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Law Library

Dedicatory Exhibit

The Joseph and Edythe Jackier Rare Book Room

April 14, 1996

The Invention of Printing and the Common Law Tradition

by

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The Joseph and Edythe Jackier Rare Book Room makes possible, for the first time, exhibits of the Law Library's very large number of old law books. The Collection includes no less than sixty titles published before 1500 - called incunabula since they come from the infancy of printing. In this exhibition we can only show a small selection, chosen to illustrate the early history of the printed law book and the rise of certain important types of legal literature.

The invention of printing with moveable type had as dramatic an effect on Western European culture as the invention of the computer in our own time. In England printing began in 1477, when William Caxton published his The Dictes or Sayengs of the Philosophres. Caxton however printed only one law book in 1490; this was a collection of Acts of Parliament. Before the advent of printing lawyers, like everyone else, had to rely on handwritten manuscripts; indeed long after printed law books became commonplace lawyers continued to make extensive use of handwritten texts. But the printed book progressively supplanted the handwritten legal text.

The world before printing is illustrated by a manuscript Register of Writs (Item 1). This would have been a very expensive book. It is written on vellum, probably by a professional scribe, and was produced for

John Chamberleyn in the reign of Edward IV (1461 - 1483). He was one of the more senior Chancery clerks. One of the functions of the Chancery was to issue the writs which initiated actions in the common law courts, and this was his precedent book. The first printed edition of the Register was not published for another fifty years, the publisher being William Rastell (1508 - 1565), who was both a lawyer and a Chief Justice and a printer; he also wrote a life of his friend Thomas More (1478 - 1535), the "man for all seasons" and the only common lawyer to become a saint.

The first printers who specialized in law books were John Lettou and William Machlinia; they were active in a small way between 1481 and 1486. The library does not possess any of their books. The first person who published law books on a large scale was a Frenchman, Richard Pynson; he was naturalised in England in 1513 and died in 1530. He was a graduate of the University of Paris and learnt the new art of printing in Rouen. He was appointed King's Printer in 1508 and thereby secured a monopoly in printing Acts of Parliament. Probably his first venture was to arrange for the publication of an abridgement of cases (Item 2) traditionally known as Statham's Abridgement; it has no title page since they had not yet been invented. The cases came from the medieval law reports known as

Yearbooks in which the cases are arranged by regnal years and law terms - Michaelmas, Hilary, Paschal and Trinity. This edition is thought to date from 1490 or 1491. It is the earliest common law book owned by the Law School, and the most beautiful example of early law printing. It was actually produced not in England but in Rouen by Richard le Tailleur, whose mark appears at the end, but it bears Pynson's name (per me Pynson) on the index. The form of this book shows the transition from the handwritten to the printed book - the first initial letter is left blank, so that the purchaser can arrange to have a colored decorated initial added by a scribe. In this copy, which belonged to a lawyer called Byllington (perhaps George Byllington of Strand Inn), it remains blank; it looks as if the book was little used. The connection between Nicholas Statham (? - 1472), a Lincoln's Inn lawyer, and this abridgement is obscure. The manuscript from which the printed text was derived survives, and was completed in 1457 for one Thomas Segden, who was Principal of Furnivall's Inn, one of the lesser Inns of Chancery associated with London legal education at this time. It contains no reference to Nicholas Statham. Perhaps he owned a copy which the printer used.

Item 3 shows the practice of adding decorated initials by hand to a printed book. This is not a common

law book; it is an encyclopedia of tricky cases (Summa de Casibus Conscientiae) produced for the use of priests in the confessional, so that they could give reliable advice as to what good conscience required for the avoidance of sin. Devout lay persons also used such works. The language is Latin. In it you can look up subjects such as fornication, lust, and so on, and see what the experts have to say about them. It was compiled by a Franciscan, the Blessed Angelus de Carletus (1411 - 1495). He was a Doctor of both Canon Law and Civil Law of the University of Bologna. This work was known as the Summa Angelica. Although dealing with what we would view as practical ethics, such confessors' manuals were, in the tradition of the Western Church, intensely legalistic, presenting under titles a sort of hotch-potch of canon and civil law. Indirectly the Summa Angelica may have influenced the common law. One matter discussed is the obligation of promises, and the discussion was used as a source by the common law writer Christopher St. German in his Doctor and Student (Item 13 below), which was widely read by lawyers. Thereby they may have learnt of the idea that a promise, to be binding, must have a good cause (causa promissionis); the doctrine of consideration in contract law is probably a version of this doctrine. The Summae may also have influenced the early Court of

Chancery, which was, in the fifteenth century, thought of as a Court of Conscience. Confessor's manuals are, I am told, still in use in the Catholic Church, but lay persons now rely on Catechisms instead.

The common law system was based in part on authoritative texts - Acts of Parliament - and in part on a oral tradition of court practice, for which law reports served as aids to memory. Statutes were amongst the earliest legal texts published; the library does not possess any very early examples. Item 4 is a collection of Statutes of Henry VIII (1509 - 1547), with legislation from the 25th to the 41st years, printed by Thomas Berthelet in 1551. The volume is open at a point showing an Act for the protection of ducks, and for the attainder for treason of Elizabeth Barton (the deranged mystic "Nun of Kent"). She was executed in 1534 for prophesying against Anne Boleyn and condemning the King's divorce from Queen Catherine of Aragon, and his remarriage to Anne.

Item 5 is a collection of Henry VIII's statutes printed by Thomas Powell in 1563. It is open at "An Act Against Poysoning". This, the most bizarre English statute, provided for the boiling alive of Richard Roose, the Bishop of Rochester's cook, who was thought to have poisoned a poor widow, and for the boiling of future cooks who poisoned food and thus committed an

unnatural crime. Richard was indeed boiled, as were a number of other cooks. On the same page is some racialist legislation against "Egyptians", that is Gypsies, who were to be expelled from the country and their property confiscated. The treatment of this minority in some parts of Europe remains a human rights problem today.

Law reports were and are the typical texts of the common law. Item 6 is a law report, a printed Yearbook, containing case reports from 1466, the sixth year of Edward IV. The language is Norman French, then still used for legal argument in the Royal Courts, and the typeface used is called "black letter". Hence "black letter lawyer" - a lawyer steeped in the learning of the old books. This volume is open at "The Case of the Thorns" (Hull v. Orynge), which contains a discussion of the principles of liability in tort law - should a defendant be liable without fault if loss was caused? This case, almost incredibly, is still used five centuries later in teaching tort law by the case system in modern America. Professor Richard Epstein, having studied it in his Oxford law course, included it in his Casebook Cases and Materials on Torts (1995).

Many editions of yearbooks were published between about 1482 and 1679; originally just one year's cases would form an edition, but before long collections

covering a number of years appeared. Item 7 is an example - it contains the cases for the whole reign of Henry IV (1399 - 1413). This edition was printed in 1575. The printer was Richard Tottell, who dominated law printing from 1553 to 1593. In 1552 he had obtained a Crown grant of a monopoly in printing common law books (but not statutes). The volume is open at the report of a case which is a forgery, probably produced to provide a precedent for a majority verdict in treason trials of peers. It records the trial of the Count of Huntingdon in Westminster Hall for treason; in fact the Count was never tried, but summarily beheaded. The date and source of the forgery is not known, but it was first published, so far as we know, by Tottell in 1553 - was it perhaps the quid pro quo for his monopoly?
Tottell, who spelled his own name in ten different ways, did not confine himself to law printing. He published the first collection of English lyric poetry, usually called Tottell's Miscelllany (1557). In his time the Inns of Court were a center of literary culture; Shakespeare's Twelfth Night was first produced in the hall of the Middle Temple.

Reports of cases arranged chronologically by terms and years present the law in a disorderly way; lawyers tried to impose system by abridging the cases, and arranging them under subject titles, as in Statham's

Abridgement (Item 2 above), giving marginal references to the full report. Item 8 further illustrates this process; it comprises one volume of a much larger and more comprehensive work than Statham, known as La Graunde Abridgement. This was compiled by Anthony Fitzherbert (1470 - 1538). His was the first attempt by anyone to systematize the entire common law; he abridged over 13,000 cases. It has been argued very plausibly that Fitzherbert's work as a systematiser was highly significant in preserving the continuity of the common law; there were, in his time, threats to replace it by receiving the civil or Roman law as developed in the Universities of Western Europe. His great work was published in three parts in 1516 - 1518, and cost, unbound, £2, then a substantial sum, but cheaper than a handwritten book of the same size. Bear in mind that all type setting was then done entirely by hand so printing was still expensive, and lawyers would not own many books. It is based not on printed Yearbooks but on manuscripts; hence the marginal references do not refer to pages or folios. Fitzherbert became a Judge of the Court of Common Pleas in 1521, and was one of the judges at the trial of Sir Thomas More in 1535. He also wrote books on agriculture. This is not as odd as it seems; a wealthy lawyer at this period would own a country estate and be concerned in its efficient

management. Abridgements of cases continue as a form of common law literature to the present day.

Fitzherbert's name is also associated with Item 9, known as the New Natura Brevium; in reality Fitzherbert merely acted as sponsor for the publication. It probably originated as a fifteenth century teaching manual; it gives the text of writs with an explanatory commentary on them. This edition was printed in 1567 by Tottell, and was one of the basic books then used by beginners in the law. It is open at the writ De Idiota Inquirendo, which lay to initiate an investigation into whether someone was an "idiot or sot". If they were then their property was taken into Crown custody for their protection.

The disorderly character of the common law system, which evolved out of the practices followed in the resolution of cases in the Royal Courts, made it extremely difficult to write legal treatises, expounding, in an orderly manner, the concepts and principles thought to underlie a particular branch of the law. The earliest such work (Item 10) was the New Tenures by Sir Thomas Littleton (c. 1415 - 1481), a remote ancestor of the English jazz musician Humphrey Lyttleton. He became a judge of the Court of Common Pleas in 1466. His book provides a concise and generally elementary statement of the law of real property, then the most important

branch of the law. It was where the money was. Originally written in Norman French, but from the 1530s also published in English, it became the most successful book on English law ever written. Over ninety editions are known, and the text itself came to be treated as authoritative. The reader is addressed as "my son", and this has led to the idea that it was written for Littleton's own son, but this was a way of addressing pupils, and the book probably originated as a set of elementary lectures on the law. Later Lord Chief Justice Coke claimed it to be "the most perfect and absolute work that ever was written in any human science". Littleton was the first common law treatise ever published, the first printing probably being in 1481. The English edition exhibited here was printed by Tottell in 1556. It is open at the first section, which provides a definition of the largest property interest recognized, the "estate in fee simple". It remains correct for the present day.

In the Roman Law based systems of continental Europe the printing of law books was conducted on a very considerable scale, and the Law Library owns a number of such books, some dating from the fifteenth century, as well as a larger number of early books of the Canon Law, the law of the Western Church (see Item 3 above). Item 11 is an example of Roman Law text. It is

an edition of the Institutes of Justinian, a comprehensive and readable statement of the whole of private Roman Law, issued in Constantinople in 533 A.D. to provide the first year course in the law schools of present day Istanbul and Beirut. This edition was printed in Nuremberg in 1486, and its first owner was John Compotus, who bought it at Easter, 1488. It embodies a commentary or gloss by Accursius (c.1182 - c. 1260); it is open at the first page where the Institutes claims that imperial majesty must be adorned by laws as well as by arms, referring thereby to the two principal functions of government - making war and administering law. The form of the book is transitional between manuscript production and printing. The influence of Roman Law on the common law is controversial, but the structure of Justinian's Institutes, derived from an earlier work by Gaius, written about 150 A.D., though somewhat modified, underlies the first successful similar work in the common law tradition, Blackstone's Commentaries (Items 18 and 19 below).

The form of this edition of the Institutes, a basic text with an elaborate gloss, was used by Sir Edward Coke (1552 - 1634) in the first part of his Institutes of the Laws of England (Item 12). His wife remarked, on hearing of his death, "We shall never see his like again, thanks be to God!". The book provides an elaborate

commentary on the text of Littelton's New Tenures. Written in a chatty but tedious stream-of-consciousness style, and embodying immense legal learning, this commentary (known to lawyers as Coke on Littleton) engulfs the text, around which it is wrapped. Coke's commentary was then commented on by Sir Mathew Hale (1609 - 1676), Hale's commentary by Francis Hargrave (1741 - 1821), and Hargrave's by Charles Butler (1750 - 1832), producing "Butler on Hargrave on Hale on Coke on Littleton". This repulsive work remained the Bible of property law until the mid-nineteenth century.

Most common law printing, until very modern times, has been driven by the immediate practical needs of the legal profession and of those seeking to enter it, or of persons who, though not lawyers, needed legal information - for example Justices of the Peace. Hence critical or evaluative works about the law have been unusual. Item 13, Christopher St. German's (c. 1460 - 1540) Dialogus de Fundamentis Legum Anglie et de Conscientia (Dialogue Concerning the Grounds of the Laws of England and Concerning Conscience, usually called Doctor and Student), is an early example of this rare type of legal book. It comprises dialogues between and Doctor of Divinity, presented as skilled in Canon Law and the learning of the confessional, and a Student

of the Common Law, and it discusses the merits of common law rules, and whether they are defensible in conscience. Doctor and Student appeared in two parts in 1528 and 1530; translated from Latin to English it became very popular. This edition is of 1554, by Richard Tottell. It is open at the passage discussing the question "What is a nude contracte or naked promyfe after the lawes of England and whether any action may lye thereupon". In this passage St. German reproduces parts of the discussion by Angelus Carletus (Item 3 above) and parts of an earlier similar work, the Summa Rosella, compiled by another but obscure Franciscan, Baptista Trovamala (still active in the 1490s). The discussion also advances the idea that a detrimental change of position in reliance on a promise should make the promise binding. This has been rediscovered as the modern doctrine of promissory estoppel.

Item 14 is the first printed edition of a comprehensive treatise on the law of England (Tractatus De Legibus et Consuetudinibus Anglie), written in Latin, and attributed traditionally to Henry de Bracton (c. 1210 - 1268), but probably written by someone else, mostly in about 1220 - 1230. It is open at the title page, which shows its original owner, one Raphe Whitfield. Some fifty or so manuscripts of "Bracton" survive, and the greatest modern expert on the very complex text was the late S.

E. Thorne of the Harvard Law School. This edition was printed by Tottell in 1569. "Bracton" tried to state the whole of the common law, using categories and concepts derived from Roman law - rather as do those anthropologists who describe the practices of their subjects in the conceptions of the anthropologist's own culture. Had it been more influential it might have Romanised the common law, but this never happened. The common law developed its own distinct culture and educational system, and "Bracton" came to be an irrelevance; by the fifteenth century it was even thought by common lawyers to be a Roman Law book. Why it was published in 1569 is something of a puzzle. Six hundred years after "Bracton" a more successful attempt was made to write a comprehensive account of the common law - see Items 18 and 19 below. This copy of "Bracton" was presented to the law school by the Class of 1868.

In the sixteenth and early seventeenth centuries law printing was fairly tightly controlled, but matters loosened up in the seventeenth century, with various new ventures in legal writing. Item 15 illustrates this; it is an anonymous work by "I.L.", edited by one " T.E.", entitled <u>The Lawes Resolutions of Womens Rights, or the Laws Provision for Woemen</u> and was printed by the assigns of John More in 1632. This is the first book ever

written on this subject. It is open at the passage on wooing, where it is explained that gifts given in the course of wooing should be returned if no marriage takes place. Item 16, William Sheppard's Actions on the Case for Deeds, viz Contracts, Assumpsits, Deceipts, Nusances, Trover and Conversion, Delivery of Goods, and for Other Malfeasance and Mis-Fesance is the first book ever written on what we call the laws of tort and contract; lacking any scheme for arranging the material it is about the worst law book ever written, simply stringing together notes of cases using the "and another thing/I forgot to mention" system. It is open at page 9 which deals, chaotically, with dog bites and the theft of pigeons, amongst other unrelated matters. Edmund Wingate's Maxims of Reason (1658), Item 17, is a much more sophisticated work. It expresses the theory that the common law was based on a number of basic principles which could be expressed in maxims; it sets out 214 maxims and explains and comments upon them. It is open at number 147: "So as none shall take benefit or advantage of their own wrong". This comes ultimately from the Roman jurist Ulpian, who was murdered by the Praetorian Guard in 223 A.D. It was applied in the American case of Riggs v. Palmer (1889) to prevent a murderer taking property under the will of his victim, a case much relied upon by Professor Ronald Dworkin in

developing his theory of judicial decision. Collections of maxims continued to be published well into this century, but this type of legal literature is now extinct, though maxims still feature in legal argument.

No exhibition of old law books would be complete without the inclusion of Sir William Blackstone's Commentaries on the Laws of England. The library possesses many editions, including that by Edward Christian, the very boring brother of Fletcher Christian of mutiny on the Bounty fame, and one of Blackstone's undistinguished successors. Blackstone (1723 - 1780), who held the first chair of common law at Oxford, wrote the first (and the last) elegant, readable and comprehensive account of the common law, which was published in four volumes between 1765 and 1769 by the Clarendon Press, Oxford. Item 18 is the first volume of the first edition, and is open at the passage stating the law on the right of personal liberty. Blackstone was even more successful and influential in America than in England; the Commentaries became the chief vehicle whereby common law legal culture became established on this side of the Atlantic. Item 19 is Volume IV of the first American edition, published by subscription in Philadelphia in 1772; it is open to show the names of some of the subscribers. There is a celebrated modern article by Professor Duncan Kennedy, in the critical legal

studies mode, on "The Structure of Blackstone's Commentaries", published in 1979 in the Buffalo Law Review. Professor Alan Watson has subsequently shown how the scheme employed by Blackstone derives ultimately from Justinian's Institutes, though modified in response to schemes by Dyonisius Gothofredus (1549-1622) and Sir Mathew Hale (1609-1676). Thomas M. Cooley of this law school edited American editions of Blackstone in 1870, 1872, 1876 and 1884, dedicated to the alumni of the law school, calling Blackstone a work:

> whose careful and frequent perusal cannot fail to strengthen the love of the law as a science and to stimulate a generous ambition for professional success.

It seems as good a note as one can choose on which to end this account of the books in this exhibition.