2009

Book Review: The Cambridge History of Law in America Vol. 1: Early American (1580-1815)

William Hamilton Bryson
University of Richmond, hbryson@richmond.edu

THE EDINBURGH LAW REVIEW

VOLUME 13 ISSUE 2 MAY 2009

Contents

Scots Law News — *Hector L MacQueen and Scott Wortley* 185

Articles

Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems — *Pamela O'Connor* 194

The Implementation of EU Environmental Law in Scotland — *Andrea Ross, Hazel Nash and Colin T Reid* 224

Mediation and Scottish Lawyers: Past, Present and Future — *Bryan Clark* 252

Analysis

Offside Goals and Induced Breaches of Contract — *John MacLeod* 278

Causation, Idiopathic Conditions and the Limits of Epidemiology — *Richard Goldberg* 282

The Continuing Confused Saga of Contract and Error — *Martin Hogg* 286

The Effect of Past and Subsisting Breaches on Contractual Rights — *David Cabrelli* 290

Chalk Dust in the Law of Inhibition — *John MacLeod* 294

Unalike as Two Peas? *R (on the application of Purdy) v DPP* — *J K Mason* 298

The Cullen Review of Fatal Accident Inquiries — *Greg Gordon* 303

Commercial Actions and *Jackson v Hughes Dowdall* — *Margaret L Ross* 306

Judicial Impartiality: Involvement, Opinion and the Judicial Oath — *Scott Crichton Styles* 312

Withholding Culpable Homicide: *Ferguson v HM Advocate* — *Claire McDiarmid* 316

The Modern Scottish Jury in Criminal Trials *Peter Duff* 320
Rights in Succession for Cohabitants: *Savage v Purches* *Frankie McCarthy* 325
The Worst of All Worlds? *Common Services Agency v Scottish Information Commissioner* *Graeme Laurie and Rena Gertz* 330
A Precautionary Approach to Pesticides? *Aylwin Pillai* 335

Reviews

P Cane and J Conaghan (eds), *The New Oxford Companion to Law* (Ross Gilbert Anderson) 340
Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Emmanuel Melissaris) 341
Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Joe Thomson) 343
James Fawcett and Janeen M Carruthers, *Cheshire, North & Fawcett: Private International Law*, 14th edn (Kirsty J Hood) 345
Jonathan Hill, *Cross-Border Consumer Contracts* (Elizabeth Crawford) 346
Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Janeen M Carruthers) 348
Jan Hallebeek and Harry Dondorp (eds), *Contracts for a Third-Party Beneficiary: a Historical and Comparative Account* (Warren Swain) 350
Antoni Vaquer (ed), *European Private Law Beyond the Common Frame of Reference: Essays in Honour of Reinhard Zimmermann* (Martin Hogg) 351
Martin J Doris, *Dispute Avoidance and European Contract Law: Dealing with Divergence* (Hector L MacQueen) 353
Andrew J M Steven, *Pledge and Lien* (D L Carey Miller) 355
Robert Rennie and Stewart Brymer, *Conveyancing in the Electronic Age* (John Glover) 357
Alison Cleland, *Child Abuse, Child Protection and the Law* (Fiona Raitt) 359
John Griffiths and Heleen Weyers, with Maurice Adams, *Euthanasia and Law in Europe* (Colin Gavaghan) 360
Douglas Thomson, *Prisons, Prisoners and Parole* (Rita E A Rae) 362
Laura Sharp and Margaret Ross, *The Vulnerable Witnesses* (Scotland) Act 2004: *Text and Commentary* (James Chalmers) 363
George P Fletcher, *The Grammar of Criminal Law: American, Comparative, and International. Volume One: Foundations* (James Chalmers) 363

H L Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Andrew L-T Choo) 365

Aileen McHarg and Tom Mullen (eds), *Public Law in Scotland* (Gavin Little) 366

Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Robert Dunbar) 368

Michael Grossberg and Christopher Tomlins (eds), *The Cambridge History of Law in America* vol 1: *Early America (1580-1815)* (W Hamilton Bryson) 369

P Andersen, M Münster-Swendsen and H Vogt (eds), *Law before Gratian: Law in Western Europe c 500-1100* (Paul du Plessis) 371

Jill Harries, *Law and Crime in the Roman World* (O F Robinson) 372

J B Thomas, *Curious Connections: Master Musicians and the Law* (Kenneth G C Reid) 374

ISSN 1364–9809
eISSN 1755–1692

peoples and an integrationist approach to minorities" – is itself not sufficiently nuanced, at least in respect of minorities. Indeed, there are a number of points with which legal scholars might take issue; yet, his approach to the subject matter is also interesting and provocative, and his contribution will repay a close consideration by such scholars.

The third and final part of the collection comprises nine case-studies in which many of the approaches introduced in the first and second parts can be seen in practice. Some of the cases will be familiar to a European readership, either by virtue of proximity (Northern Ireland, the Spanish Basque Country and Catalonia, and Scotland) or current prominence (Iraq); however, a number of non-European cases (South Africa, Nigeria, Indonesia and Fiji) are also included, as is Anver Emon's fascinating account of the interaction of Islamic law with constitutional design. Choudhry's contribution to the second part, which is essentially a consideration of the Canadian model, could as easily have been included in this third section of the collection.

While the title presents integration and accommodation as mutually exclusive alternatives, one of the themes which emerges from many of the case studies is that of hybridity, of integration *and* accommodation. For example, even strongly accommodationist models are often accompanied by a liberal bill of rights, a supposedly integrationist tool. Rather than a choice between two alternatives, what is often involved is a choice of the particular accommodationist tools to employ, and the balance to be struck between integration and accommodation.

Another important theme is the dynamic nature of the social phenomena with which constitutional design is meant to deal, and the challenges that this poses. This issue is at the heart of Richard Pildes' contribution, which notes that institutional design often takes place at critical political moments, when identities may be most fixed and entrenched; insufficient attention is given to how the model which results will respond as the society moves away from such moments. As Choudhry notes, the Canadian model, frequently held up as exemplary, is itself undergoing severe strains, partly due to its relative inflexibility. In a typically informative and lucid account, Stephen Tierney highlights the "deeply unstable" nature of the Scottish model of devolution, and the lack of a clear roadmap through potential crises. By contrast, the Spanish model, discussed by Michael Keating, seems fairly malleable, although this presents other challenges.

In conclusion, this is a rich and provocative collection that will be of value to a wide readership, including political scientists, legal scholars and public policy makers. Indeed, it should excite the sort of engagement by legal scholars – and not just comparative constitutionalists – that Choudhry aims to provoke.

Robert Dunbar
University of Aberdeen

EdinLR Vol 13 pp 369-371
DOI: 10.3366/E1364980909001723

THE CAMBRIDGE HISTORY OF LAW IN AMERICA VOL 1: EARLY AMERICA (1580-1815). Ed by Michael Grossberg and Christopher Tomlins

Cambridge: Cambridge University Press (*www.cambridge.org*), 2008. xviii + 739 pp. ISBN 9780521803052. £75.

The book under review is a survey of the influence of law on mainland British North America up to about 1815. Chapter 1, by Anthony Pagden, discusses the seventeenth and eighteenth century legal explanations for the colonisation of North American. These arguments were not disinterested but varied over time as the political exigencies required, from settlement

to defence against other European nations to independence from Great Britain. (On p 19, "St James River" should be "James River".) Katherine Hermes contributes a chapter on the legal practices of those Indians who did not assimilate into the new order, and their legal interactions with the colonists. However, the Indians kept no records, and therefore little is actually known except what is seen through the eyes of the colonists until the very end of the period covered by this book, and that is about the Cherokees only. Mary Bilder analyses the political institutions of the period "focusing on governance and authority". This theme is further elaborated in Richard Ross's essay on "legal communication and imperial governance".

Many of the contributors move easily from colony to colony, and this can mislead the reader into a sense of legal uniformity. But, in fact, the colonies had quite independent and different legal systems even though, as time went by, and some more and some less, they began to be up-to-date by contemporary English standards. David Konig's chapter rightly and best describes the differences. This legal diversity is also explained in Michael Meranze's chapter on colonial criminal law and its administration. Next, Christopher Tomlins gives a good legal account of labour law. Sally Hadden then discusses the evolution of the law of slavery during the period covered by this book.

Holly Brewer's chapter on family law begins with the straw man of Tapping Reeve's statement that men owned their wives, children, and apprentices, which is of course nonsense. She says, incorrectly, that younger sons did not have the ability to own land (292), and her statement that the assignability of an indenture of service created a "property" right to the servant (297) confuses the law of obligations and the law of property. Brewer observes that, in England (as well as in Virginia), women had more freedoms and rights "than the common law supposedly allowed" (300). However, considering what the eighteenth-century equity courts were doing in favour of married women's property rights, this is not surprising. The common law of husband and wife was medieval and thus archaic law in the early-modern period; official law reform had not brought this part of the English common law into harmony with social reality. Wealthy people had their lawyers evade the strict common law by using equitable devices and making wills; the issue was largely irrelevant to poor people. As Brewer rightly points out throughout her chapter, social status was really more important than anything else. The latter part of Brewer's chapter is concerned with the influence in America in the early republican period of Blackstone's over-generalisations for English family law. In my opinion, Blackstone's legal generalisations did not account for the evolution of family law and family property law from status to contract in English law.

The joint contribution by Mark McGarvie and Elizabeth Mensch discusses the intersection of religion and government. Bruce Mann's chapter focuses on "the ever-changing relationship between law and economy", putting a legal analysis of contract and commercial law into a broad economic perspective. The next chapter, by Claire Priest, describes British mercantilism and colonialism and argues that Americans rejected it. Priest's chapter trails off into political history, and the next three chapters continue this theme and say little about law.

The concluding chapter, by James Henretta, makes broad generalisations about the administration and control of the law. In the earliest period, there were few or no lawyers in America either representing clients or sitting as judges. From about 1680 until Independence in 1776, there were practising lawyers in abundance but the judges were laymen. After Independence, the higher courts were staffed by judges who were learned in the law, and, after about 1800, law reform was being implemented by the state legislatures. This gradual professionalisation of the administration of justice is the clue to the legal content and the level of the development of the law wherever. However, this theme is not pursued sufficiently by any of the authors of this book. In my judgment, this should be the general focus of further research by American legal historians of the early-modern period.

It is inevitable and irresistible that *The Cambridge History of Law* in *America* will be compared to *The Oxford History of the Laws* of *England*. The former is the product of the followers of Willard Hurst; the latter by the followers of F W Maitland. The former are works of historical analysis; the latter are (so far) legal analysis of historical law. This is an observation which does not prefer one to the other. Both history and law are equally valid subjects of scholarship. The editors of the *Cambridge History* state that "legal history is history not law" (xvi). But what is legal history the history of if it is not the history of doctrinal legal principles and litigation practices? The description of the law in the past and the development of legal doctrine in the past is legal history. If one does not know what the law was, one cannot write about its historical development. Therefore, legal history must begin with legal analysis, and that is as much law as anything else.

As a general principle, scholarship proceeds by empiricism and synthesis. This book is a good synthesis of much good empirical scholarship. Now, more technical legal, empirical study is needed – and there is much to be done – in order to support future synthesis of American legal history.

W Hamilton Bryson
University of Richmond, Virginia

EdinLR Vol 13 pp 371-372
DOI: 10.3366/E1364980909001735

LAW BEFORE GRATIAN: LAW IN WESTERN EUROPE c 500-1100. Ed by P Andersen, M Münster-Swendsen and H Vogt
Copenhagen: DJØF Publishing (*www.djoef-forlag.dk*), 2007. iv + 141 pp. ISBN 9788757416473. £12.

This edited collection is the third volume (from a total of four) in an exiting new series which is the result of a cycle of conferences on medieval legal history hosted by the Carlsberg Academy in Copenhagen. At the time of writing, the fourth volume, *Law and Power in the Middle Ages* (2008) has also just been published. The first volume in the series dealt with medieval Nordic law while the second was devoted to the issue of law and learning in the Middle Ages, and, more specifically, with an examination of the theological and legal schooling that the "creators" of the laws received at the major centres of learning in Europe. It also addressed a number of important questions concerning the creation and development of legal professions and the dynamics between legal practice and theoretical, learned approaches to jurisprudence.

The current volume, devoted to the topic of "early" medieval law before the rediscovery of Justinian's *Digest* in northern Italy in the twelfth century, is an important scholarly contribution. Its six papers deals with issues as diverse as the medieval transmission of Justinian's *Codex*, the sources of canon law before Gratian, settlement of disputes in Frankish kingdoms, and the notion of a pan-European medieval "common law". These diverse topics are neatly drawn together by a lucid and very informative preface written by the editors. While any one of these excellent contributions could be discussed at length, I will limit my comments to two contributions in particular. First, the chapter by Maurizio Lupoi draws on the main findings of his book, *The Origins of the European Legal Order* (2000), a translation of the Italian original published in 1994 (reviewed (2001) 5 EdinLR 398-399). This is a fascinating account of the ongoing debate regarding the relationship between comparative law and legal history and, more specifically, about the central role of Roman law in creating the *regulae* on which medieval learned law was founded. One cannot help but wonder what Basil Markesinis would make of this chapter given that the central theme of his recent book, *Comparative Law in the*