, so popular and beneficial under the Tudors, became an object of obloquy under the Stuarts, Mr. Phillip turns to the records of the court to estimate «whether the outstanding cases (of cruelty) are the exception or the rule in the annals of the Court». Using the cause lists of the court, and two sources hitherto untapped, a series of process books (formerly the property of the Clerk of the Writs and Processes) and a manuscript in the Bodleian Library (Rawlinson MS. C. 827) which contains a detailed report of each day's session in the court from Hilary term 2 Ch. 1 to Trinity term 14 Ch. 1., Mr. Phillips is able to bring convincing evidence to show that the penalties exacted in the Star Chamber in the seventeenth century were, for the most part, neither exorbitant nor savage (for example, only 19 cases out of 236 involved corporal punishment). He suggests that the court's unpopularity under the Stuarts was due to the cognizance it had come to take of offences against the church and concludes : «The sudden reaction against the Star

Chamber may be considered a phase of the general movement against the episcopacy».

Mr. Theobald Mathew contributed in 1939 an amusing short study of the survival of official emoluments long after the duties for which fees were originally paid had been vacated in his «The Six Clerks Office» (*Law Quarterly Review*, v. 375-81).

The study of urban government advances apace and is an important aspect of English constitutional history. The first volume of «The History of Local Government in Manchester» by Dr. Arthur Redford assisted by Dr. Ina Russell, appeared in 1939 and deals with Manchester's history before 1841, first under manorial rule and later under the police commissioners. The authors are fortunate in being able to draw upon an almost unbroken series of records of the court leet, from 1552 to 1846, which show in detail the working of the social service during that period. This scholarly and illuminating work has been completed by the appearance of a second and third volume during 1940.

«The Corporation of Leicester, 1688-1836» (Oxford University Press, 1939) is a smaller, but well documented work by Mr. R. W. Greaves. It does not offer so much material for the study of local government as the book previously described, but contains some chapters of constitutional interest.

Two useful short studies appeared in 1940. Mr. C. G. Parsloe draws on a fine series of borough records for his «Growth of a borough Constitution: Newark-on-Trent, 1549-1688», published by the Royal Historical Society (*Transactions*, 4th series, xxii, 191-98) and Professor R. H. George embodies some of the results of long study in «The charters granted to English Parliamentary Corporations, 1688» (*English Historical Review*, lv).

The present generation pays particular attention to the editing of texts and compilation of detailed calendars of records, which are thus made available to a wider public. During 1939, Miss A. J. Robertson published an edition of the text of the charters of the Anglo-Saxon period with translations and notes (3).

(3) *Anglo-Saxon Charters*, Cambridge Studies in English Legal History (Cambridge University Press).

The Public Record Office produced four further volumes of the calendars (Calendar of Fine Rolls, vols, xviii-xix, covering the years 1445-1461, and Calendars of Patent Rolls for Philip and Mary, vol. iv, and for Elizabeth, vol. 1, together covering the years 1557-60). It is the practice of those responsible for these calendars to make their epitomes as full as possible, to give all proper names as they appear in the records, and to reproduce any word of which transcription or translation is in doubt. The recent calendars have been as near perfection as could be wished and have contained the most full and careful indexes. These calendars are full of information, both direct and incidental, and are a first class source of knowledge for the personnel and topographical studies so much in vogue.

The Selden Society has made available the text of another Eyre roll in «Rolls of the Justices in Eyre for Gloucestershire, Warwickshire and Staffordshire, 1221-22» (vol. LIX, 1940), edited by Mrs. Doris M. Stenton.

Dr. G. O. Sayles adds a third volume to his «Select Cases in the Court of King's Bench under Edward 1» (Selden Society, 1939). Containing cases selected for their particular interest, Dr. Sayles' volumes illustrate the variety of information which the plea rolls can supply for the study of mediaeval legal history, and his introductions and appendices of cognate records are valuable for the light they throw on many legal problems of that time. Although it is possible to find Dr. Sayles a trifle over-insistent on the value of the plea rolls as a source for the general study of legal history (4), their indispensability for certain aspects of the subject is beyond dispute.

Another selection from legal material is «Exchequer proceedings (equity) concerning Wales, Henry vin-Elizabeth» (5), compiled by Mr. E. G. Jones, which consists of abstracts of bills of complaint brought in the Court of Exchequer on its equity side, with references to further proceedings on them. The calendar is full, giving all topographical details, and affords a very good idea (\*)

(\*) For a more temperate view of the relative value of Year Books and plea rolls see G. H. Williams, *Year Books of Henry VI, 1422* (Selden Society, 1933), intro., pp. XLII-XLVIII.

(5) Board of Celtic Studies, University of Wales, History and Law Series, n. »4, (1939).



of the cases involved. It makes available evidence useful for the student of the scope of equity jurisdiction.

Local historical societies, which have flourished of late years and afford one of the most encouraging proofs that an intelligent interest in the past is not confined to the professional historian, (6) have published a number of texts of value for legal studies during the two years. A « Calendar of the Roll of the Justices on Eyre, 1247», (7) was compiled by Dr. G. Herbert Fowler. The calendar, which makes use of many abbreviations and of rather elaborate symbols to differentiate interlineation and other textual peculiarities, is not easy reading, but it appears to give all essential information and to maintain Dr. Fowler's usual high standard of scholarship. His clear and stimulating introduction, while well-suited to explain the calendar to the non-expert reader whose main interest is topographical, contains matter also for the legal historian. After his study of this Eyre roll, Dr. Fowler feels impelled to challenge the late Mr. W. C. Bolland's contention, based on the evidence of the Kent Eyre of 1313, that the «main purpose of the Eyre... was not the administration of justice, but the gathering into the King's exchequer as much money as possible in any way possible». Dr. Fowler's investigations lead him to prefer the view expressed by F. W. Maitland, from his study of the Eyre roll of 1221, that «a just and regular infliction of pecuniary penalties was the only means of bringing the unprofessional policeman (and every man ought to be a policeman) to a sense of his duties».

Credit for the widespread interest in the records and functions of the justices of the peace is primarily due to the work of one American historian, Professor Bertha H. Putnam. Attracted to this subject some thirty years ago, Miss Putnam has devoted a lifetime of research to it and presented her results in a number of scholarly monographs. Since she summed up her general

(6) For such publications see the annual *Supplement to the Guide to the Publications of the Historical Societies of England and Wales* published as a supplement to the *Bulletin of the Institute of Historical Research*.

(7) Bedfordshire Historical Record Society, vol. xxn, published at Aspley Guise, 1939.

conclusions in her introduction to «Proceedings before the Justices of the Peace in the fourteenth and fifteenth centuries» (Ames Foundation volume for 1938), she has produced yet another volume of evidence for this study. Her «Yorkshire Sessions of the Peace, 1344-6» (Yorkshire Archaeological Society, vol. c) contains the Latin text *in extenso* of the roll and appendices of further record material (King's Bench, Gaol Delivery and Exchequer) for the cases concerned. In a valuable introduction, Miss Putnam gives a full account of the sessions of the peace, dates and places of meeting, area of jurisdiction, the officers, jurors and pledges, as well as a classification of offences, which discloses the preponderance of economic offences, and a discussion of many other matters of legal interest.

A former student of Miss Putnam's, Dr. Elizabeth G. Kimball, is responsible for another text, «Rolls of the Warwickshire and Coventry Sessions of the Peace 1377-1397» (Dugdale Society, 1939), for which she also supplies a translation and interesting introduction on somewhat similar lines to those by Miss Putnam. Professor T. F. T. Plucknett has compiled for this volume an analytical index of indictments similar to those which he has provided for other texts by Miss Putnam and her pupils. A further text, for 1314-16, with introductory elucidation, «Rolls of Northamptonshire Sessions of the Peace», edited by Miss Marguerite Gollancz, was published in 1940 by the Northamptonshire Record Society.

Quarter Sessions records offer the same kind of information for the modern period, and many local societies have done good services in publishing them. Mr. S. C. Ratcliff and Mr. H. C. Johnson, who edit the full text of «Orders made at Quarter Sessions, Easter 1665 to Epiphany 1674», (Warwick County Records, vol. v, 1939), are well equipped for this task and able to supply an illuminating introduction.

Calendars to similar records for two other counties are «County of Buckingham: Calendar to the Sessions Records», vol. III, 1705-12, and appendix 1647 (Aylesbury), and «Hertfordshire County: Calendar to the Sessions Books and other Sessions records with appendices, 1799-1833», vol. ix (Hertford), both compiled by Col. Wm. le Hardy and Mr. G. LI. Reckitt.

At a time when the principles which we study in constitutional and legal history in their process of evolution are gravely menaced, it is encouraging to read the testimony of one who has worked long to elucidate them and has the courage of his faith in them. Professor C. H. McIlwain's «Constitutionalism and the Changing World» (Cambridge University Press, 1939) is a collection of papers, most of which have appeared elsewhere, and some of which, reviews and addresses, are designed for the only moderately learned reader. But his popular discourses on constitutionalism and his more technical studies (such as the three essays on sovereignty, two on Magna Carta and that on «The Tenure of English Judges») burn with the same conviction that constitutionalism, though unfashionable at present, should and will survive.

MARJORIE BLATCHER

## Alemanha

### Folclore Jurídico

Die rechtliche Volkskunde (folklore jurídico) ist jener Teil der Volkskunde, der die einzelnen volkskundlichen Sachgebiete, vor allem das Sprachgut, das Sachgut, das Brauchgut und das Glaubensgut des Volkes auf die früheren und gegenwärtigen Beziehungen zu Rechtssatzungen und zum wirklichen Rechtsleben durchforscht. Dass die Aufgaben dieses Forschungszweiges, der sich in der heutigen deutschen Wissenschaft immer klarer abzeichnet und in EBERHARD VON KÜNSSBERGS *Rechtlicher Volkskunde* (Halle 1936) auch schon seine erste Gesamtdarstellung gefunden hat, auch in Portugal bereits seit Jahrzehnten ins Auge gefasst werden, beweisen zwei Abhandlungen von PAULO MERÊA : *Considerações sobre a necessidade do estudo do direito consuetudinário*