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A Concise History of the Common Law

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A CONCISE HISTORY OF THE COMMON LAW.—Theodore Plucknett, Rochester, N. Y. Lawyers Cooperative Publishing Co., 1929 pp ii, 416.

To those interested in the history of English law, Professor Plucknett's book will be a welcome addition to the literature on the subject. Notwithstanding the monumental work of Holdsworth, the smaller work of Pollock and Maitland, the more modest but valuable works of Jenks, and of Maitland and Montague in *A Sketch of English Legal History*, the short *Introduction to English Legal History* by Potter, the *Select Essays on Anglo-American Legal History*, and the recent vivid, although perhaps not *historical*, *Story of Law*, by Zane, (I believe Professor Plucknett characterized this last as "one of the worst products of the movie age")—notwithstanding all of these, there was still room for another history of English law.

Professor Plucknett, however, did not cover the whole field. The original project was to write a *Concise History of the entire English law*. Instead the book has been restricted quite narrowly to the common law.

As to general professional readers, it is felt that they will probably let this book severely alone. There is little in it of interest to those who do not possess a serious interest in early English legal history.

However, first attention probably should be devoted to an estimate of the suitability of this book for independent readers, and for beginning law students, for Professor Plucknett states in his introduction that the book has been prepared "as an historical introduction to the study of law" and that "as the readers for whom it was designed are not professional historians and are still in the early stages of their legal education, it was obviously the author's duty to avoid unnecessary detail and technicality".

In spite of this avowed purpose it is felt that the book in many respects is not suitable as an introduction to law, and that technicality has not been sufficiently avoided. It is felt that only advanced law students can expect to follow and really understand all that the author has offered them, and that independent non-professional readers will be unable to use the book at all.

For example, the elementary, or non-professional, reader will probably not grasp the following on page 181, where speaking of Bracton and the use of cases, the author states, "He never gives us any discussion of the authority of cases and clearly would not understand the modern implications of *stare decisis*" without explaining what "*stare decisis*" is. Again on page 212 the author speaks of the specific influence of Roman, on Anglo-Saxon, law

being "traced principally in the law relating to bookland" without giving any idea of what bookland is, so that the whole point of the statement is lost to the elementary reader. Again the discussion on page 253 of the rule against perpetuities, will probably be found by the elementary reader to be entirely incomprehensible. So with the reference on page 217 to the period of limitation on the writ of right, and so with the reference on page 274 to the matter of death within the period of limitation in connection with the assize of mort d'ancestor. Another example is the statement on page 343 that "the division of ownership in the case of the entail is certainly the origin of the common law system of estates * * * * *", which statement is certainly unintelligible to the beginner, and even the student with some acquaintance with the law of real property will not begin to get the point of this statement until he is well into the following chapter—if he even gets it then. Another inadvisable use of technical terminology occurs in the discussion on page 338 of alienation by subinfeudation where the terms "tenant of the land in demesne", and "tenant in service", and "incorporeal hereditament" are used without preliminary explanation.

The foregoing are only a few of numerous instances which indicate that the author at times forgot his readers, if they were expected to be beginners in the field of law, or else was in fact writing for advanced readers with considerable knowledge of law and of legal history.

As to arrangement and treatment of material, it would be interesting if space were available to compare it in detail with the *Short History of English Law* by Jenks. However, it is possible here to say only that the two books are quite dissimilar. Professor Plucknett seems to lose interest in most things newer than the 16th century, while Jenks comes down into the 20th century. Jenks, although he is restricted by his title, to English history, covers much besides the Common law. Plucknett although he has the whole scope of Common Law within his title rarely ventures into any Anglo-American jurisdiction except England. The treatment by Jenks of the 19th century reforms is quite full compared to that of Plucknett to whom this period seems to hold little interest, although it is probably more important to our own times—if one is writing for beginners—than the periods several centuries removed. As to modern procedural and substantive law, Jenks' range is much more broad, and seems better designed to connect our own time with the past.

The effort to write too briefly on the Common Law has resulted in what is felt to be a misleading under-emphasis of other essential

parts of our legal history, if it was intended to write a book suitable for beginners. Formal treatment of the Common Law consists of six pages, the influence of the Roman Civil Law gets about three pages, the Law Merchant gets about eleven pages and these are spent principally in introducing the idea of negotiability, there is hardly anything on the Admiralty jurisdiction, equity gets a slightly more adequate treatment of approximately twenty-three pages, of which, however, eleven are devoted to biographies of the early chancellors. Even a concise history of *the common law* would seem to require more extended treatment of these matters.

There is, however, much material in Professor Plucknett's book that is not to be found in that of Jenks, such as the material on the methods of progress, such as custom, the forms of action (regrettably brief), legislation and precedent. The biographical material from Bracton to Lord Eldon, scattered in various places in the book, is also an interesting feature, as are the chapters on professional literature, and on the legal profession.

As to mechanical features, there is a detailed table of contents which has to serve in lieu of section headings in the text. There is a table of some forty leading cases, and a table of some forty-four early statutes. The index, at first sight quite adequate, could stand much improvement. For example, such important matters as the names of the forms of action are not separately indexed, but can finally be located under the head of "Writs," and the Common Law Procedure Acts and the Judicature Acts could not be found in the index at all.

As to possible errors in the text, the following are a few among other doubtful matters that seem illustrative. It is suspected that Professor Plucknett sees the origin of assumpsit about a century sooner than most of us—but probably we are wrong. The statement on page 147 that below the House of Lords was the Court of Appeals and that *below it* was the High Court of Justice seems to be misleading as to the organization of the Supreme Court of Judicature. The statement on page 312 that "other aspects of feudalism such as dependent tenure" "are presumed to exist still in some jurisdictions in this country" runs counter to the reviewer's understanding that allodial ownership is everywhere recognized in the United States.

In conclusion, it is felt that the book is probably not suitable as an introduction because it is too technical, that it is not a sufficiently complete "concise history" for general use, because it stops in many instances, too many centuries from our own time, and that it is not a history of the whole Common Law, as it almost never passes outside of England—it is rather a concise history of

early English common law. However, even with this limited scope, there are, as compared with other available works, such differences in interest, in emphasis, and in treatment that no one, who pretends to be acquainted with the literature on this subject, can overlook this book.

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CASES AND MATERIALS ON THE LAW OF SALES. By Karl N. Llewellyn, Chicago: Callaghan and Company, pp. xxxv, 1081 (1930).

For several years we have been conscious of stirrings at the Columbia University School of Law. One of the first fruits, by which the outsider may judge of the nature and merit of the work there being done, is now available in the form of a Sales casebook by Professor Llewellyn. It is safe to say that this book is the most stimulating casebook that has appeared in recent years. In order to discuss in any adequate manner the very important problems of legal education that are raised, a review would have to be expanded far beyond the limits of space available. An attempt will be made to touch on only a few of what appear to the reviewer as outstanding points.

The book differs from the usual Sales casebook in several respects. Introductory remarks by the author are found at the beginning of many of the chapters and sections. Comments and questions follow the cases. The facts of many cases and the decisions are printed without opinions. There are variations in content and alignment of material.

The comments of the author (and he is more than an editor) make this book of far more interest than the ordinary casebook. They give us an insight into Professor Llewellyn's classroom methods. The doctrine to be found in the cases is revealed not as a static thing but as in the process of growth, moulded by the exigencies of the changing commercial world. The demands of social policy and the promptings of commercial sense are ably presented by way of explanation or criticism of judicial action. The patterns of commercial dealing and the reasons for them are emphasized. Rules of law, statutory and judge-made, are discussed in their relation to types of sales transactions now in use.

Professor Llewellyn imparts a knowledge of the business world and non-legal terminology that is exceedingly valuable for a lawyer to know. It will enable him better to understand the problems of his clients. It will make it easier to grasp the significance of complicated transactions involving business devices that are well