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Book Reviews

BOOK REVIEWS

The Birth of the English Common Law. By R.C. Van Caenegem. Cambridge: Cambridge University Press, 1973. Pp. vii, 160. $8.50.

During the Dark Ages, those violent centuries stretching from the Fall of the Roman Empire to the Renaissance of the twelfth century, the rule of law practically disappeared from Western Europe. While local or regional customs often provided standards for social behavior that were observed more or less spontaneously, disputes that arose between individuals or between groups over the meaning or applicability of a custom or over matters not decisively governed by custom were resolved either by brute force or by the discretionary authority of the leader. There was no functioning legal system capable of protecting persons from arbitrary exercises of power and of resolving disputes through rational methods of fact-finding and through the application of established rules. For individuals seeking justice, "finding a competent court would have been the first difficulty; proceedings were dominated by appeals to the supernatural and by a system of non-rational proof; the execution of judicial decisions was not assured."[1] Rules of law were of little consequence when lawsuits were decided by ascertaining the judgment of God through the mechanisms of ordeals, oaths, or battle.

Western Europe in the late twelfth and early thirteenth centuries witnessed, in Van Caenegem's words, a momentous modernization of society in general and the law in particular.[2] During this formative period, when other aspects of European culture (theology, literature, architecture) enjoyed a degree of homogeniety that has not been achieved since, English and continental law irrevocably, and surprisingly, took their different courses.

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1. R. David and J.E.C. Brierly, Major Legal Systems in the World Today, 25-26 (1968)(Eng. Edition of R. DAVID, LES GRANDS SYSTEMES DE DROIT CONTEMPORAINS (2d ed. 1966)).

2. VAN CAENEGEM at 89. The path-breaking historial account is C.H. HASKINS, THE RENAISSANCE OF THE TWELFTH CENTURY (1927). For Van Caenegem, a "modern" legal system is primarily one that employs rational procedures and rules for resolving disputes and for protecting private rights. In England and France modernization and centralization went hand-in-hand as new royal institutions deprived warring feudal lords and self-governing local communities of much of the power they had previously enjoyed. Centralization, however, is not a necessary concomitant of modernization because, as Van Caenegem recognizes, modern legal systems developed simultaneously in the independent Flemish towns. VAN CAENEGEM at 146 n.101.

Thus, two of the four legal "families" of the world described by Professor David, the common law family and the Civil Law or Romano-Germanic family,[3] originated in Western Europe at roughly the same time but under very different circumstances.

The Civil Law arose in the great universities where scholars revived the study of Roman Law and developed a systematic "doctrine" based on considerations of reason and justice for the judges to apply deductively in resolving the cases before them. Only later in the eighteenth and nineteenth century did this doctrine take the form of a legislative code. The origin of the common law, on the other hand, was more rooted in the history of the time; it derived from the personal efforts of the English monarchs, especially Henry II (1154-1189), to establish a network of royal courts that would bring law to their subjects and internal order to the kingdom. The common law was not a body of principles but primarily a system of remedies afforded by royal justices throughout the kingdom for an ever expanding category of basic wrongs.

Professor Van Caenegem of the University of Ghent in Belgium first wrote on the formative period of the English common law in his monumental study *Royal Writs in England from the Conquest to Glanvil* (Selden Society 1959). There he focused on royal initiatives in the development of the writ system as the principal source for the development of the common law. The present volume derives from a series of lectures Van Caenegem delivered in 1968 at University College, Cambridge, that state succinctly and in more accessible form the conclusions of his larger study. In this volume he also responds to scholarly criticism of his earlier work and adds new material of special interest to the more general reader on the origins of the jury and on the distinctive courses taken by English and continental law. The result is a concise and erudite survey worthy of the important topic selected and of interest both to lawyers and historians. While the general reader may find the text slow going at times, Van Caenegem nevertheless manages to convey a real sense for the primary sources and for the often violent events of the time. As an "intruder" to the common law from a country with a Civil law tradition, Van Caenegem has not only mastered the English materials but has contributed special insight.

Van Caenegem divides his book into four chapters covering respectively The English Law Courts, The Royal Writs and Writ

3. The other two families are Socialist Law and philosophic or religious systems (e.g., Muslim law). DAVID AND BRIERLY, *supra* note 1, at 14-20.

Procedures, The Jury in the Royal Courts, and English Law and the Continent. The approach is thus topical rather than chronological. In the first chapter he depicts the uncertain if not chaotic conditions in England of the early twelfth century created by the overlapping and often conflicting jurisdictions of the courts. Courts of feudal lords existed side-by-side with the older communal courts of the local governmental units of county and hundred. People who had been wronged either could not find an appropriate court or, if they did, could not obtain a judgment or execution thereon. As described by one contemporary author, "the perversity of the situation and the flood of evils" led people to avoid making claims because "the definite truth of the law can seldom be found."[4]

Certainly the search for truth was not aided by the irrational, superstitious methods of proof that prevailed in both the feudal and the communal courts. In the former, trial by battle, one of the least fortunate innovations brought to England by the Normans at the time of the Conquest, was the predominant method of proof, while ordeals were the most popular method of proof in the communal courts. Trial by battle was nothing more than a judicially sanctioned duel, often involving hired champions, where God was supposed to insure that victory went not to the stronger but to the righteous. Ordeals, on the other hand, took a variety of forms and were designed to test the oath of one of the parties. In the ordeal of the hot iron, for instance, one of the parties (normally the accused or the defendant) swore to his innocence and then picked up a hot iron and carried it a certain distance. His guilt or innocence depended on whether his hand healed within a prescribed period of time.[5]

The absence of a modern legal system in early twelfth century England and the weaknesses of the courts that were available were most evident in land litigation. The wrong most commonly alleged in the land-oriented society of the time was that the defendant had unjustly disseised the plaintiff from his

4. VAN CAENEGEM at 17 (quoting the anonymous early twelfth century author of the *Leges Henrici*).

5. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 114 (5th ed. 1956) [hereinafter cited as PLUCKNETT]. In one of the most celebrated ordeals, Queen Iseult, rightly suspected of adultery, "passed" the ordeal of the hot iron after successfully swearing that "no man born of woman has held me in his arms saving King Mark, my lord [husband], and that poor pilgrim who only now took a fall, as you saw." Before taking the oath, Iseult had cleverly arranged to disguise her lover Tristan as the pilgrim and to fall into his arms after she commanded him to carry her across a stream on the way to the ordeal. Since her oath was true, she naturally passed the ordeal. THE ROMANCE OF TRISTAN AND ISEULT 95-96 (J. Bedier ed., H. Belloc tr. 1961 Vintage Paperback Edition).

freehold estate. Bewildered plaintiffs who had lost their freeholds and did not know where to get justice naturally brought their grievances to the king, whose initial response was often to issue an executive writ ordering the alleged wrongdoer to restore the complainant to his freehold. In his earlier work, *Royal Writs from the Conquest to Glanvil,* Van Caenegem argued that these executive writs were the precursors of the later judicial writs of novel disseisin, mort d'ancestor, utrem, and darien presentment. These later writs were directed to the sheriff and ordered him to summon the defendant before the royal justices who would determine with the aid of twelve "recognitors" or jurymen whether the complainant was unjustly disseised or otherwise entitled to possession of the freehold estate in question. This subsequent judicialization of the writ system proved necessary because kings were often lied to and executive writs issued in error later had to be retracted.

In Chapter II on Royal Writs and Writ Procedure, Van Caenegem reiterates in more summary form his earlier arguments but, in responding to the critical reception his position has received in some quarters,[6] gives more recognition to the fact that the decision reached in the 1160's to judicialize the process was innovative and constituted a break with the past. While the executive writs may have been precursors of the judicial process, something new was added by Henry II around 1166. It is surprising that Van Caenegem continues to deemphasize this break, because the element added by Henry II was nothing less than a modern legal system of royal justices and jurymen for resolving land disputes.

Some of the uncertainty about the origin of the judicial writs may now have been cleared up by Professor Sutherland in his new book on *The Assize of Novel Disseisin.* Sutherland argues that F.W. Maitland, the most distinguished of all English legal historians, was right all along when he asserted in 1896 that the writ, in its classic form of a civil action brought at the suit of a party to regain possession of a freehold estate, was provided by a royal legislative enactment, now lost, in or about 1166.[7]

The most striking feature of the assize of novel disseisin and its companion assizes was the role of the "recognitors" or jurymen. Any measure of effectiveness enjoyed by the older methods of proof gradually broke down as people lost faith that God would protect the righteous in battle or from the ordeal and strike down

6. See especially D.M. STENTON, ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER. (1966).

7. D. SUTHERLAND, THE ASSIZE OF NOVEL DISSEISIN 6 (1973).

the giver of a false oath. Peter the Chanter, a Schoolman in Paris of the late twelfth century, could only see tricks and cheating in the ordeals. "[H]e knew a man who, before he had to undergo the water ordeal, learnt from patient exercise how to control his breathing so as to succeed in the trial. And as far as the ordeal of the hot iron was concerned, it was clear that innocence was too closely connected with calluses."[8] In 1215 the Fourth Laternan Council in Rome finally accepted the arguments of the theologians that it was tempting God to demand constant miracles even for the sake of saving innocent suspects and withdrew all ecclesiastical sanctions from the ordeals. This action precipitated a minor crisis on the Continent necessitating the development of new methods of proofs. The principal method of proof adopted was the Romano-canonical procedure whereby the judge examined the witnesses (including party witnesses) in secret under oath and on the basis of these interrogations rendered judgment. No gap of similar magnitude appeared in England because by 1215 the jury system had already developed as an alternative method of proof that could replace the older, now discredited, methods.

The origin of the common law jury has provoked heated controversy between English medievalists who defend the institution's native roots and continental writers who insist that the jury derived from the Frankish inquest procedure which was known to the Normans on the Continent and brought with them to England after the Conquest. Treatise writers and other more general writers have more often than not accepted the latter theory.[9] Van Caenegem advances an amalgam of the two theories and suggests that the Frankish inquest procedure took hold in England because it coincided with certain native habits, going back to Anglo-Saxon time, of determining the facts by asking questions of the neighbors.[10]

Van Caenegem's thesis is reasonably persuasive but does not explain how the Frankish inquest became the medieval English

8. VAN CAENEGEM at 69. In the water ordeal, the accused was bound and let gently into the water so as not to make a splash. If the water received him (e.g. he sank), the accused was saved; if the water rejected him and he floated, he was condemned. PLUCKNETT, *supra* note 5, at 114 (5th ed. 1956).

9. PLUCKNETT, *supra* note 5, at 110 (5th ed. 1956); J. DAWSON, A HISTORY OF LAY JUDGES 118-129 (1960) [hereinafter cited as DAWSON].

10. VAN CAENEGEM at 79. Interestingly, his concession to the English medievalists (and to the Anglo Saxons) indicates that modernization is a relative concept and that conditions were not totally bleak in England prior to the accession to the throne of Henry II.

jury. In the original inquest procedure royal or ducal officials determined their lord's fiscal rights or other rights in land by inquiring of the neighbors under oath. The "jurors", if they may be called that, resembled witnesses more than modern jurymen, and the information they supplied did not constitute a verdict but was the evidence on which the royal officials based their decision. There is considerable evidence that the inquest, when transplanted to England and made widely available by the monarch to his subjects, developed similar characteristics, especially in criminal-type cases. The neighbors on the jury did not always agree as to what happened and sometimes expressed ignorance on the facts in issue. The royal judges often took it upon themselves to reconcile conflicting versions of the facts or to ascertain which if any of the jurors derived his information first-hand rather than from community gossip. If none of the jurors was adequately informed on the disputed facts, additional jurors could be summoned. As the role of the royal judges increased and that of the collective or group verdict of the countryside diminished, the inquest came dangerously close in the early thirteenth century to becoming an inquistorial method of proof. The road to that development was open in England just as it was open in France. "What was needed was extra zeal or sustained curiosity on the part of the English judges, inspired by a conviction that determination of the facts on which the judgment must rest was an essential part of the judge's task."[11]

Somehow the role of the neighbors on the English jury changed in the course of the thirteenth century and they became real jurymen returning an inscrutable, collective and unanimous verdict which constituted the decision in the case because it controlled the actions of the judges. While this development may have been fortunate in the long run, its short-term implications were not necessarily so. The English legal system at this time imposed the "fact-finding function . . . on groups of laymen, whose ignorance was disguised by a group verdict and whose sources of knowledge the judges refused to examine,"[12] and only later developed techniques for presenting factual information (*i.e.*, evidence) to juries.

Perhaps this expansion in the jury's role is related to the adoption of the inquest procedure as part of the assize of novel disseisin and related assizes. The recognitors summoned by the

11. DAWSON, *supra* note 9, at 126.
12. *Id.*

sheriff were to answer the specific question of whether the complainant was unjustly disseised, rather than general queries on royal rights or the presence of malefactors in the area. This narrowing of the inquiry may have resulted in more specific answers that controlled the outcome of the case. While this explanation is certainly conjectural, it does not appear to be more so than others that have been proffered. Professor Dawson, for instance, in part explains the jury's expanded role as the product of a cop-out by the royal judges who were in short supply anyway and more than glad to put the decisional burden on the jury.[13] Strangely, Van Caenegem does not contribute to this debate in his otherwise comprehensive chapter on the distinctive courses taken by English and continental law.

Van Caenegem views the matter of timing as crucial to the distinctive development of the English common law. The great reforms of Henry II took place in the mid and late twelfth century. Thus, England had in great part already modernized its legal system by the time that the legal learning in the universities had developed far enough to influence the courts. While Van Caenegem rightly ridicules those English historians who attribute their country's precocity to the English climate or to some feature of the national character, he himself takes refuge in the irrational factor of chance. "I feel that the role of chance in history in general and in the establishment of the Common Law in particular has been too striking to be passed in silence."[14] While his discussion on the role of chance makes for interesting historiography, I find more fruitful his analysis of the factors (be they fortuitous ones or not) that made twelfth century England a prime candidate for early modernization. The well-established and relatively stable local institutions of Anglo-Saxon England and the popular Anglo-Saxon reverence for the monarch provided a base on which the strong-willed and comparatively long-lived Henrys were able to forge a modern legal system. This fusion of the Anglo-Saxon and the Norman produced the common law which itself bound England together into a single country that was neither Anglo-Saxon nor Norman but English.

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13. DAWSON, *supra* note 9, at 128-29. Dawson is more convincing when he relates the jury's survival and growth in England to the comparative strength of English local and community institutions and to how those institutions were co-opted by the monarch rather than destroyed by him.

14. VAN CAENEGEM at 107.

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