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Brown: British Statutes in American Law 1776-1836

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RECENT BOOKS

BRITISH STATUTES IN AMERICAN LAW 1776-1836. By *Elizabeth Gaspar Brown.* Ann Arbor: The University of Michigan Law School. 1964. Pp. xiv, 377. $7.50.

The all-too-short bookshelf on American legal history has been expanded slightly in quantity and substantially in quality by this unique study. More than thirty years ago, when Professor Morris issued "a challenge to American legal scholarship to rescue the law of the British colonies in North America from the obscurity in which it had long lain"[1] with the first edition of his *Studies in the History of American Law,* that edition itself was almost the only title to be placed on a reference list for such a project. Between the date of his first edition in 1930 and the lectures of Professor Ames on legal history (mostly British) in 1913,[2] hardly anything had been published on the subject, unless one broadens the definition to include such related works as Warren's earlier history of the bar in America,[3] his history of the Supreme Court,[4] and biographies such as Beveridge's study of John Marshall.[5]

In the past three decades, although one could not describe it as a mounting flood, the trickle of scholarship in legal history has slowly broadened into a credible rivulet, and at least it is flowing more strongly. The several volumes of American Legal Records published through the Littleton-Griswold Fund of the American Historical Association[6] will stand comparison with the hallmark works of the Selden Society. The original study of Goebel and Naughton on criminal procedure in New York Colony[7] proved to be an invaluable antecedent to Professor Goebel's landmark edition of the recently published first volume of Alexander Hamilton's legal papers.[8] The prospective publication of the first volume of the new Supreme Court History under the auspices of the Oliver Wendell Holmes Devise of the Library of Congress and the forthcoming Documentary History of the Ratification of the Constitution

1. MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW, p. iii (2d ed. 1959).
2. AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS (1913).
3. WARREN, A HISTORY OF THE AMERICAN BAR (1911).
4. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1937).
5. BEVERIDGE, THE LIFE OF JOHN MARSHALL (2d ed. 1944).
6. COUNTY COURT RECORDS OF ACCOMACK-NORTHAMPTON, VIRGINIA 1632-1640 (Ames ed. 1954); PROCEEDINGS OF THE MARYLAND COURT OF APPEALS 1695-1729 (Bond & Morris ed. 1933); COURT RECORDS OF KENT COUNTY, DELAWARE 1680-1705 (de Valinger ed. 1959); THE SUPERIOR COURT DIARY OF WILLIAM SAMUEL JOHNSON 1772-1773 (Farrell ed. 1942); RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA 1671-1779 (Gregorie ed. 1950); SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY (Morris ed. 1935); THE BURLINGTON COURT BOOK (Reed & Miller ed. 1944); RECORDS OF THE VICE-ADMIRALTY COURT OF RHODE ISLAND 1716-1752 (Towle ed. 1936).
7. GOEBEL & NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK—A STUDY IN CRIMINAL PROCEDURE (1944).
8. THE LAW PRACTICE OF ALEXANDER HAMILTON (Goebel ed. 1964).

under the auspices of the National Historical Publications Commission[9] are also substantial contributions to this long-neglected field.

Historically the American people have had, as one scholar puts it, a "highly instrumental attitude toward law," which "reflected the depth and spread of change in our development, the pressure of events, the preoccupation with economic values and problems and with the nearest ends—those which people deemed the most practical."[10] That socio-economic factors fundamentally affected law, especially in the context of the frontier, has been skillfully demonstrated by Professor Blume in his published work,[11] and the pragmatic considerations coloring our constitutional practices have been eloquently —as well as controversially—argued by Professors Crosskey and Haines.[12] Here and there, special studies of environmental or internal influences on our legal institutions have also appeared.[13] But the list, taking all of these together, is still much too short to do justice to the many facets of the subject.

Assuming, although not conceding, that the study of legal history has some "practical" usefulness to the contemporary profession and the modern law curriculum, a case in point is certainly the role of the common law in American jurisprudence. The author of what is already acknowledged as a modern classic on its subject has written:

> "For the long haul, for the large-scale reshaping and growth of doctrine and of our legal institutions, I hold the almost unnoticed changes to be more significant than the historic key cases, the cumulations of the one rivaling and then outweighing the crisis-character of the other. If the nature of case law growth and adjustment were the subject of the present study (as it is not), I should even be arguing with detail and persistence that in the main the difference between the great judgments which become leading cases and various equally striking judgments (they are so many!) which have sunk into obscurity lies largely in the massing around the former of these little "insig-

9. *Cf.* Dunlap's report on the Supreme Court history, and Cushman's report on the Documentary History, respectively, in The Quarterly Legal Historian, March 1963, p. 3; and *id.*, March 1962, p. 3.

10. HURST, THE GROWTH OF AMERICAN LAW—THE LAW MAKERS 4 (1950).

11. TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN, 1805-1836 (Blume ed. 1935-40); Blume & Brown, *Territorial Courts and Law*, 61 MICH. L. REV. 39, 467 (1962-63); Blume, *Legislation on the American Frontier*, 60 MICH. L. REV. 317 (1962), and related papers cited there.

12. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953); HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835 (2d ed. 1960).

13. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); JACOBS, LAW WRITERS AND THE COURTS (1954); WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (2d ed. 1962).

> nificant" applications which first built them in and then built them up and thereafter built them out into unsuspected range and into a strength which never was their own."[14]

The fact is that the role of the common law in our history, legal and general, has been a tripartite one: The first phase consists of the period and the process of "receiving" the English common law into the colonies and, in the newly established states, the application of English common-law rules of construction and decision. This phase continued well into the nineteenth century but has been diminishing rather steadily since then. The second phase has been the period when native legislation, particularly legislation seeking to divest the jurisdiction of certain rules of the common law which had been received—*e.g.*, abolition of the Rule in Shelley's Case[15]—has created a new frame of reference for the common-law tradition. We are presently in the third phase, in which a new corpus of statutory enactments is growing up substantially in derogation of the legislative developments of the second phase and of the common law as it adapted to the frame of reference established by the second phase.[16]

From Llewellyn's study we may proceed to the proposition that American jurisprudence today is conditioned by the common law inherited from the first and second phases thus described and, for the most part, has not become generally aware of the third phase.[17] If we must have some pragmatic application for legal history, then here is one; for to make each of these three phases of the common law in America clearly discernible, we need considerably more research on the first two phases.[18] And this is what makes Mrs. Brown's work of such fundamental significance. It has brought into focus an important and hitherto generally unnoticed element in the continuity of English common-law institutions in American life—for, in the first and second phases which have been suggested above, statutory materials were essentially related to the common law either because they were declaratory or in derogation thereof.

British colonial theory—at least in the eighteenth century and

14. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 109 (1960).

15. For specific statutory abolition, *cf.* ALA. CODE tit. 47, § 141 (1958); CONN. GEN. STAT. ANN. § 47-4 (1958); D.C. CODE ANN. § 45-203 (1961); FLA. STAT. § 689.17 (Supp. 1963); IOWA CODE § 557.20 (1950); MD. CODE ANN. art. 93, § 366 (1957); MASS. GEN. LAWS ANN. ch. 184, § 5 (1955); MINN. STAT. § 500.14 (1945); MISS. CODE ANN. § 835 (1956); MO. REV. STAT. § 442.490 (1949); NEB. REV. STAT. § 76-112 (1958); N.H. REV. STAT. ANN. § 551.8 (1955); N.J. REV. STAT. § 46:3-14 (1937); N.Y. REAL PROP. LAW § 54; N.D. CENT. CODE § 47-04-20 (1960); PA. STAT. ANN. tit. 20, § 180.16 (1950); S.C. CODE ANN. § 57-2 (1962); TENN. CODE ANN. § 64-103 (1955); VA. CODE ANN. § 55-14 (1959); W. VA. CODE ANN. § 3534 (1961); WIS. STAT. § 230.28 (1957).

16. *Cf.* Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936).

17. *Cf.* LLEWELLYN, *op. cit. supra* note 14, app. C.

18. *Cf.* the brilliant illustration of the technique in Llewellyn, *On Warranty of Quality, and Society* (pts. 1-2), 36 COLUM L. REV. 699 (1936) and 37 COLUM. L. REV. 341 (1937).

possibly throughout the seventeenth—held that acts of Parliament did not extend to a British colony unless the act specifically mentioned the colony or the colony specifically incorporated the act into its own law. Attempts at general incorporation by reference, on the part of certain American colonies, were disallowed by the crown; and Mrs. Brown's interesting documentation of these instances significantly supplements the critical analysis of colonial theories of British constitutionalism published by Professor McIlwain forty years ago.[19] This being the state of affairs, American colonies, and subsequently American states,[20] specifically adopted parliamentary enactments which offered benefits in many subject-areas (*e.g.*, wills, waste, uses), which the Americans sought to enjoy within the context of the English common law.[21]

Until the history of the common law in the United States was well into its second phase and the codification movement had gained ground in a number of states, the British statutes continued in effect. Unless specifically repealed, in fact, one may presume that they continue to the present, and with them, in the absence of contrary authority, the guiding precedents of British adjudication. As the author states in her preface, the period selected for her study (the first sixty years following independence) was selected in the interest of unity.[22] One may hope that she will ultimately write a sequel documenting the survival of particular British statutes in American legal systems of the present era.

With this hope in mind, one is tempted to single out Part III of the present volume as the most important and also the most exciting. Here, the author has assembled dozens of British statutes, from the reissue of Magna Carta, in 9 Hen. 3 (1225), to an act in the first year of George III in 1760, with citations of American cases or statutes which adopted them.[23] A bumper crop of separate research projects—with fields white for harvest and laborers distressingly few—now can be anticipated from this seedbed. What does this study of the survival of British statutes in the formative period of American law suggest, for example, as to the true context of the American law of wills; or of actions in arrest of judgment or in execution thereof; or of bargain and sale, the Uniform Commercial Code notwithstanding?

With this study, we have advanced a measurable distance toward the state of readiness necessary to take full advantage of the research

19. BROWN, BRITISH STATUTES IN AMERICAN LAW 1776-1836, at 1-46 (1964); MCILWAIN, THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION 18-147 (1923); *cf.* SMITH, JAMES WILSON—FOUNDING FATHER 43-115 (1956).

20. *Cf.* VA. CODE ANN. § 1-11 (1950).

21. BROWN, *op. cit. supra* note 19, at 47-200.

22. *Id.* at x.

23. *Id.* at 201-355.

opportunities suggested by Professor Hurst in a paper in 1960: the study of reciprocal influences of law and socio-economic factors in periods of major national adjustments, *e.g.*, in the Jacksonian era, during and after the Civil War, during the "progressive era," and in the Great Depression.[24] Mrs. Brown's work not only provides a solid foundation for such research, but is a major contribution in itself. The detailed checklist of British statutes incorporated into American state law, which comprises Part III and perhaps one-third of her book, is complemented in Part I with the historical background and in Part II with a review of the particular method by which the statutes were adopted in various jurisdictions (the original colonies, the Northwest Territory, the territory south of the Ohio, and the Louisiana Territory).

The role of legislation and legislatures in our history is now being re-examined in terms of what Professor Hurst called "the inheritance of the legislature"[25]—the colonial frustrations in efforts to secure greater control over local affairs from a distant center of the empire, which led the revolutionists to vest in their elected representatives a broad authority. As the present study shows, this authority was soon exercised, once free of Parliament, to adopt a number of parliamentary statutes. The westward movement carried the British statutes with it in many instances.[26] And these statutes, originating in the context of the English common law, maintained that common-law tradition (the first phase of our common-law history) until the eve of the Civil War.

The story is indeed a remarkable one; "the use of English statutes was provided for at an early stage in twenty-six out of the twenty-eight jurisdictions organized between 1776 and 1836," writes the author. "Thus, the potential break with prior legal developments was averted—there was at least as high a continuity in the use of English statutes by the several United States jurisdictions as in the case of the Canadian provinces and territories during the nineteenth century and the emergent African nations of the twentieth century."[27]

This is an important pathfinding project which certainly deserves the attention of the legal profession.

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24. Hurst, *The Law in United States History*, 104 PROC. AM. PHILOS. SOC'Y 518, 523 (1960).
25. HURST, *op. cit. supra* note 10, at 23-45.
26. *Cf.* Blume, *supra* note 11.
27. BROWN, *op. cit. supra* note 19, at 44.