1-1-1923

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THE LAW BOOK OF THE FUTURE

By WILLIAM W. COOK*

In an article published in November, 1922, in the American Bar Association Journal on the “Power and Responsibility of the American Bar and its Relations to Democratic Institutions,” the author pointed out the achievements of the profession in developing the law to meet the political and industrial needs of the American people. There is still other important work for the profession to do. Blackstone’s and Kent’s Commentaries have been outgrown and there is an imperative demand for a comprehensive and practical American treatise on all law for the use of law students and lawyers, legislators and the educated classes generally. At present, text books cover different branches of jurisprudence, but the whole law has not been systematized and compressed into one work, available and intelligible as a part of a liberal education. Blackstone’s originality, classifications, historical references, and worship of the then existing British institutions have been impugned and even his literary style attacked, but his work is still a classic and has never been displaced. It shows what is possible in summarizing the law simply, clearly, and in a manner that makes it a pleasure to laymen and lawyers.

The question at once arises whether the new treatment shall be as a science of laws, or a philosophy of laws, or as a comparison of laws.

The so-called science of laws is somewhat elusive. In the celebrated Lewisohn-Bigelow-Old Dominion Copper Company litigation, where in the same transaction the supreme court of Massachusetts differed diametrically from the Supreme Court of the United States, Judge Hough said the litigation had “a history writ very large in

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the reports, and not calculated to encourage anyone who looks upon the law as a science.” And the frequency with which upper courts reverse lower courts, and the Supreme Court the state courts, reveals how far the law is from being an exact science. This science did not exist in 1787, and yet Bryce says the American Constitution “may be deemed the greatest single contribution ever made to Government as an applied science.” In that sense all statutes and judicial decisions are applications of the science of law. But what is that science? One of the definitions of science is that it is an exact and systematic statement of a subject. Austin, Bentham, Holland, and others worked out a science of laws and called it “analytical jurisprudence.” That method first defines law (i.e., positive law) as made up of statutes, judicial decrees, and executive fiats, enforced by the state. Then it defines rights (the correlative of duties) and subdivides the whole subject. As a science, however, the field is obscure. For instance, Professor Holland in his “Elements of Jurisprudence” says somewhat abstrusely that the science of law deals with relations regulated by legal rules rather than with those rules themselves; that it is not a science of such laws as nations have in common, but of relations of mankind which have legal consequences; that it is “a scheme of the purposes, methods, and ideas common to every scheme of law.” This smacks of Platonic philosophy tinged with the mysticism of the far East, and is not very illuminating to a hard-headed profession. Moreover, the old common law classifications are severely criticised by these scientists. For instance, Austin says:

“This needless distinction between real and personal property, which is nearly the largest of the distinctions that the Law of England contains, is one prolific source of the unrivaled intricacy of the system, and of its matchless confusion and obscurity. To the absence of this distinction (a cause of complexity, disorder, and darkness, which naught but the extirpation of the distinction can thoroughly cure), the greater compactness of the Roman system, with its greater symmetry and clearness, are mainly imputable.”

And speaking of actions ex delicto and actions ex contractu, Austin says: “The Department of the English law which relates to rights of action is signally impressed with the disgraceful character of the system: namely, a want of broad and precise principles, and of large, clear, and conspicuous distinctions.”
On the other hand, Mr. Harrison's view is that a reclassification of the law on a scientific basis would involve more difficulty than advantage, and Professor Robertson (Lord Lochee) agrees with him. As a matter of fact, it would render obscure the decisions and statutes of hundreds of years. On the whole, it may safely be said that the legal profession takes little interest in the so-called science of the law. Robertson, in speaking of Sir Henry Maine's "Ancient Law," says: "It is not surprising that its influence has been even more extensive among educated laymen than among professional lawyers, for the latter are condemned by custom to disregard everything in this science but its relation to the business of the day.” True enough, but perhaps there is hope from the law students. The student from a high promontory sees the landscape of the law, the hilltops of leading principles; the practitioner delves in the valleys below. But even to the student this scientific view of the law must be somewhat visionary.

Certainty in the law is but a dream, whether evolved from the scientific school, or the "historical" school, or the "philosophical" school, or the "comparison" school, or all combined. Savigny fancifully attributed certainty to the civil law, when he said:

"It has been shown above that, in our science, all results depend on the possession of leading principles; and it is exactly this possession upon which the greatness of the Roman jurists rests. The notions and maxims of their science do not appear to them to be the creatures of their own will; they are actual beings, with whose existence and genealogy they have become familiar from long and intimate intercourse. Hence their whole method of proceeding has a certainty which is found nowhere else except in mathematics, and it may be said without exaggeration that they calculate with their ideas. If they have a case to decide, they begin by acquiring the most vivid and distinct perception of it, and we see before our eyes the rise and progress of the whole affair, and all the changes it undergoes. It is as if this particular case were the germ whence the whole science was to be developed. Hence, with them, theory and practice are not in fact distinct; their theory is so thoroughly worked out as to be fit for immediate application, and their practice is uniformly ennobled by scientific treatment. In every principle they see a case to which it may be applied; in every case, the rule by which it is determined; and in the facility with which they pass
The fact is, however, that the civil law is stagnation while the common law is progress. The very failure of the common law to define and classify everything produces uncertainty, but it also leaves the door open for growth to solve the new problems of justice arising from the developments of industry, inventions, science, and human relations. The uncertainty has its origin in them. Justice grows with the ages. The slavery of one age is the freedom of the next; the tortures of one, the constitutional guarantees of another; that might makes right (the practice between nations from time immemorial) is becoming right makes might. The history of justice is an illustration of the poet’s inspired thought that “thro’ the ages one increasing purpose runs.” Justice may be submerged for a time, as in the Dark Ages, but emerges brighter and clearer than ever. The spirit of justice dissolves all legal forms. It preserves what is good in the old and welcomes what is good in the new. The law embodies what each age believes to be justice, and the spirit of fairness in a people is more important than their laws. Any attempt to formulate an analytical, critical, and constructive statement of it would soon become obsolete. Science contributes, but justice cannot be reduced to a science. Science is baffled when it comes to the growth of great moral forces. Justice eludes scientific analysis. It is an ideal beyond the realm of science.

The philosophy of law includes more than jurisprudence. It is a part of the philosophy of history. It tries to show how and why individual freedom has been modified by society and brings in other branches of knowledge to explain the origin and nature of law. It varies according to the point of view. Montesquieu in his “Spirit of the Laws” gave a view that was one cause of the French Revolution. The German school had a historical theory and philosophy of law that flourished before the recent war; and certainly that war did not show any special respect for law. The philosophy of law seems to run to dynamics.

Comparison of laws is gradually being recognized as the true mode of studying, understanding, and improving jurisprudence. Even the English, devoted as they are to their own laws, realize this. Professor Robertson says: “There are circumstances which seem to show that the mere comparison of laws with no other object but
that of discovering in how many ways the same thing can be done, and which way is the best, will enter more and more into the higher legal studies.” In 1919 the Anglo-American Society in England established a Chair of American History, Literature, and Institutions, with an endowment fund of £20,000, contributed by Sir George Watson. Its plan is to have alternately some British and American scholar or public man deliver lectures on this subject in England. The first lecture was in 1921 by James Bryce. It was brilliant and profound. Bryce said: “It is enough to call the attention of Europeans to the wealth of material which American experience furnishes upon these and other questions which perplex, and some of which threaten, the welfare of civilized states.”

Modern American law is based largely on a comparison of laws. America has forty-nine written constitutions (one federal and forty-eight state); it has forty-nine different systems of jurisprudence; it compares these with each other and with the common law and with all English jurisprudence; it commences this comparison in the law schools and follows it in the courts and legislatures; American decisions refer to other courts; American statutes are compared and reënacted with variations by the different states. Witness the Public Service Commission Law, the Blue Sky Laws, the Negotiable Instruments Law, the Declaratory Judgments Law, and Workmen’s Compensation Laws. America’s Chief Justice in 1922 went to England to study its judicial procedure, and on his return advocated its adoption in important ways.

Aristotle studied the comparison of laws and institutions and expended much time and money in gathering the material, but his pupil, Alexander the Great, dominated Greece, and Aristotle’s work became theoretical. Rome built up the civil law with but little aid from the laws of other nations. England built up the common law in the same way, except that it absorbed a part of the civil law. Present American jurisprudence, on the other hand, is built on comparison, experimentation, and selection. The American courts are building up a jurisprudence of their own and are referring less and less to the English decisions, especially as the latter now turn largely on statutes. In continental Europe and South America the bulk of law today is the civil law, with but little inclination to consider any other law. In England there is some study of the civil law, but little study of American law.
America needs most of all a condensed treatise on all law. Blackstone and Kent showed what was possible in their day. England will not produce the desired treatise, because England pays little attention to American law. Meantime the present chaos of decisions and statutes is beyond the American student and even the lawyers themselves. Text books have grown to great size. An American treatise covering all law may be possible if, instead of citing so many cases and stating so many detailed applications of general principles, it would make references only to the Supreme Court of the United States, text books, constitutions, and statutes. At the base of the pyramid would be the countless decisions; midway would be the Supreme Court decisions, text books, constitutions, and statutes; at the apex a general treatise. This would require a galaxy of talent, such as produced the Justinian Code, King James Bible, the Napoleonic Code, the Encyclopedia Brittanica, and Halsbury's Laws of England, where judges directed the work, and were assisted by able lawyers.

Such a work would show by comparative jurisprudence how the "rule of reason" has welded conflicting decisions into just rules of law. It would show also how the old ideas as to rights in property and liberty of contract have changed.

Rights in property are being profoundly modified. All rights in quasi public corporations, such as railroads and local public utilities, are being subjected to "regulation," which invades more and more the supposed vested rights. Regulation of rents does the same as to real estate. Taxation of inheritances accomplishes the same result in an indirect way. Soon the state may limit gifts and inheritances going to one person.

Liberty of contract is also departing from the ideas of the early days of this republic. Labor laws, anti-trust laws, public service commission laws, child laws, women laws, profiteering laws, rent laws, and blue-sky laws—all based on the legal fiction of the "police power"—show the movement of the age onward if not always upward.

And the end is not yet. The conservatism of the law is hard pressed by radicalism. The tax power is seeking state conscription of wealth. The railroad problem has tangled itself into a Gordian knot, but ultimately low rates and good service will dominate wages and money-making by reducing the former and eliminating the latter
beyond a very reasonable return. And there are other problems which will tax the legal profession. The preservation of the Union itself will depend largely on how the Supreme Court of the United States moulds jurisprudence to reconcile class with class, section with section, state with state. The history of all this will be an epic in itself, higher and more resonant than the clash of arms.

Practically the best future law books will have to emanate from law school professors. But the law schools will have to be recognized to do that work. Four great juridical centers at law schools selected for their convenient geographical location and for their excellence in respect to faculties, standards, and libraries, are possible, heavily endowed, with high pay to professors, the ablest to devote practically all of their time to preparing treatises on branches of the law, studying and working out problems of the law, and advising bar associations, legislative committees, and governors. They could convene annually at one of those four law schools, to prevent duplication of work and to plan a continuous and effective effort to make the law more certain, uniform, and simple. Like Lord Acton, professor of history at Cambridge, their duties as professors would be nominal, their real work being creative. This is not at all impracticable. The machinery already exists. All that is wanted is endowments sufficient to employ the men.